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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Brook Waddle, Appellant, vs. South Carolina Department of Health and Human Services, Respondent.	)	Docket No. 13-ALJ-08-0267-AP **ORDER**

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to Appellant Brook Waddle's (Appellant) appeal from the April 4, 2013 dismissal by the South Carolina Department of Health and Human Services (HHS) of Appellant's case. The HHS hearing officer dismissed Appellant's appeal, considering it abandoned, for failure to respond to the hearing officer's order for Appellant to provide a statement of her intention to continue with the appeal by the given date.[1] For the reasons set forth below, I hereby deny the HHS' motion to dismiss this case, in whole or in part, pursuant to Rules 33 and 38 of the South Carolina Administrative Court Rules (SCALCR) and Rules 12(b)(1) and (8) of the South Carolina Rules of Civil Procedure (SCRCP), but affirm the decision of the hearing officer.

BACKGROUND

Appellant was injured in an automobile accident in 2005, which rendered her quadriplegic. She became eligible for Medicaid-covered services, and has been receiving services under the South Carolina Head and Spinal Cord Injury (HASCI) Waiver. Waivers are mechanisms within the Medicaid program under which the federal HHS waives certain generic

[1] The original deadline to submit this information was March 19, 2013, as set forth in the hearing officer's Prehearing Conference Order dated February 5, 2013. However, the hearing officer, upon receiving Appellant's Response to the Prehearing Conference Order, filed March 22, 2013, informed Appellant via email dated March 27, 2013 that Appellant's response "did not address the issue in [her] case (denial of prior authorization of an oximeter cable for [Appellant]" and instructed her "to include with [her] response the documentation of medical necessity for the cable[,]"and therefore extended the due date until Tuesday, April 2, 2013. Appellant did not respond as of the date of the hearing officer's dismissal Order (April 4, 2013).

requirements of the Medicaid program, allowing States to provide services to individuals in ways not allowed under the regular Medicaid program. Though the Department of Disabilities and Special Needs (DSN) is responsible for the day-to-day operation of the waiver, HHS is the agency that administers the South Carolina Medicaid program and thus the overall waiver program. This waiver, among others, is for home and community-based services under 42 U.S.C. § 1396n(c), allowing for services to be provided in the home rather than an institution.

Apria Healthcare, Inc. (Apria), a provider of medical equipment, submitted to KePro, the agent of HHS, a prior authorization request on behalf of Appellant for medical equipment, specifically an oximeter cable.[2] However, KePro denied Apria's request because Apria did not provide any supporting clinical information with its request. KePro gave Apria forty-eight (48) hours to submit supporting clinical information and a prescription for the device, but Apria failed to do so. Consequently, Apria's request was denied administratively for failure to supply the necessary information to allow KePro to make a determination.

Both Appellant and HHS tried to resolve the issue with KePro and/or Apria, but to no avail. Indeed, HHS even asked Apria to resubmit its request with supporting documentation, but the issue remains pending.[3]

On January 31, 2013, Appellant filed an appeal of KePro's denial of Apria's request with HHS' Division of Appeals and Hearings. On February 5, 2013, the HHS hearing officer issued a Prehearing Conference Order requiring HHS "to submit [by March 19, 2013] a summary of issues discussed, whether consensus was reached and any remaining issues." HHS' summary was to identify, with specificity, any additional information that [would] be submitted at the hearing or requests that either party anticipate[d] making." In the same order, Appellant was instructed "to submit a statement of intention to continue the appeal process and attend a Fair Hearing." Both Appellant and HHS responded to the hearing officer's order on March 19, 2013. However, Appellant erroneously emailed her response to Beth Hutto, who at the time was the director of HHS's Division of Appeals and Hearings and Third Party Liability;[4] Byron Roberts, HHS' general counsel; Janet Goode, the hearing officer in one of Appellant's prior appeals; and

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[2] An oximeter measures the oxygen saturation level of the blood.

[3] This is as of March 19, 2013, and there is nothing in the Record on Appeal to indicate that the issue has since been resolved.

[4] Hutto is currently the interim CFO for HHS.

to two other, unnamed individuals.[5] Hutto forwarded the email to the proper hearing officer, Renee Johnson, who responded on March 27, 2013 by informing Appellant that her response did not "address the issue of my case (denial of prior authorization of an oximeter cable for BW)" and that Appellant needed to "include with [her] response the documentation of medical necessity for the cable." The hearing officer also extended the due date until April 2, 2013. Appellant did not respond.

