

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-000487-MR

BETTY A. MARCUM

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE THOMAS L. JENSEN, JUDGE  
ACTION NO. 13-CI-00843

COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH AND FAMILY  
SERVICES, DEPARTMENT FOR  
COMMUNITY BASED SERVICES

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, J. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Betty A. Marcum appeals from an order of the Laurel Circuit Court which affirmed a Final Order by the Cabinet for Health and Family Services, Department for Community Based Services (the Cabinet) which imposed upon her a period of disqualification from receiving Medicaid benefits. Marcum argues that

the Cabinet failed to apply the appropriate regulations in calculating the length and starting date of this disqualification period. Finding no error, we affirm.

On July 27, 2011, Marcum filed her first application for Medicaid benefits. On August 26, the Cabinet denied the application based upon a disqualifying transfer of assets made within Medicaid's five-year "lookback" period. The Cabinet imposed a period of ineligibility running from June 14, 2011 until January 29, 2012. Marcum did not appeal from this decision.

On June 20, 2012, Marcum filed a second application for benefits. On September 19, the Cabinet denied the application based upon other transfers of assets. The Cabinet imposed a second period of ineligibility running from June 1, 2012 until November 17, 2012.

Marcum appealed from this decision, arguing the Cabinet incorrectly calculated the period of ineligibility. The hearing officer agreed, concluding that the prohibited transfers should have been considered as a single transfer and subject to only a single period of ineligibility.

The Cabinet filed exceptions to the hearing officer's Recommended Order. On April 4, 2013, the Commissioner issued a Final Order consistent with the Cabinet's position, and reaffirmed the initial ruling imposing a second period of ineligibility. Marcum then filed an appeal to the Appeal Board for Public Assistance. After review, the Appeal Board affirmed the Commissioner's Final Order. On further review, the Laurel Circuit Court affirmed the Appeal Board. Marcum now appeals to this Court.

Judicial review of an administrative decision is limited to a determination of whether the agency acted within the constraints of its statutory powers, whether the agency's procedures afforded procedural due process, and whether the agency's decision is supported by substantial evidence of record. *Carreer v. Cabinet for Health & Family Servs.*, 339 S.W.3d 477, 481 (Ky. App. 2010). *See also* KRS<sup>1</sup> 13B.150(2). So long as the agency's decision is supported by substantial evidence of probative value, it is not arbitrary and must be accepted as binding by the appellate court. *Aubrey v. Office of Att'y Gen.*, 994 S.W.2d 516, 519 (Ky. App. 1998). In its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. *Id.* However, this Court is authorized to review issues of law on a *de novo* basis. *Id.*

As an initial matter, Marcum argues that the Commissioner failed to make separate findings of fact as required by KRS 13B.120. The Cabinet responds that this argument is outside the scope of review provided by KRS 13B.150. We disagree. If the Commissioner rejects the hearing officer's findings of fact, KRS 13B.120(3) explicitly requires that the Final Order “include separate statements of findings of fact and conclusions of law.” A failure to comply with this requirement would be “in violation of constitutional or statutory provisions” and subject to judicial review under KRS 13B.150(2)(a).

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<sup>1</sup> Kentucky Revised Statutes.

But contrary to Marcum’s argument, the Commissioner’s findings are not insufficient merely because she adopted findings of fact and conclusions of law set out in the Cabinet’s exceptions to the hearing officer’s recommended order.

*Baker v. Ky. Retirement Sys.*, No. 2005-CA-001588-MR, 2007 WL 3037718 at 30 (Ky. App. 2007).

[A]n agency head, in the lawful exercise of its own wisdom and discretion, remains free to jettison the hearing officer’s recommendation, and the training and experience in fact-finding that goes with it. KRS 13B.120(2); KRS 13B.030(3), (4). The agency head is also free to replace that recommendation with language from a brief designed for an entirely different purpose, see [*Bingham v. Bingham*, 628 S.W.2d 628, 630 (Ky. 1982)], and written by an advocate who likely lacks the specialized training required of the hearing officer. See 40 KAR<sup>[2]</sup> 5:010 Section 3(1)(h) (Required hearing officer training in “Decision writing”); 40 KAR 5:010 Section 3(2)(g) (“Findings and evidence”); 40 KAR 5:010 Section 3(2)(h)1. (“The recommended order and writing for judicial review”; “The nature, scope and function of findings and conclusions under KRS 13B.110”). Determining what or whose work to appropriate is a decision left to the agency head.

