

**COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION**

**ABLE COUNSELING AND  
ASSOCIATES, INC.,**

**:**

**Appellant,**

**: CASE NO. 16 CV 12226**

**-vs-**

**: JUDGE COLLEEN O'DONNELL**

**OHIO DEPARTMENT OF  
MEDICAID,**

**:**

**Appellee.**

**:**

**DECISION AND ENTRY**

**O'DONNELL, J.**

Appellant, Able Counseling and Associates, Inc., filed this appeal on December 29, 2016, from a December 19, 2016 Final Adjudication Order issued by Appellee, Ohio Department of Medicaid. The December 19, 2016 Final Adjudication Order provides, in relevant part:

The Director therefore affixes his signature and enters this Final Adjudication Order, effective on the date of signature directing the immediate implementation of the hearing examiner's report and recommendation, as modified. Specifically, the Director finds that Able Counseling and Associates, Inc. to pay to ODM, \$28,000.26 for overpayment of Medicaid charges billed during the period of January 1, 2009 through December 31, 2011, plus accrued interest and daily interest as detailed in the modified report and recommendation. In the event that the Provider fails to pay in full \$28,000.26 in principal and all accrued interest and daily interest on this amount within 30 days of the execution of this Final Adjudication Order, ODM will declare the unpaid balance immediately due and owing and will certify the balance to the Ohio Attorney General's Office, Collection Enforcement Section, for collection. Upon certification, the Provider will be assessed a 10% collection fee by the Attorney General's Office and interest on the balance pursuant to and in accordance with R.C. 131.02.

December 19, 2016 Adjudication Order.

A review of the record indicates that on July 7, 2015, Appellee mailed to Appellant a "PROPOSED ADJUDICATION ORDER OF THE OHIO DEPARTMENT OF MEDICAID TO IMPLEMENT THE AUDIT FINDINGS IN THE AUDIT REPORT OF ABEL COUNSELING &

ASSOCIATES, INC, PERFORMED BY THE AUDITOR OF STATE, COVERING THE PERIOD OF JANUARY 1, 2009 THROUGH DECEMBER 31, 2011.”

The record demonstrates that Hearing Examiner Philip King conducted a hearing on February 10, 2016. On June 15, 2016, the Hearing Examiner issued his Report and Recommendation. The record demonstrates that in his December 19, 2016, Adjudication Order, the Director made the following modification:

After review of this matter the Director adopts the hearing examiner’s Findings of Facts and Conclusions of Law, except for that portion which concerns the application of R.C. 5164.57(B)(1) to the facts of this case. In applying R.C. 5167.57(B)(1), the hearing examiner found that the Provider was given notice of the overpayment on July 7, 2015, the date the PAO was issued. The Director modifies the report and recommendation to correct this Finding of Fact. The Provider received notice of the overpayment on November 14, 2014, the date the Final Audit Report was issued.

Accordingly, the report and recommendation of the hearing examiner is herein adopted in its entirety, including, but not limited to, findings of fact, conclusions of law, and recommendation contained in the hearing examiner’s report, excluding only that analysis concerning the application of R.C. 5164.57(B)(1). That portion is amended to reflect that Notice was provided on November 14, 2014, which fell in state fiscal year 2015, resulting in a five-year look back period to state fiscal year 2010, which began on July 1, 2009. Therefore, ODM’s recovery of Medicaid overpayment made on June 30, 2009 and before, an amount equal to \$5,364.33, is time barred.

**Appellant’s Legal Arguments.**

Appellant filed his appeal on February 15, 2017. In his appeal, Appellant asserts “that reliable probative evidence was not presented by the State to show waste abuse or any other reason to justify its order that ACS repay it for services provided to Medicaid patients. ACS also points out that the decision is contrary to law because it is based upon a repealed section of the Administrative Code, 5160-4-29, which was in conflict with an existing provision in the Ohio Revised Code, R.C. § 4757.21.” Appellant’s Brief, filed April 10, 2017.

