IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs October 31, 2002

OSCAR BOLTON AND GAIL CRAIG
v.
STATE OF TENNESSEE DEPARTMENT OF HUMAN SERVICES

An Appeal from the Chancery Court for Crockett County
No. 8095 George R. Ellis, Chancellor

No. W2002-01754-COA-R3-CV - Filed June 9, 2003

This case involves the denial of Medicaid benefits. In February 1998, the petitioner entered a nursing home as a private pay individual. In order to qualify for Medicaid benefits to pay for his nursing home expenses, the petitioner asked his daughter to transfer his assets and apply for Medicaid benefits on his behalf. Therefore, in April 1998, the daughter transferred to relatives approximately $285,000 of her father's assets. In May 2000, the daughter went to the defendant agency to apply for Medicaid benefits for her father. She was told by the agency that if she applied at that time the application would be denied because the April 1998 transfers were within the thirty-six (36) month "look-back" period under Medicaid regulations. Later, in March 2001, the daughter again went to the agency to apply for benefits effective April 2001. The agency again denied her application based on the April 1998 transfers. On review, the agency upheld that denial. The petitioner appealed the agency's decision to the trial court below. The trial court reversed, finding insufficient evidence to uphold the agency's decision. The State now appeals. We affirm, finding that substantial and material evidence does not support the agency's conclusion that the petitioner intended to apply for benefits prior to the expiration of the thirty-six (36)-month "look-back" period.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Paul G. Summers, Attorney General and Reporter, and Pamela A. Hayden-Wood, Assistant Attorney General, Nashville, Tennessee, for the appellant, State of Tennessee Department of Human Services.

Gail Craig, Bells, Tennessee, appellee, pro se.

OPINION

In February 1998, Petitioner/Appellee Oscar Bolton ("Bolton") entered Bells Nursing Facility, where he lived until his death in March 2002. At the time he entered, Bolton was a "private pay" resident, that is, at the time of his admittance, he paid for his own nursing home expenses and did not apply for state assistance. When he entered the nursing home, Bolton asked his daughter, Petitioner/Appellee Gail Craig ("Craig"), to help him take measures to protect his assets.[1] Craig sought advice from the nursing home administrator, who told her that she could transfer Bolton's assets to his relatives, wait thirty (30) months, then apply for Medicaid assistance.

To better understand the issues in this appeal, an overview of the applicable Medicaid laws is helpful. The Tennessee Medicaid program provides medical assistance to low income persons who are in need of medical care. ***See*** Tenn. Code Ann. § 71-5-106 (1995). In order to qualify for benefits under the program, an applicant must have no more income or assets than is permitted under Medicaid's maximum income and asset eligibility requirements. The Medicaid program anticipates that, in order to qualify for benefits, some applicants will transfer assets to family members or others, thereby lowering the value of the assets they own to a level below the maximum set out in the applicable regulations. ***See In re: Conservatorship of Groves***, No. M2000-00782-COA-R3-CV, 2003 WL 288436, at *23 (Tenn. Ct. App. Feb. 11, 2003) (noting that the Medicaid and TennCare programs "anticipate that persons seeking benefits may attempt to pauperize themselves in order to qualify for benefits"). Therefore, anyone who applies for Medicaid benefits must disclose any transfer for less than market value that occurred after the "look-back" date, which is the date thirty-six months (or three years)[2] prior to the application for benefits.[3] ***Id.***; Tenn. Comp. R. & Regs. ch. 1240-3-3-.03(3)(b); 42 U.S.C. § 1396p(c)(1)(B)(I) (Supp. 2002). If such a transfer was made, the applicant is ineligible for benefits for a period of time referred to as a "penalty period," which is calculated by dividing the uncompensated value of the transferred asset by the average monthly cost of nursing home care. Tenn. Comp. R. & Regs. ch. 1240-3-3-.03(3)(b).

In April 1998, pursuant to the recommendation of the administrator in Bolton's nursing home, Craig began to liquidate and transfer her father's assets. On April 27, 1998, Craig cashed $272,000 in certificates of deposit belonging to Bolton and gave $200,000 ($10,000 each) to twenty of Bolton's relatives, in accordance with Bolton's wishes. On April 29, Craig facilitated the transfer of 113.5 acres of Bolton's farmland to herself and her husband for $10. The value of the real

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[1]Craig handled all of Bolton's affairs after he entered the nursing home, and she had his power of attorney.

