Matter of Wallace v Zucker
2018 NY Slip Op 32033(U)
August 16, 2018
Supreme Court, Suffolk County
Docket Number: 006527-2017
Judge: John H. Rouse

INDEX NO. 006527-2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 02/09/2018
ADJ. DATE: 06/20/2018
Mot. Seq. 001- TRANSFERRED to APPELLATE DIVISION CASEDISP

In the Matter of the Application of BRIDGETTE WALLACE, Administrator, Estate of Joan Klocke,

Petitioner

-against-

DECISION & ORDER

HOWARD A. ZUCKER, M.D., J.D., Commissioner, New York State Department of Health, and SAMUEL D. ROBERTS, Commissioner, Office of Temporary and Disability Assistance,

Respondents

for Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

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TO:
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Upon the reading and filing of the following papers in this matter: (1) Notice of of Petition and Verified Petition filed on December 21, 2017 with Exhibits A-T and the Affidavit of Frank L. Buquicchio, Esq. affirmed on December 21, 2017; (2) Verified Answer by Responded Howard A. Zucker, M.D., J.D; (3) Return dated June 27, 2018 comprised of Exhibits A-V; it is:

ORDERED that the Petition (Seq. #001) is denied to the extent that there were no errors of law and no violations of procedure by the Respondent when it rendered its determination dated May 4, 2017 that Petitioner's request for a fair hearing upon the underlying determination made on July 3, 2014 was untimely; as to whether there was substantial evidence to support the determination on that issue, in accordance with CPLR § 7804(g) this case is transferred to the Appellate Division, Second Department, of the Supreme Court.

DECISION

This Article 78 proceeding was commenced by filing on December 21, 2012 to vacate and reverse a May 4, 2017 Decision after a Fair Hearing and the letter decision dated October 31, 2017, and for an order directing the Commissioner of the New York State Department of Health to render a decision on the merits of the Fair Hearing. This court previously denied the Respondent's pre-answer motion made pursuant to CPLR § 3211 to dismiss the petition as barred by the four month statute of limitations. *See Decision and Order of this Court dated May 22, 2018 and entered on May 29, 2018.*

The Petitioner brings this Article 78 proceeding to review a determination by the New York State Department of Health dated May 4, 2017 after a hearing had been conducted on August 10, 2016, April 7, 2017 and concluded on May 1, 2017. The issues before the New York State Department of Health were:

> Whether the Appellant's (Petitioner herein) request for a fair hearing to review the Agency determination to discontinue the Appellant's Medical Assistance benefits on the grounds that the Appellant and/or her representative failed to submit a Recertification/Renewal Notification form timely?
>
> and
>
> If such request was timely, was the Agency's determination to discontinue the Appellant's (Petitioner herein) Medical Assistance benefits on the grounds that the Appellant and/or her representative failed to submit a Recertification/Renewal Notification form correct?

Petitioner advances nine causes of action in the petition.

First: The Fair Hearing Decision is "in violation of lawful procedure, was effected by an error of law, or was arbitrary and capricious or an abuse of discretion" depriving Joan Klocke of her rights, including the right to due process, regarding her Medicaid application for Institutional Care. The Agency cannot close a Medicaid application for Institutional Care by opening and closing limited Medicaid coverage (community care)that was not applied for by Joan Klocke. Further, the Agency cannot limit coverage period for Institutional Care until it has first rendered a determination as to the Medicaid eligibility for such Institutional Care.

Second: The Fair Hearing Decision "in violation of lawful procedure, was effected by an error of law, or was arbitrary and capricious or an abuse of discretion" depriving Joan Klocke of her rights, including the right to due process, regarding her Medicaid application for Institutional Care as the July 3, 2014 Notice was not clear in setting forth that the Medicaid coverage for Institutional Care was being terminated (even though it had not yet been approved). See SSL §22(12)(g); 18 NYCRR § 358.2.2(1)

