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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001663-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 15-CI-00884

ESTATE OF LENNIE COOPER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, KRAMER AND K. THOMPSON, JUDGES.

K. THOMPSON, JUDGE: The Commonwealth of Kentucky, Cabinet for Health and Family Services, appeals from an order of the Pulaski Circuit Court ruling that 907 Kentucky Administrative Regulation (KAR) 1:005 did not preclude a reduction in the period of disqualification from Medicaid benefits. Because we

conclude the regulation precluding reimbursement by the Cabinet for payments made for a Medicaid covered service does not apply to those made while an application is pending, we affirm.

In August 2012, Lennie Cooper became a resident of Somerwoods Nursing and Rehabilitation in Somerset. At the same time, she gifted real estate valued at $80,000 and $79,785.09 from a bank account to her daughter, Marion Cooper. An application for Long Term Care Medicaid benefits was filed on Lennie's behalf on September 21, 2012.

The Department of Medicaid Services (the Agency), the Cabinet's internal agency that directly administers the Medicaid programs, issued a Medicaid Coverage Denial Notice dated October 22, 2012. The denial notice advised that Medicaid coverage was being denied as mandatory verification was not returned, specifically, a Qualifying Income Trust. However, this denial was mailed to the wrong address and neither Lennie, Marion, nor Lennie's attorney received a copy of the notice of denial.

On June 27, 2013, Lennie's attorney made a written request to the Agency regarding the status of the Medicaid application and was provided a copy of the notice of denial dated October 22, 2012. Lennie then requested a fair hearing on August 22, 2013. A hearing was held on November 18, 2013.

The hearing officer found that the denial was mailed to an incorrect address so that proper notification of the denial was not received and gave Lennie the opportunity to provide the required verification to process the application. On August 20, 2014, Medicaid benefits for Lennie were approved retroactive to June 2014. Lennie died on July 31, 2014.

While Lennie's Medicaid application was pending and before the approval of Medicaid benefits, Marian paid the nursing home $120,880 from non-Medicaid funds for Lennie's care from her admission in September 2012 through May 2014. In July 2014, Lennie's attorney provided the Agency with documentation of payments made by Marian to the nursing home for Lennie's care. Although the Agency processed the claim with an August 1, 2012 application date, Lennie was only approved for benefits effective June 2014, on the basis that private payments ended in May 2014. Lennie's estate appealed arguing that the start date for benefits should have been earlier than June 2014.

A hearing was conducted on April 21, 2015. On May 6, 2015, the hearing officer issued a recommended order affirming the Agency's action. As framed by the hearing officer, the issue presented was whether the Medicaid disqualification period was correctly computed pursuant to 907 KAR 20:030. As applicable here that regulation provides:

(3) Transfer of resources on or after February 8, 2006.

> (a) If an institutionalized individual applies for Medicaid, a period of ineligibility for NF services, ICF IID services, or 1915(c) home and community based services shall be computed if:
>
> 1. During the sixty (60) month period immediately preceding the baseline date, but on or after February 8, 2006, assets were transferred; or
>
> 2. During the sixty (60) month period immediately preceding the baseline date, but on or after February 8, 2006, a trust was created whereby the individual or the spouse disposed of property for less than fair market value.
>
> (b) The period of ineligibility shall:
>
> 1. Begin with the month of Medicaid eligibility for NF services, ICF IID services, or 1915(c) home and community based services; and
>
> 2. Be equal to the number of months derived by dividing the total uncompensated value of the resources transferred by the transferred resource factor at the time of application.

In 2012, the disqualification divisor was $196.31 and, therefore, Lennie's gifts of assets would have covered 813 days.

Before the hearing officer, the Cabinet and the Estate agreed that a transfer of assets penalty should have been imposed for the gift transfer from Lennie to Marian beginning with the date of the Medicaid application and that a disqualification period can be reduced to account for the amount of the transferred resources to pay for nursing facility care. However, the Cabinet argued that the

$85,280 Marion paid to the nursing home from September 2012 to September 2013 should not reduce the disqualification period because it was not aware of the payments until July 2014. Alternatively, it argued that under 907 KAR 1:005 there can be no reimbursement including a reduction in the disqualification period because the nursing home already accepted payment from Marian on Lennie's behalf. The hearing officer reached her conclusion without addressing whether the disqualification period should be reduced based on the following language of 907 KAR 1:005:[1]

> Section 1. Nonduplication of Payment. Nonduplication of payment as required by 42 CFR 447.15 is assured as follows:
>
> (1) When a recipient makes payment for a covered service, and the payment is accepted by the provider as either partial payment or payment in full for that service, no responsibility for reimbursement shall attach to the cabinet and no bill for the same service shall be paid by the cabinet.

The hearing officer recommended that the Agency's action in approving Lennie for Medicaid coverage for the months of June and July 2014 be approved.

The Estate timely filed exceptions, which included taking "Exception to the conclusions of law that 907 KAR 1:005 applies[.]" The Appeals Board

[1] 907 KAR 1:005 was amended effective February 1, 2019, and now provides: "In accordance with 42 C.F.R. 447.15, a payment to a provider for a service provided to a recipient shall be payment in full to the provider for the service, except as provided in subsection (3) of this section." Because both versions of the regulation use the term "recipient," the amendment does not affect our decision.

adopted and incorporated the hearing officer's recommended order. Pursuant to Kentucky Revised Statutes (KRS) 13B.140(1), the Estate appealed to the Pulaski Circuit Court.

