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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2362-09T1

V.P.,

Petitioner-Appellant,

v.

DEPARTMENT OF HUMAN SERVICES,
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES and
BURLINGTON COUNTY BOARD OF
SOCIAL SERVICES,

Respondents-Respondents.

Submitted March 29, 2011 - Decided September 2, 2011

Before Judges Payne and Hayden.

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

Rothamel Bratton, attorneys for appellant (Austin F. DuBois, on the brief).

Paula T. Dow, Attorney General, attorney for respondent Department of Human Services, Division of Health and Human Services (Melissa H. Raksa, Assistant Attorney General, of counsel; Zoe J. McLaughlin, Deputy Attorney General, on the brief).

PER CURIAM

V.P. appeals the final decision of Division of Medical Assistance and Health Services (DMAHS) imposing a period of ineligibility for Medicaid services as a result of the transfer of ownership of her home to her son, R.P. V.P. contends that the home should not have been considered a countable asset because the transfer fell within the child caregiver exemption. For reasons that follow, we agree and reverse.

I

In October 2008, V.P., then 88 years old, was admitted to a nursing home after having suffered a stroke and a heart attack. Until the time of her stroke, she had lived in her home with R.P. On March 19, 2009, shortly after transferring ownership of her home to R.P, she applied for Medicaid benefits. The Burlington County Board of Social Services ("the Board") concluded that V.P. was ineligible at that time for Medicaid for nursing home payments. The Board decided that, due to what it determined was an impermissible transfer of her home, she was subject to a twenty-three-month and seventeen-day disqualification before she would be eligible.

V.P. appealed that determination, and the matter was transmitted to the Office of Administrative Law (OAL). The Administrative Law Judge (ALJ) found that the transfer met the child caregiver exception and recommended a reversal of the

disqualification. The Director of the DMAHS rejected the recommendation of the ALJ and upheld the disqualification. This appeal followed.

At the OAL hearing on July 21, 2009, V.P.'s witnesses included her son, R.P., her daughter, V.M., her grandson, A.L., her lifelong friend, L.M., as well as her treating physician, Dr. Deborah Malone. Three more potential witnesses were present but did not testify as the ALJ thought their testimony would be cumulative. The witnesses testified as follows.

R.P. helped V.P. move around the home, assisted her walking up and down the stairs, cleaned the house, drove her to doctors' appointments, ran errands, supervised her medicine intake and helped her bathe and with the toilet. For instance, V.P. was not able to get into the bathtub and could not sit in a tub full of water due to the increased risk for urinary tract infections. V.P. had to sit in a chair in the bathroom where R.P. washed and dried her.

He also cooked all her meals, making sure that they fit within her dietary requirements for diabetes and high blood pressure. He usually cut up her food because she could not do it herself. R.P. often brought meals to V.P. in bed because she could not come down the stairs.

R.P. only left V.P. alone when he went to work. When he left for work as a crossing guard, if V.P. was downstairs, R.P. set up a portable commode on the first floor. This was necessary because V.P. was unable to climb the stairs on her own. R.P. also worked the six to eleven p.m. shift at Super Fresh. Before leaving for work, he prepared his mother for bed. He made sure that she had reading materials and the television remote control and also set up the commode in her room. Whenever R.P. left the house, he kept his cell phone on, called regularly from work, and left work early or stayed home when his mother was sick or needed him.

V.M., V.P.'s daughter, visited her mother at least three times a week. She had seen her brother preparing meals, doing laundry, cleaning, and administering their mother's medication. Her mother suffered from excruciating back pain, which resulted in a compromised equilibrium and difficulty walking. V.P. also needed help from R.P. going up and down the stairs.

L.M., a friend of V.P., who visited approximately twice a month, had seen R.P. administer medicine, cook meals, and help V.P. move around the house and up the stairs. A.L., V.P.'s grandson, who visited approximately once a month, had seen that V.P. could not walk without assistance and had heard her

complain about back pain. V.P. seemed comfortable relying on R.P., rather than using a walker.

In addition, Dr. Malone, V.P.'s primary care physician, appeared but was not presented as an expert witness. The doctor testified concerning her patient as follows. V.P. suffered from a severe case of radiculopathy, caused by spinal discs pushing on the nerves to the lower extremities. Generally, it causes weakness and pain in the legs which makes it difficult to get around; occasionally, the legs will give out. V.P. was unable to take medicine for the radiculopathy because of her extensive medicine allergy. V.P. also had other orthopedic conditions, including scoliosis, severe degenerative arthritis and osteopenia.

