SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1921-21

A.F.,

Petitioner-Appellant,

v.

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES,

Respondent-Respondent,

and

MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES,

Respondent.

Submitted February 13, 2023 – Decided March 9, 2023

Before Judges Smith and Marczyk.

On appeal from the New Jersey Department of Human Services, Division of Medical Assistance and Health Services.

Wolfe Ossa Law, attorneys for appellant (Jaclyn Healey, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Francis X. Baker, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner A.F. appeals from a February 18, 2022 Final Agency Decision (FAD) from the Division of Medical Assistance and Health Services (DMAHS) denying her request for a fair hearing to challenge the transfer penalty imposed by the Middlesex County Board of Social Services (CWA). DMAHS determined the request was not filed in the required timeframe. Following our review of the record and applicable legal principles, we remand for further proceedings.

I.

A.F. applied for Medicaid benefits in Middlesex County on May 27, 2021. The CWA approved A.F.'s application with an effective date of May 1, 2021, imposing a 572-day penalty period due to certain resources being transferred

during the five-year look-back period under N.J.A.C. 10:71-4.10 and 42 U.S.C. § 1396(c).[1]

Petitioner contends she filed a request for a fair hearing on August 4, 2021. She claims she made a request within the twenty-day timeframe set forth in N.J.A.C. 10:49-10.3(b)(3). In December 2021, petitioner's attorney contacted the Middlesex Adult Medicaid Department and was advised the Fair Hearing Unit was not "as behind as [the firm was] initially told." Counsel was subsequently advised the Office of Administrative Law (OAL) had no docket number assigned for petitioner's application.[2] Despite several months elapsing without receiving a confirmation from DMAHS, counsel indicated she was not concerned about the delay because she believed the fair hearings were backlogged due to the COVID-19 pandemic.

Petitioner's counsel subsequently faxed a copy of the August 4, 2021 request for a fair hearing on December 20, 2021.[3] After multiple calls, DMAHS

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[1] CWA determined petitioner improperly transferred $206,707.77 from a TD Bank account to various sources.

[2] DMAHS maintains it did not receive the request for a fair hearing until December 20, 2021—157 days after the July 16, 2021 notice approving the application subject to the transfer penalty.

[3] Counsel asserts she did not receive a response to that request either.

advised petitioner's counsel on January 12, 2022 it had no record of any request for a hearing. Petitioner resubmitted the request on the same day, and on January 18, 2022, DMAHS denied the request as untimely. However, DMAHS sent the letter communicating this decision to the wrong address, and petitioner did not receive it. It was not until February 11, 2022, that petitioner's counsel was advised the request for a fair hearing had been denied. On February 16, 2022, counsel sent a letter to the Fair Hearing Unit and provided a screenshot of a PDF.[4] The PDF contained the second page of the eligibility notice, showing the date it was created, based on the law firm's policy of scanning all incoming and outgoing mail on the day it is received or mailed. Petitioner's counsel was subsequently asked to provide a certification from the attorney who actually mailed the request for a fair hearing. On February 17, 2022, that attorney represented he mailed the hearing request on August 4, 2021. DMAHS issued its FAD on February 18, 2022, denying petitioner's request for a fair hearing as untimely.

[4] See Merriam Webster, https://www.merriam-webster.com/dictionary/pdf (last visited Mar. 1, 2023) (defining "pdf" (portable document format) as "a computer file format for the transmission of a multimedia document that is not intended to be edited further and appears unaltered in most computer environments").

The FAD relied on N.J.A.C. 10:49-10.3(b)(3), which provides that Medicaid "claimants shall have twenty days from the date of the notice . . . in which to request a hearing." The FAD noted the first request DMAHS received from petitioner was a December 20, 2021 letter. Petitioner's attorney contacted DMAHS and communicated her assumption that the fair hearing date had been delayed due to pandemic-related disruptions. The FAD, however, observed that the case did not appear to be impacted by the ongoing public health emergency. Because it was filed 157 days after the July 16, 2021 initial notice, it was out of time. The decision further stated petitioner's counsel only provided a screenshot of a scanned document with an August 4, 2021 date, consisting only of the second page of the denial letter from Middlesex County. There was no screenshot of a cover letter or first page of the notice provided.

