

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

ALEKSANDER ZAKHAROV,	:	
	:	
Appellant	:	CASE NO. 17CV-3243
	:	
vs.	:	JUDGE BEATTY BLUNT
	:	
OHIO DEPARTMENT OF JOB AND	:	
FAMILY SERVICES,	:	
	:	
Appellee.	:	

DECISION AND JUDGMENT ENTRY AFFIRMING THE DECISION OF
THE OHIO DEPARTMENT OF JOB AND FAMILY SERVICES
AND
NOTICE OF FINAL APPEALABLE ORDER

BEATTY BLUNT, JUDGE

This is an appeal pursuant to R.C. 119.12 from a March 24, 2017 Decision of the Ohio Department of Job and Family Services (the “Department”).

I. FACTS

Since October 2015, Appellant Aleksander Zakharov has been a participant in a Medicaid “waiver program” known as the Ohio Home Care Waiver. Mr. Zakharov is a 32-year-old who is paralyzed from the chest down. Through the program, he has been receiving in-home nursing care and home-health-aide services.

Medicaid recipients participating in the waiver program may do so only under certain conditions. The Ohio Department of Medicaid (“ODM”) must conduct a periodic assessment to determine whether an individual continues to meet the requirements for participation in the program. The requirements include that the individual must “have his or her health and welfare assured while enrolled on the waiver” and has “needs that can

be safely met through the Ohio home care waiver in a home or community setting.” Ohio Admin. Code 5160-46-02(A)(9) and (B)(3).

On January 6, 2017, ODM proposed to disenroll Mr. Zakharov from the waiver program on the basis that his health and welfare could not be assured while enrolled.

Mr. Zakharov requested a state hearing, which was held on February 21, 2017. The evidence at the hearing was as follows.

Shirley Boykins of ODM testified that Mr. Zakharov has diagnoses of spinal cord injury, paraplegia, complicated medical care, NEC/NOS convulsions, and neurogenic bladder. (T. 12). Mr. Zakharov lives with his mother, who is his paid home-care aide. (*Id.*).

Ms. Boykins testified that since enrolling in the waiver program on October 9, 2015, “Mr. Zakharov has had 11 hospital admissions due to wound infections or seizures.” (*Id.*). She stated that he “has a Stage 4 pressure ulcer to his right hip and sacral with underlying osteomyelitis.” (*Id.*).

Ms. Boykins further testified as follows:

Mr. Zakharov has frequent hospitalizations due to infections and complications from his wounds. He has not attended follow-up appointments with the wound care center as recommended. He has a history of declining in-home nursing services. He has not allowed a nurse to complete his wound care and requests that only his mother complete his care.

He left the hospital against medical advice on November 19, 2015. There was a report from the hospital that the individual had not been taking his oral antibiotic at home; that he has a history of non-compliance, probable opioid abuse and that he ran out of narcotics again prior to admission.

Primary care physician reports that Mr. Zakharov has called in on a regular basis trying to get his pain medication refilled before his due date. And he also has a history of getting into arguments with his mother. The possible consequences of not having the health and safety issues corrected

were explained to Mr. Zakharov, including possible disenrollment from the Ohio Home Care Waiver program due to the inability to assure health and welfare. (T. 12-13).

Ms. Boykins testified that because of the risks to Mr. Zakharov's health and welfare, CareStar, the case management contractor, implemented an Acknowledgement of Responsibility Agreement. (State Hearing Record, p. 15-16). The Agreement reviews the above risks to Mr. Zakharov, the possible consequences, and recommended actions by Mr. Zakharov, including attending his wound care appointments, allowing nursing services, taking medications as prescribed, participating in a mental health and substance abuse assessment, etc. Mr. Zakharov signed the document on June 28, 2016, but stated, in writing, that he declined all of the listed recommendations. (*Id.*, p. 16).

Ms. Boykins also reviewed communication notes from the case manager indicating that Mr. Zakharov was admitted to the hospital on October 24, 2016 "due to being non-compliant with his seizure medications that led him to have a seizure." (T. 15, State Hearing Record, p. 19). The case manager stated that Mr. Zakharov had missed his wound care appointments on 7/26/16, 8/16/16, and 10/4/16, and had not been to the wound care clinic since February, 2016. (T. 15, State Hearing Record, p. 21).

