

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.: 2016-001460

RECEIVED
AUG 17 2016
SC SUPREME COURT

Brook Waddle,.....Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

RILEY, POPE & LANEY, LLC

DAMON C. WLODARCZYK
S.C. Bar No. 70460
P.O. Box 11412
Columbia, South Carolina 29211
(803) 799-9993 – Office
(803) 239-1414 – Facsimile
Counsel for the Respondent

COUNTER-STATEMENT OF THE CASE

This matter is before the Court from an Opinion of the South Carolina Court of Appeals 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. [App. 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 with the provider without success. [App. 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.].

Both 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. [App. 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. [App. p. 9]. On November 11, 2013, Waddle filed and served a Notice of Appeal with the South Carolina Court of Appeals. [App. p. 60]. On November 24, 2014, DHHS filed a

Motion to Dismiss the appeal with a supporting affidavit on the grounds that the issues on appeal were now moot, which was denied by Order filed January 16, 2015. [App. pp. 61-66, 402]. On March 2, 2016, the Court of Appeals issue an Unpublished Opinion affirming the ALC's Order on the grounds that the issue was moot. [App. pp. 483-84]. Waddle filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which were denied by Order filed June 10, 2016. [App. p. 494]. The Petition for Writ of Certiorari was filed July 11, 2016. DHHS received an Order for Extension of Time allowing it to file a Return by August 17, 2016.

STATEMENT OF FACTS

The ALC's Order concisely sets forth the relevant facts. [App. pp. 2-4, 5-6]. Additionally, facts 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 COURT OF APPEALS CORRECTLY AFFIRMED THE ALC'S ORDER ON THE GROUNDS THE ISSUE WAS MOOT (WADDLE'S QUESTION PRESENTED 1)

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. [App. pp. 65-66].

Waddle did not challenge DHHS's contention that Waddle has received the cable and continues to receive the cable, but rather argued the case was not moot because Waddle “will continue to depend on the services provided by DHHS to remain alive and the violations she has complained of will be repeated, thereby denying her due process.” [App. p. 308].

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 the oximeter cable has been provided to Waddle and 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 the relief that the fair hearing officer could provide.

Waddle contends the issue of mootness was not addressed by the ALC and there was no evidence of mootness submitted by DHHS in the Record on Appeal to the Court of Appeals. [Petition p. 11].

Contrary to Waddle's argument, the ALC did address the issue of mootness in its Order. The ALC noted that both Waddle and DHHS "tried to resolve the issue with KePro and/or Apria, but to no avail. Indeed, [DHHS] even asked Apria to resubmit its request with supporting documentation, but the issue remains pending." [App. p. 3]. The ALC then footnoted, "[t]his is as of March 19, 2013, and there is nothing in the Record On Appeal to indicate that the issue has since been resolved." [Id.].

However, since the ALC's Order, the issue was resolved. As a result, DHHS filed and served a Motion to Dismiss the appeal on the grounds of mootness, which was supported by an Affidavit of Maureen E. Ryan. The Affidavit identified the error that resulted in the DME being denied, identified that the error was corrected and that the DME was provided, and identified that if the correct code is used in the future, the DME will be approved without prior authorization. [App. pp. 65-66]. As previously stated,

Waddle did not challenge DHHS's contention that Waddle has received the cable and continues to receive the cable nor does she contend in the Petition that she does not receive the DME. Moreover, Waddle conceded in her Reply Brief that, "[a]s Respondent argues on page 5, Waddle finally received the oximeter cable that initiated this civil action."¹ [App. p. 468].

While Waddle is correct in stating the Record on Appeal submitted by DHHS did not contain any evidence of mootness, this argument is not dispositive.

As stated by this Court, "[a] moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy *because an intervening event* renders any grant of effectual relief impossible for the reviewing court. Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) (emphasis added). There was ample evidence before the Court of Appeals to find that an intervening event occurred which rendered the issue moot based upon the Affidavit. Additionally, there was no allegation that the DME was not being provided and, as stated, Waddle concedes in her Reply Brief that the DME was provided. [App. pp. 65-66, 468].

Waddle also contends it was in error to affirm the ALC Order under the two (2) exceptions in which a court may address an issue despite mootness. [Petition pp. 12-13].

A court may address an issue despite mootness, when: 1) the issue raised is capable of repetition, yet evades review; and 2) the question considers matters of important public interest. Friends of Hunley, Inc., 369 at 26-27, 630 S.E.2d at 478.

In rendering its opinion, the Court of Appeals cited two (2) cases addressing this issue: Friends of Hunley, Inc., 369 at 27, 630 S.E.2d at 478 (stating "the action must be

¹ This appeal is not from a civil action but, as stated, is an appeal of an agency decision as provided by the South Carolina Administrative Procedures Act ("APA").

one [that] will truly evade review.”) and City of Charleston v. Masi, 362 S.C. 505, 508-09, 609 S.E.2d 301, 303 (2005) (stating in part “we find that while the questions involved could arise again, the questions will not ‘usually become moot’ before they can be reviewed.”). [App. p. 484].

Waddle’s own arguments citing to cases raising similar due process arguments which have been addressed by the courts support the Court of Appeals’ finding that, while the questions involved could arise again, the questions will not usually become moot before they can be reviewed. [Petition, p. 3, citing Waddle v. S.C. Dep’t of Health and Human Servs., 13-ALJ-08-603-AP (pending before the ALC); p. 9, citing Stogsdill v. S.C. Dep’t of Health and Human Servs., 410 S.C. 273, 763 S.E.2d 638 (Ct.App. 2014); p. 12, Peter Brown v. S.C. Dep’t of Health and Human Servs., 393 S.C. 11, 709 S.E.2d 701 (Ct.App. 2011); p. 13, Doe v. Kidd, 501 F.3d 348 (4th Cir. 2007) Doe v. Kidd, 419 F.Appx 411 (4th Cir. 2011)].

The Court of Appeals did not err in affirming the ALC Order on the grounds of mootness as there remains no actual controversy and there is no showing that the question presented is capable of evading review.. Accordingly, the Petition should be dismissed.

II. EVEN IF IT WAS ERR TO FIND THE ISSUE WAS MOOT, THERE WAS NO ERR IN DISMISSING WADDLE’S ADMINISTRATIVE APPEAL FOR FAILING TO COMPLY WITH THE HEARING OFFICER’S ORDER (WADDLE’S QUESTION PRESENTED 2B)

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

Waddle set forth five (5) issues on appeal to the ALC in her Initial Brief. [App. 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. [App. pp. 89-102]. Waddle first addressed the procedural dismissal in her Amended Reply Brief. [App. 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 Petition 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 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 affected Medicaid recipients to provide information and at all points permit 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 pursuing 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, this 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, Docket No. 12-ALJ-08-0067-AP, 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 prehearing 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 officer's Order of Dismissal and, therefore, even if the issue is not moot, the ALC Order should be affirmed.

For the reasons set forth, DHHS respectfully requests that the Petition be denied.

III. THE COURT OF APPEALS DID NOT ERR IN NOT ADDRESSING WADDLE'S REMAINING ARGUMENTS AS THEY WERE NOT PRESERVED FOR APPELLATE REVIEW (WADDLE'S QUESTIONS PRESENTED 2A, 3 AND 4)

A. Waddle's argument that her due process rights were violated on the grounds that the notices required by 42 C.F.R. § 431.210 is not preserved for appellate review.²

Rule 220(b)(2), SCACR, provides, "[t]he Court of Appeals need not address a point which is manifestly without merit."

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), SCRCR 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. [App. pp. 7-8]. Citing to Administrative Law Court Rule

² While the question presented is not preserved for appellate review, Waddle argues that she was denied the opportunity to cross-examine DHHS's witnesses regarding the truthfulness of the denial of the DME and that the "real reason" for the denial was different from that provided to Waddle by the third-party administrator. [Petition p. 16]. It is important to emphasize that DHHS was actively working to resolve the issue in 2013 as evidenced by the ALC's findings. [App. p. 3].

36, the ALC concluded that there were no facts in the Record to consider regarding any issue other than the Order of Dismissal.³ [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 & Env’tl. 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 the 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 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).

Waddle’s question regarding compliance with 42 C.F.R. § 431.210 was not raised to or ruled upon by the hearing officer. Moreover, Waddle did not file a Motion for Reconsideration requesting a ruling on that argument, assuming *arguendo* it was raised. Cf. Elam v. S. Carolina Dep’t of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)

³ As stated in the Order, the ALC was referring to a separate proceeding, B.W. v. S.C. Dep’t of Health and Human Servs., 09-ALJ-08-344-AP (ALC 2009), which remanded the matter to DHHS’s Division of Appeals and Hearings for further proceedings. An Order was subsequently issued by DHHS, which is currently on appeal by both parties to the ALC in Waddle v. S.C. Dep’t of Health and Human Servs., 13-ALJ-08-603-AP.

(stating a party *must* file a Rule 59(e), SCRCR, 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).

As this argument was neither discussed, addressed nor ruled upon in the Order of Dismissal, it is not preserved for appellate review and, therefore, the Petition should be denied.

