APPEALS DIVISION
TEXAS HEALTH AND HUMAN SERVICES COMMISSION
AUSTIN, TEXAS

HARLINGEN FAMILY DENTISTRY, PETITIONER	§	
VS.	§	**SOAH DOCKET NO. 529-12-3180**
TEXAS HEALTH AND HUMAN SERVICES COMMISSION OFFICE OF INSPECTOR GENERAL, RESPONDENT	§	**HHSC Cause No. 12-0789-K**

ORDER

On the 7th day of January 2013 came on for consideration Respondent's Motion for Rehearing filed on 30 October 2012. After considering the Motion, Petitioner's Response, and the pleadings in this cause, this Administrative Law Judge finds that good cause to grant the Motion does not exist for the following reasons:

1. RESPONDENT OIG ARGUES THAT THE SOAH PROPOSAL FOR DECISION (PFD) EXCEEDED THE SCOPE OF SOAH'S AUTHORITY.

Under the provisions of TEX. GOV'T CODE CHAPTER 2001, the scheme of PFDs and agency final orders necessitates that a SOAH ALJ may only "recommend" a sanction.[1] However, that limit on the SOAH ALJ's authority does not eliminate her authority to determine whether sanctions should be applied, which sanctions should be applied, and what amount or level is appropriate.

Once an agency refers a contested case to SOAH, the SOAH ALJ stands in the shoes of the agency and may make any finding necessary to resolve the legal issues in the case. This includes the authority to recommend sanctions once an underlying violation is found.

The SOAH ALJ has express authority to issue a proposal for decision for the referring agency including findings of fact and conclusions of law.[2] It is agreed that the term "including" is understood as a term of enlargement

[1] *See* TEX. GOV'T CODE § 2001.058; *Tex. State Board of Dental Examiners v. Brown*, 281 S.W. 3d 692, 697 (Tex. App.—Corpus Christi 2009, pet. denied) (distinguishing an ALJ's recommendation regarding sanctions from findings of fact and conclusions of law).
[2] TEX. GOV'T CODE § 2003.042(6).

rather than a term of limitation or restriction.[3] Accordingly, the SOAH ALJ is not restricted to simply issuing findings of facts and conclusions of law, but any finding necessary to issue a valid legal order on behalf of the agency. [4] In this instance the agency is conferred sanctioning power; that same sanctioning power is vested in the SOAH ALJ by virtue of the statute requiring the agency to refer the case to SOAH.

Specifically, the Respondent cites 1 TEX. ADMIN. CODE § 371.1703(b) (Termination or Enrollment of Contract) for the proposition that the extent of the sanction is exclusively at the discretion of the OIG, yet is unable to cite any specific language from that section to sustain this argument. However, a new rule sheds light on this issue.

Tex. Hum. Res. Code Ann. § 32.0291(c) gives providers a right to an expedited administrative hearing regarding a payment hold. The statute explicitly conditions continuation of the payment hold on a SOAH determination: "The department shall discontinue the hold unless the department makes a prima facie showing at the hearing that the evidence relied on by the department in imposing the hold is relevant, credible, and material to the issue of fraud or willful misrepresentation." This statutory provision has been in effect since September 1, 2003.

HHSC-OIG recently adopted a rule relating to payment holds, effective October 14, 2012. 1 TEX. ADMIN. CODE § 371.1709(e)(3). A "payment hold may be terminated or partially lifted" when, among other instances, an "administrative law judge or judge of any court of competent jurisdiction orders OIG to lift the hold in whole or in part." 1 TEX. ADMIN CODE § 371.1709(e)(3)(I). Section 371.1709 codifies the most logical interpretation of Tex. Hum. Res. Code Ann. § 32.0291(c): a SOAH ALJ can determine whether the OIG should lift a payment hold, in whole or in part, in an expedited administrative hearing. This determination is contingent on whether "the department makes a prima facie showing at the hearing that the evidence relied on by the department in imposing the hold is relevant, credible, and material to the issue of fraud or willful misrepresentation." TEX. HUM. RES. CODE ANN. § 32.0291(c).

While 1 TEX. ADMIN. CODE § 371.1709(e)(3)(I) was not effective at the time of the hearing before ALJ Kilgore, the Texas Legislature did not make any changes to the respective authority of HHSC-OIG or a SOAH ALJ regarding payment holds between September 1, 2003— the effective date of TEX. HUM. RES. CODE ANN. § 32.0291(c)—and October 14, 2012—the effective date of 1 TEX. ADMIN. CODE § 371.1709(e). HHSC's previous rules relating to payment holds, repealed with the adoption of 1 TEX. ADMIN. CODE § 371.1709, are silent on this issue. *See* 37 Tex. Reg. 7989 (2012) (Tex. Health & Hum. Servs. Comm'n) (listing repealed rules). Therefore, even if 1 TEX. ADMIN. CODE § 371.1709 was not effective at the date of the hearing, HHSC-OIG's current interpretation of the statutory scheme is persuasive, namely that the SOAH ALJ has had the authority to modify a sanction since 2003. Moreover, it is consistent with this Judge's, and ALJ Kilgore's, interpretation of SOAH's authority over this matter.