[2]The "look-back" period is thirty-six months, not the thirty months Craig was initially told by the nursing home administrator.

[3]If a person fails to disclose a transfer of assets for less than fair market value that occurred after the "look-back" date, he or she may be subject to a discontinuation of benefits and may be subject to criminal prosecution if the transfer was intentional. ***See*** Tenn. Comp. R. & Regs. ch. 1240-3-3-.03(3)(b); Tenn. Code Ann. § 71-5-118(b)(1)(A).

property transferred was $85,000.[4] Bolton retained an amount of money Craig believed would be necessary to pay for his nursing home care for the thirty months that she was told was the "look-back" period.

Thereafter, Craig contacted the Respondent/Appellant State of Tennessee Department of Human Services ("DHS") on several occasions seeking advice on the proper way to obtain Medicaid benefits for her father. On May 11, 2000, Craig visited the DHS office to inquire about her father's eligibility for Medicaid.[5] When she arrived at the office, she signed a form entitled "Tennessee Department of Human Services Application or Review of Eligibility for Families First, Food Stamps, Medicaid." At that time, Craig met with DHS representative Michelle Reasons ("Reasons") and explained her father's situation. Craig told Reasons that Bolton had transferred the $85,000 farmland out of his possession in April 1998. At that time, Craig did not tell Reasons about the $200,000 transfer of cash. In any event, Reasons told Craig that she would be penalized by the transfer of the farm. Based on this information, Craig agreed to return to the DHS office after the expiration of the thirty-six month "look-back" period to avoid being ineligible for a penalty period because of the farm transfer.

Craig believed that she had not actually "applied" for Medicaid benefits at her visit to the DHS in May 2000, but rather that she was merely inquiring about when her father would be eligible. Although typically the DHS representative will note "running record comments"[6] for a visit made for the purpose of applying for Medicaid benefits, there is no such running record for Craig's May 11, 2000 visit. Nevertheless, apparently unbeknownst to Craig, Reasons processed the form and treated Craig's form and interview as an application for Medicaid benefits. As noted above, an application triggers the thirty-six month "look-back" period, and can result in ineligibility for a penalty period. On June 8, 2000, the DHS office issued a formal denial of Craig's May 2000 application based on the transfer made with the three-year "look-back" period. Craig maintains that neither she nor her father received a copy of that denial.

Craig did not recall visiting the DHS office in May 2000, but she alleged that she again went to the DHS office to apply for benefits in October 2000 based on the misinformed belief that the "look back" period had expired. At that time, she did not fill out an application for benefits. Rather, she says that she met with Reasons and sought advice from her on how to obtain Medicaid benefits because Bolton's money had run out. Craig claims that Reasons told her at that time that the "look-

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[4]Though the land had been appraised for $170,250 on February 25, 1998, by Parlow Realty, the Department of Human Services assessed the penalty at issue in this case according to the tax value of the farmland, which was $85,000. The parties do not dispute, and we will assume for purposes of this Opinion, that the value of the farm was $85,000.

[5]According to the application form, Craig had an appointment to visit the DHS office on May 17, 2000, at 2:00 p.m. Craig's signature on the form, however, is dated May 11, 2000.

[6]The running record is comprised of computerized comments which include details relating to an application for benefits. The running record is generated by eligibility agents, like Reasons, in order to note activities that take place during the application process.

back" period was actually thirty-six (36) months, rather than thirty months as the nursing home administrator had told her, and that she should return to the office at the expiration of that time period. Reasons did not recall Craig's October 2000 visit to her office, and there is no documentation in the DHS records to verify that any such visit was made.

Craig alleges that in February 2001, she called the DHS office to inquire about the appropriate time to apply for benefits on her father's behalf. Craig said that Reasons told her to come into the office and apply in March so that she could set up to begin payments on the first of April. Accordingly, Craig went to the DHS office and again filled out a form entitled "Tennessee Department of Human Services Application or Review of Eligibility for Families First, Food Stamps, Medicaid" for the purpose of applying for Medicaid benefits for her father. Though March 2001 was the last month of the thirty-six month "look-back" period, the DHS "running record comments" for Craig's March 2001 visit noted that the March 2001 application "is actually for the month of April."

