

RUBY HARDEN, by Conservator)
WANDA FUZZELL,)
)
Petitioner/Appellant,)
v.)
)
FREDIA WADLEY, M.D.,)
Commissioner Tennessee)
Department of Health, Bureau)
of Medicaid,)
)
Respondent/Appellee.)

Appeal No.
01-A-01-9510-CH-00432

Davidson Chancery
No. 94-3616-I

FILED

March 27, 1996

**Cecil W. Crowson
Appellate Court Clerk**

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT FOR DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE IRVIN KILCREASE, JR., CHANCELLOR

SHEARON W. HALES
DAVID KOZLOWSKI
Legal Services of South
Central Tennessee, Inc.
P. O. Box 1256
Columbia, Tennessee 38402-1256
ATTORNEYS FOR PETITIONER/APPELLANT

CHARLES W. BURSON
Attorney General and Reporter

LISA A. YACUZZO
Assistant Attorney General
404 James Robertson Parkway
Nashville, Tennessee 37243
ATTORNEYS FOR RESPONDENT/APPELLEE

AFFIRMED AND REMANDED

O P I N I O N

Petitioner/appellant, Ruby Harden by conservator Wanda Fuzzell ("Ms. Harden"), appealed and asked this court to reverse the judgment of the Chancery Court for Davidson County which affirmed a denial of Medicaid benefits to Ms. Harden for nursing home care. Ms. Harden contends that the decision of the respondent/appellee, Fredia Wadley, Commissioner of the Tennessee Department of Health, Bureau of Medicaid, denying her Medicaid benefits, is arbitrary and capricious. She also contends that, taking the entire record into consideration, there is no substantial and material evidence in support of the decision.

This case is before this court pursuant to the Administrative Procedures Act, Tennessee Code Annotated title four, chapter five.

Hillview Healthcare Center ("Hillview"), the nursing facility in which Ms. Harden resided, filed a pre-admission evaluation ("PAE") seeking Medicaid coverage for Level 1 Intermediate Care Facility ("ICF") services on behalf of Ms. Harden as of 1 October 1993. The Commissioner denied the request for Medicaid coverage on the ground that Ms. Harden did not need daily inpatient nursing care as required by the Medicaid coverage requirements.

Ms. Harden is 87 years old. She was hospitalized after her neighbor found her on her front porch with blurred vision, slurred speech, and possible dizziness. Ms. Harden was released from the hospital into the care of Hillview Healthcare Center, a nursing home in Columbia, Tennessee. Ms. Harden's treating physician, Dr. Robert Robinson, testified that he initially recommended that Ms.

Harden enter an ICF mainly because of her confusion and because he did not think she could get along at home.

Dr. Robinson also testified about Ms. Harden's daily needs. He stated that Ms. Harden did not need the care of licensed personnel on a daily basis, but that she would need someone to do a lot for her. He also stated that Ms. Harden needs venipuncture and thyroid tests done only one time per year. Further, Dr. Robinson testified that the inpatient nursing care that Ms. Harden receives at Hillview consists of the administration of medicines and the taking of vital signs along with periodic assessments. According to Dr. Robinson, however, each of these functions can be performed outside a nursing home setting. He further testified that if someone watched Ms. Harden swallow her medication she would not need a licensed professional to administer her medication. He agreed that a lay person could monitor Ms. Harden's blood pressure to determine if it was too high, check to see if she was alert every day, and monitor her nutritional intake. It was his testimony that Ms. Harden could get by with high quality, nonprofessional care. He did indicate that he doubted whether Ms. Harden could receive such special attention in a residential homes for the aged ("RHA"), but admitted that he had very little knowledge about RHA's.

Maureen Bearden, a registered nurse employed at Hillview, has helped take care of Ms. Harden since she was admitted. Ms. Bearden testified that the only nursing care Ms. Harden needs is to help her take her medications. Ms. Bearden agreed that Ms. Harden is not taking any type of medication that a person outside the nursing home could not administer. The only assistance Ms. Harden requires is in getting a proper dosage of her medications. She does not have any problem physically swallowing her medication. Ms. Bearden also testified that Ms. Harden received services

including bathing, making sure her laboratory work was done, notifying Ms. Harden's physician if the laboratory work was abnormal, providing meals to her, encouraging participation in social activities, and encouraging Ms. Harden to change her clothing. Despite receiving these services, Ms. Harden is able to bath, feed, and dress herself, but she does need reminding.

