

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 18,065
)
Appeal of)
)

INTRODUCTION

The petitioner appeals a decision by the Department of Prevention, Assistance, Transition, and Health Access (PATH) eliminating chiropractic benefits in the Vermont Health Access Plan (VHAP).

FINDINGS OF FACT

1. PATH regulations have provided chiropractic coverage under a Medicaid waiver in the VHAP plan for several years. W.A.M. 4003.1, P. 4003.

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 VHAP beneficiaries notifying them that as of November 1, 2002, chiropractic benefits would not be covered

under the VHAP program. Beneficiaries were told in that same written notice 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 a named plaintiff in this lawsuit, joining in with the chiropractic association.

11. The petitioner's appeal was filed on October 14, 2002 and her hearing was held on October 31, 2002. The petitioner is a VHAP recipient who was in a serious motor vehicle

accident in 2001 which injured her spine and left her in extreme pain. She has received regular chiropractic treatment for some time. She believes that chiropractic treatment is crucial to her mobility and function and has no income to pay for these treatments.

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 by the petitioner and others in the lawsuit. 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. In addition, in this case, another reason to abstain was that the petitioner was also involved in the Court case and could receive immediate relief from the Court without a class certification hearing. The petitioner was advised of this ruling in writing on November 14, 2002. That notice specifically advised her

again that her benefits would continue until the outcome of her hearing before the Board.

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 so long as they appealed prior to November 1. That definition included the petitioner.

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. On December 3, 2002, the petitioner wrote to the Board asking for a speedy resolution of her hearing. At that time she was informed by the clerk pursuant to the November 14 memo that her benefits were continuing pending the outcome of the matter. The petitioner replied that she had not been aware of that fact. However, at the petitioner's request, the matter was set for a status conference on January 7, 2003.

17. Pursuant to the Superior Court's order, PATH held a public hearing on its new rules 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.

18. The petitioner attended a status conference hearing before the Board's hearing officer on January 7, 2002. At that time the hearing officer continued the matter over the petitioner's objection noting that the petitioner "would not obey the directive not to interrupt the hearing officer." The matter was reset for February 13, 2003.

19. 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 referenced dozens of pages of documents which had been submitted in the Court hearing. The petitioner did not respond to this memo so all of the documents submitted by PATH were submitted into evidence. The petitioner argued that PATH could not cut her benefits because it had been prohibited from doing so by Section 148(i) of the 2002 Appropriations Act. She also argued that her due process rights had been violated by the delays.

20. The petitioner had another status conference set on February 13, 2002. At that time, the petitioner wanted to focus on her treatment by the hearing officer on January 7, 2003 (a different hearing officer from the one holding this status conference). She was advised to file a complaint with the Board regarding her grievances and asked if she had anything to add with regard to the merits of her case. She said at that time that she was in dire emergency need of chiropractic services and that she had been prejudiced by the delays. The petitioner was again advised that her chiropractic benefits were continuing until the resolution of her appeal hearing and was referred to the two prior written

notices she had received on October 16 and November 14 telling her that. The petitioner said that she had been unaware of the continuation of her benefits and thought she should have received some further written notice in this regard. She was also advised that a decision would issue in this matter in time for the April meeting of the Board.

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 chiropractic treatment between November 1, 2002 and January 2, 2003, she should present that evidence to PATH.

REASONS

The petitioner argues a point made in her lawsuit against PATH in the Superior Court in support of this administrative appeal, namely, that PATH was not authorized by the legislature to cut chiropractic benefits in the VHAP program. 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 responded not only to that argument but several others raised in the lawsuit in its brief. In fairness to this pro se litigant, those arguments will be considered as if she had made those arguments as well 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 any doctrine of collateral estoppel or issue preclusion to adopt 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 offend state insurance law 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 chiropractic 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 was receiving continuing benefits throughout this time, her misunderstanding of this situation would justify her in receiving reimbursement for any out-of-pocket expenses for chiropractic services she might have incurred from November 1, 2002 up to January 2, 2003, if she can provide evidence of the same to PATH. If the petitioner feels that her health will be seriously harmed without future treatments, she can apply for General Assistance benefits to alleviate a medical emergency.

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