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Final Order No. DOH-09-0160-^{DS}-MOA
FILED DATE - 2.18.09
Department of Health
By: Rachul Bh
Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MEDICINE

IN RE: Petition for Declaratory Statement of
Andres F. Rodriguez, M.D.
and Stockwell, Reisman, Paulk &
Taylor, P.A., and Karl F. Hempel, M.D.
and Tallahassee Primary Care
Associates, P.A.,

FINAL ORDER ON PETITION FOR DECLARATORY STATEMENT

This matter came before the Board of Medicine (hereinafter the "Board") on December 6, 2008, in Tampa, Florida, for consideration of the referenced Petition for Declaratory Statement (attached hereto as exhibit A). The Notice of Petition for Declaratory Statement was published on November 21, 2008, in the Vol. 34, No. 37, in the Florida Administrative Weekly.

The petition filed by Andres F. Rodriguez, M.D., individually and as a representative of Stockwell, Reisman, Paulk & Taylor, P.A., d/b/a Digestive Disease Clinic, and Karl F. Hempel, M.D., individually and as a representative of Tallahassee Primary Care Associates, P.A. make the following inquiry:

If a physician is an "investor" in an entity through his/her immediate family member, will the physician's financial relationship with that entity be imputed to his/her group practice, its physicians, or its staff?

FINDINGS OF FACTS

1. Petitioner, Andres F. Rodriguez, M.D. is a physician licensed pursuant to Chapter 458, Florida Statutes, and is a shareholder and the president of Digestive Disease Clinic (DDC). Dr. Rodriguez practices at DDC in Tallahassee, Florida.

2. Petitioner, DDC, is a group practice of gastroenterologists as defined in Section 456.053(3)(h), Florida Statutes, with executive offices also located in Tallahassee, Florida.

3. Petitioner, Karl F. Hempel, M.D. is a physician licensed pursuant to Chapter 458, Florida Statutes, and is a member and President of Tallahassee Primary Care Associates, P.A. (TPCA). Dr. Hempel practices in Tallahassee, Florida.

4. TPCA is a group practice of primary care physicians as defined in Section 456.053(3)(h), Florida Statutes, with executive offices also located in Tallahassee, Florida.

5. The agency affected by this Petition is the Board of Medicine of the State of Florida. The statutory provisions upon which this Declaratory Statement is sought are contained in Section 456.053, Florida Statutes.

6. DDC provides only physician services and does not provide any "designated health services" as defined by Section 456.053(3)(c), Florida Statutes.

7. TPCA provides physician services. In addition, TPCA owns and operates: (a) a clinical laboratory and (b) a diagnostic imaging center that has the ability to perform regular x-ray, mammography, nuclear medicine, ultrasound, computed tomography (CT scans), and dexta scans. TPCA utilizes its diagnostic imaging center to perform tests on its own patients and it also accepts outside referrals for diagnostic imaging services in compliance with Section 456.053, Florida Statutes. TPCA meets the in-house ancillary services exception under the federal Stark law.

8. Periodically, TPCA physicians refer patients to DDC physicians for gastroenterology services. In many if not most instances, the DDC physicians provide a report to the TPCA physician regarding the gastroenterology findings and services. In some instances, the DDC physician may develop a "plan of care" for the patient that may be implemented, in whole or in

part, by the TPCA physician. In every case, TPCA bills for services provided by TPCA physicians and DDC bills for services performed by DDC physicians. There is no payment or *quid pro quo* of any kind that is provided between TPCA and DDC for any of these patients.

9. A shareholder of DDC ("Husband") who, under Section 456.053(3)(k), Florida Statutes, has an "investment interest" in DDC is married to another physician ("Wife") who has recently become a shareholder in TPCA and who now, under Section 456.053(3)(k), Florida Statutes, has an "investment interest" in TPCA. Under Florida law, each spouse is an "investor" in his/her spouse's group practice, but neither Husband nor Wife holds an "investment interest" in his/her spouse's group practice.¹

10. The Husband is the only DDC physician who has any type of ownership relationship with TPCA and his only connection is that he is married to the Wife. The Wife is the only TPCA physician who has any type of ownership relationship with DDC and her only connection is that she is married to the Husband.

