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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000199-MR

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; AND VICKIE YATES BROWN GLISSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 17-CI-00240

LOVING CARE, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: The Commonwealth of Kentucky, Cabinet for Health and Family Services, and Vickie Yates Brown Glisson, in her official capacity as

Secretary of Commonwealth of Kentucky, Cabinet for Health and Family Services (collectively the Cabinet) appeal from an order of the Franklin Circuit Court remanding this case to the Cabinet for an administrative hearing to determine whether the Cabinet is entitled to reimbursement of Medicaid payments paid to Loving Care, Inc. We conclude the Franklin Circuit Court properly determined that Loving Care preserved its arguments in opposition to the Cabinet's claim for reimbursement and affirm.

We begin by noting that Loving Care has not filed an appellee brief. If an appellee brief has not been filed within the time allowed, the court may:

> (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

Kentucky Rules of Civil Procedure (CR) 76.12 (8)(c). "The decision as to how to proceed in imposing such penalties is a matter committed to our discretion." *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky.App. 2007). Because the issues and facts are straightforward, we choose not to penalize Loving Care for its failure to file a brief.

The Cabinet is the executive branch administrative agency charged with the administration of Kentucky's Medical Assistance Program (the Medicaid program). Kentucky Revised Statutes (KRS) 194A.010 and KRS 12.020. Under

federal law, all states that participate in the Medicaid program must have a federally approved medical assistance plan (the Plan). *Commonwealth, Cabinet for Health and Family Services v. Owensboro Medical Health System, Inc.*, 500 S.W.3d 225, 226 (Ky.App. 2016). The Cabinet's Plan outlines how Medicaid services will be reimbursed in Kentucky and has been approved by the Federal Center for Medicare and Medicaid Services. Kentucky's receipt of federal funding for its Medicaid program is contingent upon following the terms and conditions of the Plan. *Id*. at 227.

Loving Care is a Kentucky Medicaid provider as defined in KRS 205.8451(7) and enrolled with the Department for Medicaid Services as a Supports for Community Living (SCL) Medicaid waiver provider. In the present matter, Loving Care agreed to provide Medicaid waiver services to a Medicaid member, "T.W.," as part of the Money Follows the Person Program, (MFP), a program that provides enhanced federal medical assistance to individuals with disabilities who formerly resided in an institutional environment.

A Medicaid provider's payment for services rendered to a Medicaid member is dependent on compliance with applicable regulations including maintaining appropriate documentation. 907 Kentucky Administrative Regulations (KAR) 1:672 Section 2(6) provides that "[b]y enrolling in the Medicaid Program, a provider, the provider's officers, directors, agents,

employees, and subcontractors agree to: (a) Maintain the documentation for claims as required by Section 4 of this administrative regulation[.]" Section 4(1) of 907 KAR 1:672 provides that the provider shall document:

> (a) Care, services, benefits, or supplies provided to an eligible recipient;
>
> (b) The recipient's medical record or other provider file, as appropriate, which shall demonstrate that the care, services, benefits, or supplies for which the provider submitted a claim were actually performed or delivered;
>
> (c) The diagnostic condition necessitating the service performed or supplies provided; and
>
> (d) Medical necessity as substantiated by appropriate documentation including an appropriate medical order.

As Loving Care is a SCL provider, it is also bound by the Cabinet's SCL regulations. Those regulations were the basis of the Cabinet's recoupment decision.

907 KAR 1:155 Section 2(1) provides that a SCL provider shall be reimbursed for a "covered service" provided to a Medicaid recipient. A service is "covered" only if "provided in accordance with the terms and conditions specified in 907 KAR 1:145." 907 KAR 1:155 Section 2(2). At issue in this case are the requirements of 907 KAR 1:145 Section 4(2)(k)(9), which requires that the provider document services by a monthly summary note that includes:

> a. The month, day, and year for the time period the note covers;

> b. Progression, regression, and maintenance toward outcomes identified in the plan of care;
>
> c. Pertinent information regarding the life of the SCL recipient; and
>
> d. The signature, date of signature, and title of the individual preparing the staff note[.]

In its post-payment review audit, the Cabinet found that the services provided to T.W. by Loving Care were not in compliance with 907 KAR 1:145 Section 4(2)(k)(9). Therefore, the Cabinet determined that the services were not "covered services" and made the decision to recoup payments paid for the non-covered services provided to T.W.