Later in March 2001, Craig called the DHS office to inquire about the status of her application. At that point, she talked to Mildred Brimm, Reasons' supervisor. Brimm suggested to Craig that she bring in a summary showing how much of Bolton's money had been spent on his care, because any such amounts would be deducted from her father's assets that might otherwise result in ineligibility for a penalty period. Craig compiled and documented her father's expense information for the DHS office. This documentation submitted to the DHS included Bolton's certificates of deposit worth $272,000 and the $200,000 that was transferred in April 1998. Again, at this time, no mention was made to Craig of the denial of benefits issued after Craig's May 2000 visit to the DHS.

After receiving the documentation of amounts spent on Bolton's care, the CD's, and the other assets, Reasons processed the March 2001 application effective immediately instead of making it effective in April 2001, as noted in the running record. Because the application was processed as effective in March 2001, Reasons determined that the prior transfers fell within the three year "look-back" period before the March 2001 application. In determining the appropriate penalty period, Reasons valued the farmland at $85,000, and valued the includable cash at approximately $157,000, which was the $279,000 in cash on hand (including the certificates of deposit) less about $122,000 expended on Bolton's care. By dividing the amount of the net transfers by the average monthly nursing cost ($2,572), Reasons determined that Bolton was ineligible for Medicaid from May 1, 1998 through March 31, 2003. Accordingly, on April 11, 2001, the DHS issued a formal order denying Bolton's application for inappropriate transfer of assets. It is undisputed that Craig received this denial of benefits.

Thereafter, Bolton appealed the denial of benefits to the DHS Administrative Review Unit. On June 27, 2001, the administrative officer held a hearing on the matter.[7] The officer heard testimony from Craig, Glenn Bolton (Craig's brother), Reasons, and Brimm. Many of the facts discussed above were brought out in the testimony and were largely undisputed. Craig testified that

[7] Neither party was represented by counsel at the administrative hearing.

she did not recall the May 2000 meeting with Reasons, but she acknowledged her signature on the back of the DHS form. The remainder of the form was not in Craig's handwriting. In any event, Craig claimed that she did not intend to file a formal application that time, that she must have merely been inquiring about her father's options. Craig said that she never received notice of the denial of that application, and thus was deprived of the opportunity to appeal that denial. Craig's brother, Glenn Bolton, insisted that he and his sister were both cognizant of the "look-back" period and, therefore, Craig could not have intended to file her application so prematurely. Moreover, Reasons was aware that Craig was waiting for the expiration of the three-year period and, therefore, Reasons should not have considered the form signed by Craig as an "application."

Regardless of whether Craig intended the form to be treated as an application, Reasons testified, it was processed as an application in the normal course. Predictably, this resulted in the denial of benefits issued in June 2000 which Craig maintains she never received. This first denial did not specify a penalty period, but Reasons testified that it would have been through May 2001.[8] Thus, Reasons and Brimm took the position that Craig filed two applications, both within the three-year "look-back" period. They asserted that, as a result, Bolton's application for benefits was subject to the penalty period through March 2003.

On August 15, 2001, the hearing officer issued an initial order upholding DHS's decision to deny Bolton Medicaid benefits. The officer's decision found that Bolton had filed two applications for benefits, both within three years of the transfers discussed above. Consequently, the officer determined that the denial of benefits and the application of the penalty period was appropriate. Bolton and Craig appealed that decision to the DHS Commissioner. On October 8, 2001, the Commissioner issued a final order adopting the hearing officer's findings and conclusions. The Commissioner rejected Craig's contention that she did not intend to apply for benefits in either May 2000 or March 2001, finding instead that the evidence showed that Craig intended to file applications at those times. The Commissioner noted that the May 2000 application was signed by Craig and said that it was clearly identified as an application for benefits. Craig argued that her father should not be penalized for openly providing information about the transfers of property. The Commissioner disagreed, noting that Bolton intentionally transferred his assets in an attempt to avoid paying his nursing home charges.[9] Finally, the Commissioner concluded that, by applying the penalty period, Bolton was ineligible for Medicaid benefits until March 2003.

Bolton and Craig appealed that decision to the trial court below. The trial court reversed the DHS final order, finding that it was not based on substantial evidence. The trial court concluded that Bolton had not actually applied for Medicaid benefits in May 2000, because (a) the application was

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[8]Reasons emphasized in her testimony that Craig did not inform her of the transfer of the $200,000 at their May 2000 meeting, which would have made a significant difference in the penalty period associated with the May 2000 application. She indicated that her initial discussions with Craig were premised on Craig's representation that the only transfer in question was the farm. Reasons did not comment on why, if Craig intended to hide the other transfer, she noted it in the documentation submitted to Brimm.