11. The Wife does not plan to make referrals to DDC and she will not direct TPCA, its physicians, or its staff to make referrals to DDC. The Wife will not control referrals made by TPCA, its physicians, or its staff.

12. The Husband, who is a specialist in gastroenterology, occasionally treats a patient who does not have a primary care physician. He does not plan to refer such patients to TPCA. The Husband will not direct DDC, its physicians, or its staff to make referrals to TPCA and will not control referrals made by DDC, its other physicians, or its staff.

13. Physicians at TPCA, other than the Wife, desire to refer patients in need of gastroenterology care to physicians at DDC, including the Husband.

¹ Pursuant to Section 456.053(3)(k) and (l), Florida Statutes, an "investment interest" is held by the individual, but "investor" status can be created by a spouse or other family member's "investment interest."

14. Physicians at DDC, other than the Husband, wish to refer patients: (a) to physicians at TPCA, including the Wife, for physician services, and (b) to TPCA for diagnostic imaging services.

CONCLUSIONS OF LAW

15. The Board of Medicine has authority to issue this Final Order pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.

16. The Petition filed in this cause is in substantial compliance with the provisions of 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code.

17. For purposes of determining standing in this matter, the individual Petitioners, allopathic physicians licensed pursuant to Chapter 458, Florida Statutes, are substantially affected persons due to the fact that their failure to comply with Section 456.053, Florida Statutes, the Patient Self-Referral Act of 1992 (the "Act") may result in disciplinary action by the Board. Fla. Stat. §456.053(5)(g), Florida Statutes.

18. Section 456.053, Florida Statutes, is known as the Patient Self-Referral Act of 1992 (the "Act"). In general terms, this law prohibits health care providers from referring patients for the provision of "designated health services" and other health care items or services to an entity in which the health care provider is an investor, unless certain specified provisions of the law are satisfied.

19. Section 456.053(3)(l) of the Florida Act defines an "investor" as follows:

"Investor" means a person or entity owning a legal or beneficial ownership or investment interest, directly or indirectly, including, without limitation, through an immediate family member, trust, or another entity related to the investor within the meaning of 42 C.F.R. s. 413.17, in an entity.

20. Under Section 456.053(3)(l) of the Act, the Husband is considered an "investor" in TPCA by virtue of his Wife's investment interest in TPCA. Similarly, the Wife is considered an "investor" in DDC by virtue of Husband's investment interest in DDC.

21. The Act imputes an investment interest of an immediate family member, trust, or other entity to the health care provider. Fla. Stat. §456.053(3)(l). It does not, however, contain a provision stating that a physician's prohibited financial relationship is imputed to the other physicians in his or her group practice.

22. In the past, and particularly when Florida law is silent, the Board has looked to the federal standards implementing provisions in the federal patient self-referral law, the United State Stark Act ("Stark"), when interpreting Florida's Patient Self-Referral Act. See, e.g., In re: Petition for Declaratory Statement Tallahassee Neurological Clinic, P.A., DOH-04-0921 (Fla. Bd. of Med., Aug. 17, 2004); In re: Petition for Declaratory Statement of Alan Levin, M.D. and Ameripath, Inc., 19 F.A.L.R. 4525, 4528 (Fla. Bd. of Med. 1997). In Levin, the Board ruled:

Given the magnitude of Medicare and Medicaid services rendered by Florida physicians and the relatively similar language and intent set forth in both the state and federal regulations, it is reasonable for the Board to look to the federal standards implementing the Stark Bill when interpreting the provisions of Florida's Self-Referral Act, where it would not be inconsistent with the plain meaning of and legislative intent of the Florida Act.

