

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PEGGY BROOKS, )  
 ) C.A. No. 03A-09-006 JTV  
 Appellant, )  
 )  
 v. )  
 )  
 VINCENT P. MECONI, in his )  
 official capacity as Secretary of the )  
 Delaware Department of Health and )  
 Social Services, )  
 )  
 Appellee. )

*Submitted: June 17, 2004*  
*Decided: October 29, 2004*

Dianna S. Erickson, Esq., Community Legal Aid Society, Inc., Georgetown, Delaware. Attorney for Appellant.

A. Ann Woolfolk, Esq., Department of Justice, Wilmington, Delaware. Attorney for Appellee.

*Upon Consideration of Appellant's Appeal of  
Decision of the Division of Social Services,  
Department of Health and Social Services*

**AFFIRMED**

**VAUGHN, President Judge**

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**OPINION**

This is an appeal from a decision of the Division of Social Services, Department of Health and Social Services, which determined that the appellant is not entitled to benefits relating to a drug known as Butorphanol.

**I. FACTS**

Peggy Brooks is a Medicaid recipient who suffers from Multiple Sclerosis. She was diagnosed in 1975 and has been treated by Dr. Tonwe for the last fifteen years. Ms. Brooks is allergic to most drugs in the codeine family and apparently did not respond to “first line” treatments for this disease. Dr. Tonwe has prescribed Stadol NS (the brand name for Butorphanol tartrate nasal spray) to her for pain management for approximately ten years.

Upon being approved for the Medicaid program in 2002, Dr. Tonwe, on or about July 17, submitted a prior authorization form for Stadol NS, as required by agency rule. This drug requires prior authorization because it carries a high risk of abuse and physical dependence. This request was denied because the form was not complete and, in addition, based on the information given, Ms. Brooks did not meet the criteria for the medication. On July 22, Ms. Brooks sent a request for Butorphanol to EDS,<sup>1</sup> an agent for the Division. EDS sent Ms. Brooks an approval notice for five units of the drug pending further information from Dr. Tonwe. On July 25, Dr. Tonwe sent to EDS a letter explaining that he is unable to ameliorate Brooks symptoms using conventional treatments and that he prescribed Stadol NS as

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<sup>1</sup> Peggy Brooks, DCIS No.: 7001647570, at 1 (DE Dep’t. of Health and Soc. Servs. Oct. 10, 2003)(EDS is a State actor/contractor managing certain State operations).

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she responds favorably to that drug. By letter of July 29, EDS requested additional information from Dr. Tonwe to support prior authorization. Dr. Tonwe did not respond and no approval beyond the initial five units was issued.

On July 27, 2002, Ms. Brooks filed a request for a fair hearing on the grounds that the Division of Health and Social Services (“DHSS”) did not pay for the 72 hour emergency supply or subsequent prescriptions. A fair hearing summary was prepared on September 6, 2002 in response to Ms. Brooks’ request for a fair hearing. A fair hearing was held on October 8, 2002. The hearing officer at that hearing held that the failure to approve the medication beyond the initial five units was a denial of benefits which could not be upheld due to failure to comply with Division of Social Services Manual (“DSSM”) rules. The hearing officer characterized the prior authorization as a denial since only the 72 hour emergency supply, not the entire prescription, was approved. Since the prior authorization of only five units did not cite the relevant DSSM rules, the hearing officer reversed what he characterized as a *de facto* denial and found that there was no written denial as required by DSSM rules. The hearing officer did not address the issue of Ms. Brooks’ medical necessity as neither party was put on notice of this issue prior to the hearing. The hearing officer remanded to DHSS for corrective payment and evaluation consistent with the rules of the Medicaid program.

