

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing Nos. 18,450
) & 18,476
Appeal of)
)

INTRODUCTION

The petitioner appeals the decision by the Departments of Prevention, Assistance, Transition, and Health Access (PATH) and Department of Aging and Disabilities (DAD) terminating her eligibility for Medicaid Waiver services. The preliminary issue is whether the petitioner's death renders the matter moot.

DISCUSSION

The petitioner filed the underlying appeal in this matter on April 28, 2003 after DAD notified her that it had terminated her in-home Medicaid Waiver services effective April 30, 2003. This action was based on PATH's decision that the petitioner did not meet the citizenship requirements for eligibility for Medicaid. Subsequent to filing her request for hearing the petitioner (through her attorney) conceded that the underlying basis for PATH's decision (her lack of either citizenship or resident alien status) was correct. The petitioner also conceded that she had received

Medicaid Waiver services as a result of Department error for more than four years prior to the date of her termination. However, the petitioner continued to assert that she was entitled to at least one or two months continuing benefits after April 30, 2003 solely as a result of her filing a timely request for hearing.¹

However, before the hearing officer was able to render a recommendation on this issue, both Departments moved to dismiss the matter in December 2003 based on the fact that the petitioner had recently died. In response, the petitioner's daughter, who also was the primary provider of the petitioner's in-home Medicaid Waiver services (and the payee of most, if not all, of those benefits) seeks to pursue the appeal in the petitioner's behalf. She alleges that she continued to provide personal care services free of charge to the petitioner until her death after the Department terminated Medicaid Waiver payments as of April 30, 2003. The daughter concedes that the petitioner died without any assets, and that

¹ Suffice it to say that the above is a grossly oversimplified and incomplete recitation of the procedural history and underlying legal issues involved in the "merits" of the petitioner's appeal in the matter. As background, however, it is deemed sufficient to frame the preliminary issue of mootness.

she, as the provider of the services in question, would be the sole beneficiary of any ruling at this time regarding the petitioner's retroactive eligibility for any continuing benefits.

Somewhat surprisingly, this appears to be the first case in which the Board has been directly confronted with the issue of whether a fair hearing appeal survives the death of the petitioner who brought it.

3 V.S.A. § 3091(a) provides as follows:

An applicant for or a recipient of assistance, benefits or social services from. . .the department of social welfare². . .the department of aging and disabilities. . .or an applicant for a license from one of those departments or offices, or a licensee, may file a request for a fair hearing with the human services board. An opportunity for a fair hearing will be granted to any individual requesting a hearing because his or her claim for assistance, benefits or services is denied, or not acted upon with reasonable promptness; or because the individual is aggrieved by any other agency action affecting his or her receipt of assistance, benefits, or services, or license or license application; or because the individual is aggrieved by agency policy as it affects his or her situation.

In this case, the petitioner's daughter alleges no standing other than the fact that she is an unpaid provider of services allegedly performed for the petitioner during the pendency of the petitioner's appeal in this matter. The petitioner died without assets, and no benefits that are

potentially at stake in this matter would be payable directly to the petitioner or her estate. Thus, the petitioner's daughter has no legal or equitable status beyond that of any third-party provider who performs unpaid medically-related services to an individual during that individual's appeal of Medicaid eligibility or coverage. The Board has generally held that third-party creditors do not have standing under § 3091(a), *supra*. See Fair Hearing Nos. 17,082 and 16,791.

This result appears to have been confirmed by a recent dismissal by the Vermont Supreme Court involving an appeal of a decision by the Board in which a petitioner who had received an adverse decision from the Board died while his appeal was pending before the Court. In that case, Pickering v. Dept. of PATH, Docket No. 2002-490 (Feb. 9, 2004), involving an appeal of a decision by PATH not allowing the appellant an increase in his Medicaid long-term care patient share allotment to pay court-ordered alimony to his ex-wife, the Court held:

Petitioner's representative's response fails to identify any remaining controversy for this Court to resolve. His representative indicates that petitioner continued to pay his ex-wife alimony, despite the fact that the Department did not allow him a deduction from income for this payment for purposes of calculating the amount he owed for the Medicaid benefits he received. The Department has not attempted to collect any monies owed from petitioner's estate, and has indicated no

² Now PATH.

intention to do so. Furthermore, petitioner's estate has no assets from which the Department could collect these monies. Accordingly the appeal is dismissed as moot.