Levin, supra at 4528.

23. Although Stark broadly defines "financial relationship" to include any direct or indirect transfer of remuneration, the federal regulations implementing Stark provide that a physician's financial relationship with an entity will not be imputed to his or her group-practice.

Stark provides in part as follows:

...A physician's prohibited financial relationship with an entity that furnishes DHS is not imputed to his or her group practice or its members or its staff. However, a referral made by a physician's

group practice, its members, or its staff may be imputed to the physician if the physician directs the group practice, its members, or its staff to make the referral or if the physician controls referrals made by his or her group practice, its members, or its staff.

42 C.F.R., §411.353(a) (emphasis added).

24. Under Stark, the Wife's spousal relationship with a shareholder in DDC is not imputed to other physicians at TPCA. Similarly, the Husband's spousal relationship with a shareholder in TPCA is not imputed to other physicians at DDC.

25. In the 2001 Commentary, the U.S. Department of Health and Human Services stated in relevant part:

We are adopting the position we discussed in the proposed regulations, that is, that a physician's financial relationship with an entity under section 1877 of the Act will not be imputed to his or her group practice. Thus, other members of the group practice can continue to make referrals to the entity, provided that the members do not have financial relationships with the entity and the physician with the financial relationship is not in a position to control the referrals of other group members.

66 S. ed. Reg. 903 (Jan. 4, 2001) (emphasis added).

26. Given the facts and analysis set forth above, the Board believes that it should continue to look toward the federal standards implementing provisions of Stark when interpreting Florida's Patient Self-Referral Act. Therefore, with respect to the question presented, the Board is of the opinion that under the Patient Self-Referral Act, like the Stark Act, a physician's prohibited financial relationship with an entity is not imputed to his or her group practice, its physicians, or its staff. More specifically, the Board finds that the physicians at TPCA, other than the Wife, are not prohibited from referring patients to physicians at DDC, including the Husband, for services in gastroenterology, based upon any imputed financial relationship of the Wife. Furthermore, the physicians at DDC, other than the Husband, are not

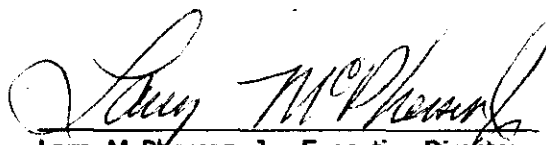
prohibited from referring patients to physicians at TPCA, including the Wife, for primary care services and to TPCA for diagnostic imaging services in compliance with Section 456.053(3)(o)3.f. and (4), Florida Statutes, based upon any imputed financial relationship of the Husband.

27. The Board's response to this Petition addresses solely the question propounded by the Petitioners and only addresses issues regarding the practice of medicine. The Board's conclusion is based solely on the Board's application of the factual circumstances outlined in the Petition to the pertinent statutory and rule provisions set forth above.

This Final Order shall become effective upon filing with the Clerk of the Department of Health.

DONE AND ORDERED this 16 day of FEBRUARY, 2009.

BOARD OF MEDICINE



Larry McPherson, Jr., Executive Director
For Fred Bearison, M.D., Chair

NOTICE OF APPEAL RIGHTS

Pursuant to Section 120.569, Florida Statutes, Respondents are hereby notified that they may appeal this Final Order by filing one copy of a notice of appeal with the Clerk of the Department of Health and the filing fee and one copy of a notice of appeal with the District Court of Appeal within 30 days of the date this Final Order is filed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Allen R. Grossman, Metzger, Grossman, Furlow & Bayo', LLC, 1408 N. Piedmont Way, Tallahassee, Florida 32308; Emily S. Waugh, Ausley & McMullen, 227 South Calhoun Street, Post Office Box 391, Tallahassee, Florida 32301; and by interoffice mail to Edward A. Tellechea, Senior Assistant Attorney General, PL-01 The Capitol, Tallahassee, Florida 32399-1050; and Josefina M. Tamayo, General Counsel, Department of Health, 4052 Bald Cypress Way, BIN A02, Tallahassee, Florida 32399-1703, on this 18th day of February, 2009.



Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH
JULY 9 2013
Karl F. Hempel, M.D.
-X 11/2/13

IN RE: Petition for Declaratory Statement of
Andres F. Rodriquez, M.D.
and Stockwell, Reisman, Paulk &
Taylor, P.A., and Karl F. Hempel, M.D.
and Tallahassee Primary Care
Associates, P.A.,

Case No. _____

Petitioners

PETITION FOR DECLARATORY STATEMENT

Pursuant to Sections 120.565, and 455.654(5), Florida Statutes, and Rule Chapter 28-105, Florida Administrative Code, Andres F. Rodriquez, M.D., individually and as a representative of Stockwell, Reisman, Paulk & Taylor, P.A., d/b/a Digestive Disease Clinic (“**Digestive Disease**”), and Karl F. Hempel, M.D., individually and as a representative of Tallahassee Primary Care Associates, P.A. (“**Primary Care**”), petition the Board of Medicine for a Final Order setting forth a *Declaratory Statement on the facts and law presented herein.*

Background Information

1. Petitioner, Andres F. Rodriquez, M.D. is a physician licensed pursuant to Chapter 458, Florida Statutes, and is a shareholder and the president of Digestive Disease. Dr. Andres F. Rodriquez practices at Digestive Disease Clinic, 2400 Miccosukee Road, Tallahassee, Florida 32308. The office telephone number is (850) 877-2105 and the fax number is (850) 942-1761.
2. Petitioner, Digestive Disease, is a group practice of gastroenterologists as defined in Section 456.053(3)(h), Florida Statutes, with executive offices located at 2400 Miccosukee

Road, Tallahassee, Florida 32308. The office telephone number is (850) 877-2105 and the fax number is (850) 942-1761.

3. Petitioner, Karl F. Hempel, M.D. is a physician licensed pursuant to Chapter 458, Florida Statutes, and is a member and President of Primary Care. Dr. Hempel practices at 1511 Surgeons Drive, Suite A, Tallahassee, Florida 32308. The office telephone number is (850) 878-6134 and the fax number is (850) 877-6727.

4. Petitioner, Primary Care, is a group practice of primary care physicians as defined in Section 456.053(3)(h), Florida Statutes, with executive offices located at 1690 Raymond Diehl Road, Unit C-1, Tallahassee, Florida 32308. The office telephone number is (850) 297-0114 and the fax number is (850) 297-0314.

5. The agency affected by this Petition is the Board of Medicine of the State of Florida (hereafter the "**Board**"). The statutory provisions upon which this Declaratory Statement is sought are contained in Section 456.053, Florida Statutes.

6. Digestive Disease provides only physician services and does not provide any "designated health services" as defined by Section 456.053(3)(c), Florida Statutes.

7. Primary Care provides physician services. In addition, Primary Care owns and operates: (a) a clinical laboratory and (b) a diagnostic imaging center that has the ability to perform regular x-ray, mammography, nuclear medicine, ultrasound, computed tomography (CT scans), and dexta scans. Primary Care utilizes its diagnostic imaging center to perform tests on its own patients and it also accepts outside referrals for diagnostic imaging services in compliance with Section 456.053, Florida Statutes. Primary Care meets the in-house ancillary services exception under the federal Stark law.

8. Periodically, Primary Care physicians refer patients to Digestive Disease physicians for gastroenterology services. In many if not most instances, the Digestive Disease physicians provide a report to the Primary Care physician regarding the gastroenterology findings and services. In some instances, the Digestive Disease physician may develop a “plan of care” for the patient that may be implemented, in whole or in part, by the Primary Care physician. In every case, Primary Care bills for services provided by Primary Care physicians and Digestive Disease bills for services performed by Digestive Disease physicians. There is no payment or *quid pro quo* of any kind that is provided between Primary Care and Digestive Disease for any of these patients.

