IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

JOYCE HAIRSTON	)	CASE NO.: CV-2016-10-4508
	)	
Plaintiff	)	JUDGE JOY MALEK OLDFIELD
-vs-	)	
	)	
OHIO DEPARTMENT OF JOBS & FAMILY SERVICES, et al.	)	**ORDER**
	)	
	)	
Defendant		

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This matter comes before the Court on Appellant Joyce Hairston's Appeal from the October 20, 2016 final decision of Ohio Department of Job and Family Services ("DJFS"). Ms. Hairston brings her Appeal pursuant to R.C. 5101.35(E) and R.C. 119.12. DJFS filed the Record on November 15, 2016. Ms. Hariston filed her Brief on November 18, 2016. Appellee CareSource filed its Brief on December 16, 2016, and Appellee DJFS filed its brief on December 19, 2016. Ms. Hairston filed a Reply Brief on December 16, 2016.

Facts

Joyce Hairston is a participant in Ohio's Medicaid program, administered by CareSource. On August 5, 2016, she sought prior authorization for coverage of a box of 100 Bayer Contour Next Blood Glucose Test Strips. That same day, CareSource issued a letter denying prior authorization for the strips. The denial letter stated: "Your request for CONTOUR NEXT STRIP cannot be approved because a formulary option which is the same diagnostic tool is available. The formulary options are Abbott Freestyle or Precision Xtra Test Strips and Glucometers."

Ms. Hairston disagreed with CareSource's denial of the prior authorization. She requested a State Hearing, which was held on September 28, 2016. At the hearing, Ms. Hairston's husband spoke on her behalf. Donna McIntosh, Clinical Appeals Nurse, and Danny Miller, Clinical Pharmacist, testified on behalf of CareSource. Mr. Miller, the CareSource pharmacist, testified that the Bayer test strips that Ms. Hairston seeks and the two options available under her Medicaid managed care plan are comparable, and that they are the same diagnostic tool. Given that the three types of test strips do the same thing, Mr. Miller explained, Medicaid rules require CareSource to approve only the least costly alternative. In this case, the least costly glucose test strips are the Abbott Freestyle and Precison Xtra test strips.

Mr. Hairston argued that retail price for the Bayer strips is less than the Abbott strips. He presented screenshots from Walmart's website, showing the price difference. In response, Mr. Miller testified that the Medicaid program does not pay retail prices, but has negotiated a lower price for the Abbott Freestyle and Precison Xtra test strips, and this makes these options the lowest cost alternatives.

Mr. Hairston argued that *he* had received coverage of the Bayer strips, and on that basis believed that Ms. Hairston should get them too. The Hearing Officer disagreed and Ms. Hairston's appeal was overruled.

Ms. Hairston requested an administrative appeal to DJFS. On October 20, 2016, the Administrative Appeal Decision affirmed the State Hearing Decision, and held that "[t]he test strips Appellant wants are more expensive than equivalent strips. Appellant has advanced no credible reason why the other strips should be authorized." Ms. Hairston then appealed to this Court.

Standard of Review

The standard of review is set forth in R.C. 119.12, which states, in part:

> The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law.

Therefore, under R.C. 119.12, this Court's inquiry is limited to deciding whether the final order of the agency is supported by reliable, probative and substantial evidence, and whether that agency order is in accordance with law.

The Ohio Supreme Court has further described this inquiry as follows:

> The evidence required by R.C. 119.12 can be defined as follows: (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight, it must have importance and value.

Our Place, Inc. v. Ohio Liquor Control Comm., 63 Ohio St.3d 570, 571 (1992).

As the Court noted in *Our Place*, the review required by R.C. 119.12 is a restricted one. *See id.* Furthermore:

> The review of the administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court "must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof."

Lies v. Veterinary Medical Bd., 2 Ohio App.3d 204, 207 (1981), quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280 (1955). The reviewing court may reevaluate the credibility of the evidence, with "due deference to the administrative resolution of evidentiary conflicts." *See Univ. of Cincinnati v.*

Conrad , 63 Ohio St.2d 108, 111 (1980) (*per curiam*); *Crumpler v. State Bd. of Edn.*, 71 Ohio App.3d 526, 528 (1991).

In addition, a court must give deference to an administrative agency's construction of a statute or rule that the agency is empowered to enforce. *See, e.g., Leon v. Ohio Bd. of Psychology* , 63 Ohio St. 3d 683, 687 (1992), citing *Lorain City Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257 (1988). Unless the construction of a statute or rule is unreasonable or impermissible, reviewing courts should follow the construction given to it by the agency. *See Leon, supra*; *see, also, Morning View Care Center—Fulton v. Ohio Dept, of Human Servs.*, 148 Ohio App.3d 518, 533, 2002-Ohio-2878, ¶43.

The Record

DJFS filed the Record. It does not include a transcript of the testimony of the state hearing. Pursuant to R.C. 5101.35(E)(4), DJFS is required to file a transcript of the testimony only upon order of the Court. "The court shall make such an order only if it finds that the department and the appellant are unable to stipulate to the facts of the case and that the transcript is essential to a determination of the appeal." *Id.*

No party requested a transcript of the testimony or indicated that it is essential to a determination of the appeal. In her Reply Brief, Ms. Hairston stipulated to the Statements of the Facts submitted by DJFS and Caresource, with one exception. Ms. Hairston claims that at the state hearing she presented evidence that the Abbott strips were known to have unreliable results. However, she raised this for the first time in her Reply Brief. Because she did not raise this argument in her Merit Brief, the Court cannot consider it. *In re Fuel Adjustment Clauses for Columbus S. Power Co.*, 140 Ohio St.3d

352, 359, 2014-Ohio-3764, ¶39, 18 N.E.3d 1157, *see also Smith v. Ray Esser & Sons, Inc.*, 9th Dist. Lorain No. 10CA009798, 2011-Ohio-1529, ¶15 ("Allowing new arguments in a reply brief denies respondents the meaningful opportunity to respond.").

