

DEC 06 2012

Opinion and Order
12-CI-00485

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 12-CI-00485

ENTERED
DEC 04 2012
FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

MICHAEL BRATCHER

PETITIONER

vs.

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES

RESPONDENTS

OPINION AND ORDER

This matter is before the Court upon Petitioner's *Petition for Review of a Final Order of the Cabinet for Health and Family Services Case No. AHB DMS 11-119*. Upon review of the parties' briefs and papers, and after being sufficiently advised, this Court hereby **REVERSES** the Final Order of the Cabinet for Health and Family Services and **ORDERS** the Cabinet to recertify Petitioner for the Supports for Community Living Waiver.

STATEMENT OF FACTS

Petitioner, Michael Bratcher (hereinafter "Bratcher"), is a recipient of medical assistance through the Kentucky Medical Assistance Program (hereinafter "Medicaid Program") established by KRS 205.510 *et seq.* Respondent, Cabinet for Health and Family Services (hereinafter "Cabinet"), is the state agency charged with operating the Medicaid Program pursuant to KRS 194A.010(1) through its Department for Medicaid Services (hereinafter "DMS").

Bratcher, who is 61 years old, participates in the Supports for Community Living (hereinafter "SCL") Waiver, which is a Medicaid Program that serves individuals with mental retardation and other developmental disabilities when such individuals qualify for intermediate care facility level of care but choose to live in a community-based setting instead. The SCL Waiver is administered pursuant to 907 KAR 1:145. By letter dated January 14, 2011, the Cabinet denied Bratcher's annual recertification request for SCL services for the period of January 2, 2011 through January 1, 2012.¹ An administrative hearing was held on March 16, 2011, and the Hearing Officer issued Findings of Fact, Conclusions of Law and a Recommended Order on April 15, 2011.

The Hearing Officer found that Bratcher has an 88 IQ and a developmental disability as defined by 907 KAR 1:145, Section 1(12) and concluded that Bratcher met his burden of proving he qualifies for the SCL Waiver because he has a developmental disability. The Cabinet filed exceptions to the Hearing Officer's Recommended Order. The Cabinet's Final Order, issued March 16, 2012, adopted most of the Hearing Officer's Findings of Facts and some of the Hearing Officer's Conclusions of Law. However, the Cabinet's Secretary rejected the Hearing Officer's conclusion that Bratcher need not have an intelligence quotient of approximately 70 or below and instead concluded that for Bratcher to be found to have a developmental disability, he must first be found to have an intelligence quotient of approximately 70 or below.²

Bratcher appeals to this Court, urging that the Cabinet Secretary's Final Order is in excess of his statutory authority because it grafts onto the definition of developmental

¹ Reconsideration was requested and likewise denied by letter dated January 19, 2011.

² The Cabinet Secretary's Final Order made the following conclusion of law: "The definition of 'Developmental disability' in 907 KAR 1:145 requires an ' . . . impairment of general intellectual functioning and adaptive behavior similar to that of a person with mental retardation. . . ' The Measure of general intellectual functioning for mental retardation is an intelligence quotient of approximately seventy or below."

disability a requirement that SCL participants must also have an IQ of 70 or below. To adopt the Secretary's interpretation of the SCL Waiver, Bratcher says, would be to eliminate from SCL eligibility anyone who does not have mental retardation, since the SCL regulation, 907 KAR 1:145, Section 1(23), requires an individual to have an IQ of approximately 70 or below as an element of mental retardation. Bratcher insists that such a requirement renders the distinction between intellectual disability and other developmental disability meaningless.³

Having suffered a substantial disability – a stroke at age 15 – Bratcher's general intellectual functioning and adaptive behavior is impaired. His most recent MAP 351 Medicaid Waiver Assessment indicates that he has an Axis II diagnosis of Cognitive Disorder secondary to intraventricular hemorrhage (onset age 15) and also brain injury.⁴ Bratcher's case manager, Jessica Cospers (hereinafter "Cospers"), completed the MAP 351 on Bratcher's behalf. Cospers stated, and the Hearing Officer found in Finding of Fact No. 11, that Cospers "misunderstood that the 'developmental disability' box needed to be marked, and stated that she erroneously failed to do so." Since she began his case management in 2008, Bratcher had been approved for the SCL Waiver, and Cospers

³ Bratcher notes that the SCL Waiver is meant to serve both individuals with intellectual disabilities as well as individuals with other developmental disabilities. In support of this proposition, he directs the Court's attention to KRS 205.6317(1)(a), which states that

Supports for Community Living Waiver Program' means funding from the Department for Medicaid Services to serve individuals with an intellectual disability or other developmental disabilities who qualify for intermediate care and choose to live in a community-based setting and includes funding for a self-determination model, as recommended by the Commission on Services and Supports for Individuals with an Intellectual Disability and Other Developmental Disabilities under KRS 210.577(2), that provides the ability for the individual receiving services and supports to personally control, with appropriate assistance, a targeted amount of dollars.