The FAD noted petitioner alleged the long delay in not receiving a hearing date for the August 4, 2021 request for a fair hearing was not a concern because there had been delayed hearings in other cases. However, the FAD observed "[t]his was curious as there is no backlog in this office related to the fair hearing requests." The FAD references two recent situations in which petitioner's law firm had requested a fair hearing, and DMAHS promptly referred the matters to the OAL for a hearing. DMAHS noted, "[b]ased upon [these cases], it is unclear why, for several months, [petitioner's counsel's] office failed to follow up on the

alleged request for a fair hearing in this matter after not receiving any communication from this office related to [A.F.]" The FAD stated petitioner's firm had received prompt responses from the office regarding the other two matters filed in 2021, including one that was filed a mere two days after A.F.'s purported application. Additionally, the FAD noted the documentation provided by petitioner's counsel for A.F. did not include—unlike the other two recently filed applications from petitioner's attorney's office—any cover letter signed by an attorney. The FAD concluded, "[t]his is insufficient to show that the fair hearing request was sent to our office prior to December 2021. As a result, your request for a fair hearing in this matter is still denied as out of time."[5]

This appeal followed. Petitioner raises the following points on appeal:

[5] DMAHS notes the PDF document only indicates it was created on August 4, 2021, not that it was mailed on August 4, 2021. The words "date mailed" are handwritten next to the screenshot. DMAHS further indicated it asked for an example of where petitioner's law firm had to wait several months for a hearing notice in the past. They were subsequently provided with a case involving B.V. DMAHS notes B.V.'s request included a cover letter, whereas there was no comparable cover letter provided in A.F.'s case. DMAHS also refers to another case, submitted two days after A.F.'s request from the same firm—in the matter of S.D.—that was promptly transmitted to the OAL for a hearing. Moreover, that request also had a cover letter.

POINT I

THE AGENCY'S DECISION MUST BE OVERTURNED AS IT IS BOTH ARBITRARY, CAPRICIOUS, OR UNREASONABLE AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE. (Not raised below).

A. The Agency's decision to deny A.F. a Fair Hearing is arbitrary, capricious, or unreasonable as A.F. submitted her request within the statutory time limit and is entitled to a hearing to make her case, to deny her the right to even plead her case under these circumstances is arbitrary, capricious, or unreasonable and is a gross miscarriage of justice, even if the Agency did not receive the request that was sent. (Not raised below).

B. The Agency's decision to deny A.F. a Fair Hearing is not supported by substantial evidence as A.F. has provided a signed certification of an officer of the court, Morgan M. Browning, Esq. certifying under penalty of perjury that he mailed the request within the [twenty]-day statutory limit, even though the Agency did not receive it. (Not raised below).

POINT II

DENYING A.F. A FAIR HEARING IS INCONSISTENT WITH THE STATUTORY MISSION OF THE MEDICAID PROGRAM, WHICH IS TO PROVIDE QUALITY MEDICAL CARE TO THOSE WHOSE INCOME AND RESOURCES DO NOT COVER THE COSTS OF THAT CARE, AND THE STATUTORY INTENTION OF THE

> [TWENTY]-DAY APPEAL WINDOW TO PREVENT NON-RESPONSIVE APPLICANTS FROM WASTING GOVERNMENT RESOURCES, THUS SHE MUST BE GRANTED A HEARING. (Not raised below).
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> POINT III
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> EXTENUATING CIRCUMSTANCES EXIST WHICH REQUIRE THE RELAXATION OF THE ORDINARY RULES, THE HARM OF NOT ALLOWING A.F. A FAIR HEARING IS FAR WORSE THAN ALLOWING HER ONE, THUS THE AGENCY'S DECISION MUST BE OVERTURNED. (Not raised below).

More particularly, petitioner contends that although DMAHS may not have received the application for a fair hearing, it was properly submitted within the twenty-day time frame pursuant to N.J.A.C. 10:49-10.3. Petitioner asserts the mailing may not have been properly delivered by the United States Postal Service because of delays or interruptions caused by the COVID-19 pandemic. Petitioner further asserts the PDF of the fair hearing request produced by the law firm and counsel's explanation of the firm's policy scanning fair hearing requests—coupled with the attorney certification verifying the request for a hearing was submitted within the twenty-day window provided by N.J.A.C. 10:49-10.3—demonstrates the custom and practice of the firm and corroborates the practice was followed for this particular fair hearing request. Lastly,

petitioner asserts the public policy underlying the Medicaid program warrants petitioner be given an opportunity to contest this matter on the merits.

DMAHS counters petitioner has presented "no credible evidence" to support a claim a fair hearing request was made in a timely manner. Although petitioner's attorney certified the request was mailed and provided a screenshot of the request indicating it was created on August 4, 2021, DMAHS contends there is no corroborating evidence a hearing request was actually sent on that date. DMAHS further argues it never received the request for a hearing, but had received other requests from petitioner's law office during the time period at issue. Accordingly, it contends this "strongly suggests" the office policy in mailing the request for a fair hearing was not followed.