The petitioner in the instant matter concedes that once the appellant in Pickering died, the only remaining issue in that case was whether a third party (the appellant's nursing home) would receive a payment from Medicaid to cover the shortfall in fees due to that appellant having continued to pay his ex-wife's alimony rather than the nursing home out of his patient share during the pendency of his appeal. However, the petitioner here argues that the Pickering court was *mistaken* in thinking that the remaining issue in that case after the petitioner's death was whether the petitioner's estate would have to reimburse the Department. Even if the petitioner is correct in his assessment of that decision, it seems highly unlikely that the Court would have ruled differently if it had been apprised that the appellant, who (like the petitioner herein) had no assets, died owing money to a third-party medical provider rather than to the Department.

However, even if it could be found that the instant petitioner's "estate" has a continuing monetary interest distinguishable from Pickering, it cannot be concluded that the petitioner was ever "entitled" to the benefits in

question. As noted above, the petitioner conceded early on in this matter that *for more than four years* she received (and her daughter was paid by) Medicaid Waiver benefits for which she was not eligible. The only outstanding claim on the "merits" in this matter is whether the Department violated its *hearing procedures* in not continuing to pay her one or two *more* months (for which she later conceded she was also ineligible) solely on the basis of her filing a "timely" appeal of a decision that she did not ultimately contest. Even if the petitioner were to prevail on this claim³ it is difficult to see how this creates an entitlement that would survive her death.

Under Medicaid Manual § M143, the Department can "recover the value of any Medicaid benefits paid during the appeal period when . . . the reason for the appeal is an issue of law or policy and the Department's position is affirmed by the fair hearing decision. An issue of law or policy means that the person is questioning the legality of a law or rule rather than the facts used or the Department's judgement in applying

³ Again, this summation of the underlying "merits" is greatly simplified. Suffice it to say that there are other facts to which PATH and DAD can (and strenuously do) point that complicate the continuing benefits issue. However, for purposes of this discussion, the facts surrounding the Departments' notices will be assumed in the light most favorable to the petitioner.

the rules to make the decision being appealed." In this case, the petitioner never truly contested *either* the legal or factual bases of the Department's decision. In light of this, even if the Department had paid her continuing benefits until she conceded that her appeal had no merit, it would be difficult for the petitioner to argue that the Department could not have attempted to subsequently recover them. Under these circumstances, it is difficult to see how the petitioner can now claim an "entitlement" to these benefits.⁴

The above notwithstanding, under 3 V.S.A. S 3091(d) the Board is empowered to determine "appropriate relief". In this case, even assuming all the *contested* facts in the petitioner's favor, on the basis of the *uncontested* facts it must be concluded that the petitioner's death requires dismissal of the matter. As noted above, the only beneficiary of any relief at this time would be the petitioner's daughter. While the daughter is certainly to be commended for continuing

⁴ This conceded lack of underlying eligibility clearly distinguishes this matter from Dodge v. Precision Construction Products, Inc., 175 VT 101 (2003), cited by the petitioner, a case in which it was held that *eligibility* for Worker's Compensation, even if established posthumously, creates a cause of action that can be pursued by the decedent's estate. That case is further distinguished from the instant matter in that Worker's Compensation is a cash payment that after death would be payable directly to the estate. Posthumous retroactive Medicaid benefits would be paid solely as reimbursement to a third-party, and would be of no benefit whatsoever to an estate without any assets.

to provide personal care service to the petitioner after her Medicaid Waiver benefits were terminated, the fact remains that she was erroneously paid for providing these services for more than four years prior to May 2003. Under these circumstances it cannot be concluded as a matter of either law or equity that she, as a third-party beneficiary, is due any further "relief".

ORDER

The Motions to Dismiss filed by the Departments of PATH and DAD are granted.

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