STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Countrywood Nursing, LLC, Appellant, vs. South Carolina Department of Health and Human Services, Respondent.	Docket No. 15-ALJ-08-0014-AP

This matter comes before the Administrative Law Court (ALC or Court) pursuant to the appeal of Countrywood Nursing, LLC (Countrywood or Appellant) from a decision of the South Carolina Department of Health and Human Services (DHHS or Department) to recoup overpayments for Medicaid benefits based on certain audits performed by the South Carolina State Auditor's Office (SAO).

BACKGROUND

Appellant is a thirty-eight bed nursing facility in Hopkins, South Carolina. It provides services under the South Carolina Medicaid program, which is administered by DHHS. DHHS has a contract with SAO to conduct audit reviews of facilities like Appellant. SAO is to identify costs reported by a facility that do not meet Medicaid program requirements. On November 22, 2011, SAO issued final audit reports on Appellant. Appellant filed an appeal of these final audit reports on December 16, 2011. On September 17, 2014, an evidentiary hearing was held before DHHS Hearing Officer Betsy Schindler. On December 16, 2014, the Hearing Officer issued an order which concluded DHHS was entitled to recoup overpayments for Medicaid benefits it had made to Appellant. Appellant filed a motion to alter or amend on December 29, 2014, which the Hearing Officer denied on January 23, 2015. On January 20, 2015, Appellant filed an appeal with this Court.

ISSUE

Did the Hearing Officer err in her December 16, 2014 decision holding that DHHS was entitled to recoup overpayments for Medicaid benefits made to Appellant?

STANDARD OF REVIEW

The ALC hears appeals from decisions of DHHS pursuant to the Administrative Procedures Act (APA). S.C. Code Ann. § 44-6-190 (2002 & Supp. 2014); Estate of Nicholson ex rel. Nicholson v. S.C. Dept. of Health and Human Servs., 377 S.C. 590, 660 S.E.2d 303 (Ct. App. 2008). Accordingly, the APA's standard of review as set forth in § 1-23-380 governs these appeals. See S.C. Code Ann. § 1-23-600(D) (Supp. 2014). That section states:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2014).

A decision is supported by substantial evidence when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub. Serv. Comm'n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dept. of Natural Res., 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). However, the ALC may reverse or remand a decision which is affected by an error of law. Gilliam v. Woodside Mills, 312 S.C. 523, 435 S.E.2d 872 (Ct. App. 1993). An error of law occurs when the lower court is vested with discretion but the order reveals the lower court did not exercise that discretion. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987).

DISCUSSION

Under the South Carolina Medicaid plan (State Plan), all nursing home facilities must maintain accurate and detailed financial records that are subject to on-site audit. DHHS has a contract with SAO (SAO Contract) to perform these audits. After purchasing an existing nursing facility in 2007, Appellant entered the South Carolina Medicaid program and accepted assignment of the contract between DHHS and the facility it purchased (Facility Contract). Under the terms of the Facility Contract, Appellant was to file initial and annual cost reports to DHHS, which were subject to audit by SAO.

In 2011, SAO audited three of Appellant's cost reports: November 29, 2007 to May 31, 2008; November 29, 2007 to September 30, 2008; and October 1, 2008 to September 30, 2009. The first cost reporting period was an initial cost report that covered a portion of the same dates as the second cost reporting period. On November 22, 2011, SAO issued the final audit reports and determined that Appellant had to repay DHHS $546,968 in overpayments for Medicaid services. Following the issuance of the final audit reports, SAO continued to receive and consider additional information from Appellant through at least August 6, 2012. Appellant filed a timely appeal of these final audit reports, which resulted in the September 17, 2014 hearing at which the Hearing Officer upheld the SAO's findings and determined that DHHS was entitled to recoupment of the disputed Medicaid payments made to Appellant.

