IN THE COURT OF APPEALS OF IOWA

No. 7-617 / 07-0093
Filed November 29, 2007

ERNEST L. GALBREATH, D.O.,
an individual,
Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES, an agency of the State of Iowa,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Scott Rosenberg, Judge.

A doctor appeals the district court's ruling affirming the final decision of the Iowa Department of Human Services that he received overpayments of Medicaid reimbursements. **AFFIRMED.**

Kirk Blecha and Barbara Person of Baird Holm, L.L.P., Omaha, Nebraska, for appellant.

Thomas J. Miller, Attorney General, and Diane Stahle, Assistant Attorney General, for appellee.

Heard by Vogel, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Ernest Galbreath appeals the district court's ruling affirming the final decision of the director of the Iowa Department of Human Services (Department) that he was overpaid Medicaid reimbursements because he did not show the medical necessity of certain medical procedures he performed and billed to Medicaid. Galbreath argues that he did not receive adequate notice that the issue of medical necessity was an ultimate issue at the administrative hearing. We affirm.

I. Background Facts and Proceedings

Galbreath is a licensed, board-certified psychiatrist whose practice also consisted of sports medicine. He was a provider with the Iowa Medicaid program from 1992 until 2004. In 2004 he sold his private practice in Cherokee and surrounding communities. He now practices medicine in a psychiatric center in Illinois. As part of his sports medicine practice, Galbreath administered trigger point injections (TPIs) to alleviate muscle and joint pain in his patients.

In 2002 Affiliated Computer System (ACS), the fiscal intermediary of the Iowa Medicaid Program, selected Galbreath for an audit due to the fact that he greatly exceeded his peers in billing for trigger point injections. Specifically, in 2002 he made 1112 TPI claims for 46 patients while the next top biller made 20 claims for 10 patients. The audit process began in September 2002 when ACS requested Galbreath produce the medical records, dating from August 2001 to July 2002, of certain TPI patients. ACS then requested the records of certain TPI patients dating from 1999 through 2002. On September 13, 2003, a conference

call was held between Galbreath, ACS, and the Department to discuss the issue of the high number of TPIs billed by Galbreath.

After seeking the opinion of Dr. Jacqueline Stokken, a medical doctor and paid consultant to the Medicaid program, ACS sent Galbreath another letter dated September 24, 2003, which stated that the number of TPIs he billed was in excess of Medicaid policy. The letter asked him to make the appropriate changes to his billing procedures. Then, on January 23, 2004, Galbreath received a letter from the Department demanding recoupment of $217,562.66 of overpaid Medicaid funds. Specifically, the Department found Galbreath had been overpaid $257.12 because he lacked adequate documentation to support the services billed and $217,305.54 for exceeding the number of TPIs allowed per year per patient. For support, the Department stated:

> Medicare policy also states "If a patient requires more than three sets of injections during one year, a report stating the unusual circumstances and medical necessity for giving the additional injections must accompany the claim for review and individual consideration." The records received did not include this report to extend the number of trigger point injections allowed per year.[1]

The Department also cited to the TPI utilization guidelines published by Noridian. Noridian is a private fiscal intermediary of the Medicaid program. The letter demanded repayment within thirty days.

On February 19, 2004, Galbreath sent a letter to the Department informing it of his intention to appeal and "dispute the application of the Medicaid LMRP to

[1] Medicare policy is applied to Medicaid pursuant to Iowa Administrative Code section 79.9(1), which states that "Medicare definitions and policies shall apply to services provided unless specifically defined differently."

his claim for Medicaid reimbursement for the services described in the Notice."[2] On July 2, 2004, a notice of hearing was issued by the Iowa Department of Inspections and Appeals stating the date of the hearing and that the issue to be decided was:

> Whether the Department correctly determined the existence of an overpayment and requested repayment from a nursing facility or provider of Medicaid-covered services. OR Whether the Department correctly determined the existence of an overpayment by a nursing facility or provider of Medicaid-covered services and initiated a vendor adjustment.

Subsequent notices recited the same issue.