On April 4, 2013, the hearing officer issued an order dismissing Appellant's appeal on the ground that Appellant abandoned her appeal by failing to provide a statement by the given deadline (April 2, 2013) of her intention to continue with the appeal process and attend a Fair Hearing.

Appellant filed an appeal of that decision with the ALC. Appellant served HHS with the Notice of Appeal on May 9, 2013 but erroneously filed the Notice of Appeal with the Court of Appeals before the Court of Appeals forwarded it to the ALC, which date stamped its receipt on June 11, 2013.

ISSUE ON APPEAL

Whether it was arbitrary or capricious for the hearing officer to dismiss Appellant's case based on the grounds that Appellant abandoned her appeal by failing to provide a statement by the given deadline of her intention to continue with the appeal process and attend a Fair Hearing.[6]

STANDARD OF REVIEW

This case is before the ALC as an appeal of an agency decision. Accordingly, the standard used by appellate bodies to review agency decisions is provided by Section 1-23-380(5) of the South Carolina Code (Supp. 2012). That section states:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;

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[5] kanthony@anthonylaw.com and tippybrook@yahoo.com were the two unnamed addressees cc:'d on the email.

[6] Appellant listed five issues on appeal in her Brief and HHS listed four issues on appeal in its Brief. However, the Court concludes that the lone issue stated above is sufficient to properly dispose of this case. In addressing this issue, though, one or more of the parties' issues may be addressed, either directly or by implication.

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 1-23-380(5); *see also* § 1-23-600(E) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380).

"A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Trimmier v. S.C. Dep't of Labor, Licensing and Regulation*, 405 S.C. 239, 746 S.E.2d 491 (Ct. App. 2013) (quoting *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184–85, 332 S.E.2d 539, 541 (Ct.App.1985)).

DISCUSSION

Respondent's Motion to Dismiss

As a preliminary matter, the Court must address HHS's Motion to Dismiss or, in the Alternative, Partial Motion to Dismiss filed September 11, 2013. Pursuant to Rule 38, SCALCR and Rules 12(b)(1) and (8), SCRCP, HHS moves to dismiss Appellant's appeal on the following grounds: (1) Appellant failed to file a timely Notice of Appeal; (2) lack of jurisdiction due to Appellant's failure to file her Notice of Appeal timely; and (3) Appellant is attempting to relitigate in this proceeding the same or substantially the same issues raised in a pending proceeding between the same parties. In the alternative, HHS moves to dismiss all of Appellant's claims except for the claim pertaining to the denial of the oximeter cable, should the Court find that the oximeter cable issue was not substantially the same as claims arising in the prior proceedings. I will address each ground, in turn, but will consolidate the first two grounds and then the third and alternative grounds, as they are respectively interrelated.

Untimely Filed Notice of Appeal and Consequent Lack of Jurisdiction

HHS argues that pursuant to Rule 38, SCALCR, the Court should dismiss Appellant's appeal because her Notice of Appeal was filed with the ALC more than thirty days after receipt of the hearing officer's Order, in violation of Rule 33, SCALCR. HHS also argues that as a

result of failure to comply with Rule 33, SCALCR, the Court lacks jurisdiction to hear the case and thus Appellant's appeal should be dismissed pursuant to Rule 12(b)(1), SCRCP. I disagree.

According to Rule 68, SCALCR, "[t]he South Carolina Rules of Civil Procedure and **the South Carolina Appellate Court Rules**, in contested cases and appeals respectively, may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules" (Emphasis added). The ALC rules do not address the question of whether a transfer to this Court of an appeal filed improperly in another court divests this Court of appellate jurisdiction that it otherwise would have possessed over the appeal. However, the South Carolina Supreme Court, in *In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 686 S.E.2d 683 (2009), a case analogous to the present case, applied Rule 204(a), SCACR, to transfer an appeal that was timely filed, albeit in the wrong jurisdiction (the South Carolina Election Commission), to the proper jurisdiction – the court of common pleas sitting in its appellate capacity. Rule 204(a), SCACR states that "[i]n the event that the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed shall issue an order transferring the case to the appropriate appellate court." The Supreme Court not only applied Rule 204(a), SCACR to allow the transfer of an appeal originally filed with a non-court (let alone an appellate court), but it also allowed the transfer of the appeal to a court that was not inherently appellate, even though it was the appropriate appellate forum in that case. The Court's reasoning was "guided by the principle that courts should not interpret procedural rules to create a trap for unwary lawyers" and that "transferring th[e] case to the circuit court w[ould] serve the ends of justice by ensuring that the [matter would be] heard in the proper appellate forum." 385 S.C. at 641, 686 S.E.2d at 688 (internal citation omitted).

