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OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0514-13T2

GRETA REUTER,

Appellant,

v.

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

Respondents.

Argued October 6, 2014 – Decided October 17, 2014

Before Judges Sabatino and Guadagno.

On appeal from the Division of Medical Assistance and Health Services, Fair Hearing Unit.

Carleen M. Steward argued the cause for appellant (Fruhschein & Steward, LLC, attorneys; Ms. Steward, on the brief).

Stephen Slocum, Deputy Attorney General, argued the cause for respondents (John J. Hoffman, Acting Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Mr. Slocum, on the brief).

PER CURIAM

Appellant Greta Reuter appeals from a final agency decision of the Division of Medical Assistance and Health Services ("DMAHS" or "the Division") rejecting her request for a fair hearing to challenge the Division's adverse determination regarding her eligibility for Medicaid benefits. The Division denied appellant a fair hearing because her request had not been filed within twenty days of the date of the notice of the Medicaid determination, as prescribed by N.J.A.C. 10:40-10.3(a), unless that deadline is extended due to "extraordinary and extenuating circumstances." N.J.A.C. 10:69-6.8(b). For the reasons that follow, we reverse and remand for further proceedings.

The limited record before us shows that appellant resides in a nursing home. With the apparent assistance of family members, appellant applied for benefits under what is known as the Medically Needy Program. The program is administered statewide by the DMHAS and locally in Burlington County by the Burlington County Board of Social Services ("BCBSS"). Appellant at some point retained counsel to assist her in securing these benefits.

As memorialized in correspondence to appellant on BCBSS letterhead bearing the typewritten date of March 28, 2013, the agency decided to approve certain benefits retroactively for her for the period of June 1, 2012 through September 30, 2012 and also for the separate month of May 2012. However, the agency declined

to provide appellant with additional benefits because she allegedly had not provided certain information it had requested concerning her inheritance from the estate of her late husband. The letter included standard language notifying its intended recipient that she had twenty days to request a fair hearing to challenge the decision.

Notably, the record is bereft of any proof that the March 28, 2013 letter was actually mailed from the BCBSS and that it was actually received by appellant at her nursing home address as shown on the letter. The letter was not send by certified mail, nor did the agency have the letter tracked by the United States Postal Service ("USPS"). According to the Deputy Attorney General who argued the appeal, the Division and the county agencies that administer the Medicaid program normally do not transmit such notices by certified mail or use USPS tracking, because of the high volume of such correspondence and the attendant costs involved. The Division maintains that, at the very least, appellant received constructive notice of the March 28, 2013 disposition because of alleged awareness of it by the nursing home facility where she resides.

Appellant contends that she did not receive the March 28, 2013 letter in the mail. She asserts that she did not learn of the letter and its contents, including the notice for seeking a

fair hearing, until much later on July 25, 2013 when the letter was faxed to her counsel by the agency at his request. According to appellant, her attorney initiated contact with the agency because he and appellant had not heard anything from the agency for some time.

On August 2, 2013, eight days after her attorney received a faxed copy of the agency's letter, he faxed and also sent by certified mail a letter to the Division's fair hearing unit requesting such a hearing. In that letter, counsel represented that his office had not been notified before July 25, 2013 of the agency's termination of future benefits. He further represented that the nursing home likewise had no record of receiving the March 28, 2013 correspondence at the time when it was supposedly issued.

On August 15, 2013, the Division denied appellant's request for a fair hearing, taking the position that the request was untimely, having been made 127 days after the date of the March 28 letter from BCBSS. The Division did not extend the deadline or address under N.J.A.C. 10:69-6.8(b) whether extraordinary and extenuating circumstances were present to justify such an extension. The Division further noted that the nursing home must have been aware of the March 28, 2013 disposition because it received on appellant's behalf payments for the months for which

her eligibility was approved, and it had not been paid on bills it submitted thereafter.

Appellant contends that the Division's denial of her fair hearing request, and its refusal to extend the twenty-day deadline in these circumstances, is arbitrary and capricious. In particular, she continues to deny that she ever received the March 28, 2013 letter from the BCBSS. She also emphasizes that the agency has tendered no proof of service substantiating that the March 28, 2013 letter was actually mailed out to her and that she received it. In response, the Division maintains that it did not act arbitrarily or capriciously by enforcing its twenty-day deadline. The Division's brief also cites case law supporting the general principle that mailed service in our legal system is ordinarily presumed to be valid and effective upon mailing.

In reviewing the parties' contentions, we accord substantial deference to the Division as a state administrative agency acting within its sphere of delegated functions. See In re Anthony Stallworth, 208 N.J. 182, 194 (2011). Except where the agency has violated constitutional rights or the terms of a statute, courts generally do not overturn the agency's decision unless it is shown to be "'arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole.'" Stallworth, supra, 208 N.J. at 194 (quoting Henry v. Rahway State

Prison, 81 N.J. 571, 580 (1980)) (alteration in original); see also W.T. v. Div. of Med. Assistance & Health Servs., 391 N.J. Super. 25, 36 (App. Div. 2007). In that same vein, we accord substantial deference to an "'agency's interpretation of statutes and regulations within its implementing and enforcing responsibility[.]'" E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 355 (App. Div. 2010) (quoting Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001)). However, we do not give deference to an agency's legal determinations. A.B. v. Div. of Med. Assistance & Health Servs., 407 N.J. Super. 330, 340 (App. Div.) (quoting Levine v. State Dep't of Transp., 338 N.J. Super. 28, 32 (App. Div. 2001)), certif. denied, 200 N.J. 210 (2009). Instead, the judicial construction of statutes and regulations entails legal issues that are reviewed on appeal de novo. Ibid.

Applying these principles to the service and notice issues presented here, we conclude that this is an exceptional instance in which the agency has misapplied its authority. The agency acted arbitrarily and capriciously by summarily rejecting appellant's contention that she did not receive the March 28, 2013 letter from the BCBSS, despite the absence of any documented proof of service that would gainsay her assertion.

The Division's reliance on First Resolution Investment Corp. v. Seker, 171 N.J. 502 (2002), and similar cases involving mailed service of court documents, is of little benefit to its position. In First Resolution, the plaintiff sent, by certified and regular mail, a notice of application for wage execution to the defendant. Id. at 505. The letter sent by certified mail was returned and marked "unclaimed" and the one sent by regular mail was not returned. Ibid. The plaintiff submitted a certification of service to the trial court, explaining how the letters had been sent and that the certified mail was returned "unclaimed." Ibid.

The Supreme Court in First Resolution discussed the required procedure for enforcing monetary judgments through wage executions. Id. at 508. In doing so, the Court referred to Rule 1:5-4, which prescribes that service by mail is deemed complete upon the mailing of ordinary mail, but only if that is done simultaneously with a mailing by certified or registered mail, or on the recipient's acceptance if mailed only by certified or registered mail. Ibid.; R. 1:5-4(b). If the recipient does not claim or refuses to accept the certified or registered mail, it is complete on the mailing of the simultaneous ordinary mail. Id. at 508; R. 1:5-4(b).

This present circumstances are distinguishable from First Resolution. In First Resolution, there was evidence that the

letters were actually mailed, namely the plaintiff's proof of service. In this case, no such proof of service by the agency has been provided. The record simply contains a dated and addressed letter. There is no proof of mailing, return receipt, tracking number, or certification from anyone at BCBSS or DMAHS substantiating that the March 28 letter was actually mailed and that it was actually received by appellant. It is entirely conceivable that the letter never made it out of the agency's mail room, or that the envelope was misaddressed and the letter discarded by a wrong recipient. Moreover, the denial by the nursing home that the letter was ever received further undermines the Division's claim of proper service.

The agency's arguments concerning the propriety of service are undermined by the Supreme Court's analysis in SSI Medical Services v. HHS, Div. of Medical Assistance & Health Services, 146 N.J. 614 (1996). In that case, the plaintiff was a qualified provider that was denied reimbursement by the DMAHS on some of its claims. The plaintiff asserted that it had mailed the reimbursement forms and submitted photocopies of the claims, along with "employee affidavits attesting to [the plaintiff's] standard procedure for mailing Medicaid claims." Id. at 618. In response, the Division provided a computer printout of received claims,

which demonstrated that there was no record of the agency timely receiving the claims from the plaintiff. Ibid.

The Supreme Court in SSI Medical Services focused on whether the plaintiff could rely on a legal presumption of proper mailing. Id. at 621. The Court acknowledged that published cases in our state "have recognized a presumption that mail properly addressed, stamped, and posted was received by the party to whom it was addressed." Ibid. In order to invoke this presumption, however, the party relying on it must show: "(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." Ibid. (citing Lamantia v. Howell Twp., 12 N.J. Tax 347, 352 (Tax 1992)). The Court held that these elements must be proved by a preponderance of the evidence. Id. at 622.

The Court acknowledged in SSI Medical Services that evidence of office custom can aid a party in establishing the presumption of mailing, but that it is insufficient by itself to trigger the presumption, and requires "other corroboration that the custom was followed in a particular instance, in order to . . . meet the preponderance of the evidence standard." Id. at 622-23 (citing Cwiklinski v. Burton, 217 N.J. Super. 506, 510 (App. Div. 1987)). Applying these principles to the record before it, the Court ruled

that since detailed testimony and affidavits had been provided outlining the mailing procedures of the plaintiff, and photocopies of the missing claim forms were produced, the preponderance of the evidence supported a finding that the plaintiff had mailed the claims, and thus raised a presumption of receipt. Id. at 623-24.

The Court further noted in SSI Medical Services that, in general, a party's reliance on "evidence of business custom or practice also requires proof that the custom or practice was actually followed on the specific occasion in order to establish the fact of mailing." Cwiklinski, supra, 217 N.J. Super. at 511. The Court did recognize that in contexts involving large business organizations with complex business operations and voluminous items being mailed daily, "it may not be possible for individuals engaged in mailing activities to recall actual mailing of a document or whether the custom or practice of mailing was followed on a given day." Ibid. In such high-volume contexts, "other corroborating proof creating the reasonable inference that the custom was followed on the given occasion may suffice to establish proof of mailing." Ibid.; cf. Calabrese v. Selective Ins. Co. of Am., 297 N.J. Super. 423, 436-37 (App. Div. 1997), overruled on other grounds Magnifico v. Rutgers Cas. Ins. Co., 153 N.J. 406, 416 (1998) (finding no presumption of mailing where a single affidavit was provided that was general and unclear and not offered

by a person at the company who had personal knowledge of its mailing policies). Further, "[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." SSI Med. Servs., supra, 146 N.J. at 625 (internal quotation marks and citations omitted).

Here, the Division and the BCBSS have furnished no such corroborating proof of the BCBSS's mailing customs, either in the appellate appendices or the statement of items comprising the record filed pursuant to Rule 2:5-4(b). The omission of such proof of custom further weakens the agency's position.

We also offer the following pragmatic observation. Given the totality of circumstances here, it would strain common sense for appellant, her family members, and her attorney to have disregarded the letter when it supposedly arrived and have waited 127 days to pursue a fair hearing. Appellant had submitted an application for important financial benefits relating to her ongoing care at a nursing home. That application was reasonably believed to be pending until her attorney took the initiative to contact the agency and ascertain the status of the matter in July 2013. Once informed of that status, the attorney responded within eight days with a fair hearing request. Although that action was not immediate it also did not consume an unreasonable amount of time.

The course of events that transpired is consistent with the credibility of appellant's assertion that she never got the letter in March 2013 or within the twenty-day period of its issuance.

We also reject the Division's argument that the nursing home's alleged notification of the termination of appellant's benefits sufficiently placed appellant personally on notice of the agency's action. The notice issues here implicate the constitutional due process interests of appellant individually. As the party affected personally by a government agency's adverse decision in her own case, she was entitled individually to fair notice and an opportunity to be heard in contesting that decision. In re Proposed Quest Academy Charter School of Montclair Founders Group, 216 N.J. 370, 384 (2013); In re Registrant, C.A., 146 N.J. 71, 94 (1996). Such notice to her has not been substantiated here.

For all of these reasons, we conclude that the matter must be remanded to the Division. We are mindful that appellant has not tendered a certification with a proffer attesting, under penalty of perjury, that she did not receive the March 28, 2013 letter. We agree with the Division that it would have been preferable for appellant to have done so before embarking on this appeal. As a condition of a remand, appellant must tender such a

certification to the Division within fifteen days of our opinion.[1] If the Division is satisfied with the certification and yields its position that service was properly made upon appellant, then the merits of the case shall proceed expeditiously to a fair hearing. If, conversely, the Division is dissatisfied with the certification and persists in doubting appellant's credibility as to her assertion of lack of service, the matter shall be referred to the Office of Administrative Law ("OAL") for a fact-finding hearing limited to the contested service issues. The OAL's ruling on that subject may then, in turn, be reviewed or challenged before the agency, and ultimately by this court if further review is sought.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

[1] Appellant's counsel indicated to us at oral argument that she would not object to such a condition, and represented that her client would be able to furnish the certification.