RENDERED: NOVEMBER 21, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-001407-MR

MARK D. BIRDWHISTELL, SECRETARY, CABINET FOR HEALTH AND FAMILY SERVICES — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 05-CI-01034

BARBARA SWORD, FOR THE BENEFIT OF RONNIE SWORD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Mark D. Birdwhistell, on behalf of the Cabinet for Health and Family Services, appeals from a judgment of the Floyd Circuit Court entered June 5, 2006. The Cabinet's appeal board for public assistance had ruled that Ronnie Sword, a mentally retarded adult, would be required to pay an increased amount for his care. The

[1]Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Floyd Circuit Court reversed, and we conclude that it was correct in so ruling. Therefore, we affirm.

Ronnie Sword has been diagnosed with severe mental retardation, disruptive behavior disorder, and obsessive-compulsive disorder. He also suffers from a metabolic or body chemistry disorder that interferes with the brain's ability to discern when the stomach is full. As a result, Ronnie is morbidly obese and enjoys only limited mobility. He also suffers with incontinence and severe skin breakdown.

Ronnie is the beneficiary of certain funding provided by the Cabinet's Supports for Community Living (SCL) Program. The SCL program seeks to promote home and community based services to mentally retarded persons as an alternative to placement in an intermediate care facility. It is administered under the Medicaid program, and recipients must meet Medicaid eligibility requirements. 907 Kentucky Administrative Regulations (KAR) 1:145, Section 2(1)(d). Eligibility and patient liability determinations for the SCL program are made by the Cabinet's Department for Community Based Services (DCBS). Patricia Crider, a DCBS Family Support Specialist, directly oversees and manages Ronnie's case.

Ronnie lives with his mother, Barbara Sword. On weekdays, while his mother is at work, he attends Community Habilitation Day Program. This program is administered by a registered nurse and is staffed by mental retardation specialists who provide him with training in daily living skills. This facility participates in the SCL

program and is reimbursed for the services that it provides to Ronnie under the provisions of 907 KAR 1:155.

Until March of 2005, Ronnie was responsible for payment of $40.00 per month for his care. Barbara was notified at that point that Ronnie's family income had increased and that henceforward he would be charged $322.00 per month – more than eight times his original payment. When Barbara asked Patricia Crider about the dramatic increase in Ronnie's financial responsibility, she was told that the change followed a formal audit of the DCBS office undertaken in February 2005. Barbara immediately requested an administrative hearing to contest the increase.

An administrative hearing was conducted by the Cabinet in April 2005. During the hearing, Patricia Crider conceded that Medicaid auditors apparently had not been aware that Ronnie lives at home with his mother and that he receives services for only a portion of the day. As a result, Crider presumed that the case reviewer concluded that certain expenses related to Ronnie's care that had been paid directly by Barbara were being paid instead by the facility rather than by Ronnie's household. During her testimony, Tonya Sanders, an administrator with Community Habilitation Day Program, confirmed that the facility was not residential in nature. She explained that the facility was not reimbursed for expenses related to Ronnie's special diet or his personal care needs – including the specialized laundry care, cleaning supplies, and body care products that Barbara provided to Ronnie as directed by his physician. Sanders explained that

these specialized diet expenses and personal care items were provided for Ronnie's benefit directly by Barbara. Barbara alone paid for these expenses.

A new hearing officer, who had not presided during the April hearing, issued a decision on June 21, 2005. In his decision, the hearing officer did not address the apparent confusion over the nature of the services that Ronnie received at Community Habilitation Day Program. Instead, he alluded to a complex mathematical formula and concluded that the "personal needs allowance" that was regularly deducted from Ronnie's social security income resulted in his "available income" for Medicaid purposes. That so-called income was then "expected to provide for normal living expenses such as food, personal hygiene and laundry supplies." In essence, that language meant that Ronnie would no longer be eligible for reimbursement for the special foods and toiletries as medical deductions.

Understandably disappointed with the hearing officer's decision, Barbara filed an administrative appeal on Ronnie's behalf. On September 14, 2005, the three-member appeal board affirmed the hearing officer's decision. Citing the provisions of 907 KAR 1:145 and 907 KAR 3:130, the board concluded that the extra care items purchased for Ronnie's benefit did not qualify as "medically necessary" as that phrase is defined in the administrative regulations. Instead, the board held that these items amounted to normal living expenses that were to be paid out of Ronnie's "personal needs allowance."

Barbara then filed a petition for review of the appeal board's decision in Floyd Circuit Court on October 11, 2005. She contended that the administrative decision was arbitrary and capricious and that it had been rendered without reference to or an understanding of the reality of Ronnie's medical exigencies.

