RENDERED: DECEMBER 18, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001130-MR

LISA HILL — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 13-CI-00329

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; AND WELLCARE OF KENTUCKY, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Lisa Hill (Hill) appeals from an order of the Bell Circuit Court that affirmed a final order by the Secretary of the Cabinet for Health and Family Services (the Secretary) rejecting her claim for Medicaid coverage of her inpatient psychiatric treatment. Hill argues that the circuit court and the Secretary erred by finding that the initial notice of denial complied with regulatory and due-process

requirements, and that the denial of the inpatient treatment was supported by substantial evidence. Finding no clear error as to either issue, we affirm.

WellCare of Kentucky, Inc. (WellCare) is a managed-care organization (MCO) under contract with the Commonwealth of Kentucky to provide its product and administer managed-care services to Kentucky Medicaid recipients. Lisa Hill was an enrollee of Wellcare in March and April of 2012. On March 23, 2012, Hill was admitted to the Psychiatric Unit of Harlan Appalachian Regional Hospital (ARH) as an emergency involuntary admission.

On March 30, 2012, WellCare issued a Notice of Action (NOA) denying Hill's continued stay at ARH past that date. The letter identified the dates of service and the reasons for the denial. The letter also advised Hill of her right to appeal the decision within 30 days, as well as her right to continue receiving services pending any appeal. Hill was discharged from ARH on April 5, 2012.

After that discharge, Phyllis Wilson, an employee of ARH, filed a request for state fair hearing on Hill's behalf. Hill initially challenged the sufficiency of the March 30 NOA. However, the Secretary ultimately concluded that the NOA met all federal and state requirements. The Secretary directed the hearing officer to determine whether (1) the provider was appropriately authorized to request an administrative hearing on behalf of the enrollee for denial of services rather than a denial of payment; (2) the action taken was adverse to Hill, entitling her to an administrative hearing; and if necessary, (3) Hill could demonstrate that

the denied services were medically necessary in accord with the provisions of 907 KAR[1] 3:130.

A hearing on these issues was conducted on December 14, 2012. Hill's treating physician, Dr. Syed Raza, did not testify at the hearing. However, Hill's medical records and Dr. Raza's notes were introduced. Wilson and Sheba Hensley, both nurses at ARH, testified concerning the course of Hill's treatment. Dr. Frank DeLand, a psychiatrist who works as a consultant and medical director for WellCare, was the only medical expert to testify at the hearing. Dr. DeLand did not personally see or treat Hill. He testified concerning the InterQual criteria, which set out standards to determine whether particular treatments are clinically appropriate for Medicaid coverage. Dr. DeLand also testified concerning his consultations with Dr. Raza during Hill's treatment, as well as his opinions based upon Dr. Raza's notes.

Based primarily upon Dr. DeLand's testimony, the hearing officer found that Hill was clinically appropriate for discharge on March 31, 2012, as she could have been treated on an outpatient basis as of that date. Consequently, the hearing officer found that Hill's acute inpatient treatment from March 31 through April 5, 2012, was not medically necessary or clinically appropriate. Based upon these findings, the hearing officer concluded that Hill failed to meet her burden of proof and that WellCare's denial of payment was proper.

[1] Kentucky Administrative Regulations.

On June 3, 2012, the Secretary issued a final order adopting the recommended order in its entirety. Hill filed a petition for review with the circuit court pursuant to KRS[2] 13B.140. In an opinion and order issued on June 5, 2014, the circuit court found that WellCare's March 30, 2012 NOA letter was not defective. The circuit further considered whether the findings properly applied the InterQual criteria to determine whether Hill's inpatient treatment was "medically necessary" and "clinically appropriate." The circuit court also found that the medical records did not compel a finding that inpatient treatment was medically necessary and clinically appropriate after March 31, 2012. Rather, the circuit court concluded that the findings of fact were supported by substantial evidence and may not be disturbed. Consequently, the circuit court affirmed the Secretary's Final Order. This appeal followed.

KRS 13B.150(2) sets out the scope of judicial review of decisions of administrative agencies, 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;

[2] Kentucky Revised Statutes.

> (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;
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> (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, Trans. Cab., Dept. of Vehicle Reg. v. Cornell*, 796 S.W.2d 591, 594 (Ky. App. 1990), *citing American Beauty Homes Corp. v. Louisville & Jefferson Cty. Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). In determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors.

