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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3151-12T3

B.B.,

Appellant,

v.

DIVISION OF DISABILITY SERVICES,

Respondent.

Submitted September 10, 2014 – Decided November 17, 2014

Before Judges Fuentes, Ashrafi and Kennedy.

On appeal from the Division of Disability Services.

Disability Rights New Jersey, attorneys for appellant (Susan W. Saidel, on the briefs).

John J. Hoffman, Acting Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel and on the brief; Molly Moynihan, Deputy Attorney General, on the brief).

PER CURIAM

Appellant B.B. appeals a final agency decision of the Division of Disability Services (Division) denying his request for reimbursement from the Traumatic Brain Injury Fund (TBIF) for a medical device he had purchased. Reimbursement was denied because appellant had not sought approval for the purchase from

the TBIF Review Committee before he incurred the expense, as required by State regulation. Appellant argues that the Division had precluded him from tendering an application to fund purchase of the device before he incurred the expense, and that "fundamental fairness" considerations warrant reversal of the Division's action.

We have considered appellant's arguments in light of the law and record, and we affirm. Briefly, the facts are as follows.

Appellant is fifty-one years of age. On June 18, 2009, he fell down a flight of stairs and suffered closed skull fractures, intracranial bleeding, and a stroke. Following hospitalization, he underwent long-term treatment at the Kessler Institute for Rehabilitation (Kessler), where a social worker suggested he apply for financial assistance to the TBIF.

Having requested and received an application from the TBIF, appellant filled out the required information and submitted it to the TBIF in September 2009. The Division reviewed the application for completeness, and thereafter referred appellant to a "case management provider" under contract with the Division, as required by N.J.A.C. 10:141-1.7(a)(4).[1]

[1] The Division contracts with case management providers to initially assess an applicant's "appropriateness" for the TBIF, (continued)

Appellant thereafter met with a representative from the assigned case management provider, and together they developed a support plan on January 8, 2010, requesting $14,100 for cognitive and physical therapy, as prescribed by appellant's doctor. The support plan was then submitted to the Division.

However, because the State had put a freeze on all money for the TBIF, appellant's support plan was not reviewed and no funding was authorized at that time. By August 2010, the Division advised the case management agencies that the TBIF Review Committee would start reviewing support plans, but, in accordance with N.J.A.C. 10:141-1.5(f), the spending limit for beneficiaries was lowered from $15,000 to $3,000.

The case management representative discussed with appellant the need to revise the prior proposed support plan to bring it within the new spending limit. Because appellant had received funding through either his existing health plan or disability coverage for the prescribed cognitive and physical therapies

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(continued)
and to "prepare a support plan in conjunction with the applicant and their family." N.J.A.C. 10:141(a)(11). Case managers have the responsibility to meet with qualified applicants and to "assist and advise" them in developing a support plan and "accessing" support services; to monitor the progress of the applicant receiving services or other support; to educate the applicant about "methods and options" to increase their independence; and to report to the Division on the outcome of any support provided and to recommend "if further support may be required." See generally N.J.A.C. 10:141-1.10.

originally identified in the January 2010 support plan, he authorized the submission in August 2010 of a "revision" to his earlier plan, indicating that he had no other needs or services for which he sought assistance.

The Division acknowledged receipt of the revision on September 23, 2010, and advised appellant that because he had indicated he had "no needs" for assistance from the TBIF, his request for funding was being dismissed. The letter also told appellant he could "re-open [his] case at any time."

Appellant asserts that after he submitted his first support plan in January 2010, his doctor recommended that he use a "Bioness" device to assist him with a foot-drop condition that had developed because of his brain injury. He states that he contacted his case management representative to ask if the TBIF would provide money to buy the device, but reportedly was told that because the $3,400 cost exceeded the spending cap, the TBIF would not approve it.

In December 2010, appellant purchased the Bioness with his own money, and first contacted the Division in approximately June 2011, to ascertain if the TBIF would reimburse him for the purchase. On July 12, 2011, the TBIF manager notified appellant that the fund would not reimburse him for the Bioness because

the purchase was made without "prior approval" as required by TBIF regulations.

Appellant, by this time represented by an attorney provided by Disability Rights of New Jersey[2], exchanged correspondence with the Division in an attempt to secure reimbursement for his Bioness device. After much back and forth correspondence over time, the Division issued a final agency decision on October 4, 2012, advising appellant's attorney that the TBIF would not reimburse appellant for the cost of the Bioness because State regulations governing the TBIF prohibit payment for any support or services that had not been pre-approved by the TBIF Review Committee. In response to a subsequent letter from appellant's counsel, the Division denied a hearing before the Office of Administrative Law (OAL), explaining that such a hearing is available only where the TBIF Review Committee has denied an application presented to it. Consequently, because appellant had never presented a support plan to the committee seeking payment for the device, he was not entitled to an OAL hearing pursuant to N.J.A.C. 10:141-1.8(a)(3). This appeal followed.

[2] Disability Rights of New Jersey is a nonprofit organization dedicated to advocate for the civil rights of persons with disabilities. http://www.drnj.org/mission.htm (Last visited October 28, 2014.)

We begin with a review of the principles that will guide our analysis. Generally, our review of a final administrative determination is limited. In re Carter, 191 N.J. 474, 482 (2007) (citations omitted). An agency determination will not be vacated "in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." Ibid. (quoting Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). Under this standard, appellate review is limited to four inquiries:

> (1) whether the agency's decision offends the State or Federal Constitution; (2) whether the agency's action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and (4) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Karins v. City of Atl. City, 152 N.J. 532, 540 (1998) (quoting George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994)).]

"The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the person challenging the administrative action." Seigel v. N.J. Dep't of Envtl. Prot., 395 N.J. Super. 604, 613 (App. Div.), certif. denied, 193 N.J. 277 (2007).

We do "not substitute [our] own [fact-finding] for that of the agency," and we will "defer to the agency . . . if the findings of fact are supported by substantial credible evidence in the record and are not so wide of[] the mark as to be manifestly mistaken." Tlumac v. High Bridge Stone, 187 N.J. 567, 573 (2006). Particularly germane to this appeal, we recently said:

> When we review an "agency's interpretation of statutes within its scope of authority and its adoption of rules implementing its enabling statutes, we afford the agency great deference." N.J. Soc'y for the Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 385 (2008) (citing In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004)). As the Court noted, "[s]uch deference is appropriate because it recognizes that agencies have the specialized expertise necessary to enact regulations dealing with technical matters and are particularly well equipped to read . . . and to evaluate the factual and technical issues that . . . rulemaking would invite." In re Freshwater Wetlands Prot. Act Rules, supra, 180 N.J. at 489 (internal quotation marks and citations omitted).
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> [Animal Prot. League of N.J. v. N.J. Dep't of Envtl. Prot., 423 N.J. Super. 549, 550, 784 (App. Div. 2011) (parallel citations omitted), certif. denied, 210 N.J. 108, 732 (2012).]

The TBIF was created by the Legislature to serve as the "payer of last resort" for the costs of acute care, services and financial assistance for residents of the State who have

suffered a traumatic brain injury. N.J.S.A. 30:6F-6(a)(1). Under the statute, the monies advanced to the TBIF are administered by the Department of Human Services, which was empowered to establish eligibility criteria and, within certain parameters, set funding limits. N.J.S.A. 30:6F-6(b).

The Department of Human Services adopted a series of regulations to "establish criteria for eligibility" and to create a "standard methodology" for determining "the amount and types of supports and services" allocated to eligible State residents. N.J.A.C. 10:141-1.1. The regulations required the Division to administer the TBIF and authorized the creation of a Review Committee to "review [] requests for services and supports" and to "render[] decisions on support plans" or reconsider requests it had previously denied. N.J.A.C. 10:141-1.4(a).

The Division was authorized to "lower the annual cap per Fund beneficiary" during periods it had "insufficient financial resources to meet its obligations," but could waive expenditure limits in cases of "extreme hardship" or "emergent circumstances." N.J.A.C. 10:141-1.5.

As we explained earlier, once an applicant has submitted a complete application, see N.J.A.C. 10:141-1.7(a)(4), an applicant is referred to a private case management provider

hired by contract at the expense of the Division to educate and assist the applicant in developing a support plan for services. The support plan must then be submitted to the Review Committee which may approve, deny, modify or hold an application. N.J.A.C. 10:141-1.8(a)(1). If the application is denied by the Review Committee, an applicant may seek reconsideration by the Committee, -1.8(a)(3)ii, and if the denial is upheld, may then seek a hearing before the OAL. -1.8(a)(3)iii.

The regulations clearly prohibit payment of, or reimbursement for, any support or service not previously approved by the TBIF Review Committee. N.J.A.C. 10:141-1.6 (a)(2)vi, N.J.A.C. 10:141-1.11(e). Appellant does not challenge these regulations, nor does he contend he complied with them.

Rather, appellant argues that the case management provider failed to amend the support plan after January 2010, after being told by appellant that his doctor had recommended his use of the Bioness device. We are not persuaded by this argument. The record shows appellant was aware that the TBIF Review Committee had not approved any expenditures for services or medical device

at the time he decided to buy the Bioness directly from the manufacturer[3].

Thus, while appellant wraps his arguments in the mantle of "fundamental fairness," we observe that appellant knew as early as September 2010 that his application had been dismissed. He did not seek to reopen his application at any point; elected to purchase the Bioness without first seeking approval from the Division; and delayed for over six months before telling the Division of his purchase or the purported problems he encountered with the case management provider.

Appellant further argues he was denied the right to seek reconsideration by the Review Committee, or a hearing before the OAL. However, the regulations only provide for reconsideration of Review Committee decisions, and OAL hearings if the Review Committee has denied reconsideration of its own prior decision. Neither of these circumstances occurred here and therefore the Division did not err in declining these avenues of redress.

Affirmed.

[3] Appellant bought a previously owned, refurbished Bioness, and paid a discounted price through an installment plan offered by the manufacturer.