The present case, like *Bluffton Town Council Election*, involves an appeal that was timely filed in the wrong jurisdiction but was transferred to a court that was the appropriate appellate forum. Unlike in *Bluffton Town Council Election*, there is no ambiguity created by conflicting statutes that gives rise to an injustice. Nevertheless, I find that the facts of this case, as in *Bluffton Town Council Election*, require the appeal to be continued in this Court so that the ends of justice may be served. Appellant did timely file her appeal and provide notice thereof to HHS, so it was not prejudiced. Therefore, pursuant to Rule 68, SCALCR, and in accordance with Supreme Court's ruling in *Bluffton Town Council Election*, this Court elects to invoke Rule 204(a), SCACR, finding that the filing of Appellant's Notice of Appeal was timely and that this

Court thus has jurisdiction to hear this matter. Therefore, the Court denies HHS' Motion to Dismiss pursuant to Rules 33 and 38, SCALCR and Rule 12(b)(1), SCRCP.

Same or Substantially the Same Claims as Those Arising in a Pending Proceeding Between the Same Parties

HHS argues that because Appellant makes "frequent and substantial reference to an ongoing proceeding between the parties that began in 2007[,]" Appellant's case should be dismissed pursuant to Rule 12(b)(8), SCRCP. In the alternative, HHS argues that should the Court find that the claim involving the oximeter cable is a new claim, that the Court should grant its Motion in part by dismissing with regards to all of the other claims that Appellant raises. Though I find that the oximeter cable is a new claim that has not been raised in other, pending proceedings, I disagree as to dismissal of the remaining claims, because the remaining claims are not before the Court.

A motion to dismiss pursuant to Rule 12(b)(8), SCRCP requires "another action [that] is pending between the same parties for the same claim." This rule inherently requires claims to be raised in the present action. HHS is quite correct that Appellant makes a number of arguments and cites to many exhibits pertaining to a separate, ongoing proceeding, *B.W. v. S.C. Dep't of Health and Human Servs.*, docket no. 09-ALJ-08-0344-AP (ALC 2009), which was remanded to HHS by the ALC, specifically by the Hon. John D. McLeod, on July 30, 2012 and is still pending in the HHS Division of Appeals and Hearings. In her Response to Motion to Dismiss, Appellant even contends that "this appeal is part and parcel of the appeal Appellant filed in 2007[,]" which was the case that Judge McLeod originally remanded for more information and later came back up before him in 2009. Thus, even had these issues been properly raised in this case, the Court would have found that dismissal was warranted pursuant to a Rule 12(b)(8) theory.

At any rate, Appellant tried to incorporate by reference exhibits from the other proceeding into the Record on Appeal in this case through her Initial Brief, just as she tried to incorporate by reference in her response to the hearing officer's Prehearing Conference Order allegations from her 2007 complaint.[7] However, the ALC Rules do not allow for the inclusion of

[7] Appellant also requested in a January 31, 2013 email sent to Beth Hutto, Byron Roberts, Rick Hepfer, and the email addressee, kanthony@anthonylaw.com, that the record in the prior, pending appeal be supplemented with the denial of Appellant's prior authorization request for an oximeter cable. She intended this denial "to "provid[e] . . . additional evidence that DHHS has improperly reduced and denied services in violation of the ADA and the

exhibits within appellate briefs. Appellant should have filed a Motion to Supplement the Record on Appeal, which can contain exhibits pursuant to Rule 36, SCALCR. Because Appellant failed to file a Motion to Supplement the Record on Appeal, the Court can only rely on what is based therein and will only entertain arguments that are based thereon. *See* Rule 36, SCALCR ("The Administrative Law Judge will not consider any fact which does not appear in the Record."). Consequently, the only issue before this Court pertains to the hearing officer's dismissal of Appellant's case concerning HHS' denial of a prior authorization request for an oximeter cable. Any other issues arising from other pending appeals or litigation, though perhaps referenced in the Record on Appeal, are not at issue in this case and will not be considered by this Court.[8]

Medicaid Act." It is thus appears that Appellant's original intent was to supplement the record in the prior, pending litigation with documents and the issue from the present appeal, which, in this same email, she said she would be filing. However, these two appeals are not one and the same, despite Appellant's attempt to make them so.