Dr. Malone's file on V.P. contained a report, dated December 19, 2007, from Robert Taffet, M.D., to whom she had referred V.P. for evaluation of her "longstanding complaints of back pain." Dr. Taffet reported that V.P. had "very obvious thoracolumbar curves with significant deformity. There is some obliquity to her pelvis while standing. She has good range of motion with flexion and extension and limited lateral bending." Dr. Taffet reviewed some x-rays and noted they revealed "lumbar degenerative disc disease and quite significant lumbar and thoracic curves."

Dr. Malone's records also contained a report from Thomas O'Dowd, M.D., an orthopedist to whom she had referred V.P. in March 2008. The orthopedist had noted that she was "somewhat hunched over with an obvious deformity in her back" and "moves somewhat insecurely." He noted that she had "quite a bit of scoliosis in the thoracolumbar spine." He reviewed an MRI which showed "degenerative changes at multiple levels."

According to Dr. Malone, V.P. also suffered from hypertension, diabetes, gastroesophageal reflux disease, anxiety, and frequent urinary tract infections. Dr. Malone also reported that V.P. had allergies to hypertension medications, which meant that she had to follow a strict low salt diet to control her blood pressure. Additionally, she had diabetes. As a result, she needed to follow strict dietary guidelines to control her sugar. Within the last two years, V.P. had not been able to prepare meals to fit her dietary needs on her own. She had not been able to stand at the stove long enough to cook due to her severe back pain. In addition, the doctor had prescribed Valium to her for anxiety. V.P. needed someone to monitor the effect of it on her for safety. V.P. was not able to get to doctors' appointments by herself and could not get in and out of the bathtub safely.

As a result of her medical conditions, the doctor thought that V.P. would have had to enter a nursing home at least two years earlier if R.P. had not been caring for her. V.P. had told the doctor that R.P. did everything for her at home. The doctor had not noted in her records that V.P. needed institutional care because she appeared to have her significant needs met at home. The doctor also stated that her records contained no notation that V.P. needed assistance getting from the waiting room to the examining room because that was not the type of information she put in her patient's records.

James Suszynski, Medicaid Supervisor for the Burlington County Board of Social Services, testified that he made the ultimate decision to deny the exemption. He does not have a medical background and did not have a doctor review V.P.'s medical records. He made the decision based on his twenty-five years of experience as a Medicaid supervisor determining Medicaid eligibility. The caregiver exemption regulation required that the child give support exceeding such services as transportation and shopping. He denied the application for the exemption because R.P's affidavit showed only normal support activities. In addition, Dr. Malone's certification that V.P. needed an institutional level of care did not match the medical records. After reviewing V.P.'s medical information from 2006

to 2008, he felt that it did not appear that R.P. provided more than normal support activities.

In her written opinion, the ALJ found that the witnesses for the petitioner were believable. She found that the credible evidence in the record showed V.P. had numerous physical conditions, including scoliosis, degenerative disc disease and lumbar radiculopathy, which meant she could not care for herself without special assistance. The ALJ credited Dr. Malone's opinion that if it were not for that care provided by R.P., the petitioner would have had to reside in a nursing home. The ALJ also found support for Dr. Malone's medical opinions in the other medical records, including Dr. O'Dowd's report. The ALJ concluded,

> R.P. provided more than normal support activities to V.P. He provided care that was essential to the health and safety of V.P., including overseeing her medication doses, preparing her meals keeping in mind her nutritional requirements and helping her around the house in light of her chronic back pain. I further [conclude], therefore, that R.P. met his burden of proving that he was eligible for the child caregiver exemption, N.J.A.C. 10:71-4.10(d), when V.P.'s home was transferred to him by deed of March 2009.

On December 9, 2009, the Director of DMAHS made the decision to reject the ALJ's recommendation. The Director stated that the child caregiver exception requires more than

"normal person support activities and Petitioner's physical or mental condition must be such as 'to require special attention and care.'" The Director found Dr. Malone's testimony to be inconsistent with her medical records. The Director appeared very concerned with the lack of notation in any medical record in 2009 that V.P. needed help walking from her doctor's waiting room to the examining room. Also, the Director pointed out that V.P.'s only medications were Valium and Tylenol. In addition, he noted that R.P.'s initial certification concerning care he provided for his mother did not include the fact that he helped his mother to walk or in the bathroom. Consequently, the Director rejected the ALJ's findings to the contrary and concluded that V.P. needed only normal support activities, not special attention and care, and thus was not eligible for the child caregiver exemption.

