STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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| Peter Brown,<br><br>Appellant,<br><br>v.<br><br>South Carolina Department of Health and Human Services,<br><br>Respondent. | ) | Docket No. 13-ALJ-08-0159-AP<br><br>**DECISION AND ORDER** |



APPEARANCES: Patricia L. Harrison, Attorney for Appellant
Kenneth P. Woodington, Attorney for Respondent

## FACTS AND PROCEDURAL BACKGROUND

On March 12, 2013, a Hearing Officer for the South Carolina Department of Health and Human Services ("DHHS") dismissed this action as moot after DHHS advised the Hearing Officer that based on litigation costs, the Department would no longer contest this case on its merits. This appeal followed.

The case originated with a 2005 administrative appeal by Appellant Peter Brown from a decision by the Department of Disabilities and Special Needs (DDSN) to terminate twelve hours per week of certain services that Appellant had been receiving. As Appellant's attorney advised the DHHS Hearing Officer in 2005, "the only issue currently on appeal before the Division of Appeals and Hearings, is the agency's proposed reduction of twelve hours of services which are needed weekly. . . ."

The case was originally tried by the DHHS Hearing Officer for three days in 2005. The Hearing Officer ultimately dismissed the case on jurisdictional grounds, holding that "[t]he servic



Exhibit 1

is not covered by Medicaid . . . it is not under the subject matter jurisdiction of a SCDHHS Hearing Officer." By Order dated May 12, 2009, this Court affirmed. *Peter Brown v. DHHS*, 2009 WL 1744572 (S.C. A.L.C. 2009). This Court denied rehearing on June 18, 2009.[1]

The Court of Appeals reversed in an opinion dated April 20, 2011, holding that the legal conclusions on which the decision of this Court was based were not considerations that affected subject matter jurisdiction. *Brown v. South Carolina Dept. of Health and Human Services*, 393 S.C. 11, 18, 709 S.E.2d 701, 704 - 705 (Ct. App. 2011). The Court of Appeals accordingly remanded the case for a hearing on the merits. *Id.* at 705.

On remand, DHHS advised the Hearing Officer by letter dated February 26, 2013, that "After balancing the costs versus the benefits of litigating this matter further, DHHS has decided not to contest the above-referenced case on the merits. Therefore, DHHS does not believe that a hearing is necessary in this matter." Appellant's counsel, who was copied with this letter, did not respond to that letter.

In its prehearing brief, DHHS reiterated the position stated in its February 26, 2013 letter that based on cost to the agency, DHHS would no longer contest the merits of the case; that is, the Appellant's entitlement to one-on-one services.

On March 7, 2013, Appellant's counsel filed a one-page, two-paragraph Pretrial Brief. It was not responsive to the position of DHHS as announced in the February 26, 2013 letter. That Pretrial Brief did not acknowledge or otherwise note that DHHS was no longer contesting Appellant's entitlement to the services at issue. Instead, the document stated "that the agency has erred by basing its decision to terminate Appellant's one-on-one or companion services on erroneous grounds. . . ,", even though the agency had given notice that it was changing its

[1] On p. 4 of the Brief of Appellant, it is erroneously stated that the denial of rehearing occurred on October 1, 2010, but that was the date on which this Court denied a petition for supersedeas.

decision to terminate services. Appellant's Pretrial Brief also asserted that the agency "has failed to provide medically necessary services," but offered no indication regarding what services had not been provided.

On March 11, 2013, the Hearing Officer advised the parties that based on the pretrial briefs the case was moot; that the hearing scheduled for March 13, 2013, was canceled; and that an order would be forthcoming within a week. Appellant's counsel did not express an objection to the cancellation of the hearing.

By order dated March 12, 2013 (mailed March 19, 2013) the Hearing Officer dismissed this appeal as moot, holding as follows:

> The issues of remand as set forth in [the Court of Appeals' opinion], whether or not the "one-on-one" service is a Medicaid service and whether or not the Petitioner needs such services in addition to RHS, are moot based on Respondent's decision not to contest the case on the merits and agrees that the Petitioner as an ID/RD Waiver participant will be allowed to received ACS offered by the ID/RD Waiver, provided by the qualified provider of his choice, in the same amount, duration, and scope as the Petitioner received "one-on-one" services at the time of Petitioner's appeal in 2005.

