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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0648-14T3

J.R.,

Petitioner-Appellant,

v.

DIVISION OF MEDICAL
ASSISTANCE AND HEALTH
SERVICES and DIVISION OF
DISABLITIY SERVICES,

Respondents-Respondents.

Submitted December 9, 2015 – Decided April 18, 2016

Before Judges Fuentes and Kennedy.

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

Susan W. Saidel, attorney for appellant.

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

PER CURIAM

Appellant, J.R., appeals the final agency decision of the Department of Human Services (DHS), Division of Medical Assistance and Health Services (Division or DMAHS), terminating his Personal Care Assistance (PCA) services because he was no

longer eligible for that benefit under Medicaid requirements. For the reasons that follow, we affirm.

A.

J.R. is a thirty-two-year-old man diagnosed with Tourette's syndrome and several other medical conditions. He lives with his mother and began receiving PCA benefits in May 2009 through the Personal Preference Program (PPP) to help him perform activities of daily living (ADLs).[1]

On November 14, 2013, a representative of Horizon, J.R.'s health management organization, undertook its obligatory reassessment of his circumstances in order to ascertain whether there was a "need for continued care" under the program. See N.J.A.C. 10:60-3.5(a)(3). The representative, a registered nurse, conducted a face-to-face evaluation of J.R., employed the PCA Beneficiary Assessment Tool (PCA Tool), and concluded that he no longer demonstrated a need for continued PCA services.

On January 6, 2014, the Division of Disability Services (DDS) advised J.R. that due to the reassessment, he was found ineligible for Medicaid PCA services, and that he would be terminated from the program pursuant to N.J.A.C. 10:60-3.8 on

[1] The PPP allows a participant to receive a cash grant for reimbursement of the costs of a personal care assistant of his choice, often a family member or a friend. See N.J.A.C. 10:60-3.2.

March 1, 2014. J.R. requested a hearing, and the matter was transferred to the Office of Administrative Law (OAL).

Prior to the hearing, however, the DDS undertook its own reassessment of J.R.'s eligibility and assigned Sandra Surujballi, R.N., to undertake that task. On March 25, 2014, Surujballi met with J.R. and his mother in their home, conducted a clinical evaluation of him, and employed the PCA Tool required by regulation. N.J.A.C. 10:60-3.9(b)(1). She also concluded that J.R. was ineligible for PCA services.

Surujballi testified at the OAL hearing, and the administrative law judge (ALJ) explicitly found her testimony to be credible. Surujballi, who was qualified as an expert in the area of PCA evaluations, stated that she met with J.R. and his mother at their home. At that time, J.R. appeared well-groomed, alert, and verbally responsive, and he advised that he did not require any assistance with his ADLs.

J.R. stated that he was also diagnosed with bipolar disorder, and that he got depressed occasionally as the spasms and tics caused by his Tourette's syndrome limit his ability to leave the apartment. He added that his last seizure occurred "several months earlier," and that it was due to his failure to take his medications at that time.

Surujballi found J.R. to be "calm and cooperative" throughout the interview, and, later, she completed the DDS PCA assessment form and accorded him only one of a possible forty points, concluding that he was self-reliant in his ability to walk, groom, and clean himself. She also found that J.R. was independently capable of bathing, brushing his teeth, dressing, moving, housekeeping, and laundering his clothes.[2] She further found that J.R. would benefit from community mental health programs, which did not affect his need for PCA services.

A.R. is J.R.'s older sister and the person that he designated to receive his PCA payments. She arrives in the morning at or shortly after 7:00 a.m. and leaves for work at 8:30 a.m. She returns in the evening at 5:00 p.m. and leaves again at 7:30 p.m. A.R. claimed that she was required to shower and dress J.R., and that he can have up to three seizures per day.