Sarah Grate of CareStar testified as follows:

I think that the incident reports and the communication notes and the communications from the emergency rooms and the wound care clinics show that despite the fact that the case manager is trying to coordinate care, trying to reduce hospitalizations and emergency room visits and trying to prevent further wound infections and trying to do what she can to have Mr. Zakharov comply with wound treatments, that he is refusing. Refused to have nursing in the home to monitor the wound. Is being non-compliant even with antibiotics and treatments, and is not really complying with following up with specialists.

And his wound on his coccyx is a Stage 4 wound, which means that it's completely down to the bone and there is underlying osteomyelitis in there.

It's a bone infection. And without proper treatment, it can lead to sepsis and death. (T. 16-17).

Ms. Grate testified that Mr. Zakharov's case has been "assessed on an ongoing basis." (T. 27-28). She stated that he had hospitalizations on August 24 and 25, 2016, on September 1 there was medication abuse, on October 9 and 10 he was given new seizure medications because he had not been taking seizure medications at home, on October 13 there was a hospitalization related to a fall, and on October 23 through 26 he was hospitalized again due to being non-compliant with seizure medications. (T. 26-27). She stated that there was an emergency room visit on January 13, 2017 due to pain in the coccyx and in the area of his ulcers. (T. 28). She stated that there were multiple emergency room visits in January, 2017, and one at the beginning of February. (T. 28).

Mr. Zakharov testified that "I do take my medication, and I do follow all my rules and all—and my nurse is right here. You can ask her." (T. 17). He added: "And I did miss a couple of those appointments because I was real sick." (T. 18). He stated that his recent emergency room visits were due to his stomach and high blood pressure. (T. 33). He denied being non-compliant with seizure medications. (T. 34). He stated that he no longer calls his doctor for additional pain medications. (T. 35).

Roslyn Boakye-Dankwah testified that she took over as Mr. Zakharov's nurse last year. (T. 23). She stated that she does most of the dressing changes. She stated that he missed two wound care appointments, but after that was going because she reminded him. (*Id.*). She stated that some of the wounds were healing, but that the one on the coccyx is "still to the bone." (T. 24).

The record includes letters from Diana Lyn Harless, Certified Nurse Practitioner, and Jonathan Pedrick, M.D., stating that Mr. Zakharov's mother should be approved to provide care. (State Hearing Record, p. 70-71).

On February 27, 2017, the Hearing Officer issued a Decision concluding as follows:

After careful review of the facts and regulations that apply, I find the proposed disenrollment correct. ... I find that the Ohio Department of Medicaid proved by a preponderance of the evidence that his health and safety could not be assured as a result of the following: failure to acknowledge the recommendations listed in his Acknowledgment of Responsibility Agreement, multiple hospital stays due to infection, medication misuse, failure to follow nursing recommendations (wound care appointments), non-compliance with medication and reports of possible opioid abuse. (State Hearing Decision, p. 5).

Appellant requested an administrative appeal of the Decision. On March 24, 2017, the Department issued its Administrative Appeal Decision. The Department concluded as follows:

The Bureau identified issues with frequent hospitalizations, failure to attend follow-up appointments, a history of declining in home nursing services, leaving the hospital against medical advice and failure to take your medications as prescribed and possible opioid abuse. Your failure to cooperate in your care is well-documented in the appeal summary and we find that the proposed disenrollment is supported. The state hearing decision is correct. (Decision, p. 4).

On April 5, 2017, Appellant filed this appeal from the Department's Decision.

II. **LAW**

This Court must affirm the Department's Decision if it is supported by reliable, probative and substantial evidence and is in accordance with law. R.C. 119.12; *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980).

III. **THE COURT’S FINDINGS AND CONCLUSIONS**

Appellant asserts that the Department’s Decision to disenroll him from the waiver program is not supported by reliable, probative and substantial evidence or in accordance with law.

Ohio Admin. Code 5160-46-02 provides as follows:

(A) To be eligible for enrollment in the Ohio home care waiver program, an individual must meet all of the following requirements:

...

(9) Have needs that can be safely met through the Ohio home care waiver in a home or community setting as determined by the Ohio department of medicaid (ODM) or its designee.

