THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Administrative Law Court

Ralph King Anderson III, Administrative Law Judge
Trial Court Case No.: 2013-ALJ-080267-AP

Appellate Case No.: 2013-002415

Brook Waddle,.....Appellant,

v.

South Carolina Department of Health and Human Services.....Respondent,

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RESPONDENT'S FINAL BRIEF

SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES

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STATEMENT OF THE CASE

This matter is before the Court of Appeals from an Order of the South Carolina Administrative Court ("ALC") affirming an Order of Dismissal issued by the Respondent, the South Carolina Department of Health and Human Services ("DHHS"), regarding the denial of Appellant's ("Waddle") request for durable medical equipment ("DME"), specifically an oximeter cable.

Waddle was injured in an automobile accident in 2005, which rendered her quadriplegic. Following the accident, Waddle became a Medicaid-eligible individual, who has been receiving services under the South Carolina Head and Spinal Cord Injury ("HASCI") waiver program. Under the waiver program, participants can receive a mix of services through the South Carolina Department of Disabilities and Special Needs ("DDSN"). Waivers are mechanisms within the Medicaid program under which, by having certain generic requirements of the Medicaid program "waived," States are able to provide services to eligible participants in ways not allowed under the regular Medicaid program. This waiver and other waiver programs operated by DDSN are for home and community based services under Section 1915(c) of the Social Security Act. 42 U.S.C. § 1396n(c). These types of waivers allow services to be provided in the home or community in lieu of institutional services. DDSN is responsible for the day-to-day operations of the waiver program, but DHHS is the single agency responsible for the South Carolina Medicaid program. [R. pp. 2-3].

Apria Healthcare, Inc. ("Apria"), is a provider of DME. Apria submitted to KePro, an agent of DHHS, a prior authorization request on behalf of Waddle for a piece of DME, specifically requesting an oximeter cable, which measures the oxygen saturation of the blood. However, the request was denied because Apria did not provide

any supporting clinical information with the request. Both Waddle and DHHS attempted to resolve the issue without success. [R. p. 3].

On January 31, 2013, Waddle filed an appeal of the denial of the oximeter cable to DHHS's Division of Appeals and Hearings. On February 5, 2013, the DHHS hearing officer issued a Prehearing Conference Order requiring DHHS "to submit [by March 19, 2013] a summary of issues discussed, whether consensus was reached and any remaining issues." The Order also instructed Waddle "to submit a statement of intention to continue the appeal process and attend a Fair Hearing." Id.

Bother DHHS and Waddle responded to the Prehearing Order on March 19, 2013. However, Waddle erroneously e-mailed her response to a number of individuals, none of whom were the assigned hearing officer. The e-mail was ultimately forwarded to the hearing officer who responded to Waddle on March 27, 2013 by informing her that the response did not "address the issue of my case (denial of prior authorization of an oximeter cable for [Waddle])" and that Waddle needed to "include with [her] response the documentation of medical necessity for the cable." The hearing officer gave Waddle until April 2, 2013 to respond. Waddle did not respond. Id.

On April 4, 2013, the agency hearing officer issued an Order dismissing Waddle's appeal on procedural grounds. Specifically, that Waddle abandoned her appeal by failing to notify the hearing officer by the due date of her intention to continue the appeal process and attend a fair hearing. [R. p. 4].

Waddle appealed the Order dismissing the appeal to the Administrative Law Court ("ALC"), which affirmed the dismissal in an Order dated October 11, 2013, which is the subject of this appeal.

STATEMENT OF FACTS

The ALC's Order concisely sets forth the relevant facts. [R. pp. 2-4, 5-6]. Additionally, facts as relevant to the issues on appeal are more fully set forth below as needed.

STANDARD OF REVIEW

The standard of review is governed by the Administrative Procedures Act. S.C. Code Ann. § 1–23–380 provides in part that appellate review must be confined to the record and the appellate 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 agency's decision or remand the matter for further proceeding.