The ALJ found that A.R. was not credible in giving her testimony. She made factual assertions that were contradicted by the record and J.R.'s testimony. The ALJ also found that

[2] Surujballi's findings and conclusions were very similar to those of the Horizon nurse. J.R. also told her that he did not need any assistance with walking, bathing, grooming, or toileting. Further, she concluded that J.R. was not eligible for continued receipt of PCA services because he was independent.

Lisa Rozycki, a consulting nurse and principal of Senior Health Solutions, was not credible. Rozycki undertook an evaluation of J.R. in February 2014. At that time, she stated that J.R. can walk, but that his tics can interfere with walking. As a result, she concluded that J.R. requires "constant supervision" for his own safety and assigned him a score of twenty-two on the PCA Tool. She opined that J.R. requires twenty-nine hours of PCA services every week, but that he could remain safe with only fourteen hours.

The ALJ found that Rozycki was "less credible" than Surujballi because Rozycki concluded that J.R. requires constant supervision, despite opining earlier that he could perform almost all ADLs when not subject to the tics caused by his Tourette's syndrome. The ALJ then concluded:

> In this case, J.R. does not need assistance with the activities of daily living, when his tic[]s are not present. The tic[]s are not constant and it cannot be determined when the tic[]s will occur. Although J.R. needs supervision because of his tic[]s, PCA services will not be approved for supervision.

Thereafter, the Division adopted the ALJ's findings and conclusions, holding:

> The possibility that J.R. may experience a tic or have a seizure exists regardless of how many PCA hours are provided. Moreover,

> PCA services are to be used for specific health related tasks, not to provide supervision or monitoring in case a particular condition occurs. Fortunately, J.R.'s seizures are controlled by medication. Unfortunately, there is no way to predict when a tic will occur and, as stated above, PCA services are not available for supervision. N.J.A.C. 10:60-3.8(c).

This appeal followed.

B.

J.R. argues that the Division's decision is arbitrary, capricious, and not supported by the record. Further, he argues that in determining he was ineligible for PCA benefits because of the intermittent nature of his ailment, the Division engaged in improper rule-making. He also contends that the Division reached its conclusions by relying upon the PCA Tool, which he argues is flawed.

For the reasons set forth hereinafter, we find none of these arguments persuasive. We begin our analysis with a review of the governing principles of law.

Medicaid is a federally-created, state-implemented program that provides "medical assistance to the poor at the expense of the public." Estate of DeMartino v. Div. of Med. Assist. & Health Servs., 373 N.J. Super. 210, 217 (App. Div. 2004) (quoting Mistrick v. Div. of Med. Assist. & Health Servs., 154 N.J. 158, 165 (1998)), certif. denied, 182 N.J. 425 (2005); see

also 42 U.S.C.A. § 1396-1. Although a state is not required to participate, once it has been accepted into the Medicaid program, it must comply with the Medicaid statutes and federal regulations. Harris v. McRae, 448 U.S. 297, 301, 100 S. Ct. 2671, 2680, 65 L. Ed. 2d 784, 794 (1980); United Hosps. Med. Ctr. v. State, 349 N.J. Super. 1, 4 (App. Div. 2002); see also 42 U.S.C.A. § 1396a(a)-(b).

The state must adopt "reasonable standards . . . for determining eligibility for . . . medical assistance . . . consistent with the objectives of the Medicaid program," Mistrick, supra, 154 N.J. at 166 (quoting L.M. v. Div. of Med. Assist. & Health Servs., 140 N.J. 480, 484-85 (1995)), and "provide for taking into account only such income and resources as are . . . available to the applicant." N.M. v. Div. of Med. Assist. & Health Servs., 405 N.J. Super. 353, 359 (App. Div.) (emphasis omitted), certif. denied, 199 N.J. 517 (2009); see also 42 U.S.C.A. § 1396a(a)(17).