(B) [T]o be enrolled and maintain enrollment in the Ohio home care waiver program, an individual must be determined by ODM or its designee to meet all of the following requirements:

...

(3) Have his or her health and welfare assured while enrolled on the waiver.

In support of the Decision, the Department relies on evidence in the record of multiple hospitalizations due to infections, medication non-compliance and misuse, failure to follow provider recommendations, and failure to appear for medical appointments.

Appellant argues that it was improper for the Department to rely on his hospitalizations as a justification for termination, because an individual with his conditions may occasionally require hospitalization. The Department points to evidence of the high number of admissions and the reasons for them. Specifically, the evidence was that there were 11 hospital admissions in approximately one year due to infections and complications from Mr. Zakharov’s wounds. Ms. Boykins testified that Mr. Zakharov failed to attend appointments with the wound care center as recommended and

declined in-home nursing services. (T. 12-13). There was also evidence that Mr. Zakharov was hospitalized due to being non-compliant with seizure medications. (T. 26-27). Thus, there was evidence that the hospitalizations were due not just to Mr. Zakharov's conditions, but to inadequate treatment of the conditions while on the waiver program.

Appellant argues that the Department failed to consider Mr. Zakharov's reasons for missing doctors' appointments and declining in-home nursing services. The evidence showed that Mr. Zakharov missed multiple wound care appointments between August and October, 2016, and had not been seen by wound-care specialists for approximately eight months. (T. 15). Mr. Zakharov's explanation was that he was not feeling well. The Department was entitled to weigh the adequacy of this explanation.

Appellant argues that the evidence does not substantiate opioid or medication abuse. Ms. Boykins testified regarding a hospital admission from 11/23/15 to 12/2/15 and a report from the hospital that Mr. Zakharov "had not been taking his oral antibiotic at home, that he has a history of non-compliance, probable opioid abuse, and that he ran out of narcotics again prior to admission." (T. 13; State Hearing Record p. 14). Ms. Boykins also testified regarding "primary care physician reports that Mr. Zakharov has called in on a regular basis trying to get his pain medication refilled before his due date." (T. 13).

This Court's scope of review of the agency's decision in an administrative appeal is limited. The Court is to "give due deference to the administrative resolution of evidentiary conflicts" because the fact finder had the opportunity to observe the witnesses and weigh their credibility. *Univ. of Cincinnati v. Conrad, supra*, 63 Ohio St.2d at 111.

The Court “will not substitute its judgment for the board’s where there is some evidence supporting the board’s order.” *Harris v. Lewis*, 69 Ohio St.2d 577, 578 (1982). *See also In re Frank and Glenda Miller*, 10th Dist. No. 76AP-348, 1976 Ohio App. LEXIS 6408, p. 8 (“The inference made by the commission should not be altered by the Common Pleas Court or this court merely because we would come to a different conclusion”).

As the finder of fact, the Department was entitled to conclude from the evidence that Mr. Zakharov’s health and welfare could not be assured while enrolled in the waiver program. After reviewing the record, the Court finds that there is reliable, probative, and substantial evidence supporting the Department’s Decision, and the Court will not substitute its judgment for that of the Department.

For the foregoing reasons, the Court finds that the Department Decision is supported by reliable, probative, and substantial evidence and in accordance with law. The Department’s Decision is **AFFIRMED**. This is a final, appealable Order. Costs to Appellant. Pursuant to Civil Rule 58, the Clerk of Court shall serve upon all parties notice of this judgment and its date of entry.

Copies to counsel by e-filing

Franklin County Court of Common Pleas

Date: 11-13-2017
Case Title: ALEKSANDER ZAKHAROV -VS- OHIO STATE DEPARTMENT
JOB FAMILY SERVICE
Case Number: 17CV003243
Type: DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink that reads "Laurel Beatty Blunt". The signature is written over a circular official seal of the Franklin County Court of Common Pleas. The seal contains the text "FRANKLIN COUNTY OHIO" and "COMMON PLEAS COURT" around the perimeter, with "ALL THINGS TO" at the bottom. The signature is written in a cursive style.

/s/ Judge Laurel Beatty Blunt

Court Disposition

Case Number: 17CV003243

Case Style: ALEKSANDER ZAKHAROV -VS- OHIO STATE
DEPARTMENT JOB FAMILY SERVICE

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes