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DIVISION II
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No. 40811-2-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Faith Freeman, *Appellant*

v.

State of Washington, Department of Social and Health Services

REPLY BRIEF OF APPELLANT

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Faith Freeman presents this reply to the Department of Social and Health Services (DSHS) Response Brief. She incorporates her opening brief in her reply brief and limits herself to responding to DSHS' arguments, rather than reiterating her opening brief.

A. Procedural History

Ms. Freeman hereby incorporates the recitation of the facts in her opening brief, including the procedural history found on pages 6 through 11 of that document. Replying to DSHS's version of those facts requires a brief synopsis, provided below. In the opening brief, Ms. Freeman provided the procedural history chronologically. In order to better reply to DSHS's arguments in its response brief, Ms. Freeman reviews that history here organized by issue decided.

1. Comprehensive Assessment Reporting and Evaluation (CARE) Tool Decision.

DSHS has consistently evaluated Ms. Freeman's eligibility for services under its CARE tool. Ms. Freeman has consistently argued that DSHS calculated that eligibility erroneously. By the time Ms. Freeman was able to bring her claim before an Administrative Law Judge (ALJ), her appeal included DSHS's CARE determinations for the years 2004, 2005, and 2006.

The ALJ overturned DSHS's CARE tool determinations, retroactively increasing Ms. Freeman's monthly service level to 190 hours. DSHS's Board of Review (Board) reversed that determination, significantly reducing the ALJ's CARE tool award. Ms. Freeman appealed the Board's decision to the Superior Court. Following full argument and briefing on that issue, the Superior Court reinstated the ALJ's CARE tool award. DSHS did not assign error to that determination on appeal.

2. Early Periodic Screening, Diagnosis, and Treatment (EPSDT) Decision.

At the same time she was appealing DSHS's application of the CARE tool, Ms. Freeman was presenting her claim for services under EPSDT. This claim was rooted in Federal Medicaid Law and was separate and outside of the CARE tool analysis. DSHS refused to acknowledge that EPSDT was relevant, or even that it existed, at least initially.

The ALJ agreed with Ms. Freeman and awarded her supervisory care under EPSDT. DSHS appealed to the Board, arguing that because Ms. Freeman's service providers were not medical providers, their services were outside the scope of the Medicaid definition of "medical assistance." The Board did not adopt that rationale. It reached the result sought by DSHS on another ground. With all the evidence to the contrary, the Board could not

go so far as to bar all non-medical services from the definition of medical assistance. Instead finding specifically that because supervisory care was not a medical service, it was not ameliorative and thus was outside the scope of authorizing language of EPSDT.

Ms. Freeman sought judicial review of the Boards decision. The Superior Court reversed DSHS's ruling that the language of the EPSDT law requiring that service be ameliorative limited EPSDT to medical services. COL no. 3, CP 352. While overturning DSHS's conclusion of law, the Superior Court adopted a new rationale for denying Ms. Freeman's EPSDT claim, finding that the supervisory care prescribed in the EPSDT screening did not meet the definition not "medical assistance" under 42 U.S.C. §1396d(a). COL 4, 5, CP 352.

Ms. Freeman appealed the Superior Court's conclusion that supervisory care did not meet the definition of medical assistance. Neither party assigned error to the Superior Court's COL no. 3 reversing the Board's conclusion that EPSDT's requirement that services be ameliorative limited EPSDT to medical services.

3. Retroactivity Decision.

Ms. Freeman relied on unambiguous provisions of federal law to

establish that her eligibility for Medicaid services was retroactive back to the first of the month where she became eligible, July 1, 2004. DSHS has consistently tried to commence her services in the month where it determined she was eligible, September 2004.

In what has become a familiar pattern, the ALJ agreed with Ms. Freeman's analysis and ordered retroactive benefits. DSHS appealed to the Board. The Board reversed the ALJ. On appeal, the Superior Court reinstated the ALJ's conclusion and ordered retroactive benefits. DSHS assigned error to that portion of the Superior Court's order.

4. Jurisdictional Decision.

The deadline for appealing the ALJ's order to the Board expired on July 18th, 2008. Ms. Freeman filed her appeal on July 16th. DSHS filed its appeal on July 22nd, 4 days after the deadline. Ms. Freeman moved to strike DSHS's appeal to the Board as untimely. The Board ruled it would accept that appeal. Ms. Freeman moved for summary judgment before the Superior Court to dismiss DSHS's appeal of the ALJ order as untimely. The Superior Court denied that motion. Ms. Freeman assigned error to that denial.

5. Attorney's Fees Decision.

The Superior Court fully overturned the Board's decision. The Court

granted Ms. Freeman relief on her claim for an increased level of services under the CARE tool and for retroactivity of benefits. The Superior Court agreed with Ms. Freeman that the Board's decision denying her EPSDT claim was an error of law. The Court did not grant Ms. Freeman the relief she sought under EPSDT, instead adopting a new rationale for denying her claim.

Based on Ms. Freeman's success on the majority of her claims, the Court awarded her 70% of her attorney's fees, including those incurred on her first trip to Superior Court in this case. DSHS assigned error to that award.

C. Analysis

1. Scope of Review.

"The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issued pertaining thereto." RAP 10.3(g). DSHS did not assign error to the Superior Court's conclusion of law no. 3 reversing the Board's conclusions of law on the application of EPSDT. By failing to assign error, DSHS waived the arguments it attempts to raise in its response that seek to revive the Board's conclusion. *Unigard v. Mutual of Omaha*, 160 Wn.App. 912,

250 P.3d 121, 127(2011). “[The] trial court's ruling to which no error is assigned is the law of the case” *State v. Jensen*, 149 Wn.App. 393, n. 3, 203 P.3d 393 (2009) citing *In re Estate of Campbell*, 87 Wash.App. 506, 512 n. 1, 942 P.2d 1008 (1997).

DSHS’s response provides no authority authorizing the Appeal’s Court to review a conclusion of law to which no error was assigned. Instead DSHS focuses on the result, claiming “The superior court agreed on all relevant grounds” with the Board’s decision. *See* DSHS response brief, p. 15, 48.

DSHS’s tactical decision to focus on the Superior Courts result and substitute its own reasoning is telling. Neither DSHS nor Ms. Freeman assigned error to the Superior Court’s conclusion of law reversing the Board’s EPSDT rationale. That conclusion is the law of the case. RAP 10.3(g) places that conclusion outside the scope of review on appeal.

DSHS’s response also claims the Court of Appeals owes deference to its argument on appeal. As explained in Ms. Freeman’s opening brief, that claim is erroneous. Deference is only due to an agency’s position if the agency meets its burden to show the interpretation is an established matter of agency policy and not just the bootstrapping of a legal argument. *Sleasman*

v. City of Lacey, 159 Wn.2d 639, 646, 151 P.3d 990 (2007), citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 815, 828 P.2d 549 (1992). Despite being appraised of that issue in Ms. Freeman's opening brief, DSHS makes no effort to meet its burden.

The history of this case shows an ever shifting rationale offered up in support of DSHS's refusal to provide Ms. Freeman the level of services she is entitled to under EPSDT. DSHS's current argument is not an established matter of agency policy. Accordingly, this Court owes it no deference.

2. DSHS Failed to Invoke Appellate Jurisdiction.

Ms. Freeman fully briefed DSHS's failure to invoke the Board's appellate jurisdiction due to its failure to file a timely appeal. While not reiterating that full argument, Ms. Freeman provides the following reply to DSHS's response.

DSHS's response is based on the hope that the Court will not require it to follow its own rules. That hope flies in the face of *Costanich v. Soc. & Health Servs.*, 138 Wn.App. 547, 554, 156 P.3d 232 (2007): "DSHS hearing rules delineate the authority of the review judge, and DSHS is bound by those rules."