[9]It should be noted that such transfers are contemplated under the Medicaid regulations.

ambiguous on its face; (b) DHS did not treat Craig's visit as an "application" because the running records relating to the "application" were incomplete; and (c) there was no evidence that either Bolton or Craig ever received notice of the denial of that application; thus, the application process was never completed. As to the second application, the trial court concluded that the evidence clearly showed that the March 2001 application was intended to be effective in April 2001, and, thus, should have been processed beyond the three-year "look-back" period. From that order, the DHS now appeals.

In reviewing the DHS final order, we employ the same standard as the trial court. ***Miller v. State Dept. of Human Servs.***, No. W2000-01088-COA-R3-CV, 2001 WL 278001, *2 (Tenn. Ct. App. Mar. 5, 2001). The standard of review is governed by Tennessee Code Annotated § 4-5-322(h), which applies to administrative proceedings:

> (h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
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> > (1) In violation of constitutional or statutory provisions;
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> > (2) In excess of the statutory authority of the agency;
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> > (3) Made upon unlawful procedure;
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> > (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
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> > (5) Unsupported by evidence which is both substantial and material in the light of the entire record.
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> In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h) (Supp. 2002). Thus, we must review the findings of fact of the administrative agency by determining if they are based on substantial and material evidence. ***Miller***, 2001 WL 278001, at *3 (citing ***DePriest v. Puett***, 669 S.W.2d 669, 673 (Tenn. Ct. App. 1984)). We have held that "substantial and material evidence" is "something less than a preponderance of the evidence, but more than a scintilla or glimmer." ***Wayne County v. Tennessee Solid Waste Disposal Control Bd.***, 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988) (citations omitted). "While this Court may consider evidence in the record that detracts from its weight, the Court is not allowed to substitute its judgment for that of the agency concerning the weight of the evidence." ***Miller***, 2001 WL

278001, at *3 (citing ***Pace v. Garbage Disposal Dist.***, 390 S.W.2d 461, 463 (Tenn. 1965)). Substantial and material evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." ***Pace***, 390 S.W.2d at 463. Applying this standard, we must review the DHS decision.

We first address whether substantial and material evidence supported DHS's conclusion that Craig filed an application for benefits in May 2000, thus triggering a penalty period based on the transfer of assets within the three-year period. Craig argued that she, on behalf of her father, did not file an application for Medicaid benefits in May 2000. Rather, she asserts that she must have signed the document as a ministerial procedure in order to meet with a DHS representative and explore Bolton's potential Medicaid eligibility. The DHS officer, however, determined that the evidence did not support Craig's position. The officer acknowledged that there was no running record for the application, but determined that the application had been processed and denied, and that the ineligibility period based on that transfer was from May 1, 1998, through May 31, 2000. The Commissioner upheld that decision, reasoning:

> Ms. Craig contacted the Department [of Health] and filed an application for medical services on May 11, 2000. She testified she did not remember this contact, but she did acknowledge that the signature on the application was hers. A review of the application form . . . shows it is clearly identified as an "Application or Review of Eligibility for Families First, Food Stamps, Medicaid." On the back of the document, Gail Craig signed as guardian or authorized representative, and it is dated May 11, 2000. The evidence shows that Ms. Craig filed an application as opposed to making an inquiry; therefore her action was intentional. For this reason I do not agree that she did not intend to file an application for benefits.

Thus, the Commissioner essentially relied solely on the form signed by Craig to determine that Craig intended to file an application for benefits in May 2000. The trial court reversed that finding, however, concluding that the application was ambiguous on its face, and that the other evidence in the record reflected that Reasons was aware that Craig did not intend to file an application on that date. Alternatively, the trial court held that, even if the process conducted in May 2000 could have been construed as an application, there was no evidence that Bolton or Craig ever received notice that the application was denied.

Based on the record before us, we must decide whether the DHS officer's decision was based on substantial and material evidence, that is, whether there is sufficient relevant evidence to furnish a reasonably sound basis for his finding. This issue presents a close question. The DHS officer relied on the fact that Craig visited DHS unquestionably for the purpose of inquiring about Medicaid benefits for her father. While there, she signed the back of a form entitled "Application or Review of Eligibility." The question becomes whether, in light of the other undisputed evidence, this can be deemed "substantial and material" evidence, i.e. whether the other undisputed evidence "detracts from [the] weight" of the documentary evidence, the form. Tenn. Code Ann. § 4-5-322 (h) (1998).