Carol Spurgeon, a licensed practical nurse employed at Hillview has also helped care for Ms. Harden. Ms. Spurgeon testified that she provided services to Ms. Harden such as helping her take her medication, making her bed, doing her laundry, providing her meals, and other matters. Ms. Spurgeon was of the opinion that Ms. Harden could not be cared for at an RHA because she would need her blood pressure and pulse monitored. As we have stated, however, Ms. Harden's treating physician testified that a lay person could perform those tasks. Ms. Spurgeon also testified that she believed Ms. Harden would need assistance in evacuating a building in the case of an emergency. The record shows, however, that Mary Mahoney, a registered nurse working for the Department of Health, tested Ms. Harden's ability to evacuate in case of an emergency and found that Ms. Harden could safely transfer out of her bed from a lying position and ambulate 150 feet in two and one-half minutes. Ms. Mahoney testified that, after talking with Ms. Harden's caretakers and reviewing Ms. Harden's records, she was of the opinion that Ms. Harden did not require daily inpatient nursing care, that her medical condition could be monitored through physician's visits, and that an RHA would meet her needs.

Dr. John Gore, the Medicaid Medical Director, did not examine Ms. Harden, but reviewed her records. Based on his review, he concluded that Ms. Harden did not require daily inpatient nursing care.

Ms. Harden's PAE indicates that she is capable of communicating information to others such as the presence of pain and the need for assistance with her toilet. She is sometimes disoriented and has difficulty remembering; however, she feeds herself without assistance, her vision is adequate, and she is able to go to the bathroom without assistance. She is capable of using a wheelchair without assistance and of self-transfer from a bed to a chair or from a chair to a bed.

Ms. Harden presents two issues. The first is whether the denial of benefits was arbitrary and capricious. She argues that the ALJ should have given deference to the opinions of the treating physician and the ICF nurses regarding Harden's need for daily inpatient nursing care. She also argues that the ALJ did not afford proper consideration to the professional opinions and testimony of Carol Spurgeon, LPN; Tricia Striklan, Activities Director; Wanda Fuzzell, public guardian and conservator for Ruby Harden; Arthur Hamby, District Long Term Care Ombudsman; and the lay testimony of Mary Atkins. The second issue is whether there was substantial and material evidence to support the ALJ's decision.

This court's scope of review is the same as that of the chancery court. ***Estate of Street v. State Bd. of Equalization***, 812 S.W.2d 583, 585 (Tenn. App. 1990). Tennessee Code Annotated section 4-5-322(h) governs the chancery court's review of the ALJ's determination. In reviewing an administrative decision, the chancery court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." ***Southern Ry. V. State Bd. of Equalization***, 682 S.W.2d 196, 199 (Tenn. 1984)(quoting Tenn. Code Ann. § 4-5-322(h)(5)). We are to review the factual issues upon the standard of substantial and

material evidence which 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 v. Garbage Disposal Dist.***, 54 Tenn. App. 263, 267, 390 S.W.2d 461, 463 (1965). This standard generally requires "'something less than a preponderance of the evidence, but more than a scintilla or glimmer.'" ***Estate of Street***, 812 S.W.2d at 585-86 (citations omitted). "An arbitrary decision is one that is not based on any course of reasoning or exercise of judgment or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." ***Jackson Mobilephone Co. v. Tennessee Pub. Serv. Comm'n***, 876 S.W.2d 106, 111 (Tenn. App. 1993)(citations omitted).

The burden was upon Ms. Harden to prove by a preponderance of the evidence that she needs inpatient nursing home care daily. *Tenn. Dep't of Health and Env't Bureau of Medical Care Serv. Div. Of Medicaid*, Gen. R. 1200-13-1-.10(3)(d)(July 1983)[hereinafter Gen. R.]. "Inpatient nursing care needed" means "[n]ursing [s]ervices must be such that as a practical matter they can only be rendered on an inpatient basis or it is the general medical practice that they be rendered only on an inpatient basis." Gen. R. 1200-13-1-.10(1)(b)(Dec. 1988). We have previously held that an individual does not meet the Medicaid criteria when the individual's needs can be provided for at a lower level of care than nursing home care on an inpatient basis. ***Wheeler v. Tennessee Dep't Of Health and Env't***, App. No. 86-263-II, 1987 WL 5172, at *2 (Tenn. App. 7 Jan. 1987).

