SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2034-15T4
A-4414-15T3

E.M.,

Appellant,

v.

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES,

Respondent.

Submitted March 5, 2018 - Decided April 9, 2018

Before Judges Messano, Accurso and O'Connor.

On appeal from New Jersey Department of Human Services, Division of Medical Assistance and Health Services, Nos. 1620362142 and 13935-2015.

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

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

PER CURIAM

We calendared E.M.'s two appeals challenging final agency decisions of the Department of Human Services, Division of Medical Assistance and Health Services (DMAHS) back-to-back and consolidate them for resolution in this opinion. The essential facts are easily summarized.

E.M. was admitted to Lakeview Subacute Care Center in August 2012 suffering from dementia. He was on a ventilator and fed through a feeding tube. He applied for Medicaid only benefits three different times. E.M.'s daughter first applied on his behalf in December 2012. The Passaic County Board of Social Services denied the application the following month for failure to provide documents necessary to evaluate his eligibility for benefits. Although advised of the right to request a fair hearing from the denial of benefits, no request for a hearing was made.

A year later, in February 2014, Future Care Consultants applied to Passaic County's Board of Social Services for Medicaid benefits on E.M.'s behalf. The Board denied that application a month later on April 8, 2014, after Future Care also failed to provide the necessary supporting documents. Future Care requested a fair hearing as to that denial. DMAHS responded by advising of the need to submit an authorized representative form before the agency could assist Future Care

in processing its request for a hearing. That letter further advised the case would be closed if the form were not provided within thirty days. Forty-five days later, on May 30, Future Care advised that E.M. was incapacitated, that it had appealed to "preserve [his] eligibility" and asked that the matter be held "in abeyance until the final Appointment of Guardian."

E.M.'s daughter was appointed his guardian in December 2014[1] and completed the form designating Future Care as E.M.'s authorized representative. Future Care filed E.M.'s third application for benefits on December 2, 2014. In July 2015, Passaic County's Board of Social Services granted E.M.'s application effective September 1, 2014. Future Care filed a timely request for a fair hearing, contending E.M.'s eligibility should be retroactive to his August 2012 admission to Lakeview. It argued E.M.'s two prior Medicaid applications were denied for failure to provide information that could not be gathered until

[1] We note the verified complaint for guardianship brought by counsel for Lakeview, the same counsel pursuing this appeal, sought the appointment of an unrelated professional guardian for E.M. The judgment signed by Judge McVeigh appointing E.M.'s daughter his guardian reflects the court's appointment of independent counsel for E.M. and denial of a fee to Lakeview's counsel. Counsel offers no explanation of the nursing home's reasons for seeking the appointment of someone other than the daughter who had obviously been involved in E.M.'s care since his admission to the facility, nor Judge McVeigh's reasons for appointing independent counsel for E.M. and rejecting an unrelated guardian.

the appointment of a guardian. As the information provided following the appointment of the guardian demonstrated E.M. was "financially eligible as of his admission to the nursing home," Financial Care argued E.M. should "be approved as of that date." DMAHS granted the request for a hearing, transferring the case to the Office of Administrative Law in September 2015.

The following month, counsel for Future Care wrote to DMAHS requesting that the agency transfer Future Care's April 2014 appeal of the denial of E.M.'s second application for Medicaid benefits to the OAL for a hearing. DMAHS denied the request on November 24, 2015 as grossly out of time.

The agency noted that Future Care's recent request was made "567 days from the April 8, 2014 date of the notice you reference in your letter and 308 days from the date the Passaic County Superior Court issued a Judgment of Legal Incapacity and Appointment of Guardian of the Person and the Estate" for E.M. The agency wrote that neither Future Care's April 11, 2014 request for a fair hearing nor its May 30, 2014 letter asking that the matter be held in abeyance pending the appointment of a guardian for E.M. "indefinitely preserves your right to a fair hearing." As E.M.'s guardian did not seek to reopen the second application for benefits upon her appointment but instead authorized a third application, already pending in the OAL,

DMAHS denied the belated request for a fair hearing on the second application. Counsel for E.M. appeals that decision in A-2034-15, arguing "E.M.'s fair hearing request was timely and was perfected as soon as was practicable."

