

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4816-13T3

M.S.,

Petitioner-Appellant,

v.

DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES,

Respondent-Respondent.

Argued September 2, 2015 – Decided January 14, 2016

Before Judges Leone and Higbee.

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

Carl G. Archer argued the cause for appellant (Archer Law Office, LLC, attorneys; Mr. Archer, on the briefs).

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

PER CURIAM

Petitioner M.S. appeals from a final agency decision by the Director of respondent Division of Medical Assistance and Health Services (Division). The Director reversed the decision of the

Administrative Law Judge (ALJ), who had reversed the Division's denial of authorization of a motorized wheelchair. We vacate the Director's decision and remand for further proceedings.

I.

The ALJ found the following facts. The seventy-three-year-old plaintiff resides in a 220-bed Genesis Healthcare facility (facility). She has an extensive medical history, including obesity, diabetes, arthritis, osteoporosis, and chronic obstructive pulmonary disease. She suffered a stroke, and as a result is hemiplegic: the left side of her body is non-functional. She has been using a manual one-arm wheelchair.

Petitioner submitted an application seeking the Division's authorization of a power wheelchair. The application included a letter by occupational therapist Carmen Wong, detailing pain in petitioner's right shoulder due to overuse in the manual wheelchair; a letter by Dr. Patel indicating petitioner complained of increased pain in her right shoulder causing her great difficulty in propelling the manual wheelchair; and a letter by Dr. Bach recommending petitioner be given a power wheelchair.

The Division denied the application because the "item(s) requested are considered part of the per diem rate" paid to the

facility under N.J.A.C. 10:59-1.4(a)(4). Petitioner requested a hearing.

At the hearing before the ALJ, Dr. John Sawicki testified for the Division as follows. Dr. Sawicki denied petitioner's request after reviewing her written application for a power wheelchair. He did not examine petitioner or conduct a field evaluation. Dr. Sawicki cited Dr. Patel's letter that petitioner would benefit from a power wheelchair primarily because she was a very active patient who liked to participate in all the activities of the facility. Dr. Sawicki determined that, within the per diem rate paid by the New Jersey Medicaid/NJ FamilyCare program (Medicaid), the facility should already be providing services that would enable petitioner to have greater participation in activities. Thus, he concluded that a power wheelchair was not medically necessary.

Dr. Darryl Freeman is a physical therapist and administrator at the facility, who has treated petitioner and is an expert in physical therapy. He testified for petitioner as follows. He was thoroughly familiar with petitioner's medical history and present physical state. Petitioner has little or no use of one side of her body and cannot walk. Due to petitioner's use of the manual one-armed wheelchair, Dr. Freeman observed deterioration in petitioner's right shoulder which

caused her pain. Dr. Freeman concluded that continued use of a manual wheelchair will only lead to further deterioration.

Dr. Freeman opined that use of a power wheelchair would decrease further deterioration of petitioner's right shoulder and was medically necessary. Dr. Freeman supervised a test which showed petitioner could successfully use a power wheelchair.

Dr. Freeman testified that the pain petitioner experiences using the manual wheelchair limits her mobility, preventing her from traveling far. Dr. Freeman opined that a power wheelchair would enable her greater participation in activities and enhance her limited independence.

The ALJ found petitioner's request for the power wheelchair was improperly denied. The ALJ credited Dr. Freeman's testimony. The ALJ was not persuaded by Dr. Sawicki, whose paper review gave him no basis for concluding that petitioner's physical state was other than as represented by Dr. Freeman's testimony and the letters by Wong and the doctors. The ALJ credited the evidence that the deterioration and pain in petitioner's right shoulder would be alleviated by a power wheelchair. The ALJ found that a power wheelchair was medically necessary, and reversed the Division's denial.