Third: The Fair Hearing Decision is "in violation of lawful procedure, was effected by an error of law, or was arbitrary and capricious or an abuse of discretion,"and is not supported by "substantial evidence" on the record as a whole. The complexity of the Medicaid application process has resulted in numerous determinations and reversals of determinations made by the Agency. Joan Klocke, through her attorney, has established a high degree of diligence and responsiveness throughout the Medicaid application process. Joan Klocke is entitled to an opportunity to be heard on the merits of the Medicaid application for Institutional Care. However, the Agency's foreclosing any examination of the merits based upon its mechanical timing requirements set forth in the July 3, 2017 Notice, and only received by Joan Klocke's attorney more than one year later, denies Joan Klocke's rights, including the right to due process, and unfairly prejudices Joan Klocke. The substantial harm to Joan Klocke is clearly great and there is no unfair prejudice to the Agency by allowing an examination of the merits. *See Futterman v. New York State Div. of Housing and Community Renewal. 264 A.D. 2d 593 (1999).*

Fourth: Joan Klocke was deprived of her rights, including the due process rights to challenge this determination. The Agency is bound to make decisions fairly, assist the Medicaid Applicant, when necessary, and permit a reasonable opportunity and forum to challenge its decisions. In fulfilling its purpose, the Agency should strive to render decisions on the merits. This is especially the case when Joan Klocke's attorney actively and diligently participates in the Medicaid application process and is responsive to the requests and notices of the Agency. At all times, the Agency was fully aware that Joan Klocke's attorney was actively engaged in the Medicaid application process. Through the latter part of 2014 and into 2015, and particularly at Fair Hearings on August 26, 2014 and September 30, 2014, the Agency never raised the fact that a Notice of Discontinuance was issued on July 3, 2014. If Joan Klocke's attorney had known, he could have either appealed the determination or filed a re-application for Medicaid Institutional Care Services. The August 26, 2014 Fair Hearing on the transfer issue was within 60 days of the date of the Notice of Discontinuance. The Agency representative failed to disclose the July 3, 2014 Notice, at that time, and never disclosed it at the subsequent Fair Hearing on September 30, 2014. This Medicaid determination which does not cover all of Joan Klocke's institutional care services should not punish Joan Klocke, her spouse and/or the nursing home which has an outstanding statement for care services rendered.

Fifth: The Fair Hearing Decision is "in violation of lawful procedure, was effected by an error of law, or was arbitrary and capricious or an abuse of discretion," and is not supported by "substantial evidence" on the record as a whole. In its decision, the Agency refused to address the merits of the Medicaid Application for Institutional Care premised solely upon a presumption of notice which had been rebutted. As part of the settlement in Meachem v. Wing, 99 Civ. 4630, Administrative Law Judges (ALJ) were required to take a continuing education course which included issues of mailing and receipt of Notices, the purpose of which was to conduct a better Hearing. The ALJ is to "evaluate.. . the appellant's explanation..." and the rationale relied upon by the ALJ".. . should be clearly articulated in the 'DISCUSSION' section of the DAFH." (See pages 13 and 14 of the outline of that course attached as Exhibit "S".) As detailed above, the sworn Affidavit of Joanna Perez, and the testimony of Joan Klocke's attorney established

non-receipt of the July 3, 2014 Notice. Further, the Agency had before it convincing supporting circumstances concerning the course of diligent conduct by Joan Klocke's attorney throughout the Medicaid application process, including timely responses to other Agency requests, notices, and requests for fair hearings. In addition, the Fair Hearing Decision improperly applied a presumption of delivery in the first instance based upon an Affidavit regarding mailing procedures of the Agency made six months prior to the July 3, 2014 Notice and which did not provide sufficient evidence that the procedures were applied in this particular case. Where the presumption of mailing is rebutted, the Notice in not effective and the statute of limitations to request a Fair Hearing is tolled.

Sixth: The Fair Hearing Decision is "in violation of lawful procedure, was effected by an error of law, or was arbitrary and capricious or an abuse of discretion,"and is not supported by "substantial evidence" on the record as a whole because it fails to give sufficient basis for the determination as required by Meachem v. Wing, 99 Civ. 4630. The Meachem case led to required further training of Administrative Law Judges specifically when mailing and receipt of a Notice is at issue. See attached memo to "All Hearing Officers" from Russell J. Hanks, RJH, Department of Social Services dated December 11, 1996, wherein he states that when credibility is in issue, ".. the basis for the determination should be included in the decision as specifically as possible". There is no such basis established in the current Decision.