- B. Waddle's argument that DHHS violated the Medicaid Act for failing to issue a final administrative order and to provide services to prevent institutionalization is not preserved for appellate review.

Waddle argues DHHS has violated the Medicaid Act for failing to issue a final administrative decision within 90 days. [Petition p. 22].

As stated above, 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. Waddle's question was not raised to or ruled upon by the hearing officer. Waddle did not file a Motion for Reconsideration requesting a ruling on that argument, assuming *arguendo* it was raised. Moreover, this issue was not briefed to the Court of Appeals. [App. p. 412]. Therefore, the question is not preserved for appellate review and the Petition should be denied. Brown, 348 S.C. at 519, 560 S.E.2d at 417; Carson, 371 S.C. t 120, 638 S.E.2d at 48; Rule 242(d)(2), SCACR.

- C. Waddle's argument that DHHS violated the Americans with Disabilities Act ("ADA") by not promulgating regulations and failing to provide reasonable accommodation is not preserved for appellate review.

Waddle argues DHHS has violated the ADA by failing to provide services in the least restrictive setting and failing to promulgate regulations. [Petition pp. 24-25].

As stated above, 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. Waddle's question was not raised to or ruled upon by the hearing officer.

Waddle did not file a Motion for Reconsideration requesting a ruling on that argument, assuming *arguendo* it was raised. Therefore, the question is not preserved for appellate review and the Petition should be denied. Brown, 348 S.C. at 519, 560 S.E.2d at 417; Carson, 371 S.C. t 120, 638 S.E.2d t 48.

IV. THE COURT OF APPEALS DID NOT ERR IN STRIKING WADDLE'S DESIGNATION OF MATTER AND INITIAL BRIEF WITH INSTRUCTIONS TO FILE AN AMENDED DESIGNATION OF MATTER AND AMENDED INITIAL BRIEF COMPLYING WITH RULE 209(b), SCACR.

Waddle argues the Court of Appeals erred in granting DHHS's motion to strike her Designation of Matter and Initial Brief. [Petition p. 21]. Waddle claims this Court should consider evidence related to her 2007 appeal because it was incorporated by reference and it would be a "travesty of justice and encouragement to this agency to win appeals by denying basis fundamental rights of disabled persons who rely upon those services." [Petition p. 22].

As stated, 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. The ALC was referring to a separate proceeding, B.W., 09-ALJ-08-344-AP (ALC 2009), which at the time was remanded to DHHS's Division of Appeals and Hearings for further proceedings. A final Order was subsequently issued by DHHS, which is currently on appeal to the ALC in Waddle., 13-ALJ-08-603-AP.

The facts set forth in the Petition regarding a 2007 administrative appeal concerning service hours to be provided, an adult communication device, and remuneration to Waddle's mother, which ultimately resulted in a final administrative Order filed November 19, 2013, is currently on appeal to the ALC in Waddle, 13-ALJ-

08-603-AP. The case has been fully briefed and the parties are awaiting the scheduling of oral arguments or a final Order by the ALC. [Petition pp. 5-10]. Moreover, a review of the November 19, 2013 Order clearly shows that it did not involve the denial of an oximeter cable.

As the November 19, 2013 Order is currently before the ALC, as specifically provided for by S.C. Code § 1-23-600(A) and a final decision has not been issued by that court, the Court of Appeals was without jurisdiction to review the 2007 appeal/November 19, 2013 Order as stated in S.C. Code § 1-23-610. S.C. Code § 1-23-610 (providing for judicial review of a *final decision* of an administrative law judge to the Court of Appeals). Therefore, the Court of Appeals did not err in granting DHHS's motion to strike matters related to the 2007 appeal as those issues are pending before the ALC in a different case.

CONCLUSION

For the reasons set forth, DHHS respectfully requests that the Court dismiss the Petition for Writ of Certiorari.

RILEY POPE & LANEY, LLC



Damon C. Włodarczyk, SC Bar 70460
Post Office Box 11412
Columbia, South Carolina 29211
Telephone: (803) 799-9993
Facsimile: (803) 239-1414

Columbia, South Carolina

August 17, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.: 2016-001460

RECEIVED
AUG 17 2016
SC SUPREME COURT

Brook Waddle,.....Petitioner,


v.

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

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be served upon the person named below the attached **Return to Petition for Writ of Certiorari** in the above-captioned matter via United States mail, first-class postage prepaid, to the following:

Patricia Harrison, Esquire
611 Holly Street
Columbia, SC 29205


Damon C. Wlodarczyk

Columbia, South Carolina
August 17, 2016