A contested hearing was held on February 2 and 3, 2005, presided over by Administrative Law Judge Bohlken. At the hearing, the Department called Dr. Stokken to testify. She testified that the Noridian policy limiting the number of TPIs to six per year was consistent with a good standard of medical care and that there was no documentation in Galbreath's patient records indicating any unusual circumstances to create a medical need for additional TPIs. Stokken also stated that she would have concerns of possible side effects if TPIs were administered at a greater rate than the medical standard. Galbreath testified but he offered no other evidence to support his decision to administer more than the standard number of TPIs.

After the hearing, the parties briefed their arguments for Judge Bohlken. In his brief, Galbreath argued that the Noridian policy does not limit coverage but is merely provider guidance, not the law. He argued that even if it is considered law, the Department impermissibly applied it retroactively since it did not consider

[2] LMRP stands for "local medical review policy" and refers to the Medicare policy published by Noridian.

the policy to be authoritative until September 2003 when it made the decision to apply it to Galbreath. Additionally, Galbreath argued that it was improperly applied, and that ACS's handling of the audit was abusive toward him as a provider.

The Department alleged that Galbreath failed to meet his burden of demonstrating that the Department's action to establish an overpayment was invalid because he failed to show the excessive claims for TPIs were medically necessary. To support their argument the Department cited both the Noridian policy and Iowa Administrative Code section 441-79.9(2) requiring all Medicaid coverage to be "in accordance with standards of good medical practice" and meet the "medical need of the patient." Galbreath replied by arguing that the issue before the administrative law judge was not medical necessity but whether the Noridian policy should be applied. Galbreath's post-hearing reply brief notes that the Department's position throughout the audit process was whether Galbreath exceeded three or six injections per year per patient and whether that conduct violated the Noridian policy. Galbreath claimed the issue of medical necessity was not raised until the Department's post-hearing brief.

Judge Bohlken issued a proposed decision on April 15, 2005, reversing the Department's decision that Galbreath was overpaid Medicaid funds. Judge Bohlken found the Noridian policy could not be relied on because it was merely the policy of a private company, not the law. In addition, Judge Bohlken found medical necessity was not an issue in the case because no notice was given that it was an ultimate issue and that it was not clearly related to the issue stated in the notice of hearing. Judge Bohlken placed the burden of proof on the

Department and took official notice that the issue of medical necessity is normally set forth in the notice of hearing for Medicaid contested cases where it is an issue. Judge Bohlken's proposed decision does not cite Iowa Administrative Code section 441-79.9(2).

The Department then requested the Appeals Advisory Committee to recommend to the director that he review and reverse Judge Bohlken's proposed decision. The Department asked the Advisory Committee to review its post-hearing brief as well as its "additional arguments" regarding medical necessity, deference to the treating physician, and Iowa Administrative Code section 441-79.9(1) incorporating Medicare policies. The director of the Department subsequently reviewed and reversed Judge Bohlken's proposed decision because Galbreath presented no evidence to establish the medical necessity of the excess TPIs. The director found Stokken's testimony that the medical standard of care is consistent with the Noridian policy and that there were no documented unusual circumstances to require excess TPIs was not rebutted by Galbreath. He also found that, pursuant to the Noridian policy and Iowa Administrative Code section 441-79.9(2), the excess TPIs were unnecessary and the Department's finding of an overpayment should be affirmed.

Galbreath then appealed the director's decision to the district court, arguing that the issue of medical necessity was not an issue in the contested hearing and therefore was not a proper issue before the director. The district court upheld the director's decision, even though it found that he did not properly rely on the Noridian policy. The district court found that the Noridian policy was not properly promulgated by either rule-making or contested case proceedings

and therefore could not be relied upon as law. However, it found the director's findings of fact and conclusions of law regarding Iowa Administrative Code section 441-79.9(2) were independent of Noridian's policy and were supported by substantial evidence in the record. The district court further found Galbreath failed to offer sufficient evidence to dispute the appropriate standard of care established by the Department and therefore failed to provide Medicaid services in accordance with good standards of medical practice that meet the needs of the patient. Specifically, the district court found that Galbreath failed to properly explain the unusual circumstances that caused him to give more than the appropriate number of TPIs under a good standard of medical practice.