> 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 granted 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(4)&(5); Doe v. S. Carolina Dep't of Health & Human Servs., 398 S.C. 62, 70-71, 727 S.E.2d 605, 609-10 (2011).

ARGUMENTS

I. THE APPEAL SHOULD BE DISMISSED AS MOOT

Generally an appellate court "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." Sloan v. Dep't of Transp., 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008) (internal citations omitted).

In the present case, the healthcare provider, Apria, incorrectly coded the request for the oximeter cable and, therefore, the request was denied. However, the coding issue was discovered when the denial was appealed and the cable was approved manually and Waddle received the cable and continues to receive the cable. Moreover, if the correct code is used by the provider in the future, barring any other error, it will be approved without prior authorization. [R. pp. 65-66].

Based upon the fact that the coding error was identified and the DME provided to Waddle, the issue on appeal is moot. Even if Waddle prevails in her appeal to this Court, the relief would be to remand the matter to DHHS's Division of Appeals and Hearings for a fair hearing to determine whether or not the denial of the oximeter cable was proper, and whether or not the DME should be provided to Waddle. As DHHS has resolved the issue and provided the oximeter cable to Waddle, and DHHS has indicated that absent any future coding error the oximeter cable will continue to be provided without prior authorization, there is no need for a fair hearing or relief that the fair hearing officer could provide. As such, the present appeal should be dismissed as moot as there remains no actual controversy.

II. THERE WAS NO ERR IN DISMISSING WADDLE'S APPEAL FOR FAILING TO COMPLY WITH THE HEARING OFFICER'S ORDER (WADDLE'S ISSUES 1 & 2)

A. Waddle failed to appeal the hearing officer's procedural dismissal and, therefore, the dismissal is the law of the case and the present appeal should be dismissed.

Waddle set forth five (5) issues on appeal to the ALC in her Initial Brief. [R. p. 75]. In reviewing the arguments presented to the ALC, none assign any err as to the hearing officer's Order dismissing the appeal for failing to provide the information requested in the Prehearing Conference Order. [R. pp. 89-102]. Waddle first addressed the procedural dismissal in her Amended Reply Brief. [R. pp. 135-137].

It is well-settled that an un-appealed ruling is the law of the case. Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). Moreover, "an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief. Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) citing Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct.App.1993).

Since Waddle first argued in her Reply Brief to the ALC that the hearing officer erred in procedurally dismissing her appeal without a fair hearing allegedly in violation of 42 C.F.R. 431.223, the argument was not properly preserved for appellate review and the issue presently before the Court should be dismissed.

B. There is substantial evidence in the Record on Appeal, which supports the hearing officer's order to dismiss Waddle's appeal.

There is substantial evidence in the record to support the hearing officer's Order dismissing Waddle's appeal for her failure to provide information requested in the Prehearing Conference Order. At issue in this case are the following regulations:

42 C.F.R. §431.205 provides in part that the Medicaid agency (DHHS) is responsible for maintaining a hearing system that provides a hearing before the Medicaid agency (DHHS) and which meets the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970).

42 C.F.R. § 431.220(a)(1) provides that a State agency must grant an opportunity for a hearing to a Medicaid participant if an applicant who requests it because his claim for services is denied or is not acted upon with reasonable promptness.

Finally, 42 C.F.R. §431.223 provides the agency may deny or dismiss a request for a hearing if the applicant withdraws the request in writing; or the applicant fails to appear at a scheduled hearing without good cause.

South Carolina's regulations governing fair hearings are set forth in S.C. Regs. 126-150, *et seq.* Specifically, Reg. 126-154 grants hearing officers the following authority:

> A Hearing Officer has the authority, among other things to: direct all procedures; issue interlocutory orders; schedule hearings and conferences; preside at formal proceedings; rule on procedural and evidentiary issues; require the submission of briefs and/or proposed findings of fact and conclusions of law; call witnesses and cross-examine any witnesses; recess, continue, and conclude any proceedings; *dismiss any appeal for failure to comply* with requirements under this Subarticle

(emphasis added).