---

[3] *Railroad Comm'n v. Arco Oil & Gas Co., 876 S.W. 2d 473, 491–92 (Tex. App. – Austin 2005, pet. denied); see Republic Ins. Co. v. Silverton Elevator. Inc.* 493 S.W. 2d 748,752 (Tex.1973).
[4] *See* Lou Bright & Prof. Ron Beal, *The Legal Authority of a SOAH ALJ to Determine Sanctions and the Power of the Agency to Modify the Same*, article presented at the University of Texas 5th Advanced Administrative Law Conference, September 2–3, 2010, at 6–7.

In the instant case, OIG applied a 100% vendor hold on Harlingen's Medicaid reimbursements related to orthodontic care after OIG determined that Harlingen incorrectly applied Medicaid policy and committed Medicaid fraud. OIG determined that Harlingen was committing Medicaid fraud because it believed that Harlingen had submitted an unusually high number of incorrect claims for reimbursement.

The SOAH ALJ decided that OIG's 100% vendor hold of Harlingen's Medicaid reimbursements was inordinate and not justified, based on her determination that OIG failed to prove that Harlingen committed fraud. The following Findings of Fact and Conclusions of Law demonstrate the basis upon which she reduced the vendor hold from 100% to 9%:

> **Finding of Fact 34**. There is no evidence that is credible, reliable, or verifying, or that has indicia of reliability, that a fraudulent lack of dysfunction existed among the 85 HFD patients reviewed by Dr. Evans.
>
> **Finding of Fact 35**. There is no evidence that is credible, reliable, or verifying, or that has indicia of reliability, that HFD committed fraud or misrepresentation.
>
> **Finding of Fact 38**. In Dr. Orr's opinion, in 8 of the 85 cases (or approximately 9 percent), the patients failed to meet the 26-point threshold for Medicaid coverage on the HLD score sheet.
>
> **Finding of Fact 39**. Prima facie evidence exists that, as to approximately 9 percent of the HFD cases reviewed, HFD: billed or caused claims to be submitted to the Medicaid program for services or items that are not reimbursable by the Medicaid program; failed to comply with the terms of the Medicaid program provider agreement; and failed to comply with a Medicaid program procedure manual.
>
> **Conclusion of Law 9**. HHSC may impose a hold on payment of future claims submitted by a provider if there is reliable evidence that the provider has committed fraud or willful misrepresentation regarding a claim for reimbursement under the medical assistance program. TEX. HUM. RES. CODE § 32.0291(b). In a SOAH hearing on a payment hold, HHSC must make a prima facie showing that the evidence relied on in imposing the hold is relevant, credible, and material to the issue of fraud or willful misrepresentation. TEX. HUM. RES. CODE § 32.0291(c).
>
> **Conclusion of Law 10**. HHSC-OIG lacks authority to maintain the payment hold against HFD for alleged fraud or misrepresentation. TEX. GOV'T CODE § 531.102(g)(2); 42 C.F.R. § 455.23; TEX. HUM.

RES. CODE § 32.091(c); 1 TEX. ADMIN. CODE §§ 371.1703(b)(3) and (5), 371.1617(a)(1)(A)–(C).

Conclusion of Law 11. HHSC-OIG has authority to maintain a payment hold against HFD based on prima facie evidence of: billing or causing claims to be submitted to the Medicaid program for services or items that are not reimbursable by the Medicaid program; failing to comply with the terms of the Medicaid program provider agreement; and failing to comply with a Medicaid program Procedure manual. 1 TEX. ADMIN. CODE §§ 371.1703(b)(5), 371.1617(1)(K), (5)(A) and (G).

Recommendation: The ALJ recommends that any payment hold against HFD be reduced to 9 percent of the 40 percent of HFD's total Medicaid reimbursement that is related to orthodontics, or 4 percent of HFD's total Medicaid reimbursement.

Respondent correctly asserts that an agency has the ultimate responsibility to impose sanctions and determine the scope of those sanctions.[5] In cases when a SOAH ALJ recommends a finding of fact or conclusion of law, TEX. GOV'T CODE § 2001.058 governs, and a SOAH ALJ's recommendation of a sanction in a finding of fact or conclusion of law may be overturned only if the agency determines:

> (1) that the ALJ did not properly apply or interpret applicable law, agency rules, written policies or prior administrative decisions;
> (2) that a prior administrative decision on which the ALJ relied is incorrect or should be changed; or
> (3) that a technical error in a finding of fact should be changed.[6]

Therefore, to overturn the SOAH ALJ's reduction in the percentage of vendor hold to be applied, Respondent must demonstrate that one of the three criteria described above is present. Respondent's argument is that the SOAH ALJ failed to properly interpret and apply agency policy.