Appellant's representatives filed the present appeal, but did not challenge the Hearing Officer's conclusion concerning mootness.[2]

## STANDARD OF REVIEW

This case is before the Court as an appeal from a Final Order of DHHS pursuant to S.C. Code Ann. § 1-23-600(D) of the Administrative Procedures Act (APA). An Administrative Law Judge reviews the case in an appellate capacity under the APA. In South Carolina, the provisions

[2] Respondent has provided information to the Court concerning a federal case in which Appellant's representatives have sought, on other grounds, the relief sought in the present case. This information is not reiterated in this Order, because it is not necessary to the decision of the issues in this appeal.

of the APA, specifically, Section 1-23-380(5), govern the circumstances in which an appellate body may reverse or modify an agency decision. That section states:

> 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;
> (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.

S.C. Code Ann. § 1-23-380(5) (Supp. 2012).

## CONCLUSIONS OF LAW

1. **Appellant has received all the relief he requested, and therefore is not entitled to additional relief.**

Appellant's counsel stated at the outset of this matter in 2005 that "the only issue currently on appeal before the Division of Appeals and Hearings, is the agency's proposed reduction of twelve hours of services which are needed weekly. . . ." That sole issue has been resolved in Appellant's favor as a result of the DHHS decision not to contest his entitlement to the twelve weekly hours of services.

The relief actually sought by Appellant is not entirely clear. It appears, however, that the only relief Appellant now seeks under that argument heading is an order granting a hearing, based on an unsupported claim that "as of June 14, 2013," the services ordered in the March 12, 2013, Order, were not being provided. In other words, Appellant's current complaint is addressed to alleged noncompliance with the March 12, 2013, Order at a time several months after its issuance.

Appellant also appears to request, without any factual showing other than the argument of counsel, that this Court "schedule a hearing to take evidence of the irregularities in this process. . . ." *Id.* This is an apparent reference to § 1-23-380(4), which provides as follows:

> The review must be conducted by the court and must be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, and established by proof satisfactory to the court, the case may be remanded to the agency for action as the court considers appropriate.

(Emphasis added.)

The Record does not contain evidence of these alleged "irregularities." The statute requires a showing of irregularities "by proof satisfactory to the court," but Appellant's counsel has offered no evidence of whatever is being claimed.

Appellant cites several procedural requirements found in federal regulations, but offers no suggestion as to how he was prejudiced by the alleged failure to comply with those regulations. A hearing was not necessary in order for the Hearing Officer to decide that the case was moot, which was a decision in favor of Appellant. Again, Appellant's counsel stated at the outset of this process in 2005 that "the only issue currently on appeal before the Division of Appeals and Hearings, is the agency's proposed reduction of twelve hours of services which are needed weekly. . . ." Once DHHS decided not to contest Appellant's challenge to that reduction, the sole issue was resolved in Appellant's favor, leaving nothing else to be heard or decided by the Hearing Officer.

To the extent that Appellant now argues that a hearing should have been held in order to review claims that the services already being provided were inadequate, Appellant never raised that claim before the Hearing Officer, even after DHHS requested that the hearing be canceled on the basis of mootness, and after the Hearing Officer had provided advance notice that the hearing would be canceled and that case would be dismissed as moot. Appellant's Prehearing

Brief contained nothing which would suggest that Appellant's representatives wished to present evidence on the nature of the services that Appellant was then receiving. To the contrary, the one-page Pretrial Brief did not raise the issue with any specificity, and therefore cannot be claimed to have brought the issue to the attention of the Hearing Officer. *See, e.g., South Carolina Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007)(in order to be preserved for review, an issue must be "raised to the trial court with sufficient specificity," citing Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)("an objection must be sufficiently specific to inform the trial court of the point being urged by the objector"). As a result, the issue therefore may not be presented in this appeal. *See, e.g., Carson v. South Carolina Dep't of Natural Res.*, 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002)(court sitting in appellate capacity may not consider issues not raised or ruled on by administrative agency). *See also,* ALC Rule 36(G)("The Administrative Law Judge will not consider any fact which does not appear in the Record").

Appellant cites and discusses *Catanzano v. Wing*, 103 F.3d 223, 227 (2d Cir. 1996), claiming that in the present case (as apparently occurred in *Catanzano*), "the State's agent [Charles Lea Center] refused to provide the services that had been ordered. . . ." Again, however, Appellant's representatives did not present this issue to the DHHS Hearing Officer. Based on the same authorities cited above, the issue is not properly before the Court in this appeal.