The Goldberg Court stated that "[t]he fundamental requisite of due process of law is the *opportunity* to be heard." Goldberg v. Kelly, 397 U.S. at 267 (internal citations omitted) (emphasis added). To comply with this fundamental due process requirement, the Court stated that the aggrieved "should have timely and adequate notice detailing the reasons for a proposed termination, and an effective *opportunity* to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." Id. (emphasis added).

Since Goldberg, however, the Court has refined its position regarding the fair hearing process and due process requirements. For example, the United States Court of

Appeals for the Sixth Circuit noted that the U.S. Supreme Court has since explained that the "due process requirement that the government provide a hearing before the termination of benefits turns on the sensible fact/law dichotomy that CMS, the State and Benton have drawn." Rosen v. Goetz, 410 F.3d 919, 928 (6th Cir. 2005) citing Codd v. Velger, 429 U.S. 624, 627 (1977). In order for "the hearing mandated by the Due Process Clause [ ] to serve any useful purpose, there must be some factual dispute . . .." Id.

In applying the rationale set forth above, the Rosen court concluded that Tennessee's Medicaid fair hearing procedures, which after an initial review and adverse determination would require the effected Medicaid recipients to provide information and at all points permitted a request for a hearing if a beneficiary presented a "valid factual dispute" about their continued eligibility for coverage, complied with due process requirements. Rosen, 410 F.3d at 929.

Similarly, in the present case, Waddle was given two (2) opportunities to state her intention with regard to pursing the appeal, seeking a fair hearing, and presenting evidence of medical necessity prior to the fair hearing pursuant to a Prehearing Conference Order. Appellant failed to provide the requested information by the first due date and simply did not respond by the second due date. Although Goldberg provides the "opportunity" for a participant to be heard, it is clear under the present facts that Waddle abandoned the opportunity that was afforded to her by failing to provide the information requested.

Moreover, the South Carolina Supreme Court has determined that "[o]ne cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it. Zaman v.

S.C. State Bd. of Med. Examiners, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) (identifying the due process requirements set forth in Goldberg in reaching its decision).

As previously stated, Waddle simply failed to take advantage or declined to take advantage of the fair hearing process by refusing to provide information requested from the hearing office in a Prehearing Conference Order.

Finally, in the cases of Mims v. S.C. Dept. of Health and Humans Svcs., Docket No. 07-ALJ-08-0082-AP (S.C. ALC 2007) and Brown v. S.C. Dept. of Health and Human Svcs., Docket No. 12-ALJ-08-0067-AP (S.C. ALC 2012), the ALC discussed the requirements of 42 C.F.R. § 431.223. In Mims, the hearing officer dismissed the appeal due to the participant's failure to timely provide further information requested in a pre-hearing Order. In Brown, the hearing officer dismissed the appeal due to the participant's failure to provide a more definite statement of the issues on appeal. Both were procedural dismissals prior to a fair hearing.

In Mims, the appellant/participant raised the same arguments present in this case; specifically, that a hearing officer may only dismiss a fair hearing request if the participant withdraws the request in writing, or fails to attend a hearing without good cause. While the ALC acknowledged those situations in which a hearing officer *may* dismiss appeals, citing Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 593 S.E.2d 462 (2004), the court determined that "may" was permissive and not mandatory.

The ALC opined,

> the federal regulation [42 C.F.R. § 431.223] is not so comprehensive that it preempts the state from passing regulations which are not contradictory. In this instance the state has promulgated regulations that provide additional grounds for dismissal and can be applied harmoniously with the federal regulations.

> [DHHS] can promulgate regulations governing the administration of hearings so long as they do not conflict with the federal regulations. [internal citation omitted] The language of 42 C.F.R. § 431.223 and 27 S.C. Code Ann. Regs. 126-154 do not contradict each other. Accordingly, the Hearing Officer had the authority to dismiss Mims's appeal for failure to comply with his November 30 Order.

Mims, Docket No. 07-ALJ-08-0082-AP.