II

The Federal Medicaid Act, Title XIX of the Social Security Act, 42 U.S.C.A. § 1396a to -1396v, establishes a joint federal-state program to provide financial assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services. Once a state joins the program, it must comply with the Medicaid statute and federal regulations in order to receive Medicaid funds. See Harris v. McRae, 448 U.S.

297, 308, 100 S. Ct. 2671, 2683-84, 65 L. Ed. 2d 784, 799 (1980). Participating states must submit a state plan for approval to the Secretary of the Department of Health and Human Services in order to receive federal financial participation. 42 U.S.C.A. § 1396a.

The Social Security Act confers broad discretion on the participating states "to adopt standards determining the extent of medical assistance, requiring only that the standards be 'reasonable' and 'consistent with the objectives' of the Act." Monmouth Med. Ctr. v. State, 158 N.J. Super. 241, 249 (App. Div. 1978), aff'd, 80 N.J. 299 (1979). New Jersey's participation in the federal Medicaid program was authorized by the enactment of the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5.

DMAHS is the agency within the Department of Human Services that administers the Medicaid program. Eligibility for medical assistance is governed by regulations adopted in accordance with the authority granted by the Commissioner of the New Jersey Department of Human Services. N.J.S.A. 30:4D-7a. Individuals seeking Medicaid must submit an application to the county board of social services for review for compliance with the regulatory requirements. N.J.A.C. 10:71-1.1; N.J.A.C. 10:71-2.2(b).

Generally, only applicants with income and non-exempt resources below specified levels may qualify for Medicaid assistance. An applicant's countable resources cannot exceed $2,000 to qualify for the New Jersey Medicaid Only program. N.J.A.C. 10:71-4.5. An applicant's resources cannot be transferred or disposed of for less than fair market value without penalty after the start of the sixty-month period prior to the application (look-back period). 42 U.S.C.A. § 1396p(c)(1); N.J.A.C. 10:71-4.10(b)(9)(iii). The calculation of the length of the transfer penalty, during which Medicaid benefits are not available, is set forth in N.J.A.C. 10:71-4.10(m)(1).

N.J.A.C. 10:71-4.10(d), which contains the caregiver exemption, provides as follows:

> (d)[A]n individual shall not be ineligible for an institutional level of care because of the transfer of his or her equity interest in a home which serves (or served immediately prior to entry into institutional care) as the individual's principal place of residence and the title to the home was transferred to: . . . .
>
> > 4. A son or daughter of the institutionalized individual . . . who was residing in the individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual and who has provided care to such individual which permitted the individual to reside

> in the home rather than in an institution or facility.
>
> i. The care provided by the individual's son or daughter for the purposes of this subchapter shall have exceeded normal personal support activities (for example, routine transportation and shopping). The individual's physical or mental condition shall have been such as to require special attention and care. The care provided by the son or daughter shall have been essential to the health and safety of the individual and shall have consisted of activities such as, but not limited to, supervision of medication, monitoring of nutritional status, and insuring the safety of the individual.

We begin by examining some well-recognized principles concerning judicial review of administrative agency decisions. "Appellate courts have 'a limited role' in the review of such decisions." In re Stallworth, ___ N.J. ___, ___ (2011) (slip op. at 23)(quoting Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)); see also In re Taylor, 158 N.J. 644, 656 (1999). We will intervene only "in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission

or other state policy." In re Musick, 143 N.J. 206, 216 (1996). We must defer to an agency decision unless it is arbitrary, capricious or unreasonable, or not supported by substantial credible evidence in the record as a whole. In re Stallworth, supra, ___ N.J. ___(slip op. at 23-24). "A reviewing court 'may not substitute its own judgment for the agency's, even though the court might reach a different result.'" Id. at ___ (slip op. at 23-24)(quoting In re Carter, 191 N.J. 474, 483 (2007)). Nevertheless, if our review of the record shows that the agency's finding is clearly mistaken, the decision is not entitled to judicial deference. See H.K. v. Dep't of Human Servs., 184 N.J. 367, 386 (2005); L.M. v. State, Div. of Med. Assist. & Health Servs., 140 N.J. 480, 490 (1995).