**2. Appellant seeks an advisory opinion about matters that were neither raised to, nor ruled on, by the Hearing Officer.**

Appellant's second question asks this Court to act in a manner completely contrary to principles of appellate practice. Apparently, Appellant would like for this Court to issue an order

as to what this Court is not deciding. Appellant is therefore seeking an advisory opinion from this Court.[3]

The issue is not only advisory, but also concerns an issue that, like Appellant's first question, was never presented to or ruled upon by the Hearing Officer. This is reason enough for this Court to decline to consider it. *Carson v. South Carolina Dep't of Natural Res., supra.*

This issue also does not seek reversal of anything in the March 12, 2013 Order of the Hearing Officer. In the absence of such a request for reversal, Appellant is not seeking anything that may properly be sought from a court sitting in an appellate capacity. As the Supreme Court held in *Powers v. City of Aiken*, 255 S.C. 115, 177 S.E.2d 370 (1970),

> This is a court of review. The purpose of an appeal under our procedure is to determine if the lower court did something that it should not have done, or omitted doing something it should have done. A trial judge will not be reversed for failing to grant a motion on a ground that was not submitted to him.

255 S.C. at 117, 177 S.E.2d at 371. Appellant's second question does not seek review of anything, and therefore should not be addressed for that reason as well.

Finally, the relief requested by Appellant's second question is of a purely advisory nature. However, it is axiomatic that such issues cannot be decided. *See, e.g., Booth v. Grissom,* 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975)("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.").

**3. Appellant's third question is entirely conclusory, and fails to set forth a basis for reversal.**

Appellant's third question is stated in the Brief of Appellants as follows:

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[3] The issue in Question B is stated on p. 1 of the Brief of Appellant as follows:

> "This Court should issue an order affirming that the violations of the Americans with Disabilities Act and § 1983 alleged by Peter in his federal lawsuit are not before this Court and that jurisdiction for those claims lies properly with the federal court."

> Respondent has violated the Administrative Procedures Act by enacting binding norms in the administration of the DDSN Medicaid waiver programs, has violated the U.S. Supreme Court's mandate of Olmstead to give the greatest of deference to the opinions of Peter's treating physicians in determining the need for services and has retaliated against Peter and his representatives in violation of the Americans with Disabilities Act and Appellant should be allowed to file a supplemental brief after a hearing pursuant to S.C, Code § l-23-380(A)(5)[sic] in the event that the requested remedial relief is not granted.

Br. of Appellant 1.

ALC Rule 37(B)(1) provides in part that "The statement [of the issues on appeal] shall be concise and direct as to each issue and may be stated in question form. Broad general statements may be disregarded by the Court." Appellant's Question C is neither "concise" nor "direct." Instead, it consists of three or four "broad general statements" combined in a single sentence. As the Supreme Court has held in *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010), and many other cases, "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." To the same effect is *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011), which holds (in the context of a Rule 59(e) motion) that "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge."

Appellant offers only a one-paragraph conclusory argument in support of this point, and it bears little or no resemblance to the argument heading. In fact, the argument of the point is not much longer than the statement of the issue. Appellant argues, in summary fashion and without any details, that he "has been prejudiced in bringing these [unstated] issues to the attention of this Court because of the eight year lapse of time without providing the hearing ordered by the Court of Appeals and required by the Medicaid Act." This contention fails "to bring into focus

the precise nature of the alleged error. . . ." *Herron, supra.* It does not challenge any issue that was actually brought to the attention of the Hearing Officer or decided by the Hearing Officer.

The conclusory argument of this vaguely-stated issue sheds no light on the nature of the error asserted. The appellate courts of this State have often held that such conclusory arguments will not be considered. *See, e.g., Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct.App.1999)(declaring that conclusory arguments may be treated as abandoned); *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n. 2, 433 S.E.2d 871, 873 n. 2 (Ct.App.1993)(stating that a one sentence argument is too conclusory to present any issue on appeal). This is especially true in this case, when Appellant simply asserts "prejudice" without showing how he was prejudiced, or what specifically is requested. *See, e.g., State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998)(holding an appellant's argument meritless where appellant did not argue or show prejudice except in conclusory fashion). For the reasons stated in the above authorities, the Court declines to consider this issue.

## CONCLUSION

For the foregoing reasons, the Order of the DHHS Hearing Officer dismissing the matter as moot is affirmed.

**AND IT IS SO ORDERED.**

Carolyn C. Matthews

CAROLYN C. MATTHEWS
Administrative Law Judge

February 4, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 4th day of February 2014
By: MaryBeth Campbell
Judicial Law Clerk