For the reasons set forth in Mims, there is substantial evidence in the record to support the hearing officers Order of Dismissal and, therefore, the Order should be affirmed.

For the reasons set forth herein, DHHS respectfully requests that the appeal either be dismissed as not preserved or, in the alternative, that the hearing officer's Order of Dismissal be affirmed.

III. WADDLE'S REMAINING ARGUMENTS ARE NOT PRESERVED FOR REVIEW (WADDLE'S ISSUES 3, 4 AND 5)

In its October 11, 2013 Order, the ALC determined that all of the issues presented on appeal, except the hearing officer's Order of Dismissal, involved the same or substantially the same claims as those arising in a pending proceeding between the same parties and, therefore, even if properly raised in this case would be subject to dismissal under at Rule 12(b)(8), SCRCP theory. Regardless, the ALC went on to state that Waddle failed to present a proper record of these issues on appeal but instead attempted to improperly create a record through incorporating exhibits from the companion proceeding in her Initial Brief. [R. pp. 7-8]. Citing to Administrative Law Court Rule 36, the ALC concluded that there were no facts in the Record to consider regarding any issue other than the Order of Dismissal. Id.

"Issues not raised to and ruled on by the agency are not preserved for judicial consideration." Brown v. S. Carolina Dep't of Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002); Carson v. South Carolina Dep't of Natural Res., 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) (stating that a court sitting in appellate capacity may not consider issues not raised or ruled on by administrative agency); see also Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000); Kiawah Resort Assoc. v. South Carolina Tax Comm'n, 318 S.C. 502, 458 S.E.2d 542 (1995). If an issue is raised to, but not ruled upon by the agency, nothing in the South Carolina Administrative Procedures Act ("APA") prevents a party from seeking reconsideration or requesting a hearing. Kiawah Resort Associates, 318 S.C. at 506, 458 S.E.2d at 544. In fact, the APA specifically acknowledges a party's right to seek reconsideration of a final agency decision. Id. citing S.C. Code Ann. § 1-23-380 ("proceedings for review are instituted by serving and filing notice of appeal . . . within thirty days after the final decision of the agency *or, if a rehearing is requested,* within thirty days after the decision is rendered") (emphasis added).

In the present appeal, the remaining issues raised on appeal by Waddle were not raised to or ruled upon by the hearing officer. Moreover, Waddle did not file a Motion for Reconsideration requesting a ruling on the arguments, assuming *arguendo* they were raised. Cf. Elam v. S. Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (stating a party *must* file a Rule 59(e), SCRCP, Motion to Alter or Amend when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review).

Moreover, as stated by the ALC, there are no facts in the Record on Appeal upon which this Court can base its decision. S.C. Code § 1-23-380 (stating appellate review must be confined to the record).

As these arguments were neither discussed, addressed nor ruled upon in the Order of Dismissal, they are not preserved for appellate review and, therefore, the appeal should be dismissed or, in the alternative, the Order of Dismissal affirmed.

CONCLUSION

For the reasons set forth, Respondent respectfully requests the Court dismiss the appeal as the issues are not preserve or, in the alternative, to affirm the agency's Order of Dismissal.

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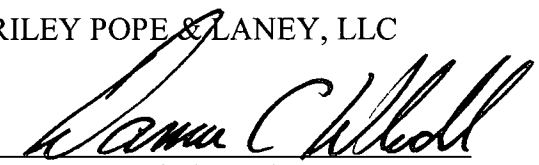

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April 15, 2015

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CERTIFICATION OF COUNSEL

I hereby certify that Respondent's Final Brief complies with Rule 211(b), SCACR.

RILEY, POPE & LANEY, LLC

Damon C. Wlodarczyk

Columbia, South Carolina
April 16, 2015

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CERTIFICATE OF SERVICE

This is to certify that have this day caused to be served upon the person named below the attached **Respondent's Final Brief and Certification of Counsel** in the above-captioned matter via United States mail, first-class postage prepaid, to the following:

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Damon C. Wlodarczyk

Columbia, South Carolina
April 16, 2015