Although Appellant not does set forth specific legal assignments of error, he states the following in his brief:

- B. There is No Evidence of Fraud, Waste or Abuse.
- C. Mr. Oriri Is Authorized by Statute to Provide Counseling Services Independent of Supervision by a Physician.
- D. This Court Must Enforce Current Laws and not Repealed Regulations.
- E. A Regulation in Conflict With a Statute Will Not Be Enforced.

**Standard of Review**

Appellant states in his brief that he is appealing pursuant to R.C. 2506.01. However, R.C. 2506.01 does not confer a right to appeal in this case. The correct standard of review for appeals from a Final Adjudication Order of the Ohio Department of Medicaid is authorized by R.C. 119.12

This Court must determine whether the Ohio Department of Medicaid’s Adjudication Order is supported by reliable, probative, and substantial evidence and is in accordance with law. R.C. 119.12; see also *Rossiter v. State Med. Bd.*, 2004-Ohio-128. R.C. § 119.12 sets forth the standard of review a common pleas court must follow when reviewing an administrative appeal. R.C. 119.12 provides, in pertinent part:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law.

In *Our Place* the Ohio Supreme Court provided the following definition of reliable, probative and substantial evidence as:

- (1) ‘Reliable’ evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) ‘Probative’ evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) ‘Substantial’ evidence is evidence with some weight; it must have importance and value.

*Our Place, Inc. v. Ohio Liquor Comm.*, 63 Ohio St.3d 570, 571, (1992).

Once the common pleas court has determined that the administrative agency’s order is

supported by reliable, probative and substantial evidence, the court must then determine whether the order is in accordance with law. See R.C. § 119.12. The reviewing court cannot substitute its judgment for the agency's decision where there is some evidence supporting the decision. See *Harris v. Lewis*, 69 Ohio St. 2d 577, 579, (1982); see also *University of Cincinnati v. Conrad*, 63 Ohio St. 2d 108 (1980).

**Law and Analysis**

- A. The version of O.A.C. 5101:3-4-29, renumbered as O.A.C. 5160-8-05, which was in effect during the relevant time period is enforceable against Appellee.

The present version of O.A.C. 5101:3-4-29 provides as follows:

**5101:3-4-29. Services provided for the diagnosis and treatment of mental and emotional disorders. [See note: Renumbered as 5160-4-29]**

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**Editor's Note:**

Former Rule **5101:-3-4-29** was renumbered as Rule 5160-4-29 effective October 1, 2013, pursuant to the transfer of Chapter 5101:1 and 5101:3 of the Revised Code from the Office of Medical Assistance within the Department of Job and Family Services to the Department of Medicaid, by Am. Sub. H.B. 159 of the 130<sup>th</sup> General Assembly.

O.A.C. 5160-4-29 demonstrates that its effective date of rescission was February 1, 2016.

O.A.C. 5160-8-05, effective October 29, 2016, is the current regulation that sets forth provisions governing payment for mental health services provided by certain licensed professionals in non-institutional settings. O.A.C. 5160-8-05 was not in effect during the relevant time period.

Thus, O.A.C. 5101:3-4-29, renumbered as 5160-4-29, was in effect during the relevant time period of January 1, 2009 through December 31, 2011. The effective date of O.A.C. 5160-8-05 is October 29, 2016. There is consistent language in O.A.C. 5101:3-4-29, renumbered as O.A.C. 5160-4-29, that payment be made to eligible providers employed by or supervised by a physician, that the claims include modifiers to indicate provision of services by a non-physician, and that the

patient file include valid treatment plans and documentation for the services provided. Thus, a licensed professional clinical counselor, such as Appellant, was not permitted to be directly reimbursed for services he provided pursuant to the Medicaid program. The facts are undisputed that Mr. Oriri, the only person who provided services for Appellant during the relevant time period, is not a physician, and that Appellant billed for and received payments for *physician* services that were not provided during the relevant time period. Thus, Appellant's argument is not well-taken and is hereby **OVERRULED**.