9. A shareholder of Digestive Disease (“**Husband**”) who, under Section 456.053(3)(k), Florida Statutes, has an “investment interest” in Digestive Disease is married to another physician (“**Wife**”) who has recently become a shareholder in Primary Care and who now, under Section 456.053(3)(k), Florida Statutes, has an “investment interest” in Primary Care. Under Florida law, each spouse is an “investor” in his/her spouse’s group practice, but neither Husband nor Wife holds an “investment interest” in his/her spouse’s group practice.¹

10. The manner in which all of these Petitioners are substantially affected by Section 456.053, Florida Statutes is described further below.

¹ Pursuant to Section 456.053(3)(k) and (l), Florida Statutes, an “investment interest” is held by the individual, but “investor” status can be created by a spouse or other family member’s “investment interest.”

Requested Declarations

11. Petitioners respectfully request that the Board of Medicine make the following declarations:

(a) If a physician is an "investor" in an entity through his/her immediate family member, then the physician's financial relationship with that entity is not imputed to his/her group practice, its physicians, or its staff.

(b) Accordingly: (i) physicians at Primary Care, other than Wife, may refer patients to physicians at Digestive Disease, including Husband, for services in gastroenterology and (ii) physicians at Digestive Disease, other than Husband, may refer patients to the primary care physicians at Primary Care, including Wife, for physician services and also to Primary Care for diagnostic imaging services; and that none of the foregoing will subject the physicians to discipline by the Board of Medicine for making such referrals.

Issue: Investment Interest Not Imputed

12. Section 456.053, Florida Statutes, is known as the Patient Self-Referral Act of 1992 (the "**Florida Act**"). In general terms, this law prohibits health care providers from referring patients for the provision of "designated health services" and other health care items or services to an entity in which the health care provider is an investor, unless certain specified provisions of the law are satisfied. Among other potential sanctions, violation of this law by health care providers subject to the jurisdiction of the Board may result in disciplinary action by the Board. Fla. Stat. §456.053(5)(g), Florida Statutes.

13. Section 456.053(3)(I) of the Florida Act defines an "investor" as follows:

"Investor" means a person or entity owning a legal or beneficial ownership or investment interest, directly or indirectly, including, without limitation, through an immediate family member, trust, or

another entity related to the investor within the meaning of 42 C.F.R. s. 413.17, in an entity.

14. Under Section 456.053(3)(l) of the Florida Act, Husband is technically an "investor" in Primary Care by virtue of Wife's investment interest in Primary Care. Similarly, Wife is technically an "investor" in Digestive Disease by virtue of Husband's investment interest in Digestive Disease.

15. Husband is the only Digestive Disease physician who has any type of ownership relationship with Primary Care and his only connection is that he is married to Wife. Wife is the only Primary Care physician who has any type of ownership relationship with Digestive Disease and her only connection is that she is married to Husband.

16. Wife does not plan to make referrals to Digestive Disease. Wife will not direct Primary Care, its physicians, or its staff to make referrals to Digestive Disease. Wife will not control referrals made by Primary Care, its physicians, or its staff.

17. Husband, who is a specialist in gastroenterology, occasionally treats a patient who does not have a primary care physician. Husband does not plan to refer such patients to Primary Care. Husband will not direct Digestive Disease, its physicians, or its staff to make referrals to Primary Care. Husband will not control referrals made by Digestive Disease, its other physicians, or its staff.

18. Physicians at Primary Care, other than Wife, desire to refer patients in need of gastroenterology care to physicians at Digestive Disease, including Husband.

19. Physicians at Digestive Disease, other than Husband, wish to refer patients: (a) to physicians at Primary Care, including Wife, for physician services, and (b) to Primary Care for diagnostic imaging services.