II.

Our review of DMAHS's determination is ordinarily limited. Barone v. Dep't of Hum. Servs., Div. of Med. Assistance & Health Servs., 210 N.J. Super. 276, 284-85 (App. Div. 1986) ("[W]e must give due deference to the views and regulations of an administrative agency charged with the responsibility of implementing legislative determinations."); see also Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001) ("It is settled that [a]n administrative agency's interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to our

deference.") (alteration in original) (citations and internal quotation marks omitted). "Where [an] action of an administrative agency is challenged, a presumption of reasonableness attaches to the action of an administrative agency[,] and the party who challenges the validity of that action has the burden of showing that it was arbitrary, unreasonable or capricious." Barone, 210 N.J. Super. at 285 (citation and internal quotation marks omitted). "Delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public." Ibid. Thus, ordinarily our task is limited to deciding:

> (1) whether the agency's decision offends the State or Federal Constitution; (2) whether the agency's action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and (4) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [A.B. v. Div. of Med. Assistance & Health Servs., 407 N.J. Super. 330, 339 (App. Div. 2009) (citation omitted).]

Nevertheless, we are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." R.S. v. Div. of Med. Assistance & Health Servs., 434 N.J. Super. 250, 261 (App. Div. 2014) (quoting Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affs. of Dep't of L.

& Pub. Safety, 64 N.J. 85, 93 (1973)). "[If] an agency's determination . . . is a legal determination, our review is de novo." L.A. v. Bd. of Educ. of Trenton, Mercer Cty., 221 N.J. 192, 204 (2015) (citation omitted).

III.

DMAHS relies on SSI Medical Services, Inc. v. State Department of Human Services, Division of Medical Assistance & Health Services, 146 N.J. 614 (1996). In SSI Medical, a medical service provider challenged DMAHS's denial of Medicaid reimbursement claims stemming from the company providing specialized equipment to patients recovering from injuries. Id. at 618.[6] SSI claimed it timely mailed various reimbursement forms within the statutorily prescribed time period, and submitted affidavits regarding its

[6] The New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5, provides the authority for New Jersey's participation in the federal Medicaid program. DMAHS is the administrative agency within the Department of Human Services that is charged with administering the Medicaid program. N.J.S.A. 30:4D-7. In that regard, the Division has the authority to oversee all State Medicaid programs and issue "all necessary rules and regulations." Ibid. Under the applicable regulations, if an applicant is denied Medicaid benefits, "[i]t is the right of every applicant . . . to be afforded the opportunity for a fair hearing in the manner established by the policies and procedures set forth in N.J.A.C. 10:49-10 and 10:69-6 . . . ." N.J.A.C. 10:71-8.4(a). Applicants have the right to fair hearings when "their claims . . . are denied or are not acted upon with reasonable promptness . . . ." N.J.A.C. 10:49-10.3(b). Requests for fair hearings must be submitted to the Division in writing within twenty days of the date of the notice of a denial, reduction, or partial denial of Medicaid benefits. N.J.A.C. 10:49-10.3(b)(1), (3).

standard procedures for mailing Medicaid claims. Ibid. The State submitted computer printouts of claims received during the relevant time period claiming they demonstrated no record of timely receipt of SSI's claims. Ibid.

The Chief Administrative Law Judge (CALJ) conducted a hearing and determined there was sufficient evidence to demonstrate approximately one-half of SSI Medical's claims were properly completed and mailed but rejected the other claims. DMAHS affirmed that portion of the decision disallowing payment. However, it reversed the CALJ's decision allowing payment for the remaining requests. Id. at 619. In doing so, DMAHS required a higher standard of proof for the "timely filing of a claim" and determined the petitioner must present "documentary evidence of filing." Ibid.

The Supreme Court ultimately rejected this heightened standard and instead applied the preponderance of the evidence standard to the presumption of mailing.[7] The Court observed, "New Jersey cases have recognized a

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[7] The Court noted:

> The question presented in this case is what level of proof must be demonstrated in order to trigger the presumption of mailing. In the absence of any administrative rule or regulation to the contrary, the traditional preponderance of the evidence standard applies to administrative agency matters. In re Polk, 90 N.J. 550, 561 (1982); Atkinson v. Parsekian, 37 N.J.

presumption that mail properly addressed, stamped, and posted was received by the party to whom it was addressed." Id. at 621 (citing Bruce v. James P. MacLean Firm, 238 N.J. Super. 501, 505 (Law Div.), aff'd o.b., 238 N.J. Super. 408 (App. Div. 1989)). Specifically, the Court noted, "[t]he conditions that must be shown to invoke the presumption are (1) that the mailing was correctly addressed; (2) that proper postage was affixed; (3) that the return address was correct; and (4) that the mailing was deposited in a proper mail receptacle or at the post office." Id. at 621 (citing Lamantia v. Howell Tp., 12 N.J. Tax 347, 352 (Tax 1992)).