B. O.A.C. 5101:3-4-29 does not conflict with the Ohio Revised Code.

The two versions of R.C. 4757.21 in effect during the relevant time period include language which permit a "professional clinical counselor" to diagnose and treat mental and emotional disorders. A review of the legislative history demonstrates that neither version of this statute, effective during the relevant time period, ever addressed Medicaid reimbursement payments to a "licensed professional clinical counselor" or a "professional clinical counselor." Moreover, the legislative history provides that the 2014 amendment, HB 232, inserted the word "licensed" preceding the word "professional" throughout the section.

Thus, Appellant's assertion, that R.C. 4757.21 is in conflict with the "repealed administrative regulation," does not meet the criteria set forth in *Ohio Council 8* because the statute and the relevant administrative code sections do not address the same subject matter. See *Ohio Council 8, Am. Fedn. Of State, Cty. Mun. Emp., AFL-CIO v. Cincinnati*, 69 Ohio St.3d 677, 680 (1994). Thus, a rule promulgated by an agency, issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactment governing the same subject matter. Upon review, the language of both applicable versions of R.C. 4757.21 is not ambiguous, and thus, does not include any language regarding Medicaid reimbursement

payments.

Additionally, Appellant asserts in its brief that as follows:

In this case the positive change was the repeal of the regulation 5160-4-29. This regulation was the only basis for the State's claim that ACS provided unauthorized services to Medicaid clients. There is no claim that ACS is in violation of the current regulation OAC 5160-8-05.

There is no basis for an assertion that the repeal of OAC 5160-4-29 and its replacement with OAC 5160-8-05 still requires enforcement of the repealed law case because of the constitutional prohibition against retroactive application of new law. "The retroactivity clause nullifies those new laws that "reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective]." *Bielat v. Bielat* (200), 87 Ohio St.3d 350,352-353, quoting *Miller v. Hixson* (1901), 64 Ohio St. 39, 51. However there are no new burden (sic), duties obligations or liabilities created by the repeal of OAC 5160-4-29.

Thus, Appellant argues that the repeal of OAC 5160-4-29 is curative because it cures the conflict between the regulation and R.C. 4757.21. Appellant cited *Ridenour v. Wilkinson*, 2007-Ohio-5965 in its brief. The *Ridenour* court held that R.C. 5120.021, as amended, did not preclude ODRC from charging and collecting healthcare co-payments and fees from the inmates. In affirming the trial court's judgment, the *Ridenour* court held that inmates property rights were not violated under due process, and that ex post fact claims did not apply. The *Ridenour* holding is not applicable to the case *sub judice*.

Appellant also cites to *Cosby v. Franklin Cty. Dept. of Job and Family Serv.*, 2007-Ohio-6641. In that case, the day care provider argued that the agency erred by retroactively applying R.C. 5104.09 (2005). The appellate court held that, because the provider had pled guilty to forgery prior to the effective amendment date of R.C. 5104.09 (2005), the administrative hearing officer correctly found that the statutory amendment applied retroactively to her, in accordance with the legislature's intent. Although the trial court erroneously found that the challenged amendment operated prospectively only, the error was harmless. The provider was not prejudiced when the agency applied R.C. 5104.09(D) retroactively because its retroactive application was in accordance with

law. The Court reasoned that the provider acquired no “vested right” to own or operate a type B family day-care home. Further, in light of the overriding purpose of the child care legislation to safeguard the health, safety and welfare of children receiving child care, and the government interest in preventing fraud in publicly funded day-care operation, the administrative rule at issue was reasonable in preventing the provider, a past felony offender convicted of forgery, from owning or operating a publicly funded day-care home. Likewise, the holding in *Cosby* does not apply to the case *sub judice*.

The test is for this Court first to determine whether the General Assembly expressly intended the statute to apply retroactively. If so, the court moves on to the question of whether the statute is substantive, rendering it unconstitutionally retroactive, as opposed to merely remedial. A purely remedial statute does not violate Ohio Const. art II, §28. A review of the record demonstrates that Appellant has not provided any evidence that the legislative intent of the General Assembly was for O.A.C. 5160-8-05 and/or R.C. 4757.21 to be retroactive.