Following this remand, Ms. Brooks and her representative received a partial reimbursement check and, on November 27, 2002, a written denial notice. The denial notice issued by DHSS cited Section 1.11.8 of the Delaware Medical Assistance

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Program (hereinafter “DMAP”) practitioner manual in support of its decision.<sup>2</sup>

On December 26, 2002, Ms. Brooks requested another fair hearing. The hearing summary was prepared on January 3, 2003. The fair hearing was held on March 25, 2003. During this hearing, Ms. Brooks attempted to raise issues concerning the adequacy and timing of the denial notice. The hearing officer at this second fair notice hearing declined to rule upon these procedural challenges because they were raised for the first time at the hearing and were not raised in Ms. Brooks’ request for a fair hearing or in the fair hearing summary. The hearing officer proceeded to rule upon the issues on remand from the first hearing; DHSS’s reconsideration of medical necessity and recalculation of possible repayments owed to Ms. Brooks.<sup>3</sup>

On August 20, 2003, the hearing officer issued an opinion affirming the decision to deny authorization for Stadol NS. The hearing officer found that the evidence supported the Agency’s determination that there was no medical necessity. The hearing officer remanded to DHSS to explain to Ms. Brooks’ attorney how it calculated the reimbursement to Ms. Brooks for the 72 hour supply. As the amount of reimbursement exceeded the cost of the 72 hour supply, the hearing officer suggested that Ms. Brooks may be required to repay some portion of that amount.<sup>4</sup>

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<sup>2</sup> (November 27, 2002 Denial) (The copy of this letter indicates that if claimant disagrees with this decision to read the back but the back of this copy is blank).

<sup>3</sup> Peggy Brooks, ID No.: 000376515, at 3-4 (DE Dep’t of Health and Soc. Servs. Aug. 20, 2003).

<sup>4</sup> *Id.*

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Ms. Brooks appealed the August 20, 2003, decision to the Superior Court.

**II. STANDARD OF REVIEW**

The DSSM Section 5405(5) provides that the decision of the hearing officer is the final decision of DHSS.<sup>5</sup> That decision is subject to judicial review pursuant to 31 *Del. C.* § 520. The appropriate standard of review is whether the decision of the hearing officer is supported by substantial evidence and free of legal error.<sup>6</sup> The Superior Court reviews *de novo* the application of the law by DHSS in determining the qualifications of the applicant for assistance through the Medicaid program.<sup>7</sup> If the procedure for an eligibility determination is legal, the court proceeds to the question of sufficiency of the evidence to support the decision.<sup>8</sup> Thus, the analysis begins with a review of the procedure applied in making the determination of eligibility before any substantive evidence is analyzed.<sup>9</sup> In its review, the court shall decide all relevant questions and matters involved.<sup>10</sup> The court will sustain any factual findings of the hearing officer that are supported by substantial evidence in

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<sup>5</sup> *Lawson v. Dept. Of Health and Social Services*, 2004 Del. Super. LEXIS 60, at \*4.

<sup>6</sup> *Bowden v. Delaware Department of Health and Social Services Division of Social Services*, 1993 Del. Super. LEXIS 304.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* See also, *Zdiech v. Delaware Department of Health and Social Services*, 2000 Del. Super. LEXIS 250.

<sup>9</sup> *Id.*

<sup>10</sup> *Dean v. Delaware Department of Health and Social Services*, 2000 Del. Super. LEXIS 490.

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the record as a whole.<sup>11</sup> This court may not remand on appeal a case brought to it under 31 *Del. C.* § 520 for further findings as the statute does not grant the court that power.<sup>12</sup>

**III. CONTENTIONS OF THE PARTIES**

Appellant contends that the second hearing officer committed legal error under both federal and state law by failing to consider her procedural arguments; that the decision was arbitrary and conflicted with the first fair hearing decision; and that the decision is unsupported by substantial evidence.

The State contends that the second hearing officer did not err by refusing to hear and rule upon procedural challenges to the denial notice because such objections were not contained in the request for a fair hearing and were raised for the first time at the hearing in violation of applicable regulations. The State also contends that the August 20, 2003, decision was not arbitrary or in conflict with the first fair hearing decision and properly addressed the issues considered on remand from the first decision. The State also contends that there is substantial evidence in the form of expert testimony by a licensed physician and pharmacist to support the conclusion that there was no medical necessity to support the prior authorization requested by Ms. Brooks.

**IV. DISCUSSION**

***A. Hearing officer's decision was free from legal error***

The jurisdictional requirements of the DSSM state that only the issues raised

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<sup>11</sup> *Id.*

<sup>12</sup> *Collins v. Eichler*, 1991 Del. Super. LEXIS 105.

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in the denial notice, the fair hearing summary, or the request for a fair hearing may be presented for the hearing officer's review.<sup>13</sup> Issues on adequacy and timeliness of the denial notice could not have been raised in the denial notice itself and were not addressed in the fair hearing summary. In addition, Ms. Brooks' request for a second fair hearing did not raise the issue of adequacy of her due process. Based upon the requirements of § 5304 of the DSSM, the second hearing officer properly refused to address these issues when raised by Ms. Brooks during the hearing.

Ms. Brooks contends that procedural due process requirements are at the very core of a fair hearing and that arguments relating to timeliness and adequacy should be heard regardless of whether they were previously raised. She cites *Goldberg v. Kelly*<sup>14</sup> and the Delaware decision of *Bell-Atlantic–Delaware, Inc. v. Public Serv. Comm'n of Del.*<sup>15</sup> in support of her argument. Administrative hearings, like judicial proceedings, are indeed governed by due process and at the root of these due process requirements lies the fundamental requirement of fairness. The requirements include fair notice of the scope of the proceedings and adherence of the agency to the stated scope of the proceedings.<sup>16</sup> The scope of the proceedings was stated by Ms. Brooks in her request for a fair hearing and did not include timeliness and adequacy of the

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<sup>13</sup> DSSM at § 5304.

<sup>14</sup> 397 U.S. 254 (1970).

<sup>15</sup> 705 A.2d 601, 605 (Del. Super. Ct. 1997).

<sup>16</sup> *Bell-Atlantic–Delaware, Inc. v. Public Serv. Comm'n of Del.*, 705 A.2d 601, 605 (Del. Super. Ct. 1997) citing *Carousel Studio v. Unemployment Ins. Appeal Bd.*, 1990 Del. Super. LEXIS 232.

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denial notice.

Citing 42 C.F.R. § 431.242 (2003), Ms. Brooks argues that the hearing officer erred by not allowing her to establish all pertinent facts and circumstances and present her argument without undue interference. Due process affords Ms. Brooks the right, in an administrative proceeding, to controvert every material fact which bears on the questions in the matter involved.<sup>17</sup> The questions to be heard by the hearing officer were those raised by Ms. Brooks in her request for a fair hearing; medical necessity and reimbursement. Ms. Brooks makes no allegation that the hearing officer failed to allow her to present her arguments on medical necessity and reimbursement, only that she was not allowed to argue due process violations. Because the due process concerns were not raised in the request for a fair hearing, the determination by the hearing officer not to hear these arguments was not legal error.

Ms. Brooks further argues that federal law supersedes the State requirements of DSSM § 5304. Ms. Brooks cites Federal Rule 42 C.F.R. § 431.201 which defines “request for a fair hearing” to mean a clear expression by the appellant or recipient, or his authorized representative that he wants the opportunity to present his case to a reviewing authority. Ms. Brooks contends that no more than “a clear expression by appellant requesting a fair hearing” can be required by state law because, to require more, would conflict with federal law. Ms. Brooks improperly characterizes 42 C.F.R. § 431.201. The federal statute defines the phrase “request for a fair hearing,” but the State may then define what constitutes a clear expression and DHSS has done

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<sup>17</sup> *Carousel Studio v. Unemployment Ins. Appeal Bd.*, 1990 Del. Super. LEXIS 232, at \*3.



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so through § 5304.