Ms. Harden's treating physician, Dr. Robinson, testified that the majority of services Ms. Harden requires could be provided by an unskilled person and that any additional services could be

provided on an outpatient basis. For example, a lay person could watch Ms. Harden to be sure she swallowed her medicine and could check her blood pressure and vital signs. Dr. Robinson also testified that Ms. Harden could get by with high quality, nonprofessional care. In addition, he testified that the medical procedures needed by Ms. Harden, including venipuncture and thyroid tests are only needed one time per year. While Dr. Robinson indicated that he did not think Ms. Harden could get high quality care in an RHA, he did admit that he was not familiar with RHA facilities. The testimony of the nurses, who have cared for Ms. Harden in the nursing home, also demonstrates that she does not need inpatient care on a daily basis.

It is the contention of Ms. Harden that the treating physician rule, which is commonly applied in disability cases, should apply here. The rule provides that the trier of fact must give the treating physician's medical opinion deference, and if it is not contradicted, the trier of fact should give it complete deference. ***Walker v. Secretary of Health and Human Serv.***, 980 F.2d 1066, 1070 (6th Cir. 1992). The reason for the rule is that "[t]he treating physician has had a greater opportunity to examine and observe the patient [and] is generally more familiar with the patient's condition than other physicians." ***Id.*** The ultimate decision of disability, however, rests with the ALJ. ***Id.***

We have found no authority nor have we been cited to any for the application of this rule to Medicaid PAE's. The application of the treating physician rule to social security disability cases is specifically set forth and governed by the statutory and regulatory schemes governing those cases. Such a provision is absent from the statutes and regulations governing the issue addressed in this case.

Moreover, the rule does not lend itself to application in the instant case. The question of whether a person needs daily inpatient care requires an analysis of what other types of care are available. This court has held that a person who can get the necessary care at a lower level care facility, such as a group home, does not meet the Medicaid requirements. **Wheeler**, 1987 WL 5172, at * 2.

While the treating physician usually is in the best position to know what medical care a patient needs, the treating physician is not necessarily in the best position to know where those needs can best be met and what opportunities for care are available. Dr. Robinson's testimony demonstrates this point. When asked how much experience he had with RHA's, Dr. Robinson stated as follows: "not very much. I have a lot with nursing homes. But not very much with residential...very little knowledge." Nurse Spurgeon also testified that she did not know anything about RHA's. While the treating physician and the nurses can identify a patient's medical needs, they are not always in the best position to determine whether a patient can obtain proper care in a setting other than a nursing home.

Even if we were to adopt the treating physician rule in regard to Medicaid coverage, Ms. Harden would not meet the Medicaid criteria. The testimony of both her treating physician and her treating nurse demonstrates that Ms. Harden does not need inpatient nursing care on a daily basis.

The burden of establishing a need for inpatient nursing care on a daily basis is on Ms. Harden. While the Commissioner did not have the burden of proof, she did demonstrate that Ms. Harden's needs could be taken care of on an outpatient basis. The Commissioner also gave a specific example of a facility where it

was very likely that Ms. Harden could get all her required services.

The record shows that an RHA can provide personal services such as the following:

[T]hose services that are rendered to residents who need supervision or assistance in activities of daily living [and] must include protective care of the residents, responsibility for the safety of the resident when in the facility, daily awareness by the management of the resident's functioning, daily awareness by the management of the resident's whereabouts and the ability and readiness to intervene if crisis arise.

Rules of Tenn. Dep't of Health and Env't, Standards for Home for Aged, R. 1200-8-11-.01(9)(March 1992)[hereafter Home for Aged R.]. Residents may be assisted with personal care such as bathing, grooming, and cleaning. Home for Aged R. 1200-8-11-.09(5)(Sept. 1988). RHA personnel may assist a resident with medication by reminding the resident to take medications, observing the patient taking the medicine, reading labels, opening bottles, checking dosages, and reporting any noticeable change in the resident's condition to a doctor. Home for Aged R. 1200-8-11-.09(1),(2)(Sept. 1988).

A resident at an RHA must be able to evacuate the home in the event of an emergency within 13 minutes. Home for Aged R. 1200-8-11-.07(1)(March 1992). While the treating physician and nurses indicated some concern with Ms. Harden's ability to self-evacuate from a building in case of emergency, Ms. Mahoney, a nurse from the Department of Health, tested Ms. Harden and found that she was able to self-evacuate with no assistance in a timely fashion. The PAE application supports Ms. Mahoney's findings. Further, none of the other witness indicated that they had ever tested Ms. Harden's ability to evacuate. There is no RHA rule requirement that a resident be capable of evacuating with no assistance. To the contrary, the rules specifically state that "[r]esidents may be

assisted by staff." Home for Aged R. 1200-8-11-.01(13)(March 1992).