2. RESPONDENT OIG ARGUES THAT PFD INCORRECTLY INTERPRETED DEFINITION OF "ECTOPIC ERUPTION."

Respondent claims the definition of "ectopic eruption," used by HHSC's Medicaid claims administrator, TMHP, when pre-approving the disputed claims, is incorrect. To support its argument, Respondent raises the principle of *ejusdem generis* in an attempt to show that the SOAH ALJ improperly interpreted the term "ectopic eruption."

Ejusdem generis is a "canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only

---

[5] *Sears v. Tex. State Bd. Of Dental Examiners*, 759 S.W. 2d 748, 751 (Tex. App.—Austin 1988, no writ).

[6] *Granek v. Tex. State Bd. Of Medical Examiners*, 172 S.W. 3d. 761 (Tex. App.—Austin 2005, pet. denied); *Grotti v. Tex. State Bd. Of Medical Examiners*, No. 03-04-00612-CV, 2005 WL 2464417 (Tex. App.—Austin 2005) (memo op.); *Tex. State Board of Dental Examiners v. Brown*, 281 S.W. 3d 692 (Tex. App.—Corpus Christi 2009, pet. denied).

items of the same class as those listed."[7] As this definition suggests, the principle of *ejusdem generis* applies to broad, general language that "immediately follows narrow and specific terms"[8]—and not necessarily to the reverse (i.e., specific language following general language).[9]

The rule of *ejusdem generis* does not apply to the Medicaid policy's definition of "ectopic eruption." The general term—"an unusual pattern of eruption"—does not follow a list of specifics; rather, the general term precedes the specific list: "an unusual pattern of eruption, such as high labial cuspids or teeth that are grossly out of the long axis of the alveolar ridge." Thus, the rule of *ejusdem generis* is not instructive here, and greater weight should be given to the first definitional phrase: "an unusual pattern of eruption."[10]

Texas courts have widely recognized *ejusdem generis* as a rule of *statutory* construction.[11] This ALJ is unaware of any opinion that has applied the rule of *ejusdem generis* to agency *policy*. Texas courts may construe administrative rules, which have the same force as statutes, in the same manner as statutes.[12] However, courts rarely dissect the administrative intent behind an agency policy. Agency policy, and Medicaid policy in particular, looks toward contemporary agency practice and an affected party's most likely interpretation. Accordingly, the SOAH ALJ placed weight on the ambiguity of the Medicaid policy, as well as the absence of "any widespread, non-Medicaid understanding of the specifics of ectopic eruption," and determined that the definition in the Texas Medicaid Provider Procedure Manual was vague and required subjective judgment to interpret. Her findings note that the Manual's definition was amended after this case began to more explicitly exclude certain conditions, which indicates that the agency had its own concerns about the definition then in effect.

The SOAH ALJ analyzed the evidence from the hearing, including testimony from experts from both sides, and concluded that Respondent's experts lacked credibility when compared to Harlingen's witnesses. One of OIG's experts had not treated Medicaid patients, and had no familiarity with the score sheet used to determine whether a patient had an ectopic eruption. Another OIG expert, not an orthodontist, did not know how TMHP had interpreted "ectopic eruption." A third OIG witness, the current Medicaid director, asserted he was not an expert on the issue. He also could not explain why, in 2012, after this case arose, the rule on "ectopic eruption" had been changed. The SOAH ALJ determined that OIG expert testimony carried less weight than that of Harlingen's

---

[7] BLACK'S LAW DICTIONARY (9th ed. 2009); *see also Stanford v. Butler*, 181 S.W.2d 269, 272 (Tex. 1944) ("Under the rule of *ejusdem generis*, where specific and particular enumerations of persons or things in a statute are followed by general words, the general words are not to be construed in their widest meaning or extent, but are to treated as limited and applying only to persons or things of the same kind or class as those expressly mentioned.").

[8] *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010).

[9] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TERMS 204–05 (2012) (arguing that *ejusdem generis* should only apply to the "species-genus pattern," where general terms follow specific terms).

[10] *Id.* at 204 ("Following the general term with specifics can serve the function of making doubly sure that the broad (and intended-to-be-broad) general term is taken to include the specifics.").

[11] *See Farmers' and Mechanics' Nat. Bank v. Hanks*, 137 S.W. 1120, 1123 (Tex. 1911) ("It is a prime rule of construction that where in a statute general words follow a designation of particular subjects or classes of persons the meaning of the general words will be restricted by the particular designation in such statute.").

[12] *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999).

expert, who was the former director of the Medicaid dental program for nine years. The ALJ is the sole judge of a witness's credibility, and those credibility determinations cannot be challenged at the motion for rehearing stage.

For the reasons stated herein, Respondent has failed to persuade this Administrative Law Judge that the Final Order of 10 October 2012 is incorrect.

Therefore, IT IS ORDERED that Respondent's Motion for Rehearing BE DENIED.

Entered this 7th day of January 2013.

Susan Nash Fekety,
Administrative Law Judge
Appeals Division
Texas Health and Human Services Commission