⁴ The Hearing Officer, in Finding of Fact 6, stated that "[t]he MAP 351 offers four choices with regard to diagnosis of the recipient, and purports to require that one of the boxes be marked, as part of the request for waiver services. The four alternatives for classification include (a) mental retardation; (b) developmental disability; (c) mental illness; or (d) brain injury. Bratcher's form had 'brain injury' marked. The MAP 351 is used for the various Medicaid waiver program requests."

testified that “she did not realize that she needed to provide proof of Bratcher’s cognitive deficits for the recertification request, as Bratcher had not had a change in function during the years she has known him.” Because the “developmental disability” box was not marked on Bratcher’s MAP 351, Ken Henderson, M.D., the physician reviewer who initially denied Bratcher’s recertification, stated that he could not approve Bratcher for the SCL Waiver because his IQ was 88. Without meeting the standard set forth in the regulation for mental retardation, then, Bratcher could only be approved for SCL Waiver services if he had a developmental disability. Because that box was not marked on his MAP 351, his recertification was denied. Henderson went on to testify that to be found to have a developmental disability, an individual must also first have an IQ of 70 or below, because Henderson did not believe a person could have a developmental disability or adaptive behavior similar to a person with mental retardation without also having an IQ of 70 or below. The Hearing Officer expressly rejected Henderson’s reasoning, but the Cabinet Secretary rejected that Finding of Fact in the Final Order.⁵

Assisted by the SCL Waiver, Bratcher resides at home with his 90-year-old mother, who assists with taking care of him on a daily basis. Bratcher presently attends Options for Individuals, an adult day care facility, where he receives adult day training to help him interact in the community, and he also receives intensive speech therapy services through the SCL Waiver. Bratcher’s speech-language pathologist, Joseph C.

⁵ In Finding of Fact 19, the Hearing Officer explained why he believed Henderson’s analysis is flawed. The Hearing Officer stated that

the regulation does not anywhere state that a person must have mental retardation in order to have a developmental disability. On the contrary: the regulation specifically states that a person may have mental retardation or related conditions that result in impairment of general intellectual functioning and adaptive behavior similar to that of a person with mental retardation. If the intent of the regulation were to restrict the services in the manner assumed by Henderson, it would have sufficed to allow services only for a person with mental retardation. The additional language modifying the developmental disabilities would be unnecessary.

Grubb (hereinafter “Grubb”), stated that Bratcher needs speech therapy because “he has issues with everyday problem solving and sequencing and that makes it difficult for him to function without some guidance and support.” Cosper testified that if Bratcher no longer receives SCL Waiver services, and if his mother is no longer able to assist with his support, he will be required to reside at Central State, or a similar facility.

Bratcher’s SCL has been recertified every year since 2005, and Bratcher insists that the Cabinet’s Final Order is an inconsistent decision which amounts to arbitrary action on behalf of the Cabinet. Bratcher appeals to this Court, requesting reversal of the Cabinet’s Final Order and adoption of the Hearing Officer’s Recommended Order. In Bratcher’s opinion, the Hearing Officer’s Recommended Order complies with KRS 205.6317 because it properly recognizes the distinction between intellectual disabilities and developmental disabilities and that the SCL Waiver is meant to serve individuals who suffer from both types of disability.