New Jersey participates in the federal Medicaid program pursuant to the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5. Eligibility for Medicaid in this State is governed by regulations adopted in accordance with the authority granted by N.J.S.A. 30:4D-7 to the Commissioner of the DHS. The DMAHS is the agency within the DHS

that administers the Medicaid program. N.J.S.A. 30:4D-5; N.J.A.C. 10:49-1.1(a). Accordingly, the DMAHS is responsible for protecting the interests of the New Jersey Medicaid Program and its beneficiaries. N.J.A.C. 10:49-11.1(b).

The program at issue here is the PPP for individuals with disabilities. Administered by the DDS, the PPP allows individuals to seek services best-suited to their unique circumstances. To be eligible to participate, the individual must be both Medicaid eligible and already approved for PCA services. Covered PCA services include assistance with ADLs, such as: grooming, bathing, eating, dressing, and the like. N.J.A.C. 10:60-3.3(a)(1).

However, covered PCA services for health-related activities are circumscribed, and include only: aid in undertaking a prescribed exercise, where both the individual and the assistant have been trained in the exercise; aid in measuring and taking self-administered medications; aid in monitoring temperature, blood pressure, and rate of respiration; and other similar procedures. N.J.A.C. 10:60-3.3(a)(3).

The regulations explicitly state that PCA services for activities such as supervision and companionship "shall not be approved or authorized." N.J.A.C. 10:60-3.8(c) (emphasis added).

Consistent with the rigorous standards established for the types of services for which PCA payment is authorized, the standards governing individual eligibility for program participation is likewise rigorous. We shall not burden the record with a recitation of all the steps that an individual must take, see, e.g., N.J.A.C. 10:60-3.1 to -3.9, but we do note that the DDS reviews each request for services and sets forth the number of hours authorized. N.J.A.C. 10:60-3.9(b)(4).

Importantly, a nursing reassessment visit is required at least once every six months to evaluate an individual's need for continued PCA services. N.J.A.C. 10:60-3.5(a)(3). Therefore, an individual who has received approval for eligible services is not thereby entitled to rely ad infinitum on the initial approval and remains subject to the DDS reevaluation at least once every six months.

Finally, we note that our role in reviewing agency decisions is very limited. R.S. v. Div. of Med. Assist. & Health Servs., 434 N.J. Super. 250, 260-61 (App. Div. 2014). "An administrative agency's decision will be upheld unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Id. at 261 (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). In determining whether agency

action is arbitrary, capricious, or unreasonable, our role is restricted to three inquiries:

> (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
>
> [Ibid. (quoting H.K. v. Div. of Med. Assist. & Health Servs., 379 N.J. Super. 321, 327 (App. Div.), certif. denied, 185 N.J. 393 (2005)).]

"Deference to an agency decision is particularly appropriate where the interpretation of the Agency's own regulation is in issue." Ibid. (quoting I.L. v. Div. of Med. Assist. & Health Servs., 389 N.J. Super. 354, 364 (App. Div. 2006)). "Nevertheless, we are not bound by the agency's legal opinions." A.B. v. Div. of Med. Assist. & 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). "Statutory and regulatory construction is a purely legal issue subject to de novo review." Ibid. (citing Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)).

Guided by these principles, we determine that this is not one of "those rare circumstances in which an agency's action[s are] clearly inconsistent with its statutory mission," George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994), or where its findings lack "fair support in the evidence." Thurber v. City of Burlington, 191 N.J. 487, 501 (2007). Consequently, we defer to the agency's superior knowledge and expertise in the field, and we affirm. See id. at 502.

In this case, the record developed in the OAL amply supported the findings of fact and conclusions of law adopted by the Division in rendering its final decision. Specifically, the findings and conclusions of the HMO reassessment nurse were independently verified by the DDS reassessment nurse. Each employed the PCA Tool, in conjunction with a face-to-face clinical appraisal, to conclude that J.R. was capable of living independently with his mother, despite being subject to an occasional seizure, which would interfere with his ADLs.

In reaching this conclusion, the Division neither acted arbitrarily nor capriciously, nor did it engage in improper "rule-making." The remainder of appellant's arguments are too insubstantial to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.