*Id.*

We conclude that the findings of fact and conclusions of law in the Commissioner’s Final Order were sufficient to afford meaningful judicial review. The Commissioner adopted the hearing officer’s findings to the extent that they were not in dispute. The Commissioner set out separate findings of fact and conclusions of law on those matters where she disagreed with the hearing officer’s

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<sup>2</sup> Kentucky Administrative Regulations.

findings. Consequently, the Final Order sufficiently complies with the mandates of KRS 13B.120(3).

The primary issue on appeal concerns the Commissioner's application and calculation of the period of ineligibility for Medicaid benefits. Marcum does not dispute that she should be subject to a period of disqualification based upon prohibited transfers of resources within the lookback period. Rather, she argues that the Cabinet failed to follow its own operation manual in determining the period of ineligibility.

The relevant transactions are not in dispute. The Cabinet imposed the first period of ineligibility based upon a transfer of resources totaling \$40,008.30. During this first penalty period, Marcum sold her home for \$87,000.00 and the proceeds were transferred into an irrevocable trust. Marcum's family gifted \$55,380.84 back to Marcum. These gifts were not used to calculate resource ineligibility but did reduce the period of Marcum's ineligibility. In addition, the Cabinet identified several other transfers from Marcum's bank accounts during this period, totaling \$1,859.25. The Cabinet also discovered that Marcum sold a partial amount of her homestead property in 2008, and this transfer had not been detected during the first application. The Cabinet calculated the total second period of ineligibility based upon disqualifying transfers of \$33,478.41.

Marcum focuses on the provision in the Cabinet's operation manual which requires that multiple asset transfers be counted as a single transaction and treated as if they occurred on the date of the first transfer. She also cites another

provision of the operations manual which states that, once a penalty period has been established, it runs until expiration and that a penalty period cannot begin to run until the expiration of prior ineligibility periods. Based on these provisions, Marcum argues that the Cabinet should have treated all of the disqualifying transfers together to impose a single penalty period. Had the Cabinet calculated the penalty period in this manner, Marcum contends that the consolidated penalty period would have lapsed by the time she filed the second application. In the alternative, Marcum argues that any second disqualification period should have begun immediately following the end of the first, commencing on January 30, 2012.

In rejecting this approach, the Commissioner held as follows:

In the case at hand, an application for LTC<sup>3</sup> Medicaid was filed for the Appellant on July 27, 2011. The Agency determined that there had been a prohibited transfer of resources, and the disqualification period was established for the period June 14, 2011 to January 29, 2012.

A second application for LTC Medicaid was filed on June 20, 2012. By that time, the first disqualification period had been served and was expired. During the second application, it was determined that there had been another prohibited transfer of resources. As Mrs. Marcum had been private pay until May 31, 2012, the disqualification period was effective June 1, 2012, since that is the date that Mrs. Marcum would have been eligible for Medicaid LTC vendor payment. The second disqualification period cannot be added to the first disqualification period because the first period had been served and was expired by the time the second application was filed.

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<sup>3</sup> Long Term Care.

Although the argument of Appellant's counsel is certainly acknowledged, the above cited regulation [907 KAR 1:650 § 2(12)(b)] clearly states that the disqualification begins with the Medicaid LTC eligibility effective date. As all parties are in agreement that the first application was correctly denied due to the prohibited resource transfer, the LTC effective date for the second resource transfer is based on the date of the second application.

We find no error in the Commissioner's approach. As a general rule, multiple related transfers should be treated as a single transfer occurring on the date of the first transfer. But in this case, the Cabinet denied Marcum's second application based upon transactions which were not related to those which served as the basis for the denial of her first application. Indeed, most of these transactions took place during the first period of ineligibility. Moreover, Marcum's first period of ineligibility had expired nearly six months prior to her second application for benefits.

Marcum cites no authority which would allow or require the Cabinet to simply recalculate the first disqualification period to include transactions occurring after that period was imposed. Likewise, she presents no authority which would allow the first disqualification period to be modified after it had expired. And finally, we agree with the Cabinet that the applicable regulations require that the second period of ineligibility must run from the date of Marcum's second application, rather than immediately following from the expiration of the first period. Therefore, we agree with the circuit court that Marcum has not set forth any basis supporting reversal of the Cabinet's Final Order.

Accordingly, the order of the Laurel Circuit Court is affirmed.

ALL CONCUR.

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