Moreover, when an agency rejects an ALJ's findings of facts, we need not give the agency the deference we ordinarily accord review of final administrative decisions. See H.K. v. Dep't of Human Servs., supra, 184 N.J. at 384. An agency cannot simply reverse an ALJ's factual finding based upon the credibility of lay witnesses without meeting certain specific requirements:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not

> supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.
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> [N.J.S.A. 52:14B-10(c)]

As we have previously noted, under this statute the agency

> was not at liberty to simply substitute its judgment for that of the ALJ's. . . . When an ALJ has made factual findings by evaluating the credibility of lay witnesses, the [agency] may no longer sift through the record anew to make its own decision, which will be affirmed if it is independently supported by credible evidence. . . . [I]n order to reverse such a factual finding by an ALJ, the agency head must explain why the ALJ's decision was not supported by sufficient credible evidence or was otherwise arbitrary.
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> [Cavalieri v. Bd. of Trs., Pub. Employees Ret. Sys, 368 N.J. Super. 527, 534 (App. Div. 2004) (citations omitted).]

Here, the Director failed to satisfy the above statutory burden. The ALJ found truthful Dr. Malone's testimony about her patient's severe medical conditions. Dr. Malone's opinion was corroborated by the reports of Dr. O'Dowd and Dr. Taffet as well as their review of x-rays and an MRI that showed she had rather severe orthopedic problems, including degenerative disc disease, and significant scoliosis in her lumbar and thoracic spine.

Thus, the evidence the ALJ determined to be credible showed that V.P. had severe orthopedic conditions, rendering her unable to stand securely, climb stairs, move about freely, cook, and bathe on her own. Family and friends supported the statement she made to her doctor that her son did everything for her. Nevertheless, the Director simply discounted the testimony of all the witnesses found credible by the ALJ. In addition, the Director rejected as incredible all the witnesses' testimony that V.P. was unsteady and needed assistance in walking based on the fact that the medical records in 2009 did not state that V.P. needed assistance walking to the examining room. Yet, Dr. Malone testified, credibly according to the ALJ, that she would not write such details in a patient's medical records.

The Director apparently rejected the credibility finding of the ALJ based upon the medical records provided from 2006 to 2008. The Director found that, contrary to the testimony of her treating physician and the reports of two consultants, the records did not show that V.P. had any serious medical condition. There is nothing the Director points to in the record as a whole that suggests that the physical conditions identified by three doctors, apparently relying on x-rays and an MRI, were fabrications or misdiagnoses. The Director's reliance on reports from the ear, nose and throat specialist and the

gastroenterologist that V.P. health appeared normal for her age is not sufficient to negate the findings of the three doctors focusing on her back problems.

Further, the Director does not provide a cogent reason for rejecting Dr. Malone's statement that her usual practice was not to note in a patient's file whether she needed assistance walking to the examining room. Nor does he provide support for his assumption that doctors generally observe patients coming from the waiting room to the examining room, and note any instability in the patient's record. We think that the Director's unsupported speculation regarding V.P.'s ability to walk is too slender a thread on which to hang the rejection of the credibility findings of the ALJ.

Utilizing the standard codified in N.J.S.A. 52:14B-10(c), we find that the Director has not demonstrated that the ALJ's credibility findings were arbitrary, capricious or unsupported by the record. Moreover, the scant evidence in the record marshaled by the Director to sustain his alternate factual finding is not supported by substantial credible evidence in the record as a whole and hence does not meet the statutory requirement. N.J.S.A. 52:14B-10(c). Accordingly, the agency and this court must accept the credible evidence as found by the ALJ that due to her physical condition V.P. needed her son's

continuous assistance, not just routine support, to keep her safe and healthy.

N.J.A.C. 10:71-4.10(d) describes normal personal support as services such as "routine transportation and shopping." To qualify for the child caregiver exemption "special attention and care" must be both needed and provided. This care must be essential to the health and safety of the individual and consist of "activities such as, but not limited to, supervision of medication, monitoring of nutritional status, and insuring the safety of the individual." Ibid. We agree that the credible evidence in the record supports the ALJ's finding that V.P needed, and R.P. provided, special care and attention essential to her health and safety. Hence, V.P. met the requisites of N.J.A.C. 10:71-4.10(d) for the child caregiver exemption. We agree that, as V.P. qualified for an exemption under this regulation, the transfer of her home to her caregiver son should not be subject to a transfer penalty. We reject the Director's unsupported determination to the contrary as it did not take into consideration all the credible evidence in the record as a whole.

We conclude that the decision and resulting order of the Director of DMAHS was arbitrary and without basis in fact or law and therefore requires reversal. Accordingly, we reverse the

Director's decision and remand the matter to the DMAHS for determination of the date of V.P.'s eligibility for Medicaid without disqualification for the transfer of her home to her son.

Reversed.