It is undisputed that Craig had learned from the nursing home administrator that the transfer of assets during the "look-back" period under the regulations would result in ineligibility for benefits for a penalty period. Prior to her visit to DHS, Craig was under the impression from the nursing home administrator that the "look-back" period was thirty months. The transfers occurred in April 1998. Craig's first DHS visit was in May 2000, clearly within the "look-back" period. Thus, it is undisputed that Craig knew prior to visiting DHS that the "look-back" period had not expired.

Furthermore, it is undisputed that, when Craig visited Reasons in May 2000, she told Reasons about her father's transfer of real property in April 1998, and that Reasons informed Craig that an application made at that time would trigger the "look-back" period and would result in the denial of benefits and the assessment of a penalty period. In fact, Reason said that after she talked to Craig about the transfer of farm land and the penalty period, Craig "agreed to come back in . . . once the 36 months had expired." Apart from the form signed by Craig, there is no other indicia that Reasons understood at the time that Craig intended to immediately apply for benefits.[10]

The DHS officer stated that the form signed by Craig was "clearly identified" as an application for Medicaid benefits. This is simply not true. The form is obviously intended to serve a number of functions, only one of which is to apply for Medicaid benefits. The form is entitled "Application *or Review of Eligibility*" for several types of benefits: Families First, Food Stamps, or Medicaid.[11] Here, the only portion of the form in Craig's handwriting is her signature. Thus, the form in and of itself does not indicate whether Craig intended to apply for food stamps, obtain a review of eligibility for food stamps, apply for Medicaid, or obtain a review of eligibility for Medicaid. In addition, when Craig visited DHS in March 2001, neither Reasons nor her supervisor, Brimm, indicated to Craig that she had previously applied for benefits, had been denied those benefits, and was subject to a previously imposed penalty period. Indeed, the May 2000 application" and denial was not even mentioned to Craig until after the second denial of benefits.

In summary, it is undisputed that Craig was aware of a "look-back" period, when she visited DHS in May 2000, and that she explained her situation to Reasons. Reasons testified that she knew Craig's plan was to await the expiration of the "look-back" period before applying for benefits. The absence of running record comments related to the May 2000 visit further undermines DHS's assertion that the signed form was intended to be Craig's application for benefits. Moreover, the form signed by Craig was ambiguous on its face. Under these circumstances, we must conclude that

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[10]Reasons explained the absence of specific comments in the running records for the June 2000 denial, stating that "at that time we had discussed that she knew that there was a penalty period. She had heard that before and she would just come back in in the following year and apply." Therefore, Reasons was admittedly aware of Craig's intention to apply for benefits only after the expiration of the thirty-six (36) month "look-back" period.

[11]In fact, Bolton was approved for TennCare and SLMB, which covers his Medicaid premiums.

the trial court did not err in determining that there was not substantial and material evidence to support the DHS finding that Craig intended to apply for Medicaid benefits in May 2000.[12]

DHS argues next on appeal that substantial and material evidence supports the conclusion that Craig filed an application in March 2001, rather than in April 2001. The DHS final order indicated that this application was also premature on its face, thereby triggering the penalty for transfers made during the three-year "look back" period. Here, DHS's records clearly indicate that this application was to be effective in April 2001. It is undisputed that Craig had diligently tried to work with DHS to avoid applying for Medicaid benefits prior to expiration of the "look-back" period. It is also undisputed that Craig filed the March 2001 application based on assurances from Reasons and Brimm that the application would not be premature. Under these circumstances, we must conclude that the DHS decision with regard to the March 2001 application for benefits was also not supported by substantial and material evidence. Thus, we uphold the trial court's reversal of the DHS denial of benefits.

The decision of the trial court is affirmed. Costs are to be assessed to the State of Tennessee Department of Health and Human Services, for which execution may issue, if necessary.

HOLLY KIRBY LILLARD, JUDGE

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[12]The DHS makes much of the fact that Craig did not inform its office of the $200,000 in cash transfers at the time she visited DHS in May 2000. This fact, however, does not indicate that Craig intended to apply for benefits at that time. If the omission of that information has any probative value, it shows that Craig did not complete her application for benefits in May 2000; rather, she cut the process off at the outset after being advised by Reasons that she would be penalized for the farm transfer. Later, Craig candidly set out for DHS her transfers of the cash and her expenditures in her application in March 2001. DHS does not allege that Craig intended to defraud DHS or hide the transfers of cash, nor would such an allegation be supported.