Because no party requested a transcript of the testimony and Ms. Hairston stipulated to the Statement of Facts, the Court finds that a transcript of the testimony is unnecessary to determination of the appeal.

Analysis

Ms. Hairston divides her argument into five issues:

I. Whether the Hearing Officer's decision was contrary to the weight of the evidence presented.

Ms. Hairston argues that CareSource presented no evidence to support its argument that the Abbott strips have a lower cost than the Bayer strips. However, she concedes that the CareSource Pharmacist testified that CareSource has a contract with Abbott and therefore, the wholesale cost is lower than the cost of the Bayer strips. Ms. Hairston's argument is that "[t]estimony is not 'evidence.'" She believes that because she supplied a print of from Walmart's website showing a lower retail cost for the Bayer strips, the hearing officer should have ruled in her favor and not considered the CareSource Pharmacist's testimony. However, testimony is evidence, and a hearing officer is "free to believe or disbelieve" testimony. *Tsiperson v. Ohio Doc Div. of Fin. Insts.*, 8th Dist. Cuyahoga No. 96917, 2012-Ohio-1048, ¶35. A credibility determination is "best left to the hearing officer, not the common pleas court on appeal." *Id.*

Because the Caresource Pharmacist testified that the wholesale cost of the Abbott strips is lower than the cost of the Bayer strips, the Court finds that the hearing officer's decision is not contrary to the weight of the evidence.

II. Whether prejudicial error was committed during the course of the proceeding.

Ms. Hairston argues that the hearing officer would not allow her representative to question the Pharmacist about why CareSource approved Bayer strips for him and not for her. Hearing officers have discretion to determine the admissibility of evidence, and a court's review is limited to whether the hearing officer abused its discretion. *In re Waste Techs. Indus.*, 132 Ohio App.3d 145, 152, 724 N.E.2d 819 (10th Dist. Franklin 1998). Ms. Hairston offers no support for the proposition that a determination as to her husband is relevant to her case. The Ohio Administrative Code provides that "State hearing decisions shall be binding on the agency or managed care plan for *the individual case for which the decision was rendered.*" Ohio Admin. Code 5101:6-7-01(H) (emphasis added). Therefore, the Court finds no merit to this argument.

III. Whether the decision relies on an incorrect application of law or rule.

Ms. Hairston argues that because Ohio Admin. Code 5160-1-01(C)(4) does not distinguish between "contractual cost" and "retail cost," the hearing officer incorrectly applied the law. The Court disagrees. A court should give a word its ordinary meaning, and has a duty "to give effect to the words used, not to delete words used or to insert words not used." *State v. Tuomala*, 104 Ohio St.3d 93, 2004-Ohio-6239, ¶12, 818 N.E.2d 272, quoting *Cleveland Elec. Illum. Co. v. Cleveland* , 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of

the syllabus (1988). In this case, the hearing officer focused on the actual cost to CareSource. Ms. Hairston does not explain how the retail cost at Walmart is relevant to the case. The Court finds no merit to this argument.

IV. Whether the decision constitutes a conflict s contemplated by §3(B)(4), Article IV of the Ohio Constitution.

Ms. Hairston argues that § 3(B)(4), Article IV of the Ohio Constitution prevents the hearing officer from reaching a different decision that what she claims a hearing officer made in her husband's case. This provision states, "[w]henever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." This provision of the Ohio Constitution applies to the Ohio Court of Appeals and not administrative agencies. Therefore, the Court finds no merit to this argument.

V. Whether a Pharmacist has the independent authority, pursuant to R.C. § 4729.01, to refuse to dispense medications or drug therapy related devices ordered by a physician authorized under Chapter 4127 of the Ohio Revised Code.

Ms. Hairston argues that the CareSource Pharmacist is engaging in the practice of medicine without a license by opining as to the medical necessity of the Bayer test strips, alleging "a Pharmacist does not have the authority to countermand a prescriber's orders." However, she misunderstands the meaning of "medical necessity" in this context. As DJFS states in its Brief, it is not a matter of whether she is allowed to obtain the Bayer test strips, it is a matter of whether CareSource will pay for them.

"The Medicaid Act gives states considerable latitude in determining the scope of their respective Medicaid programs." *Holman v. State Dep't of Human Servs.*, 143 Ohio App.3d 44, 50, 757 N.E.2d 382, 2001-Ohio-3155 (7th Dist. Monroe). "Within those parameters, the state has broad authority to define medical necessity." *Id.* "The fact that a physician, dentist or other licensed practitioner renders, prescribes, orders, certifies, recommends, approves, or submits a claim for a procedure, item, or service does not, in and of itself make the procedure, item, or service medically necessary and does not guarantee payment for it." Ohio Admin. Code 5160-1-01(D).

The Court finds no merit to this argument.

Conclusion

The Court has reviewed the record and finds that the administrative decision of the Ohio Department of Job and Family Services is supported by reliable, probative, and substantial evidence and is in accordance with law. The Court finds no merit to Ms. Hairston's arguments. Therefore, the Court hereby AFFIRMS the decision of the Ohio Department of Job and Family Services. The appeal is DISMISSED with prejudice.

IT IS SO ORDERED.

JUDGE JOY MALEK OLDFIELD

CC: ATTORNEY JEFFREY JAROSCH
ATTORNEY MARK R. CHILSON
ATTORNEY JARED M BRUCE

PEZ

The Clerk of the Summit County Common Pleas Court shall serve a copy of this Order upon the following Pro Se parties by U.S. Mail, Certificate of Service, noting return of same:

Joyce Hairston