Ms. Brooks further argues that the parties were on notice of the procedural due process issues because they were addressed in the first hearing. To the extent that Ms. Brooks is still arguing that the first denial notice was insufficient, a decision has already been rendered in her favor on that point.<sup>18</sup> Following remand from the first fair hearing, DHSS reevaluated the claim and concluded that the Butorphanol was not medically necessary. DHSS then issued a second denial notice. DHSS was not put on notice regarding any issues surrounding the sufficiency of the second denial notice until the second fair hearing.

Ms. Brooks cites the recent decision of this Court in *Lawson v. Div. of Health and Soc. Services*<sup>19</sup> in support of her argument. While *Lawson* is factually similar, it is distinguishable from the case at bar. In *Lawson*, DHSS maintained that they did not have to conform to procedural requirements because the decision as to whether the claimant needed orthodontic services did not constitute an action and, consequently, did not trigger the notice requirements (conceding that the requirements had not been followed). In the alternative, DHSS argued that even if the procedural requirements for denial were required to be followed, a proper denial and explanation was given during the fair hearing, thus remedying the wrong.<sup>20</sup> The court found that the denial of services did constitute an action triggering due process

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<sup>18</sup> Peggy Brooks, DCIS No.: 7001647570, at 5 (DE. Dep't of Health and Soc. Servs. Oct. 10, 2002).

<sup>19</sup> 2004 Del. Super. LEXIS 60.

<sup>20</sup> *Id.* at \*2.

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requirements and remanded for findings consistent with its decision.<sup>21</sup> The court in *Lawson* did note the requirements of DSSM § 5304, in dicta, but did not elaborate since DSSM § 5304 was not at issue in the case. In the case at bar, DHSS is not arguing that they were not required to conform to the notice requirements but that they were not put on notice of the issue prior to the fair hearing.

Since the Court finds that the hearing officer's decision not to address the procedural due process arguments raised by Ms. Brooks was free from legal error, it is not appropriate to address the substance of those arguments. As the State points out, a full record on the issue is not even before this court.

***B. Decision was supported by substantial evidence on the record***

Ms. Brooks' argument that the second hearing officer's decision conflicts with the decision of the first hearing officer is unsupported by the record. The first hearing officer reversed and remanded due to the insufficient denial notice and for further consideration of the issues of medical necessity and reimbursement.<sup>22</sup> The second hearing officer ruled on the issues of medical necessity and reimbursement, the precise issues the first officer remanded for further consideration.<sup>23</sup> The decisions do not conflict with each other because they were not decided on the same issues.

Ms. Brooks lastly argues that the second hearing officer erroneously shifted the

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<sup>21</sup> *Id. at* \*8.

<sup>22</sup> Peggy Brooks, DCIS No.: 7001647570 at 3, 5 (DE. Dep't of Health and Soc. Servs. Oct. 10, 2002).

<sup>23</sup> Peggy Brooks, ID No.: 000376515, at 4 (DE Dep't of Health and Soc. Servs. Aug. 20, 2003).

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burden of proving medical necessity to her when it properly lies with the State. However, the hearing officer determined that the State met its burden of proving that the drug was not medically necessary by offering evidence, in the form of physician's testimony, of its addictive qualities. Ms. Brooks had the opportunity to rebut this evidence offered by DHSS and it was the hearing officer's determination that Ms. Brooks was not able to do so. "[DHSS] lacked any documentation to show that the claimant's use of Stadol NS to treat pain associated with multiple sclerosis is medically necessary. This is despite numerous attempts, by both [DHSS] and the claimant, to obtain clinical information from the claimant's treating physician, Dr. Tonwe."<sup>24</sup> The decision of the hearing officer is free from legal error and is supported by substantial evidence on the record.

The decision is ***affirmed***.

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/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary  
cc: Order Distribution  
File

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<sup>24</sup>Peggy Brooks, ID No.: 000376515, at 3 (DE Dep't of Health and Soc. Servs. Aug. 20, 2003).