Additionally, the SSI Medical Court noted proof of mailing can be established by evidence of habit or routine practice. Id. at 622. "However, evidence of office custom alone is insufficient to trigger the presumption of mailing and receipt." Ibid. (citing Weathers v. Hartford Ins. Group, 77 N.J. 228,

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> 143, 149 (1962); see also Fairfax Hospital Ass'n v. Califano, 585 F.2d 602, 611-12 (4th Cir. 1978) (in proceeding before the Medicare Provider Reimbursement Review Board, proponent of fact must establish that fact by preponderance of the evidence). Thus, in respect of the ultimate issue in this case, if the proofs establish by a preponderance of the evidence that SSI submitted the claims in a timely fashion, then the claims should be processed for payment.
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> [Id. at 622.]

234 (1978)). Rather, "[e]vidence of office custom requires other corroboration that the custom was followed in a particular instance, in order to raise a presumption of mailing and receipt and meet the preponderance of the evidence standard." Id. at 622-23 (citing Cwiklinski v. Burton, 217 N.J. Super. 506, 510 (App. Div. 1987)).[8] The Court further stated, "[t]he presumption of receipt derived from proof of mailing is 'rebuttable and may be overcome by evidence that the notice was never in fact received.'" Id. at 625 (quoting Szczesny v. Vasquez, 71 N.J. Super. 347, 354 (App. Div. 1962)).

Importantly, in SSI Medical a hearing was held before the OAL. In the matter before us, there was no such hearing to determine if petitioner did in fact mail the fair hearing request and whether or not DMAHS received the request. A hearing would be useful for a variety of reasons. For example, in SSI Medical,

> [t]here was . . . unrebutted testimony that many claim forms had in the past been "lost" [by DMAHS's fiscal agent] and had to be resubmitted . . . [and] that evidence indicates that the claim forms were more than likely missing because they had been lost after receipt rather than because they had not been mailed and received. The evidence supports a finding that the presumption of receipt was not rebutted.
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> [Ibid.]

[8] The SSI Medical Court determined the petitioner there had satisfied the preponderance standard based on the detailed evidence presented by affidavit and testimony at the hearing. As below discussed, we are not in a position to make such a determination as there was no hearing in this matter.

Here, because there was no hearing, the record was not developed, and there was no opportunity for petitioner to inquire as to whether there were issues regarding DMHAS misplacing claim forms as in SSI Medical.

Moreover, in SSI Medical, the Court noted, "DMAHS produced only 'generalized statements' that its former fiscal agent . . . had searched its files without finding the claims in question." Ibid. The Court determined that was inadequate. Ibid. Similarly, here, the record before us does not include any certifications from DMAHS regarding who searched the files, when they were searched, and whether there were any delays occasioned by the COVID-19 pandemic.[9] On the other hand, petitioner's law firm has provided a certification regarding the custom and practice of the law firm regarding its procedure for scanning and mailing fair hearing requests. Petitioner also produced an attorney's certification regarding the actual mailing of the fair hearing request form at issue.

Even if DMAHS had submitted such a conflicting certification, there would have been a fact issue. A judge may not make credibility determinations or resolve genuine factual issues based on conflicting affidavits. Conforti v.

[9] Rather, DMAHS appears to have based its decision, in part, on the fact that it provided petitioner's counsel "prompt responses" concerning two other fair hearing petitions filed around the same time as the disputed request.

Guliadis, 128 N.J. 318, 322 (1992). "When the evidence discloses genuine material issues of fact, the failure to conduct a plenary hearing to resolve those issues requires us to reverse and remand for such a hearing." K.A.F. v. D.L.M., 437 N.J. Super. 123, 138 (App. Div. 2014). The same principles would apply to DMAHS.

The record is insufficient for us to determine factually if petitioner properly sent the fair hearing request. The issue was never properly adjudicated because the matter was never transmitted to the OAL. For these reasons, we conclude this matter must be remanded to DMAHS for referral to the OAL for a fact-finding hearing to determine whether petitioner timely mailed the request for a fair hearing. If it is determined at the fact-finding hearing that service was proper, then the matter shall proceed expeditiously to a fair hearing to be considered on the merits. We take no position on the merits of the underlying application.

To the extent we have not addressed the parties' remaining arguments, we are satisfied they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Remanded for further proceedings consistent with our opinion. We do not retain jurisdiction.