> The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them. . . . Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence. . . . If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

Kentucky Ret. Sys. v. Bowens, 281 S.W.3d 776, 780 (Ky. 2009) *quoting Bowling v. Nat. Resources & Environmental Protection Cab.*, 891 S.W.2d 406, 409 (Ky. App. 1994).

Hill first argues that WellCare's NOA was deficient, and consequently, the Secretary should have automatically granted her appeal pursuant

to 907 KAR 17:005E[3] § 5(24). Subpart E of Part 431 of Chapter IV under Title 42 of the Code of Federal Regulations (CFR) sets out procedures for an opportunity for a hearing if an agency takes action under Subpart F of Part 438. Part 431 further addresses the contents of the notices that must be given to enrollees in such situations. First, every recipient, at the time of any action affecting her claim, must be informed in writing of: (1) her right to a hearing; (2) the method by which she may obtain a hearing; and (3) that she may represent herself or use legal counsel, a relative, a friend or other spokesperson. 42 CFR §§ 431.206(b)&(c). Hill also points to 42 CFR § 431.210, which also requires the NOA to include, among other things, the specific statute or regulations that support the provider's actions. Kentucky has incorporated these federal requirements into 907 KAR 1:563 § 2.

Hill notes that Wellcare's March 30, 2012 NOA did not set out the specific statutes or regulations under which it was denying payment, nor did it advise her of her right to represent herself, or to be represented by an attorney or non-attorney spokesperson. As such, she contends that the NOA was deficient as a matter of law.

The hearing officer initially agreed with Hill's interpretation, but the Secretary reversed that finding. The Secretary found that the Kentucky regulation applies only to Medicaid-covered services appeals and hearings which are unrelated to MCOs. Section 12 of that regulation sets out special procedures

[3] During the applicable time period, the Cabinet promulgated emergency regulations to establish managed care policies for the Kentucky Medicaid Program. Subsequently, the Cabinet replaced the emergency regulations with ordinary administrative regulations.

applicable to a managed care participant. However, the Secretary found that this section is specifically applicable only to members enrolled in accordance with 907 KAR 1:705. The Secretary concluded that the NOA provided by a managed care organization such as WellCare is governed by 42 CFR § 438.404(b), as adopted in 907 KAR 17:005E § 45(4)(b). This section requires that a NOA include most of the same information set out in 42 CFR § 431.210. However, it does not require that the NOA include references to the particular statute or regulation supporting the denial, or the same level of detail regarding the recipient's right to be represented on appeal by counsel or a non-attorney spokesperson. Based upon this interpretation of the applicable regulations, the Secretary concluded that WellCare's March 30, 2012 NOA complied with the applicable requirements.

As a general rule, courts grant deference to an agency's interpretation of statutes or regulations that it is charged with implementing. *See Bd. of Trustees of Judicial Form Ret. Sys. v. Atty. General of Commonwealth*, 132 S.W.3d 770, 786–87 (Ky. 2003), *citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844–45, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984). A reviewing court is not free to substitute its judgment as to the proper interpretation of the agency's regulations as long as that interpretation is compatible and consistent with the statute under which it was promulgated and is not otherwise defective as arbitrary or capricious. *City of Louisville by Kuster v. Milligan*, 798 S.W.2d 454, 458 (Ky. 1990). Nevertheless, a court is not bound by an agency's erroneous interpretation or application of the law, no matter how long-

standing the interpretation. *Camera Ctr., Inc. v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2000)

While the regulatory scheme is complex and includes seemingly contradictory requirements, this Court is not convinced that the Secretary's interpretation was clearly erroneous. As noted by the circuit court, 42 CFR §§ 431.206(b) and 431.210, as adopted in 907 KAR 1:563, set out the content of the notices to be afforded relating to actions by a state agency or nursing facility, not an MCO. WellCare's March 30, 2012 NOA complied with the slightly less detailed requirements of 42 CFR § 438.404(b), as adopted in 907 KAR 17:005E § 45(4)(b). Moreover, Hill does not allege that the NOA failed to meet the requirements of due process, or that her ability to appeal the decision was adversely affected by the content of the NOA. Therefore, we agree with the circuit court that the Secretary was not obligated to automatically grant Hill's appeal as provided by 907 KAR 17:005E § 5(24).