Seventh: The Fair Hearing Decision is "in violation of lawful procedure, was effected by an error of law, or was arbitrary and capricious or an abuse of discretion" in that the July 3, 2014 Notice was defective since it was not received by Joan Klocke's attorney. As detailed herein, the convincing supporting circumstances and Joan Klocke's attorney' s diligent conduct and participation in the Medicaid application process overcame any presumption of delivery and established non-delivery of the July 3, 2014 Notice. Whena Notice is not given to the designated representative, the Notice is defective. Bailey v. Commissioner and Oneida Comity DSS, unpublished decision. It is well settled that if a Notice is defective, the 60 day statute of limitations to request a Fair Hearing should be tolled.

Eighth: The Fair Hearing Decision is "in violation of lawful procedure, was effected by an error of law, or was arbitrary and capricious or an abuse of discretion" in that July 10, 2015 Notice was defective and could not cure the non-delivery of the July 3, 2014 Notice issues one year earlier. The July 10, 2015 Notice only generally referred to the July 3, 2014 Notice merely stating that "Notice dated July 3, 2014 remains in effect." A copy of the July 3, 2014 Notice was not attached to or made a part of the July 10, 2015 Notice.

Ninth: The Fair Hearing Decision is "in violation of lawful procedure, was effected by an error of law, or was arbitrary and capricious or an abuse of discretion" in that any attempt to cure the non-delivery of the July 3, 2014 Notice by faxing a copy of said notice to Joan Klocke's attorney on August 7, 2015 failed in that the Agency did not effectively give Joan Klocke notice of her right to appeal the Notice by requesting a timely fair hearing by a date certain. Pursuant to 18

NYCRR § 358-3.5(1), "A request for a fair hearing must be made within 60 days after the social services agency's determination. The copy of the July 3, 2014 Notice faxed on August 7, 2015 only provided that a hearing must be requested before September 1, 2014 (an impossibility for someone receiving actual notice one year later). Indeed, nowhere in the copy of the July 3, 2014 Notice faxed on August 7, 2015 did it state that a hearing must be requested within 60 days and provide a specific deadline.

The Respondent after the 2017 fair hearing made the following findings of fact:

1. Joan Klocke was a recipient of Medical Assistant;

2. Joan Klock had been receiving nursing facility services in Carillon Nursing and Rehabilitation Center, a local Residential Health Care Facility since January 2012.

3. On April 11, 2014 the Respondent prepared a Recertification/Renewal Notification form addressed to the Appellant, the Appellant's representative's at his address of record and the Residential Health Care Facility which advised the Appellant's representative of the requirement to recertify the Appellant's continuing eligibility for Medical Assistance.

4. Neither Joan Klock, her representative nor the Residential Health Care Facility returned the Recertification/Renewal Notification form to the Agency.

5. By Notice dated July 3, 2014, the Respondent advised the Joan Klock of its determination to discontinue the Joan Klock's Medical Assistance benefits on the grounds that the neither Joan Klock nor her representative submitted a Recertification/Renewal Notification form.

6. The Notice advised the Appellant, her representative and the RHCF that a fair hearing must be requested within sixty days of the date of the Agency's action.

7. The Agency mailed the notice dated July 3, 2014 to the Appellant, the Appellant's representative's address as contained in the Appellant's case record and to the RHCF.

8. On November 20, 2015, the Appellant's representative requested the fair hearing that is the subject of this Article 78 proceeding.

9. On January 17, 2016, the Appellant passed away.

10. On March 31, 2016, the Surrogate's Court of the County of Suffolk issued Letters of Administration appointing Brigitte Wallace as Administrator of the Appellant's estate.

The Respondent determined that because the hearing was requested more than sixty days after the Agency determination sought to be reviewed, the Commissioner was without jurisdiction to review the local Agency's determination.

The court has reviewed the submissions and there has been no error of law or procedure and accordingly the issue of whether there was substantial evidence to support the determination is referred to the appellate division for determination. CPLR § 7804(g).

The foregoing shall constitute the decision and order of the court.

Dated: August 16, 2018

JOHN H. ROUSE, Acting J.S.C.

FINAL DISPOSITION