Ms. Harden relies on *Demonbreun v. Department Of Health*, Docket No. 17.01-34-0655J (Tenn. Dep't of Health 7 March 1994). In *Demonbreun*, however, the Administrative Law Judge relied particularly on the petitioner's tendency to become addicted to pain killers, her history of frequent anxiety attacks and complaints, and her tendency to wail, scream, and upset her neighbors in finding that she met her burden of proof. *Id.* There is no evidence in the instant case which brings Ms. Harden within the situation described in *Demonbreun*.

The evidence presented by both Ms. Harden and the Commissioner indicate that Ms. Harden does not require inpatient nursing services on a daily basis. The record supports the Chancellor's affirmation of the ALJ's decision to deny Ms. Harden's claim. It is not arbitrary and capricious.

Ms. Harden next insists that the Commissioner did not afford proper weight to her remaining witnesses and that he ignored their testimony. Our review of the record does not support her insistence. Only two of the witnesses identified by Ms. Harden have a medical background: Carol Spurgeon, one of the nurses who cared for Ms. Harden at the nursing home and the activities director, who once worked as a certified nurses technician. The others included the neighbor who found Ms. Harden on her front porch, Ms. Harden's public guardian, and the District Long Care Ombudsman. Our review of the record does not support Ms. Harden's contention that the Commissioner ignored the testimony of these witnesses. The findings of fact contain several facts testified to by those witnesses such as Ms. Harden's dizziness, occasional

confusion, and the manner in which RHA's supervise medication.

This court cannot substitute its judgment as to the weight to be given evidence when determining questions of fact for that of the ALJ. The record shows that the activities director, the public guardian, and Ms. Harden's neighbor primarily testified as to Ms. Harden's occasional dizziness and poor memory. The ALJ specifically noted these conditions in his finding of fact. The public guardian and the Ombudsman offered testimony regarding the operations of RHA's. While the Ombudsman offered his opinion that Ms. Harden could not be appropriately cared for in an RHA, other facts in the record contradicted his testimony. The PAE contradicted his concerns regarding Ms. Harden's ability to transfer herself from her bed to her wheelchair in the event of an emergency. The Ombudsman also testified that Ms. Harden needed professional care despite Ms. Harden's treating physician's testimony to the contrary. The Ombudsman is not a physician and the record does not show that he had any medical training. Finally, Ms. Spurgeon testified that the primary reason she thought an RHA would not be acceptable was that Ms. Harden needed her blood pressure monitored. However, Ms. Harden's treating physician testified that a lay person could perform that task.

Ms. Harden cites ***Gartmann v. Secretary of U.S. Dep't of Health and Human Serv.***, 633 F.Supp. 671 (E.D.N.Y. 1986), in support of her contention that the ALJ gave too much weight to the department's medical director. In ***Gartmann***, the ALJ relied almost entirely on the testimony of a medical advisor who never examined or treated the patient and who failed to mention the diagnosis and certifications of the need for skilled care made by the treating physician. ***Id.*** at 678-80. ***Gartmann*** is inapposite to this case because it applied to the treating physician rule which is not

applicable in the instant case. *See id.* at 680. Further, the ALJ in this case gave little, if any, weight to the testimony of the Department of Health's medical director. In fact, the ALJ made only one reference to the medical director's extensive testimony. Ms. Harden has failed to demonstrate that the ALJ acted arbitrarily or capriciously or that it improperly gave too much weight to the Department of Health's witnesses.

Our review of the record shows the ALJ properly considered and weighted the testimony offered by the nonmedical witnesses. We cannot substitute our judgment as to the weight given that testimony. Our review of the record show that substantial and material evidence supports the denial of Medicaid coverage and that the decision was not arbitrary and capricious.

The judgment of the chancellor in affirming the Commissioner's denial of Medicaid benefits is affirmed, and the costs on appeal are assessed to the petitioner/appellant. The cause is remanded to the chancery court for any further necessary proceedings.

SAMUEL L. LEWIS, JUDGE

CONCUR:

HENRY F. TODD, P.J., M.S.

BEN H. CANTRELL, JUDGE