The central issue in this case concerns the sufficiency of the evidence supporting the Secretary's final order. Our standard of review was set forth in *McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 458-59 (Ky. App. 2003), as follows:

> Determination of the burden of proof also impacts the standard of review on appeal of an agency decision. When the decision of the fact-finder is in favor of the party with the burden of proof or persuasion, the issue on appeal is whether the agency's decision is supported by substantial evidence, which is defined as evidence of substance and consequence when taken alone or in light

> of all the evidence that is sufficient to induce conviction in the minds of reasonable people. *See Bourbon County Bd. Of Adjustment v. Currans,* Ky. App., 873 S.W.2d 836, 838 (1994); *Transportation Cabinet v. Poe,* Ky., 69 S.W.3d 60, 62 (2001)(workers' compensation case); *Special Fund v. Francis,* Ky., 708 S.W.2d 641, 643 (1986). Where the fact-finder's decision is to deny relief to the party with the burden of proof or persuasion, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it. *See Currans, supra; Carnes v. Tremco Mfg. Co.,* Ky., 30 S.W.3d 172, 176 (2000) (workers' compensation case); *Morgan v. Nat'l Resources & Environ. Protection Cabinet,* Ky.App., 6 S.W.3d 833, 837 (1999). "In its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact." *Aubrey v. Office of Attorney General,* Ky. App., 994 S.W.2d 516, 519 (1998) (*citing Kentucky State Racing Commission v. Fuller,* Ky., 481 S.W.2d 298, 309 (1972)). Causation generally is a question of fact. *Coleman v. Emily Enterprises, Inc.,* Ky., 58 S.W.3d 459, 462 (2001). A reviewing court is not free to substitute its judgment for that of an agency on a factual issue unless the agency's decision is arbitrary and capricious. *See Johnson v. Galen Health Care, Inc.,* Ky.App., 39 S.W.3d 828, 832 (2001).

Id. at 458-59.

Hill argues that the circuit court erred by addressing the introduction of the medical records before the hearing officer. The circuit court noted that the medical records submitted in this case constitute hearsay. Under KRS 13B.090(1), hearsay evidence may be admissible in administrative actions if it is the type of evidence that reasonable and prudent persons would rely upon in their daily affairs, but it shall not be sufficient in itself to support an agency's findings of fact unless

it would be admissible over objections in a civil action. Since Hill's medical records were not properly authenticated, the trial court concluded that the records alone would not be sufficient to support the hearing officer's findings in this case. Hill notes that neither the hearing officer nor the Secretary addressed the admissibility of the records. Consequently, she argues that the trial court should not have considered the issue on appeal.

The Cabinet and WellCare respond that the trial court did not specifically address whether the medical records were properly admitted. Rather, the trial court was discussing whether Hill's unauthenticated medical records would be sufficient to meet her burden of proving that the additional treatment was medically necessary or clinically appropriate. We agree that the issues relating to the medical records do not go to their admissibility in this particular proceeding, but only to the appropriate weight to be given to them with regard to Hill's burden of proof.

Thus, we return to the central question of the sufficiency of the evidence supporting the findings adopted in the Secretary's Final Order.

In order for a service to be covered it must be medically necessary and clinically appropriate. The definition of "medical necessity" is set forth in 907 KAR 3:130, and the definition of "clinically appropriate" is set forth in 907 KAR 3:130(1)(1). The latter regulation specifically authorizes the use of the InterQual criteria. Hill does not challenge the applicability of those criteria, but argues that Dr. DeLand misapplied those criteria in light of Dr. Raza's notes in the medical

records and the supporting testimony by the ARH staff who participated in her treatment.

However, Dr. DeLand was the only physician to testify at the hearing. He testified that Hill did not meet the InterQual criteria after March 30, and that Dr. Raza agreed with this assessment. Dr. DeLand further testified that Hill's psychiatric symptoms were not increasing or uncontrolled to the point that she was unable to care for herself. The hearing officer also considered the staff testimony and the medical records to conclude that Hill was clinically appropriate for discharge on March 31, rather than March 30. Based on the entire record, we cannot say that the evidence compelled a finding that Hill was clinically appropriate for discharge at a later date. Therefore, we must affirm the findings in the Secretary's final order.

Accordingly, the judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

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