With regard to the deference Galbreath claimed he was owed as the treating physician, the district court found that it is left to the agency to determine the credibility and weight to be given to the evidence. It noted that Dr. Stokken testified only to whether Galbreath documented an appropriate reason for giving excess TPIs and not whether the patients needed them. It found that Galbreath was given an opportunity to justify why he gave the excessive TPIs and that he received the appropriate deference. Galbreath appeals.

II. Standard of Review

We review the district court's ruling by applying the standards of section 17A.19 (2005) to the agency's action to determine whether our conclusions are the same as those reached by the district court. *University of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004). If they are, we affirm; if not, we reverse. *Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 669 (Iowa 2005). We may affirm, remand, reverse, modify, or grant other appropriate relief if the substantial

rights of the person seeking relief has been prejudiced in violation of any of the fourteen grounds listed in section 17A.19(10). *Waters*, 674 N.W.2d at 95. Galbreath specifically claims his rights were prejudiced under sections 17A.19(10)(b), (d), (i), (k), (m) and (n).

We are bound by the agency's findings if they are "supported by substantial evidence when the record is viewed as a whole." *Simonson v. Snap-On Tools Corp.*, 588 N.W.2d 430, 434 (Iowa 1999). Evidence is substantial if a reasonable person would find it adequate to reach a conclusion. *Id.* Substantial evidence need not amount to a preponderance, but must be more than a scintilla. *Elliot v. Iowa Dep't of Transp.*, 377 N.W.2d 250, 256 (Iowa Ct. App. 1985). Further, we are to give deference to the fact-finding of the agency as we would a jury verdict. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 417 (Iowa 2001). This deference includes the agency's credibility determinations. *Clark v. Iowa Dep't of Revenue & Fin.*, 644 N.W.2d 310, 315 (Iowa 2002). Our review of the record should be fairly intensive. *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003). We must consider all of the evidence; even that which detracts from the agency's findings is not insubstantial merely because it supports a contrary conclusion. *Id.* However, if there is enough evidence to support the findings, we must affirm the agency's decision even if we might have found otherwise. *Harpole*, 621 N.W.2d at 420.

III. Merits

Galbreath argues that he was prejudiced when the district court erred in determining that he received adequate notice that medical necessity was an ultimate issue at the contested hearing before Judge Bohlken. In addition, he

argues that if medical necessity was an ultimate issue at the contested hearing, he was denied the appropriate deference as the treating physician.

Galbreath claims his rights were prejudiced when the director reviewed and ruled on issues not properly before the administrative law judge. Specifically, Galbreath claims (1) there was no mention of medical necessity during the hearing; (2) if medical necessity was an ultimate issue, there would have been evidence presented on each patient's unique medical condition and history to determine whether the TPIs administered to each patient were medically necessary; and (3) if such evidence would have been presented by the Department, Galbreath would have presented evidence in rebuttal.

Galbreath's argument relies on Iowa Administrative Code section 441-79.16(4), which states that the director's review "shall be limited to issues raised prior to that time and specified by the party requesting the appeal or review." Because he alleges medical necessity was not an issue at the hearing, Galbreath argues that the director's finding that medical necessity was not established was improper.

The notices of the hearing stated the issue to be:

> Whether the Department correctly determined the existence of an overpayment and requested repayment from a nursing facility or provider of Medicaid-covered services. OR Whether the Department correctly determined the existence of an overpayment by a nursing facility or provider of Medicaid-covered services and initiated a vendor adjustment.

We find this statement to be very broad. Its main purpose is to determine whether there was an overpayment of funds. It lists no citation to the law and therefore left the parties free to make any relevant legal argument to prove the

overpayment was correctly or incorrectly determined. Galbreath, however, claims this notice was not adequate notice that medical necessity was an issue at the hearing, therefore violating his right to due process. Although we find this to be a close case, we disagree.