In this appeal, Countrywood argues that DHHS should be barred from recouping the overpayments identified in the audit reports for two reasons. First, Appellant argues that because DHHS's contract with SAO limits audits to two periods, the initial cost report at issue here was not a proper subject for audit. Second, Countrywood argues that the audit reports were not issued within the three-year time period required by the Facility Contract and so recovery of the overpayments is barred.

Initial Cost Report

At the September 17, 2014 hearing, Appellant argued that the SAO Contract limited the audit review to two cost reporting periods. DHHS argued that Appellant did not have the standing necessary to challenge the language of the SAO Contract. Appellant argued it had standing to enforce this reading of the SAO Contract as a third-party beneficiary. Appellant stated that Medicaid nursing homes, like its own facility, were the intended beneficiaries of DHHS' statutory

duty to ensure equitable administration of the South Carolina Medicaid program and the corollary duty to equitably administer Medicaid audits.

The Hearing Officer correctly determined that Appellant was not a third-party beneficiary to the SAO Contract. Generally, a "third person not in privity of contract with the contracting parties has no right to enforce a contract." Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997) (citing Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994)). However, when a contract is "made for the benefit of the third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Id. As noted by the Hearing Officer, the purpose of the SAO Contract is to formalize the relationship between two state agencies and not, as Appellant argues, to benefit nursing home facilities. Therefore, the Hearing Officer correctly found that Appellant did not have standing to enforce the SAO Contract as a third-party beneficiary.

Appellant also argues it has standing to enforce the agreement between DHHS and SAO under the public importance doctrine. Appellant alleges that failure to adopt its interpretation of the effect of the SAO Contract language would have an impact on the entire Medicaid program. The Hearing Officer correctly determined that the public interest doctrine does not confer standing to enforce the SAO Contract upon Appellant. Under the public importance doctrine, a party can have standing to litigate "when an issue is of such public importance as to require its resolution for future guidance." Sloan v. Dept. of Transportation, 365 S.C. 299, 618 S.E.2d 876 (2005). Whether a resolution is needed for future guidance is the key to public importance analysis. ATC S., Inc. v. Charleston Cnty., 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). Appellant failed to prove facts or cite any authority demonstrating that its case rose to the level of public importance necessary to establish standing under this doctrine. As the Hearing Officer noted, public interest does not favor Appellant's position that audits of cost reporting periods related to Medicaid reimbursement should be restricted. On the contrary, the State Plan provides that all nursing facilities must maintain accurate and detailed financial records for at least six years following the end of the contract period, and that such records must be made available upon demand to DHHS or the State Auditor. See, State Plan at Attachment 4.19-D,I.(C). It is axiomatic that the public interest does not favor a result that contradicts the express provisions of the State Plan.

Even setting aside the issue of whether Countrywood has standing to enforce a provision of a contract between SAO and DHHS, there is no support for Appellant's argument that DHHS is contractually barred from examining more than two cost reporting periods. Appellant believes that language in both the SAO Contract and Facility Contract that references when the SAO must issue a final audit report creates a ceiling and restricts the number of cost reporting periods that SAO can audit. However, Appellant's position is not supported by case law or evidence in the record. Under the State Plan, with which both the SAO Contract and Facility Contract must comply, Medicaid service providers like Appellant must always make records available to the SAO. The Hearing Officer correctly found that the plain language of both contracts clearly leads to the conclusion that the two cost reporting periods are not intended as a limitation on SAO's ability to perform audits. If the language was as a ceiling rather than a floor, words of limitation, such as "only," would have been included.