In a Final Agency Decision dated April 17, 2014, the Director reversed the ALJ's decision for three reasons. First, the Director agreed with Dr. Sawicki that petitioner "had failed to demonstrate that the requested wheelchair is medically necessary to treat, evaluate or diagnose Petitioner's medical condition" under N.J.A.C. 10:49-5.5(a)(1). Second, the Director found that a power wheelchair was not cost-effective under N.J.A.C. 10:59-1.4(a)(1). Third, the Director found that "providing necessary equipment (e.g., a wheelchair) as well as providing assistance in that wheelchair, including qualified attendants available to transport Petitioner where she wants to go, is within the nursing home's responsibility, and is already included in the rate paid to the nursing home under its [Medicaid] contract," citing N.J.A.C. 10:59-1.4(a)(4) and N.J.A.C. 8:85-2.15(c). Petitioner appeals.

II.

We must hew to our standard of review. "Courts have a limited role in reviewing the decision of an administrative agency." SSI Med. Servs. v. HHS, Div. of Med. Assistance & Health Servs., 146 N.J. 614, 620 (1996). "Ordinarily, reversal is appropriate only if the decision of the agency is arbitrary, capricious or unreasonable, or not supported by substantial credible evidence in the record as a whole." Ibid. Generally,

"an agency determination is entitled to deference in respect of the expertise that the agency head brings to the statutory scheme that he or she is charged with administering." H.K. v. State, 184 N.J. 367, 384 (2005). "'Deference to an agency decision is particularly appropriate where interpretation of the Agency's own regulation is in issue.'" R.S. v. Div. of Med. Assistance & Health Servs., 434 N.J. Super. 250, 261 (App. Div. 2014) (citation omitted). Given the complexity of Medicaid statutes and regulations, there is "significant deference accorded agency decisions in the Medicaid context." Id. at 265. However, "an appellate court is 'in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue.'" Id. at 261 (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)).

III.

Petitioner first challenges the reason given by the Division in its initial denial notice, and reaffirmed by the Director: that Medicaid was not required to purchase a power wheelchair because it was considered part of the per diem paid to the nursing facility (NF) under N.J.A.C. 10:59-1.4(a)(4) ("(a)(4)"). N.J.A.C. 10:59-1.4 sets forth circumstances under

which Medicaid does not cover durable medical equipment (DME).¹ Under (a)(4), "[m]edical supplies, routinely used DME and other therapeutic equipment/supplies essential to furnish the services offered by a facility for the care and treatment of its residents are considered part of the NF's per diem and therefore, not covered." N.J.A.C. 10:59-1.4(a)(4); see N.J.A.C. 10:59-1.6(f). "Exceptions to [(a)(4)] include certain durable medical equipment not routinely used in a nursing facility and which is required due to the medical need of the individual resident[.]" N.J.A.C. 10:59-1.4(a)(5).²

¹ DME means "an item or apparatus" that: is "primarily and customarily prescribed to serve a medical purpose and is medically necessary for the beneficiary for whom requested;" is "generally not useful to a beneficiary in the absence of a disease, illness, injury, or disability;" and is "capable of withstanding repeated use (durable) and is nonexpendable; for example, hospital bed, oxygen equipment, wheelchair, walker, suction equipment, and the like." N.J.A.C. 10:59-1.2 (emphasis added).

² Similarly, the regulations governing nursing facility services provide that "[r]outinely used durable medical equipment ordered for Medicaid beneficiaries in a participating NF (for example, walkers, wheelchairs, . . .) and other therapeutic equipment and supplies essential to furnish the services offered by the facility for the care and treatment of its residents shall be considered part of the NF's cost, and shall not be billed directly to the program by the supplier." N.J.A.C. 8:85-2.15(c) (emphasis added). However, "[w]hen unusual circumstances require special medical equipment not usually found in a NF, such special equipment may be reimbursable[.]" N.J.A.C. 8:85-2.15(d).

"Examples of th[e] type of equipment and supplies [for which coverage is excluded by (a)(4)] include, but are not limited to, . . . (xvii) Standard wheelchairs and accessories including adjustable leg rests and detachable armrests[.]" N.J.A.C. 10:59-1.4(a)(4).³ The Division does not argue that the power wheelchair requested by petitioner is a standard wheelchair.⁴ Rather, the Division notes that (a)(4)'s list is non-exclusive. However, (a)(4) excludes from coverage only DME that is "routinely used" and "essential to furnish the services offered by a facility for the care and treatment of its residents." N.J.A.C. 10:59-1.4(a)(4).

There is no evidence in the record that power wheelchairs are routinely used or essential to the facility's services. Dr. Freeman testified that the facility does not provide power wheelchairs because they are "really not part of what we're expected to provide for a patient," and that the facility expects Medicare or insurance to pay for them. Because the evidence was that power wheelchairs are "not routinely used" or

³ See N.J.A.C. 8:85-1.16(e)(4) ("The basic items that NFs shall make available for beneficiary use under the Medicaid program include . . . ii. Durable medical equipment such as wheelchairs"). Dr. Freeman testified that the facility provides manual wheelchairs when necessary. The facility provided petitioner with the manual one-armed wheelchair.

⁴ See N.J.A.C. 10:59-2.3 (coding a "Standard wheelchair" differently from motorized or power wheelchairs).

essential to the facility's function, they are not "considered part of the NF's per diem." N.J.A.C. 10:59-1.4(a)(4), (5).

Thus, the requested power wheelchair was not excluded by (a)(4), and may be covered if "required due to the medical need of" petitioner. N.J.A.C. 10:59-1.4(a)(5).

IV.

Petitioner next argues that a power wheelchair was medically required. The Division will not pay for "[a]ny service, admission, or item, which is not medically required for diagnosis or treatment of a disease, injury, or condition[.]" N.J.A.C. 10:49-5.5(a)(1). "Medical necessity" is not defined in the regulations "because these decisions are based upon the professional medical judgement of appropriate Division staff and the actual data provided for each request," and "take into consideration all aspects of [the beneficiary's] needs, including medical and rehabilitative needs; a beneficiary's potential for independence; and ensuring the provision of quality and cost-effective medical supply services." 28 N.J.R. 1027(a).

The Division asserts the power wheelchair is not medically required for treatment because petitioner seeks it so she can participate in activities. However, nursing facility regulations require that "[a]n ongoing resident activities

program shall be established as an adjunct to the treatment program and an integral component of the interdisciplinary plan of care." N.J.A.C. 8:85-2.5(a). "The program shall be a planned schedule of appropriate social, physical, spiritual, psychological, leisure, cognitive, vocational and educational activities designed to meet the needs, interests, and behaviors of all residents, whether ambulatory, chair bound, or bedfast." Ibid. (emphasis added). The activities must "enable the residents to maintain a sense of usefulness and self-respect, and when possible, help to prevent regression," "encourage development or restoration to self-care and resumption of normal activities, stimulate and maximize the total functional ability of the resident and assist the resident to integrate into the social life of the facility." N.J.A.C. 8:85-2.5(b).

Similarly, the federal regulations require long-term care facilities to "provide for an ongoing program of activities designed to meet . . . the interests and the physical, mental, and psychosocial well-being of each resident." 42 C.F.R. § 483.15(f). "A resident has the right to participate in social, religious, and community activities," and to "receive services in the facility with reasonable accommodation of individual needs." 42 C.F.R. § 483.15(d), (e)(1).

Moreover, as the Director noted, "[t]he ALJ found that a power wheelchair is medically necessary because it would prevent further deterioration of Petitioner's right shoulder and alleviate the pain that she currently experiences using a manual wheelchair." The ALJ's finding was supported by Dr. Freeman's testimony, including that using the manual wheelchair exacerbated petitioner's pain, osteoarthritis, rotator cuff impingement, shortness of breath, and fatigue, while use of a power wheelchair would decrease her pain and shortness of breath, and reduce the wear and tear on her right shoulder.