The circuit court reversed, ruling that the Cabinet's reliance on 907 KAR 1:005 was erroneous as a matter of law and remanded the matter for a recalculation of Cooper's benefits based on payments that would partially cure the disqualification period. This appeal followed.

Our standard of review of an action of an administrative agency is set forth in Kentucky Revised Statute (KRS) 13B.150(2), as follows:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
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> (a) In violation of constitutional or statutory provisions;
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> (b) In excess of the statutory authority of the agency;
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> (c) Without support of substantial evidence on the whole record;
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> (d) Arbitrary, capricious, or characterized by abuse of discretion;
>
> (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;

> (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
>
> (g) Deficient as otherwise provided by law.

"Judicial review of an administrative agency's action is concerned with the question of arbitrariness." *Commonwealth, Transportation Cabinet, Department of Vehicle Regulation v. Cornell,* 796 S.W.2d 591, 594 (Ky.App. 1990). A "reviewing court is bound by the agency's factual findings that are supported by substantial evidence." *Id.* Where, as here, there are no factual disputes and the issue is one purely of statutory or regulatory interpretation, a court's review is *de novo*. *Com., Cabinet for Health & Family Servs. v. RiverValley Behavioral Health*, 465 S.W.3d 460, 468 (Ky.App. 2014). While agencies are entitled to great deference in interpreting their own statute and regulations, the reviewing court has the ultimate responsibility in matters of statutory and regulatory construction. *Id.*

The issue in this case involves the interpretation of 907 KAR 1:005 and, specifically, the word "recipient" as used in the regulation. In interpreting the regulation, "the same rules apply that would be applicable to statutory construction and interpretation." *Revenue Cabinet, Com. v. Gaba*, 885 S.W.2d 706, 708 (Ky.App. 1994). The most commonly stated rule in statutory interpretation is that the plain meaning of the statute controls. *Lamb v. Holmes*, 162 S.W.3d 902 (Ky. 2005). We adhere to the plain-meaning rule "unless to do so would constitute an

absurd result." *Executive Branch Ethics Commission v. Stephens,* 92 S.W.3d 69, 73 (Ky. 2002).

907 KAR 1:005 states the Cabinet has no responsibility for reimbursement when a "recipient makes payment for a covered service" and the provider accepts either partial payment or full payment for a service. The trial court concluded, and we agree, that Lennie was an applicant and not a recipient when Marion made the payments on her behalf. Consequently, the regulation does not apply.

Although 907 KAR 1:005 does not define recipient, 907 KAR 1:560 Section 1 defines recipient as "an individual who receives Medicaid." The same section defines "applicant" as "an individual applying for Medicaid." The two terms are mutually exclusive. Lennie was not a recipient until she began receiving benefits on June 4, 2014.

Moreover, the Cabinet's interpretation is illogical and would result in a stark inequity. In *King v. Butler Rest Home, Inc*., 365 S.W.3d 561 (Ky.App. 2011), this Court held that a facility could discharge a nursing home resident for nonpayment without waiting for the exhaustion of the appeals process for the denial of the resident's Medicaid application. Although the issue was unresolved in *Marcum v. Cabinet for Health & Family Servs.*, 496 S.W.3d 480 (Ky App. 2016), because the case was reversed and remanded on other grounds, the dilemma

faced by the Medicaid applicant and their family members in *Marcum* was the same as Lennie and Marion faced. They were placed in a '"Catch-22' of (i) facing the possibility of discharge if the initial Medicaid application is denied, or (ii) paying, loaning or gifting the nursing home facilities charges with no possibility of reimbursement until the Cabinet is reversed or grants benefits." *Id*. at 483.

This same "Catch 22" was deemed inequitable in *Schott v. Olszewski*, 401 F.3d 682 (6th Cir. 2005). The Court held that reimbursement was required for out-of-pocket amounts paid between the time an initial application for Medicaid was denied and then successfully appealed. The Court noted that had the applicant "been accepted into the program from the outset, she would never have been in a position where she felt he need to make payments for the medical services she received, because all of her care would have been covered by Medicaid." *Id*. at 689. The Cabinet's interpretation of 907 KAR 1:005 is afoul to the regulatory language and is absurd in that it "would . . . reward those who make no effort to pay for their own care and penalize those who do." *Id*. at 690. By limiting 907 KAR 1:005 to the plain meaning of "recipient," such an absurd result is avoided.[2]

The Cabinet argues that regardless of the merit of the Estate's argument, the issue of whether Lennie was an applicant or a recipient was not

[2] Because the Cabinet's interpretation of 907 KAR 1:005 is rejected, we do not address whether such an interpretation would violate any federal statute or regulation applicable to Medicaid.

preserved for review. This is not a situation where no exceptions where filed, *Rapier v. Philport*, 130 S.W.3d 560 (Ky. 2004). Exceptions were filed which included an exception to the hearing officer's reliance on 907 KAR 1:005. Although the Estate did not explicitly state that Lennie was not a recipient of Medicaid benefits when Marion made the payments, the exceptions filed made clear that the application of 907 KAR 1:005 was presented. The Cabinet's argument is rejected.

The Cabinet relied solely on 907 KAR 1:005 to determine the request for recalculation of the disqualification period was moot and, therefore, it has not been addressed. On remand, the Cabinet is required to recalculate the benefits to which Lennie was entitled, including any payments made on her behalf that would partially cure any disqualification period.

The order of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Lucas Roberts Frankfort, Kentucky	Jay McShurley Somerset, Kentucky