On December 11, 2014, the Cabinet sent Loving Care a letter informing it that the Cabinet had determined an overpayment occurred in the amount of $8,200 between January 1, 2012 and December 31, 2012. On that same date, the Cabinet sent a second letter informing Loving Care that the Cabinet had determined an overpayment occurred in the amount of $58,029.93 for the time period between January 1, 2013 and October 23, 2013. The Cabinet sought to recoup the overpayment.

The President of Loving Care, Isaiah Hoagland, sent a letter to the Cabinet requesting a Dispute Resolution Meeting (DRM). In that letter, Hoagland explained that Loving Care did not deny that the monthly summaries were not compliant with applicable regulations in that the house manager did not place her

title next to her name or state whether T.W. had progressed or regressed in meeting goals. However, Loving Care claimed that "the decision to reverse over $66,000 in services Loving Care provided due to wording on summaries is absolutely unreasonable."

A DRM was held on March 16, 2015. Hoagland attended the DRM without counsel. At the DRM, Hoagland stated: "I'm not taking aim at the findings . . . because obviously with the summaries . . . our house manager obviously with the summaries . . . our house manager obviously did not . . . state whether or not the goals were being met or progressing or regressing . . . so I'm not taking aim at that." Hoagland claimed that the mistakes in the summaries were only minor and that the Cabinet should not be permitted to recoup all amounts for the services rendered to T.W.

Following the DRM, Loving Care was sent two letters dated March 24, 2015, documenting the Cabinet's decision to affirm the recoupment decision for the two time periods in question. In response, Loving Care requested an administrative hearing. In Hoagland's letter requesting an administrative hearing, he stated that in the DRM it was explained that Loving Care "was not denying that the house manager did not place her title next to her name or that the goals did not have next to them whether or not T.W. progressed, regressed, etc. . . ." Again, Loving Care stated its position that its "minor clerical error" should not permit the

Cabinet to recoup an entire year of payments. As Hoagland phrased Loving Care's position: "We had a small error and are being asked to send a check for $67,000! It just seems unfair and morally wrong[.]"

Loving Care deposed individuals with the MFP program and later filed a motion for summary judgment before the Cabinet's administrative hearing officer. Essentially, Loving Care argued that while it committed some minor errors in its documentation of the services provided to the Cabinet, those errors did not cause an "overpayment" as defined in the applicable federal regulation, 42 Code of Federal Regulations (CFR) § 433.304. The Cabinet responded to Loving Care's legal arguments and also argued that Loving Care had not preserved its argument at the DRM as required by 907 KAR 1:671 Section 9(13)(a)-(c).

The hearing officer issued a recommended order in which the issue of preservation was addressed. In that order, the hearing officer found that Loving Care had not preserved its "overpayment" argument at the DRM level. It found that "Loving Cares' position throughout the DRM process was that while [the Cabinet] was legally entitled to recoup the $66,229.93, its decision to recoup the full amount was unreasonable and too harsh a penalty in light of the relatively minor underlying documentation infraction." The hearing officer's substantive findings were adopted by the Secretary in her final order except that the burden of proof was assigned to Loving Care.

Loving Care sought review in the Franklin Circuit Court. The Franklin Circuit Court issued an order remanding the matter for further administrative proceedings. In its order, the circuit court held that Loving Care properly preserved its "overpayment" argument based on 42 CFR § 433.304. It also held that Loving Care properly preserved its argument that it substantially complied with all applicable regulations. Finally, the circuit court held that the Secretary erred when the final order placed the burden of proof on Loving Care. The Cabinet appealed.

Our standard of review of an administrative agency's order is set forth in statutory law. KRS 13B.150(2) provides that a reviewing court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." The role of an appellate court is "to ensure that the decision of an administrative agency is supported by substantial evidence. We are not permitted to retry the case or to review the evidence *de novo*." *Commonwealth of Kentucky Cabinet for Human Res. v. Bridewell*, 62 S.W.3d 370, 373 (Ky. 2001). We review issues of law *de novo*. *N. Kentucky Mental Health-Mental Retardation Reg'l Bd., Inc. v. Commonwealth, Cabinet for Health & Family Servs.*, 538 S.W.3d 298, 302 (Ky.App. 2017). Finally, in performing its review of an administrative agency's decision, a court is required to give an administrative agency's

interpretation of its own regulations substantial deference. *Camera Center, Inc., v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2000).