Thus, we reject the Division's arguments that petitioner failed to show a power wheelchair was medically necessary.

V.

The Director stressed that "[w]hat the ALJ fail[ed] to take into account is that Petitioner resides in a nursing home where the Medicaid program is paying for 24-hour care, thus negating the need for Petitioner to operate a wheelchair herself." The Director stated that "providing assistance in that wheelchair, including qualified attendants available to transport Petitioner where she wants to go, is within the nursing home's responsibility, and is already included in the rate paid to the nursing home under its contract as a Medicaid provider."

For support, the Director cited N.J.A.C. 10:59-1.4(a) and N.J.A.C. 8:85-2.15(c). However, those regulations are inapplicable, as they merely distinguish DME for which the nursing facility is responsible from DME for which Medicaid will separately reimburse. Those regulations do not dictate that nursing facility staff push the wheelchairs of the residents.

On appeal, the Division cites 42 C.F.R. § 483.25, which states that in long-term care facilities, "[e]ach resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care." The Division also cites the licensing standards for long-term care facilities, under which a facility "shall provide and ensure that each resident receives all care and services needed to enable the resident to attain and maintain the highest practicable level of physical (including pain management), emotional and social well-being, in accordance with individual assessments and care plans." N.J.A.C. 8:39-27.1(a).

Those general provisions do not explicitly require the nursing facility staff to push a resident's wheelchair. Nor have we located such a requirement in the more specific

licensing provisions.⁵ Rather, the licensing regulations simply require that the facility provide a "walker or a tripod cane to each resident who requires mechanical assistance to walk," and a "wheelchair to each resident who is not ambulatory." N.J.A.C. 8:39-31.8(f)(2), (3).

We do not suggest that nursing facility staff cannot have a duty to push a patient's wheelchair to get her to activities. Rather, because such a duty is not spelled out in the cited regulations, it must be established as a matter of fact.

Here, Dr. Sawicki testified that the facility's staff are required to assist residents by "pushing them down the hallway" in their wheelchairs, including by "taking them to activity rooms or outside. So those services are all included in the per diem already." The ALJ apparently did not credit Dr. Sawicki's testimony in this regard. The ALJ instead credited Dr. Freeman, who testified that "[t]here was not always someone available to push [petitioner] somewhere, and then push her back."⁶ Based on

⁵ Cf. N.J.A.C. 8:39-17.3(c) ("For each meal, the facility shall assign staff to help residents who require assistance with eating."); N.J.A.C. 8:39-27.3(b) ("Residents shall be afforded an opportunity to go outdoors on a regular basis").

⁶ Petitioner submitted a certification that "no staff is available to help me move." However, the ALJ made clear that only testimony, not certifications, would be considered.

his testimony, the ALJ found that "the facility's staff was not consistently available to wheel her to the activity room."

An agency head, such as the Director, cannot "reject or modify any findings of fact [by the ALJ] 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." N.J.S.A. 52:14B-10(c). The Director's decision contains no such determination as to Dr. Freeman's lay observations, or as to Dr. Sawicki, who was not offered by the Division or accepted by the ALJ as an expert witness. In any event, given the inapplicability of the regulations the Director cited, the Director did not "state clearly" and "with particularity the reasons for rejecting the [ALJ's] findings." Ibid. Given the ALJ's findings, there was no "sufficient, competent, and credible evidence" to support for the Director's conclusion that the facility was required under the Medicaid per diem to push petitioner's wheelchair. Ibid.

As we are remanding for further proceedings, the ALJ may allow petitioner or the Division to present further evidence on this issue, including whether the facility's staffing is sufficient to provide such services on a consistent basis. We

encourage the joining or participation of the facility if that issue is raised.

VI.