A thorough research demonstrates that O.A.C.5160-8-05 effective date was October 29, 2016. The purpose of the rule, “Mental Health Services,” was to establish independent practice social workers, counselors and marriage and family therapists as direct providers in the Ohio Medicaid fee-for-service program. The rule authorizes that licensed independent professional counselors, independent social workers and independent marriage and family therapist may enroll as providers. The October 28, 2015 Rule Summary and Fiscal Analysis is silent as to the issue of whether the rule is to be applied retroactively. **It states that the rule is being adopted to facilitate the updating of Medicaid program policy** and replaces rules 5160-4-29 and 5160-8-05. It also states that the new rule recognizes independent practitioners as eligible Medicaid providers with their own provider types; they will be able to submit claims and receive payments for Medicaid

services they provide. Thus, this Court concludes as a matter of law that there is no evidence that the General Assembly expressly intended this rule to apply retroactively. Moreover, assuming that this rule did apply retroactively, there is no evidence to support how far back in time the retroactivity of this rule extends, or the implications of other providers who were found to have violated this rule since 2009 and the consequences of their violations. Accordingly, Appellant's argument is not well-taken and is hereby **OVERRULED**.

C. There is Reliable, Probative and Substantial Evidence to Support the December 19, 2016 Final Adjudication Order.

There is reliable, probative and substantial evidence to support that Appellant did not meet the requirements of O.A.C. 5101:3-4-29, renumbered as O.A.C. 5160-8-05, during the relevant time period, and thus, received overpayments of \$28,000.26. Tr. 19-26, Tr. 106, 114-115, and 129. Moreover, the transcript demonstrates that Dr. Edward Dutton, a physician, did not provide services during the relevant time period. Tr. 42. 106-107, 114-115, 129.

Pursuant to the laws and regulations in effect between January 1, 2009 and December 31, 2011, there is reliable, probative and substantial evidence supporting that Appellant improperly billed the Ohio Department of Medicaid for mental health services provided by non-physician Abel Oriri. Mr. Oriri provided services without being employed by or under contract with a physician or clinic during the examination period and did not perform services under the general supervision of a physician; all services were billed without a modifier to indicate that a non-physician rendered them; and Appellant did not have proper treatment plans or adequate service documentation to support reimbursed services. Final Audit Report, pgs. 9, 11-13. Thus, Appellant's argument is not well-taken and is hereby **OVERRULED**.

Accordingly, the December 19, 2016 Adjudication Order is hereby **AFFIRMED**. The December 19, 2016 Adjudication Order is supported by reliable, probative and substantial evidence



and is in accordance with law. This Court concludes as a matter of law that there is reliable, probative and substantial evidence supporting that Appellant failed to comply with the laws that were in effect during the relevant time period.

THE COURT FINDS THAT THERE IS NO JUST REASON FOR DELAY. THIS IS A FINAL APPEALABLE ORDER. Pursuant to Civil Rule 58, the Clerk of Court shall serve notice of this judgment and its date of entry upon all parties.

It is so **ORDERED**.

Copies to all parties registered for e-filing

Franklin County Court of Common Pleas

**Date:** 07-21-2017

**Case Title:** ABLE COUNSELING & ASSOCIATES INC -VS- OHIO STATE  
DEPARTMENT MEDICAID

**Case Number:** 16CV012226

**Type:** ENTRY

It Is So Ordered.

A handwritten signature in blue ink, "Colleen O'Donnell", is written over a circular blue seal. The seal contains the text "FRANKLIN COUNTY COURT OF COMMON PLEAS" around the perimeter and "ALL THINGS ARE POSSIBLE" at the bottom. The year "2003" is also visible on the left side of the seal.

/s/ Judge Colleen O'Donnell

Court Disposition

Case Number: 16CV012226

Case Style: ABLE COUNSELING & ASSOCIATES INC -VS- OHIO  
STATE DEPARTMENT MEDICAID

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 16CV0122262017-05-0999980000  
Document Title: 05-09-2017-MOTION TO EXTEND TIME -  
PLAINTIFF: ABLE COUNSELING & ASSOCIATES INC  
Disposition: MOTION IS MOOT