The conditions of the Medicaid administrative appeal process are set forth in 907 KAR 1:671 Section 9. Subsection (13) governs the issues that may be raised during an administrative hearing. "The issues considered at a hearing shall be limited to: (a) Issues directly raised in the initial request for a dispute resolution meeting; (b) Issues directly raised during the disputed resolution meeting; or (c) Materials submitted in lieu of a dispute resolution meeting." *Id*.

The question of whether Loving Care preserved its overpayment and substantial compliance arguments depends on the meaning of the phrase "issues directly raised" as used in the regulation. The same principles are applicable to the construction of regulations and to the construction of statutes. *Comprehensive Home Health Services, Inc. v. Professional Home Health Care Agency, Inc*., 434 S.W.3d 433, 441 (Ky. 2013). It is a fundamental rule that "[a]ll [regulations] should be interpreted to give them meaning, with each section construed to be in accord with the statute as a whole." *Transportation Cabinet v. Tarter,* 802 S.W.2d 944, 946 (Ky.App. 1990). "[Regulations] should not be construed such that their provisions are without meaning, whether in part or in whole." *Aubrey v. Office of Attorney Gen.*, 994 S.W.2d 516, 520 (Ky.App. 1998).

The Cabinet takes the view that "directly" as used in 907 KAR 1:671 Section 9(13) means "exactly." Given the informality of a DRM hearing and, because providers are often unrepresented by legal counsel, we must disagree.

The Franklin Circuit Court found that Loving Care preserved its challenge to the recoupment decision based on the definition of "overpayment" found in 42 CFR § 433.304. That section defines "overpayment" as "the amount paid by a Medicaid agency to a provider which is in excess of the amount that is allowable for services furnished under section 1902 of the Act and which is required to be refunded under section 1903 of the Act." *Id.* In its initial letter requesting a DRM hearing, Loving Care directly asserted that the failure to adhere to certain requirements of the documentation of services was not a basis for recouping the full amount of payments for service rendered to T.W. While not expressly stating so, Loving Care directly argued that an "overpayment" does not occur when services have been rendered but not documented as required by applicable regulations.

We also disagree that to preserve its substantial compliance argument, Loving Care was required to expressly use the legal phrase "substantial compliance." We conclude the substance of Loving Care's arguments in its request for a DRM and at the DRM are more important than the wording in its arguments.

"Substantial compliance, of course, presupposes a failure of technical compliance but is applied to avoid a harsh and unjust result when a particular defect is trivial." *Com. ex. rel. Stidham v. Henson*, 887 S.W.2d 353, 354 (Ky. 1994) (Lambert, J., dissenting). Loving Care specifically complained in its letter requesting a DRM hearing and at the DRM hearing that its clerical errors were minor, and the recoupment of the entire amount sought by the Cabinet was unfair. We agree with the circuit court that Loving Care preserved the issue of substantial compliance.

Before leaving the issue of whether Loving Care properly preserved its arguments, a final comment is necessary. Our discussion has been limited to preservation. We do not comment on whether the issues of overpayment and substantial compliance can prevail on legal grounds or factual grounds.

Having affirmed the circuit court's decision that remand for a full administrative hearing on the issues of overpayment and substantial compliance is required, we address whether Loving Care or the Cabinet has the burden to show it is entitled to recoupment.

907 KAR 1:671 Section 9(14) provides that "KRS 13B.090(7) shall govern the burdens of proof." KRS 13B.090(7) places the burden on an agency to "show the propriety of a penalty imposed **or the removal of a benefit previously granted**." (Emphasis added.) The Cabinet argues that the auditing provision

contained in 907 KAR 1:673 renders any payments made preliminary and not final so that the burden of proof is on Loving Care to show that Medicaid claims it billed were accurate and properly submitted to be entitled to payment for those claims. Again, we disagree with the Cabinet.

The language of 907 KAR 1:671 Section 9(14) and KRS 13B.090(7) is clear and unambiguous, and subject to only one reasonable interpretation. The agency has the burden of proof to recover benefits paid, even when subject to an audit. The Cabinet attempts to reclaim funds previously paid to Loving Care for the care of T.W. The General Assembly left no doubt that the burden of justifying the removal of a benefit previously granted rests solely with the Cabinet.

For the reasons stated, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Matthew H. Kleinert Frankfort, Kentucky	No brief filed.