[8] Appellant raised concerns about HHS' perceived lack of progress in carrying out Judge McLeod's July 30, 2012 Order. But attempting to have this Court address the issues in that case through the backdoor of a Brief in this case is inappropriate. Instead, if Appellant believes she is aggrieved by HHS's actions, or lack thereof, in that case, that matter must be properly brought before this Court.

Furthermore, Appellant raised several contentions regarding this Court's procedures in her Amended Reply Brief, specifically on pages 9-10. Appellant contends that the case continues Respondent's "ongoing and unconstitutional pattern of violating the Separation of Powers provision of the Constitution of South Carolina . . . by cycling and recycling of 'fair hearing' cases between DHHS and the [ALC]." She also contends that the ALC is violating federal law by not allowing the case to reach a final decision within 90 days. Appellant adds that "the wait time for Medicaid appellants is much longer in the Administrative Law Court, because each time the case is remanded and either heard or dismissed by the DHHS hearing officer, this Court treats the case as a new one, beginning at day one."

Appellant's contentions are based upon a gross misunderstanding of this Court's review of these cases. S.C. Code Ann. § 1-23-600 (E) (Supp. 2012) sets forth that review in these cases does not occur **until** a final decision in a contested case is made. Moreover, the cases before the Court follow a set time for submission of the record and briefs unless the Court expands or shortens that schedule. *See* Rules 36 (A) and 37 (A), SCALCR. In fact, Appellant's arguments fail to recognize Appellant's own contributions to a delay in the conclusion of these proceedings. The reason for one of the delays and "recycling" of cases back to HHS is that counsel for Appellant in Judge McLeod's case in 2009, docket no. 07-ALJ-08-0626, who is also counsel for Appellant in the instant case, failed to produce a "Memorandum of Understanding" as requested by the hearing officer. Indeed, that remand order was completely concerned with directing Appellant to provide detailed information to Respondent, the hearing officer, and the Court regarding her various allegations. Other delays occurred when counsel for Appellant sent a response to the hearing officer's Prehearing Conference Order to the wrong person, resulting in a submission-date extension, and thus a delay, of two weeks, and when counsel filed the Notice of Appeal with the wrong court, resulting in a delay of just over a month, even though counsel has practiced for many years in the correct court and could have instructed her runner where specifically within the building to file it. Other delays were due to four deaths in counsel's and her spouse's families in less than two months, as well as counsel having had two other hearings in other courts and the retirement of counsel's longtime secretary, all occurring just prior to deadlines. Incidentally, the Court received no complaints when it granted Appellant's counsel the extensions of time that she requested.

Arbitrary or Capricious

Turning now to the hearing officer's dismissal of Appellant's appeal of HHS's denial of Appellant's prior-authorization request for an oximeter cable, the issue is whether the hearing officer's decision was arbitrary or capricious pursuant to S.C. Code Ann. § 1-23-380(5)(f).

"A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Trimmier*, 405 S.C. at ---, 746 S.E.2d at 495.

In this case, however, Appellant failed to raise as an issue on appeal the hearing officer's dismissal of Appellant's appeal for abandonment due to failure to submit a statement of intent to continue her appeal and attend a Fair Hearing. It is only in her Reply Brief that Appellant makes an argument specifically addressing the hearing officer's decision in this matter to dismiss Appellant's appeal for abandonment. But "[i]t is axiomatic that an issue cannot be raised for the first time in a reply brief." *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011). "[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief." *Simmons v. SC STRONG*, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 635 n.2 (Ct. App. 2013) (citing *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001). Because Appellant failed to challenge the hearing officer's decision in her Initial Brief, that decision is the law of the case.

ORDER

IT IS THEREFORE ORDERED that the hearing officer's decision to dismiss Appellant's appeal is **AFFIRMED.**

AND IT IS SO ORDERED.

Ralph K. Anderson, III
Chief Administrative Law Judge

October 11, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

October 11, 2013
Columbia, South Carolina