The Director also pointed out that "[a] particular item of DME is not covered [by Medicaid] when, in the opinion of the Division, the item is not considered cost-effective or safe and effective for the treatment of a beneficiary's medical condition." N.J.A.C. 10:59-1.4(a)(1). Petitioner counters that the Division's denial notice only cited the per diem argument and (a)(4), and did not mention cost-effectiveness or N.J.A.C. 10:59-1.4(a)(1). She claims she received inadequate notice of "the reasons for the intended agency action [and] the specific regulations supporting such action." 45 C.F.R. § 205.10(a)(4)(i)(B).⁷

Dr. Sawicki testified that the Division is only allowed to put one reason on its denial forms. If such a technical limitation exists, it should be remedied. Advising those seeking DME of all reasons for the Division's denial will ensure

⁷ Petitioner similarly argues that the Division's denial notice did not contest medical necessity. However, as set forth above, medical necessity is part of the definition of DME, N.J.A.C. 10:59-1.2, and is an explicit exception to (a)(4) under N.J.A.C. 10:59-1.4(a)(5). Accordingly, we find that petitioner had adequate notice that she would have to show medical necessity, and that she adequately did so by presenting Dr. Freeman's testimony.

complete notice, and may avoid further litigation by claimants who cannot surmount the Division's additional reasons.

Nonetheless, the Division did raise N.J.A.C. 10:59-1.4(a)(1) and cost-effectiveness early in the hearing before the ALJ. Petitioner has not suggested that she would have presented additional evidence about cost-effectiveness had she received earlier notice. Thus, we find any lack of notice harmless. R. 2:10-2.

However, Dr. Sawicki's testimony about N.J.A.C. 10:59-1.4(a)(1) was merely that a power wheelchair was "not being used to treat a medical condition." The Division similarly argues that a power wheelchair would not cure petitioner's medical condition or remove her need for round-the-clock skilled care. However, N.J.A.C. 10:59-1.4(a)(1) does not require that requested DME cure all of a patient's ills or allow a nursing facility resident to leave the facility. Thus, the Division's arguments misapprehend N.J.A.C. 10:59-1.4(a)(1).

As the ALJ found, Dr. Sawicki's "conclusions failed to take into account the pain and debilitation in [petitioner's] right shoulder that would be alleviated by the use of the power wheelchair." We have upheld the ALJ's finding that substitution of a power wheelchair for the manual wheelchair would reduce her pain and prevent further deterioration of her shoulder. That is

a medical condition, and a power wheelchair is a form of treatment. See 28 N.J.R. 1027(a) ("The Division determines 'medical necessity' based on the capability of equipment or medical supplies to maintain or improve the medical condition of a Medicaid beneficiary" (emphasis added)).

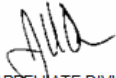
Unfortunately, the ALJ made no finding on whether the purchase of the power wheelchair was a cost-effective solution to petitioner's increasing difficulty in propelling herself to activities with the manual wheelchair.⁸ Accordingly, we remand to the ALJ to make such a finding after allowing the parties an opportunity to present further evidence on this issue. In making that finding, the ALJ may consider the cost of the wheelchair, the availability and cost of alternative forms of treatment such as staff to push the wheelchair, and the human cost if petitioner is unable to get to activities. See 28 N.J.R. 1027(a) (the Division considers "all aspects of the service coverage, including the appropriateness of these services," medical necessity, and cost). Moreover, the ALJ shall give considerable deference to "the opinion of the Division" if based on a proper understanding of N.J.A.C. 10:59-

⁸ Indeed, there was no testimony concerning the cost of the power wheelchair. Petitioner's application indicated that the power wheelchair cost \$5939, two batteries cost \$232, and two adjustable arms cost \$230.

1.4(a)(1). "State agencies must make the hard choices about how to expend these funds." Dougherty v. Dep't of Human Servs., 91 N.J. 1, 10 (1982).

Vacated and remanded for further proceedings in accordance with this opinion.⁹ We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.



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⁹ Because we remand on the above grounds, we need not address petitioner's argument that the Division discriminated against her in violation of 42 U.S.C.A. § 1396a(a)(10)(B) because it would have provided a power wheelchair if she was not in a nursing facility.