SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0775-15T4

J.C.,

Appellant,

v.

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES,

Respondent.

Submitted March 5, 2018 - Decided April 11, 2018

Before Judges Messano, Accurso and O'Connor.

On appeal from New Jersey Department of Human Services, Division of Medical Assistance and Health Services, No. 0410053972.

Schutjer Bogar LLC, attorneys for appellant (John P. Pendergast, on the briefs).

Gurbir S. Grewal, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Stephen J. Slocum, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner J.C. appeals from a final agency decision of the Department of Human Services, Division of Medical Assistance and

Health Services (DMAHS), denying her request for a fair hearing. Because J.C.'s designated authorized representative filed its request for a fair hearing before being designated her authorized representative, then failed to perfect its request for a fair hearing for over four months and finally attempted to submit a certification on appeal explaining its actions without a motion to expand the record, we affirm.

J.C. was admitted to a nursing facility in March 2014, and her son, S.C., subsequently submitted an application to the Camden County Board of Social Services for Medicaid benefits on her behalf. Based on information provided by S.C. in response to requests from the agency, it wrote to him on October 29, 2014, to advise that J.C.'s transfer of $10,700 for less than full market value during the look-back period, presumably to qualify for Medicaid, would subject her to a one month and eleven day transfer penalty extending from August 1, 2014, unless rebutted. The notice explained petitioner's right to rebut the presumption by providing evidence the transfer was for some other purpose, and that she could request a waiver of the transfer penalty based on undue hardship, as set forth in N.J.A.C. 10:71-4.10(q), within twenty days.

On December 17, 2014, the Camden County Board of Social Services sent S.C. its decision approving J.C. for Long Term

Care Services effective September 12, 2014 based on the application of the transfer penalty. The notice advised of petitioner's right to request a fair hearing within twenty days in accordance with N.J.A.C. 10:49-10.3.

On December 30, Avista Healthcare c/o Future Care Consultants wrote to DMAHS requesting a fair hearing on behalf of J.C. The letter claimed that "[d]ocumentation was provided to the [Medicaid case] worker to prove that the money in question was actually used for [J.C.] herself and was not gifted to her son," S.C. The letter did not identify which county welfare agency had approved J.C. for benefits subject to the transfer penalty, did not identify the date of the decision and did not include anything designating Avista Healthcare or Future Care Consultants as J.C.'s authorized representative.

DMAHS replied to Future Care Consultants on January 8, 2015, requesting a copy of the letter from "the County or State that is the basis for the fair hearing" with regard to J.C. Future Care responded on January 23, 2015, by faxing a copy of the October 29, 2014 penalty advisory letter. DMAHS responded on January 30, 2015, again requesting a copy of the letter forming the basis of the fair hearing request and a completed Authorized Representative Form designating Future Care Consultants as J.C.'s representative with regard to her

eligibility for Medicaid. Future Care responded on February 17, 2015, by faxing an Authorized Representative Form dated January 2, 2015, three days after its letter requesting a fair hearing on J.C.'s behalf, and again attaching the October 29, 2014 prospective penalty notice but not the eligibility letter forming the basis of the fair hearing request.

DMAHS responded on March 11, 2015 with a "3rd & Final Request" advising Future Care that the agency needed the eligibility letter forming the basis of the Fair Hearing request. DMAHS's correspondence advised that "[i]f the requested information is not received within 30 days from the date of this letter this case will be closed." On March 20, a representative of DMAHS's Fair Hearing Unit followed up by telephone, advising Future Care it needed the eligibility letter in order to process an appeal from that letter. Two months later, on May 7, 2015, Future Care sent a fax to DMAHS enclosing the December 17, 2014 eligibility notice, noting the "[o]riginal request for a fair hearing was sent on 1/1/15 which is in the 20 day time frame." DMAHS, having closed the case, did not respond.

On August 10, 2015, counsel pursuing this appeal wrote to DMAHS as counsel to Future Care Consultants complaining of the agency's failure to have responded to Future Care's May 7, 2015

letter and demanding a fair hearing "due to DMAHS['s] inaction regarding [J.C.'s] appeal of her December 2014 eligibility notice." DMAHS responded on September 2, 2015, recounting the several letters it sent to Future Care in order to obtain the documents necessary to perfect its appeal on behalf of J.C. DMAHS noted that "N.J.A.C. 10:49-10.3(b)(3) specifically states that Medicaid: '[c]laimants shall have 20 days from the date of the notice . . . in which to request a hearing,'" and that while the agency "will permit claimants an additional 30 days to complete the request, the time periods here exceed reasonableness."