Timeliness of Audit Reports

Appellant next argues that DHHS is barred from recovering overpayments identified in report AC# 3-RDM-E8 because the audit report was not issued timely. The Facility Contract states, "Any disallowance made pursuant to an on-site audit shall be made in the final audit report which shall be issued within three years of the close of the contract period." The Facility Contract provides that, "the contract period will be the rate period as defined by the South Carolina State Plan." The issue in this case turns upon the meaning of the term "rate period."[1]

DHHS presented testimony from an expert on the State Plan that a "rate period" was the time frame determined by the information contained in a cost report and was not limited to the report period itself. It was within the Hearing Officer's discretion to believe this expert testimony over evidence presented by Appellant. See, Kearse v. State Health & Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995) (The findings of an administrative agency are presumed correct and will only be set aside if not supported by substantial evidence.) Here, the testimony of DHHS' witness was supported by substantial evidence and it was within the Hearing

[1] Appellant argues that C.A.N. Enterprises, Inc. v. S. Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988), requires a finding that DHHS is barred from recouping funds disallowed by the audit reports related to the November 29, 2007 to May 31, 2008 cost reporting period. In C.A.N., the court examined language in a contract between the former state Medicaid agency and a provider of services. However, as the Hearing Officer pointed out, the C.A.N. decision dealt with a different deadline than the one at issue here. Therefore, nothing in the C.A.N. decision offers any guidance on the interpretation of the term "rate period."

Officer's purview to weigh the witnesses' credibility. DHHS went on to present evidence and testimony that showed Appellant's initial report, which ran from November 29, 2007 to May 31, 2008, set the base for reimbursement through September 30, 2009 and should be considered a part of that extended rate period. Therefore, DHHS argues, the SAO's final audit report that was issued on November 22, 2011 was made well within the three-year period that began on September 30, 2009.

Appellant argues that because the State Plan offers no express definition, the term "rate period" means any time a rate changes, regardless of the reason. Appellant presented correspondence from a DHHS employee in support of its position that the parties all understood "rate periods" to be any time a reimbursement rate changed. Under South Carolina law, even if a public employee is acting in the scope of their employment, they cannot make representations that alter controlling provisions of law or regulation. Ahrens v. State, 392 S.C. 340, 351, 709 S.E.2d 54, 59, (2011). In other words, representations made by a DHHS employee in correspondence with Appellant, do not control the interpretation of the language of the State Plan. Moreover, while the correspondence in question contains a heading "rate period," it does not purport to address the definition of that term as used in the Facilities Contract or State Plan. The Hearing Officer rightly focused her analysis on construing the term using the relevant principles of statutory construction, giving deference to the consistently-applied interpretation of the Department.

In construing a term in a statute, regulation or other public document an interpretation that leads to an absurd result must be rejected. Peake v. S.C. Dept. of Motor Vehicles, 375 S.C. 589, 599, 654 S.E.2d 284, 289 (Ct. App. 2007). The interpretation is

> not to be governed by the apparent meaning of words found in one clause, sentence, or part of the act, but by a consideration of the whole act, read in the light of the conditions and circumstances as we may judicially know they appeared to the Legislature, and the purpose sought to be accomplished.

State v. Sawyer, 104 S.C. 342, 88 S.E. 894, 895 (1916). The State Plan makes a distinction between an initial cost report, which in this case ran from November 29, 2007 to May 31, 2008, and an annual report. The initial reports are filed after a change in ownership and allow a new owner the chance to obtain a new prospective rate until such a time as they are required to file an annual report. Under Appellant's interpretation of the term "rate period," the State Plan's distinction between initial and annual cost reports is rendered meaningless. The Hearing Officer

correctly found that Appellant's interpretation of the "rate period" would not be consistent with the purpose of Medicaid or the State Plan as a whole and, therefore, must be rejected.

The Hearing Officer's December 16, 2014 decision is supported by substantial evidence and does not exhibit any errors of law or abuse of discretion.

IT IS HEREBY ORDERED that the decision finding DHHS was entitled to recoup $546,968 in Medicaid reimbursement payments from Appellant is **AFFIRMED.**

AND IT IS SO ORDERED.

Deborah Brooks Durden

Deborah Brooks Durden
Administrative Law Judge

August 19, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin E. Coleman

Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

August 19, 2015
Columbia, South Carolina