

In re) Fair Hearing No. 18,052
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Appeal of)
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The petitioner appeals a decision by the Department of Prevention, Assistance, Transition, and Health Access (PATH) eliminating chiropractic benefits in the Medicaid program.

1. PATH regulations have provided optional Medicaid coverage for chiropractic benefits for several years. See M640.

2. The chiropractic coverage rules have been mandated by the legislature and during the 2002 legislative session PATH was specifically directed not to amend its rules to eliminate coverage for chiropractic services for adults in the 2002 appropriations bill. Act 142, § 148(i), June 21, 2002.

3. That same Act, however, in anticipation of a budget shortfall which would not be fully understood until the legislature adjourned for the year, gave the Administration Secretary the emergency power to implement program and funding reductions under certain conditions. See § 324 Id. Those

circumstances included: (1) a finding that a revenue shortfall would exist equaling two percent or more above the current projection; (2) that the legislature was not in session; and (3) there was a need to balance the budget through this "deficit prevention" provision. Id. Any reductions proposed by the Secretary had to be filed with the joint fiscal committee of the legislature which would review and pass the matter on to the relevant legislative committee which would have an opportunity to disapprove the reductions. Thereafter, the committee was required to give a report on the reductions to the General Assembly by November 15, 2002. Id.

4. On July 10, 2002, some twelve days after the legislature adjourned, the revenue shortfall was assessed by the Emergency Board to be 4.3 percent greater than expected and a deficit in the budget was predicted of several million dollars. The Administration Secretary, acting pursuant to the legislative provisions outlined above, asked PATH, among other government divisions, to reduce its expenditures for the coming fiscal year.

5. Administrators at PATH assessed the Medicaid and VHAP programs to determine which reductions would affect the fewest Vermonters. PATH determined that cutting the chiropractic programs in the Medicaid and VHAP programs would

affect about 3,000 recipients out of 116,000 and that cutting the denture program in Medicaid would affect about 1,100 recipients. It also determined that only thirty percent of hospital payments were for elective surgery in the VHAP program, a program that was initiated in 1996. The Secretary of the Agency of Human Services recommended to the Administration Secretary that these programs should be cut for a savings of a little more than \$600,000. The total cut from all PATH programs (including staff reductions) was around four million dollars.

6. The Administration Secretary presented these cuts and others in a deficit prevention plan to the Joint Fiscal Committee of the legislature on August 12, 2002. The Secretary of the Agency of Human Services testified before the Committee that these cuts were unfortunate but would achieve the needed savings by affecting the fewest needy Vermonters. On August 23, 2002 the Committee rejected some cuts but approved the cuts at issue and adopted a deficit reduction plan. The plan was presented to the Health Access Oversight Committee on August 26 which did not block its passage.

7. Following this review, PATH initiated emergency rulemaking on September 5, 2002. See Bulletin 02-34 and 3 V.S.A. § 844. In this bulletin the Secretary attested that

there was an "imminent peril" to the public health, safety or welfare, namely the projected budget deficit. The bulletin dispensed with any public comment and was to take effect on October 1, 2002. A notice of the action had been placed in the Burlington Free Press on September 3, 2002.

8. The proposed emergency rules were reviewed by the Legislative Committee on Administrative Rules on September 25, 2002. This committee had the power under the deficit prevention act to reject any proposed reductions. Some members of the committee argued that there was no peril and that the emergency rule conflicted with the legislative intent not to cut the programs. Other members felt that the legislative desire to keep these programs had been overridden by an equally clear legislative intent to avoid a budgetary deficit which they classified as an emergency. The committee vote ended in a tie resulting in no action to block the cuts. Without a block, the cuts were authorized to proceed under the law.

9. These emergency rules were to take effect on November 1, 2002 and remain in effect for 120 days until a permanent rule could replace it. On October 14, 2002, PATH sent a letter to all Medicaid and VHAP beneficiaries notifying them that as of November 1, 2002, chiropractic benefits would

not be covered under the Medicaid program. Beneficiaries were told that they had a right to appeal and would continue to receive benefits until their hearings were resolved if they appealed before November 1, 2002.

10. On October 31, 2002, Vermont Legal Aid filed a class action lawsuit against the Agency of Human Services in which it was joined by the Vermont Chiropractic Association. The suit filed by the plaintiffs argued that the legislature had unconstitutionally delegated its authority to the legislative branch; that PATH's new rules were in contravention of the will of the legislature; that PATH had violated regulations of the state Department of Banking, Insurance and Health Care administration requiring the inclusion of chiropractic coverage in insurance policies; that the new rules violated the federal Medicaid Act; and that the new rules were promulgated in violation of the Administrative Procedures Act. A hearing was held on November 15, 2002 on the request for a preliminary injunction against the implementation of the new rules. The petitioner was not a named plaintiff in this lawsuit and has never been represented by an attorney in this matter.

11. The petitioner's appeal was filed prior to November 1 and a hearing was held thereon on October 31, 2002. The

petitioner, who is a Medicaid recipient, was engaged in a course of chiropractic treatment when the elimination notice was sent. She has subsequently become eligible for the Medicare Part B program which does cover chiropractic benefits with certain deductions and co-payments. Making these payments as well as making the Part B premium payment for such services is a financial hardship for the petitioner.

12. On November 1, 2002, PATH asked the Board to abstain from making any decisions in any appeals regarding the benefits eliminations pending a decision by the Superior Court on the request for a preliminary injunction made on behalf of all beneficiaries by Vermont Legal Aid. PATH made this request to avoid inconsistent outcomes and to avoid litigating the matter in two different forums simultaneously. The hearing officers assented to this request based on PATH's promise that benefits would continue for those who appealed prior to November 1 and because they felt that the interests of all of the pro se persons who had appealed could be better protected by the attorneys handling the cases in court. The petitioners were advised of this ruling in writing on November 14, 2002 and advised to contact legal aid.

13. On November 20, 2002, PATH clarified in a letter to the Board that benefits would continue only for individuals

who were already in a course of treatment at the time of the appeal. The petitioner was a person included in this category of continuing benefits.

14. On November 22, 2002, the Superior Court of Washington County issued its decision. The Court concluded that the plaintiffs were not likely to succeed on the merits of any of the above claims with the exception of the last regarding the requirements of the Administrative Procedures Act. The Court concluded that the Agency of Human Services was required to not only give notice but to receive comment before implementing any regulation and that its decision not to allow comment was a violation of the APA. The Court issued a preliminary injunction but stayed the injunction until December 31, 2002 in order to allow the Agency of Human Services to cure its error in the rulemaking process.

15. On December 2, 2002, the Court granted the plaintiffs' motion to take an interlocutory appeal to the Supreme Court on the legality of staying the preliminary injunction and on the question of whether there had been an unconstitutional delegation of power from the legislature to the executive branch.

16. PATH held a public hearing on December 9, 2002 and allowed comments for one week thereafter. On December 27,

2002, the Court granted PATH's motion to vacate the preliminary injunction. The new rules went into effect on January 2, 2003.

17. On January 14, 2003, PATH notified the Board that the preliminary injunction had been vacated by the Court. On that date, the hearing officers sent a notice to all those with pending cases of this event. All parties were asked to submit their arguments by January 31, 2003. PATH provided the Board with an argument that included dozens of pages of documents which had been submitted in the Court hearing. The petitioner did not object to those documents being considered part of the record nor did she offer any additional legal argument.

ORDER

The decision of PATH to terminate the petitioner's chiropractic benefits is affirmed but the effective date should be amended to January 2, 2003. If the petitioner had out-of-pocket expenses for such procedures before that date, she should present that evidence to PATH.

REASONS

The petitioner did not herself raise all of the points which were made on behalf of the class (yet to be certified) in the Superior Court lawsuit. See Susann Hunter, Robin Gagne, and Jane Doe on behalf of themselves and all others similarly situated, v. State of Vermont, M. Jane Kitchel and Eileen Elliott, Washington County Docket No. 687-11-02 and Vermont Chiropractic Association, Inc. Shawn James McDermott and Dee Kalea v. State of Vermont, Howard Dean, M. Jane Kitchel and Eileen Elliott, Washington County Docket No. 693-11-02). However, PATH has discussed all those arguments in its brief in this matter and in fairness to this pro se litigant, those arguments will be considered as if she had made those arguments in her own behalf.

No final decision on the merits has been reached in the lawsuit filed in Superior Court on this same issue, so it is doubtful that the Board is legally bound by considerations or collateral estoppel or issue preclusion by the Court's findings and decision in the preliminary injunction ruling. Trepanier v. Getting Organized, 155 Vt. 259, 265 (1990). However, a close review of the legal reasoning in the Court's decision indicates that it is sound and that reasoning, as well as the Court's legal conclusions as set forth in

Attachments One and Two, should be adopted herein as the Board's rationale and conclusion.

Essentially, the Court concluded that the legislature properly delegated the authority to the Administration Secretary and to certain committees of the legislature to cut programs to avoid a fiscal deficit; that there was no legislative enactment which would prevent the cutting of these particular programs; that the cuts did not violate state insurance or federal Medicaid law; and that emergency rulemaking was an appropriate mechanism to use in this instance. However, as the Court pointed out, the emergency rulemaking process was initially flawed and as such did not operate to terminate these benefits until the flaws were cured at the end of December. As such, it must be concluded that the elimination of these benefits was legal but that the elimination should not have been effective until January 2, 2003. Thus, the Board should uphold the decision of PATH to terminate these benefits with a modification of the effective date from November 1, 2002 to January 2, 2003. Although the petitioner had continuing chiropractic coverage until the Board made this decision, if she misunderstood that provision she may present any out-of-pocket expenses she had from November 1, 2002 through January 2, 2003. If the petitioner

feels that her health will be seriously harmed in the future without these treatments, she can apply for an exception for payment through the "M108" program.

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