On June 5, 2006, the Floyd Circuit Court entered findings of fact, conclusions of law, and judgment. The court concluded that the Cabinet failed procedurally to give Ronnie constitutionally adequate notice regarding the change to his benefits. Additionally, it concluded that the board's decision was substantively arbitrary and capricious. This appeal followed.

On appeal, the Cabinet contends that the circuit court applied the wrong standard of review and erred in substituting its judgment for that of the administrative agency. We disagree.

The provisions of KRS 13B.150 govern judicial review of a final order of an administrative agency. That statute provides, in part, as follows:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Without support of substantial evidence on the whole record;
> (d) Arbitrary, capricious, or characterized by abuse of discretion;
> (e) Based on an ex parte communication. . . ;
> (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified. . . ; or

(g) Deficient as otherwise provided by law.

The Cabinet contends that the correct legal standard requires the trial court to consider "whether the decision by the board was supported by substantial evidence." However, the circuit court carefully analyzed the appeal board's decision in light of Ronnie's unique medical condition and concluded that the board's opinion was wholly contrary to the substantial weight of the evidence, reciting as follows: "that the items Mr. Sword purchases for his medically ordered low-fat diet and toiletries are not a medical necessity is against the substantial weight of the record, arbitrary, and capricious."

In concluding that the board's decision was "against the substantial weight of the record," the court impliedly and logically held that the decision was not supported by substantial evidence. The semantic distinction in phraseology is substantively meaningless. Ronnie affirmatively produced evidence from his treating physician that the specialized items at issue were necessary for his care. However, there was absolutely **no evidence** presented by the Cabinet to refute the doctor's statement. In short, without any evidence, the board summarily denied Ronnie's appeal.

907 KAR 3:130, Section 2 provides that the determination of whether a benefit or service is medically necessary shall be based on an **individualized** assessment of a recipient's medical needs. In order to qualify as medically necessary, a benefit shall be:

> 1. Reasonable and required to identify, diagnose, treat, correct, cure, palliate, or prevent a disease, illness, injury, disability or other medical condition . . .;

> 2. Appropriate in terms of the service, amount, scope, and duration based on generally-accepted standards of good medical practice;
> 3. Provided for medical reasons rather than primarily for the convenience of the individual, the individual's caregiver, or the health care provider, or for cosmetic reasons;
> 4. Provided in the most appropriate location, with regard to generally-accepted standards of good medical practice, where the service may, for practical purposes, be safely and effectively provided;
> * * * *

His physician wrote in detail that Ronnie "requires much special care which becomes very expensive for the household to provide and undertake." The doctor's statement indicated expressly that "the special care and additional cost is due to his [diagnoses]." Clearly recognizing the burden of the added expense, the doctor nevertheless strongly recommended an exceedingly low fat diet to help Ronnie reduce his weight because substantial weight loss would likely increase Ronnie's mobility, decrease his skin breakdown issues, and potentially mitigate his incontinence problems. The doctor also commented on Ronnie's unusual body chemistry and explained that Ronnie is unable to use regular soaps to keep clean. Additionally, because of his severe incontinence, Ronnie requires special powders, lotions, and wipes to alleviate and prevent skin breakdown. Special laundry aids are also necessary to permit daily washing of Ronnie's linen.

The totality of this evidence meticulously linked the specialized items to Ronnie's necessary medical care, rendering them "reasonable and required" as a result of

his medical conditions in compliance with the requirements of 907 KAR 3:130. The Cabinet made no attempt whatsoever to dispute the medical evidence.

When an agency's decision is not supported by substantial evidence, it is considered arbitrary and capricious. *Allen v. Kentucky Horse Racing Auth.*, 136 S.W.3d 54 (Ky. App. 2004). "No evidence" falls far short of the "substantial evidence" standard in administrative review. Since there was no evidence to support the Cabinet's unwarranted and unsubstantiated conclusion that Ronnie's requirements were nothing more than normal living expenses, we hold that the circuit court correctly concluded that the agency's decision was indeed arbitrary and capricious.

The heart of this case is the lack of substantial evidence to support the Cabinet's position. While the timeliness of notice is not critical to our holding, it nonetheless bolsters and reinforces the overall deficiency of the Cabinet's handling of this case. We agree with the circuit court that the notice provided was so woefully inadequate as to constitute a denial of fundamental due process.

We affirm the judgment of the Floyd Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jon R. Klein
Cabinet for Health and Family Services
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Sue Ellen Prater
Appalachian Research and Defense Fund
Prestonsburg, Kentucky