J.C. appeals, contending Future Care's "hearing request was perfected as soon as was practicable due to the diligent efforts of her authorized representative, despite J.C.'s son's lack of cooperation and the Division of Medical Assistance and Health Services' unlawful refusal to cooperate." We reject the argument as utterly without merit and based on a certification submitted with counsel's brief that was the subject of a prior motion to supplement the record denied by this court.

N.J.A.C. 10:49-10.3(b)(3), promulgated by DMAHS in accordance with its statutorily imposed duty to administer the State's Medicaid program, see N.J.S.A. 30:4D-7; 42 U.S.C. §§ 1396-1396w-5; N.J.A.C. 10:49-1.1 to -24.5, provides that

"[c]laimants shall have 20 days from the date of notice of Medicaid Agent . . . action in which to request a hearing." The letter Future Care sent to DMAHS initially requesting a fair hearing, besides being submitted before J.C. had designated it as her authorized representative, did not attach the eligibility letter forming the basis of its appeal, or even identify the county welfare agency (the Medicaid Agent) that made the determination or the date of its decision. The October 29, 2014 notice it subsequently submitted was merely notification of the penalty that would be imposed if no evidence rebutting the presumption were submitted. The December 30, 2014 letter from Future Care claimed that "[d]ocumentation was provided to the [Medicaid case] worker" to rebut that presumption, although no proof was provided and no eligibility letter attached.

Future Care's December 30, 2014 letter requesting a fair hearing was obviously incomplete. Future Care referenced only a notice of penalty to J.C. that could be rebutted, asserted that it had been rebutted by proofs submitted to an unknown agency, which agency subsequently approved benefits on an unknown date without taking into account those proofs. We cannot fault the agency for failing to transmit such an inchoate dispute to the Office of Administrative Law for an administrative hearing. DMAHS thereafter left the case open for four months to permit

Future Care to perfect its appeal. Although Future Care submitted some additional documents, including a designated authorization form, it never submitted the eligibility letter from which it purportedly appealed, despite being advised the case would be closed without it.

Future Care seeks to excuse its failure to perfect its appeal by submitting a certification with its appellate brief from an employee of Future Care Consultants claiming J.C.'s son and the Medicaid case worker in Camden County failed to cooperate in providing it documents.[1] As Future Care's motion to supplement the record with this certification in accord with R. 2:5-5(b) was made eleven months after it filed its brief and nine months after all briefing was complete, and was denied by this court, it is obviously dehors the record on appeal and we

[1] Future Care claims it included the substance of this certification in an October 13, 2015 letter to DMAHS "renewing J.C.'s request" for a fair hearing. That letter was not included in the statement of items comprising the record on appeal filed by the agency on January 28, 2016, pursuant to R. 2:5-4, and is thus outside the record we may consider. See Townsend v. Pierre, 221 N.J. 36, 45 n.2 (2015). Although Future Care claims the agency "appears to have purposely omitted" its October 13, 2015 letter from the statement of items, its remedy for any claimed omission is a motion in the agency to correct or supplement the record pursuant to R. 2:5-5, see High Horizons Dev. Co. v. N.J. Dep't of Transp., 120 N.J. 40, 44 (1990), not to simply argue the facts it contends were omitted in its appellate brief followed by a belated motion to supplement in this court.

cannot consider it. See Rudbart v. Bd. of Review, 339 N.J. Super. 118, 122-23 (App. Div. 2001).

Having reviewed the record in accord with our deferential standard of review, see E.B. v. Div. of Med. Assistance & Health Servs., 431 N.J. Super. 183, 190-91 (App. Div. 2013), we cannot find the agency decision to deem Future Care's request for a fair hearing as out of time to be arbitrary, capricious or unreasonable. As to its contention that DMAHS failed to act on its May 7, 2015 fax finally perfecting its fair hearing request four months beyond the twenty days permitted, an appeal will not lie from an agency's failure to respond to requests for action filed grossly beyond the time allotted by regulation. Cf. State Dep't of Envtl. Prot. v. Mazza & Sons, Inc., 406 N.J. Super. 13, 19-20, 23-26 (App. Div. 2009) (prohibiting the defendant from collaterally challenging an administrative order it failed to challenge by the timely request for an administrative hearing).

Affirmed.