ANALYSIS

I. Standard of Review

In reviewing an agency decision, this Court may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law or if the decision itself is not supported by substantial evidence on the record. *See Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 301 (Ky. 1972); *see also Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641, 642-43 (Ky. Ct. App. 1994). “Judicial review of an administrative agency’s action is concerned with the question of arbitrariness.” *Commonwealth, Transportation Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky. Ct. App. 1990), *quoting Am. Beauty Homes Corp. v. Louisville &*

Jefferson County Planning & Zoning Comm'n, 379 S.W.2d 450, 456 (Ky. 1964). Arbitrariness means “clearly erroneous, and by ‘clearly erroneous’ we mean unsupported by substantial evidence.” *Crouch v. Police Merit Board*, 773 S.W.2d 461, 464 (Ky. 1988). Substantial evidence is “evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men.” *Fuller*, 481 S.W.2d at 308. “[T]he trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes.” *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 410 (Ky. Ct. App. 1994), citing *Com. Transp. Cabinet Dept. of Vehicle Regulation v. Cornell*, 796 S.W.2d 591, 594 (Ky. Ct. App. 1990).

If it is determined that the Board's findings are supported by substantial evidence, the next inquiry is whether the agency has correctly applied the law to the facts as found. *Kentucky Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 578 (Ky. 2002); quoting *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n*, 437 S.W.2d 775, 778 (Ky. 1969). Questions of law arising out of administrative proceedings are fully reviewable *de novo* by the courts. *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. Ct. App. 1998). When an administrative agency's findings are supported by substantial evidence, and when the agency has applied the correct rule of law, these findings must be accepted by a reviewing court. *Ward*, 890 S.W.2d at 642.

II. Argument

Pursuant to KRS 13B.090, Bratcher bore the burden at the administrative level to demonstrate by a preponderance of the evidence that he meets the regulatory criteria that

would allow recertification for the SCL Waiver. The SCL Waiver program is an alternative to placement in an intermediate care facility. The program is a waiver service for individuals with mental retardation or developmental disabilities. 907 KAR 1:145, Section 1(12) defines “developmental disability” as a disability that

- (a) Is manifested prior to the age of twenty-two (22);
- (b) Constitutes a substantial disability to the affected individual; and
- (c) Is attributable to mental retardation or related conditions that:
 - 1. Result in impairment of general intellectual functioning and adaptive behavior similar to that of a person with mental retardation; and
 - 2. Are a direct result of, or are influenced by, the person's substantial cognitive deficits.

The Hearing Officer found that Bratcher carried his burden in showing that he has a developmental disability. However, the Cabinet Secretary’s Final Order rejected that conclusion and found that Bratcher did not have a developmental disability because his IQ was 88.

KRS 205.6317, the statute governing the SCL Waiver, specifically states that the program is to serve individuals with an intellectual disability or other developmental disabilities. To give full effect to the General Assembly’s intent in enacting this program, this Court must read the statute’s conjunctive language literally. The regulation governing the SCL Waiver, 907 KAR 1:145 provides a definition for both “Developmental disability” and “Mental retardation.” The definition for “Developmental disability” is not necessarily dependent on the “Mental retardation.” The Cabinet’s Final Order exceeded the Cabinet’s statutory powers by requiring Bratcher to have, as a prerequisite to showing a developmental disability, an IQ of 70 or below. The requirement is written nowhere in the regulation governing and defining developmental disabilities.

The Hearing Officer issued a well-reasoned Order finding that Bratcher proved, by a preponderance of the evidence, that he is entitled to SCL recertification due to his developmental disability.

III. Conclusion

Substantial evidence supports the Hearing Officer's conclusion that Bratcher carried his burden. The Cabinet exceeded its statutory powers by grafting the regulation's mental retardation IQ requirement onto the definition of developmental disability. There is no properly promulgated regulation which requires an individual who qualifies for the SCL Waiver on the basis of developmental disability to show first that he also meets the regulation's definition of mental retardation. It was an abuse of the Cabinet's statutory powers to require as much.

WHEREFORE, the Final Order of the Cabinet for Health and Family Services is **REVERSED**, and this Court hereby **ORDERS** the Cabinet to recertify Petitioner for the Supports for Community Living Waiver.

This order is final and appealable and there is no just cause for delay.

SO ORDERED, this 3rd day of December, 2012.



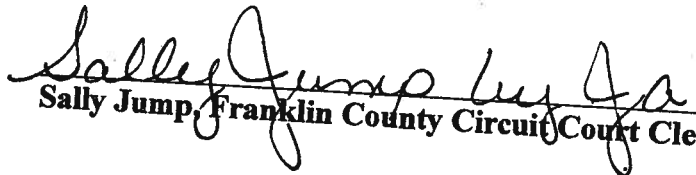
THOMAS D. WINGATE
Judge, Franklin Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this 4th day of December, 2012, to the following:

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Sally Jump, Franklin County Circuit Court Clerk