An administrative Law Judge affirmed DMAHS's determination deeming E.M. eligible for Medicaid as of September 1, 2014, on E.M.'s third application for benefits in a comprehensive written decision. The ALJ found Future Care abandoned its request for a fair hearing on the denial of E.M.'s second application by failing to submit a designated authorized representative form until December 18, 2014, eight months after its request for a fair hearing was denied by DMAHS. See N.J.A.C. 10:49-10.3(b)(7).

The ALJ found DMAHS's decision establishing E.M.'s eligibility from September 1, 2014, three months prior to the date of the filing of his third application consistent with N.J.A.C. 10:71-2.16(a), and rejected E.M.'s argument that his eligibility should be made retroactive to his admission to Lakeview in August 2012 pursuant to I.L. v. N.J. Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 389 N.J. Super. 354, 365-66 (App. Div. 2006) (reversing DMAHS's denial of benefits due to excess resources based on the agency's failure to recognize that because I.L.'s family had abandoned her,

assets theoretically accessible to her through an appointed guardian were not in fact accessible until the guardian's appointment). The ALJ found I.L. inapposite because in addition to this case having nothing to do with the availability of resources, "E.M.'s first and third applications were filed by his daughter who ultimately became his guardian."

The Director of DMAHS adopted the ALJ's initial decision, agreeing, based on the December 2, 2014 filing date for E.M.'s third application for benefits, that "the earliest possible date that Petitioner could be found eligible is September 1, 2014." The Director found that in arguing for an eligibility date two years earlier, E.M. improperly relied on the denial of his prior two applications, the first of which was never appealed and the second of which was appealed at least 308 days out of time. Specifically, the Director found:

> Petitioner used the current OAL hearing, not as an opportunity to address the merits of the third application, but to argue the merits of his first and second Medicaid applications, as well as argue the timeliness of Petitioner's request for a fair hearing with regard to his second Medicaid application. In fact, Petitioner's exceptions make clear his intent to establish that he tolled the time period to perfect his appeal of the second application.
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> In so doing, Petitioner assets that he was unable to access the requested

> verifications because he was incapacitated. Although not properly before her, the ALJ explored the merits of Petitioner's arguments and correctly determined that Petitioner had not established a lack of access to the verifications requested by [the Passaic County Board of Social Services] and that Petitioner abandoned his appeal of [the Passaic County Board of Social Services'] second denial.

The Director noted a

> verified complaint for guardianship was not filed until September 29, 2014 and Petitioner was not deemed incapacitated until December 23, 2014. The question of Petitioner's capacity was not raised during the first two applications or when he authorized [Future Care] to represent him in the Medicaid application process. Petitioner had not been deemed incapacitated at the time of his Medicaid applications and there is no indication that his daughter, J.M., who became his court appointed guardian and filed the first Medicaid application on Petitioner's behalf, was not assisting him in the application process. There is nothing in the record to demonstrate that Petitioner lacked the ability, himself or through J.M., to provide [the Passaic County Board of Social Services] with the requested information on either of his first two applications when J.M. was able to provide those verifications by the time of the third application. Furthermore, there is nothing in the record to dispute [the Passaic County Board of Social Services'] determination of a September 1, 2014 date of eligibility.

Counsel for E.M. appeals the Director's decision in A-4414-15, reprising the argument that the documents necessary to

process E.M.'s application for Medicaid benefits only became accessible "after E.M.'s daughter J.M. was appointed to serve as his guardian," and he is thus "entitled to Medicaid benefits retroactive to the date of his admission to the nursing facility."

Our role in reviewing the decision of an administrative agency is limited. In re Stallworth, 208 N.J. 182, 194 (2011). We accord a strong presumption of reasonableness to an agency's exercise of its statutorily delegated responsibility, City of Newark v. Nat. Res. Council, 82 N.J. 530, 539, cert. denied, 449 U.S. 983 (1980), and defer to its fact finding, Utley v. Bd. of Review, 194 N.J. 534, 551 (2008). We will not upset the determination of an administrative agency absent a showing that it was arbitrary, capricious or unreasonable; that it lacked fair support in the evidence; or that it violated legislative policies. Lavezzi v. State, 219 N.J. 163, 171 (2014); Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963).

Applying that standard here, we are satisfied DMAHS's decision is supported by sufficient credible evidence on the record as a whole, R. 2:11-3(e)(1)(D), and that counsel's arguments to the contrary are without sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E).

Accordingly, we affirm substantially for the reasons set forth in the final agency decisions rendered in these matters.

Affirmed.