20. As noted above, the Florida Act imputes an investment interest of an immediate family member, trust, or other entity to the health care provider. Fla. Stat. §456.053(3)(l). The Florida Act does not contain a provision stating that a physician's prohibited financial relationship is imputed to the other physicians in his or her group practice. In the past, and particularly when Florida law is silent, the Florida Board of Medicine has looked to the federal standards implementing provisions in the federal patient self-referral law (commonly known as the "Stark Act") when interpreting Florida's Patient Self-Referral Act. See, e.g., In re: Petition for Declaratory Statement Tallahassee Neurological Clinic, P.A., DOH-04-0921 (Fla. Bd. of Med., Aug. 17, 2004); In re: Petition for Declaratory Statement of Alan Levin, M.D. and Ameripath, Inc., 19 F.A.L.R. 4525, 4528 (Fla. Bd. of Med. 1997). In Levin, the Board ruled:

Given the magnitude of Medicare and Medicaid services rendered by Florida physicians and the relatively similar language and intent set forth in both the state and federal regulations, it is reasonable for the Board to look to the federal standards implementing the Stark Bill when interpreting the provisions of Florida's Self-Referral Act, where it would not be inconsistent with the plain meaning of and legislative intent of the Florida Act.

Levin, supra at 4528.

21. Although the federal Stark law broadly defines "financial relationship" to include any direct or indirect transfer of remuneration, the federal regulations implementing the Stark Act provide that a physician's financial relationship with an entity will not be imputed to his or her group practice. The federal Stark regulations provide:

...A physician's prohibited financial relationship with an entity that furnishes DHS is not imputed to his or her group practice or its members or its staff. However, a referral made by a physician's group practice, its members, or its staff may be imputed to the physician if the physician directs the group practice, its members, or its staff to make the referral or if the physician controls referrals made by his or her group practice, its members, or its staff.

42 C.F.R., §411.353(a) (emphasis added).

22. Under the federal Stark Act, Wife's spousal relationship with a shareholder in Digestive Disease is not imputed to other physicians at Primary Care. Similarly, Husband's spousal relationship with a shareholder in Primary Care is not imputed to other physicians at Digestive Disease.

23. In the 2001 Commentary, the U.S. Department of Health and Human Services stated in relevant part:


We are adopting the position we discussed in the proposed regulations, that is, that a physician's financial relationship with an entity under section 1877 of the Act will not be imputed to his or her group practice. Thus, other members of the group practice can continue to make referrals to the entity, provided that the members do not have financial relationships with the entity and the physician with the financial relationship is not in a position to control the referrals of other group members.

66 S. ed. Reg. 903 (Jan. 4, 2001) (emphasis added).

24. Petitioners respectfully request that the Board of Medicine declare that under the Florida Act a physician's prohibited financial relationship with an entity is not imputed to his or her group practice, its physicians, or its staff. Further, Petitioners respectfully request that the Board of Medicine declare that: (a) physicians at Primary Care, other than Wife, are not prohibited from referring patients to physicians at Digestive Disease, including Husband, for services in gastroenterology, based upon any imputed financial relationship of Wife, and (b) physicians at Digestive Disease, other than Husband, are not prohibited from referring patients to physicians at Primary Care, including Wife, for primary care services and to Primary Care for diagnostic imaging services in compliance with Section 456.053(3)(o)3.f. and (4), Florida Statutes, based upon any imputed financial relationship of Husband.

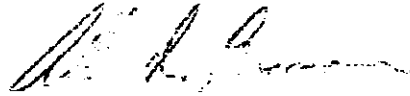
Wherefore, Petitioners respectfully request that the Board of Medicine issue a Final Order stating that under the specific circumstances set forth in this Petition, the status of Husband and Wife, as a result of each spouse's ownership interest in his/her respective group practice, is not imputed to the other physician owners of Primary Care and Digestive Disease and therefore, the other physicians in each group may refer to the other group without violating the prohibitions of Section 456.053, Florida Statutes.

Respectfully submitted this 10th day of November, 2008.



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