First of all, it is well established that the overriding purpose of the Medicaid program is to assist the poor and uninsured with the costs of *necessary* medical care. 42 U.S.C. § 1396; *see, e.g., Anderson v. Iowa Dep't of Human Servs.*, 368 N.W.2d 104, 107-08 (Iowa 1985). This should especially be understood by a doctor such as Galbreath who has been a Medicaid provider for over ten years. In creating the Medicaid program, the government in no way intended to foot the costs of unnecessary medical expenses.

Second, Iowa Administrative Code section 441-79.9(2) requires all Medicaid claims to "be in accordance with standards of good medical practice" and to "meet the medical need of the patient." Even though the Department never specifically cited this rule until it requested the director to review Judge Bohlken's ruling, the parties' correspondence made clear that the Department was questioning the necessity of Galbreath administering a high number of TPIs to his patients. Once again, correspondence directed to Galbreath stated as follows:

> Medicare policy also states "If a patient requires more than three sets of injections during one year, a report stating the unusual circumstances and medical necessity for giving the additional injections must accompany the claim for review and individual consideration." The records received did not include this report to extend the number of trigger point injections allowed per year.

Although it was quoting the Noridian policy, the Department's recoupment letter stated that it had received no records indicating unusual circumstances and medical necessity for giving the additional injections. It certainly put Galbreath on notice that the Department was claiming there was no medical necessity for the excess TPIs. The fact that the Department failed to cite Iowa Administrative Code section 441-79.9(2) does not affect the substance of its claim. The Department was simply using the policy to define medical necessity. The issue is encompassed in the broad statement of the issues contained in the notices of hearing.

Finally, even if Galbreath mistakenly understood that the only issue at the hearing was whether the Noridian policy should have been applied, medical necessity would have still been an underlying issue. If Judge Bohlken would have determined the policy to be applicable, Galbreath would have been required to prove that his records showed the necessity of the excess injections to prevail under the policy. Galbreath argues that if medical necessity would have been an issue at the hearing there would have been evidence presented of individual patients' medical needs. Although such evidence might have been helpful in proving there was no medical necessity for the additional TPIs, we do not find such detailed testimony to be necessary. Dr. Stokken testified that she found no unusual circumstances to be documented in the medical records that would necessitate treatment in excess of a standard of good medical care. We find this to be sufficient in light of the lack of evidence offered by Galbreath.

We agree with the district court that the Noridian policy lacks the characteristics of promulgated law and cannot, therefore, be strictly applied to

Medicaid providers. However, we do not believe this renders the policy useless. The testimony of Dr. Stokken shows that she primarily relied on the policy as a guideline and not law. Her determination that Galbreath's patient records showed no unusual circumstances or medical need to administer a number of TPIs greater than a good standard of medical care would have been the same regardless of the policy. Dr. Stokken independently determined the correct standard of care, which happened to agree with the policy standard. Specifically, she testified that the policy of six TPIs per patient per year was in accordance with standards of good medical care. Galbreath could have produced his own expert to testify otherwise. We find there is substantial evidence to support the director's findings under Iowa Administrative Code section 441-79.9(2).

We further find that the appropriate amount of deference was afforded to Galbreath's opinion of medical necessity. Although a medical necessity determination normally "rests with the individual recipient's physician and not with clerical personnel or government officials," the presumption may be overcome. *Weaver v. Reagan*, 886 F.2d 194, 199-200 (8th Cir. 1989). It would make little sense to base the medical necessity determination solely on the opinion of the treating physician whom is being paid for such services. Under this theory, Galbreath could increase his Medicaid billing substantially by providing unnecessary medical treatments knowing his judgment could not be challenged. It is the Department's job to guard against such unnecessary utilization of Medicaid services. 42 U.S.C. § 1396a(30)(A). We think the presumption in favor of Galbreath's opinion was easily overcome by the testimony of Dr. Stokken, the fact that the number of TPIs administered to Galbreath's patients was greatly

disproportionate to the number of TPIs administered by other providers, and the fact that Medicare policy defines necessary treatments with substantially lower numbers. We find that the director's findings were supported by substantial evidence.

We acknowledge that the notice of hearing in this case could have presented the issues for hearing more precisely. However, prior correspondence directed to Galbreath from the Department made clear that the Department was disputing the medical necessity of the excess TPIs.

AFFIRMED.