DSHS first seeks to avoid responsibility for its failure to file a timely

appeal of the ALJ's decision by claiming "However, as Ms. Freeman timely appealed the initial order, this is a moot issue." *See* DSHS response brief at p. 39. This argument, that Ms. Freeman's limited appeal of portions of the ALJ order bootstraps in DSHS's appeal of the entire order cannot be reconciled with DSHS's own rule:

(1) Any party may request a review judge to review the initial order.

(2) If more than one party requests review, each request must meet the deadlines in WAC 388-02-0580.

WAC 388-02-0570.

DSHS's other arguments similarly contradict their rule. In assuming jurisdiction, both the Board and the Superior Court judge relied on the following language:

If the ALJ corrects an initial order and a party does not request review, the corrected initial order becomes final twenty-one calendar days after the original initial order was mailed.

WAC 388-02-0555(2). On its face, this rule requires that the ALJ's decision became final on July 18th, 4 days before DSHS filed its appeal. The Board and the Superior Court claimed that language only controlled where a party does not request review, and that DSHS's subsequent request for review revived the order. DSHS's Board of Appeals shored up that argument by

inventing a loophole:

But what is not addressed in the rule is the effect on the deadline in the situation where the ALJ actually does issue a corrected initial order and one of the parties thereafter files a request for review. A party receiving a corrected initial order has received a new order.

DSHS review decision, p. 66, AR 79S. So the corrected order is only final 21 days after the original initial order if no one requests review. If a party requests review after the 21 days, the order is no longer final. That is, it is never final. That is absurd.

The absence of a discussion of finality of appealed orders in WAC 388-02-0555 does not create a loophole. That discussion would be meaningless because properly appealed orders are not final. "'Final' has a specific meaning in context of appellate jurisdiction. A 'final decision' is '[o]ne which leaves nothing open to further dispute and which sets at rest a cause of action between parties.'" BLACK'S LAW DICTIONARY 567 (5th ed. 1979)." *Samuel's Furniture, Inc. v. Dep't of Ecology* 147 Wn.2d 440, 452, 54 P.3d 1194 (2002).

DSHS's discomfort with this rationale is reflected in its response brief. Although DSHS needs this argument to invoke appellate jurisdiction, it relegates it to a footnote. *See* DSHS Response Brief, p. 41, 42, fn. 38.

DSHS has no qualms about applying its rules to prohibit citizen appeals. In *Ruland v. DSHS*, 144 Wn.App. 263, 182 P.3d 470 (2008), DSHS argued vociferously that missing a filing deadline prohibited appellate review. DSHS was reversed on appeal due to the unique facts of that case. It attempts to distinguish the lenience it seeks here from the strict compliance standard it championed in *Ruland* by claiming that the relevant regulations in *Ruland* contained an unequivocal deadline while the regulations here do not.

The deadline in DSHS's rule here is just as unequivocal as that in *Ruland*: "BOA must receive the written review request on or before 5:00 p.m. on the twenty-first calendar day after the initial order was mailed" WAC 388-02-580(1). Requesting and obtaining a corrected order does not change the deadline:

Requesting a corrected initial order for a case listed in WAC 388-02-0215(4) does not automatically extend the deadline to request review of the initial order by BOA. A party may ask for more time to request review when needed.

WAC 388-02-0555(4). DSHS never asked for more time.

DSHS's real argument is that the issuance of the corrected order included unchanged language from the original order. By definition, all corrected orders include the verbatim language of the original order, other

than correction of clerical orders. DSHS's rules are clear that this does not make the corrected order a new order. The appeal deadline relates back to the original initial order. The fact that some of the unchanged language includes the boilerplate appeal language does not change that. If that were true, then the corrected order would always be a new order with a new appeal deadline. But that is exactly the opposite of what DSHS's rules require.

In the alternative, DSHS's argues that reprinting the boilerplate notice paragraph provided "good reason" to extend the 21-day appeal deadline under WAC 388-02-580(3). Again, DSHS's argument cannot be reconciled with its rules.

DSHS's rule states that issuance of a corrected order does not reset the appeal clock. Therefore, by definition, issuance of a corrected order is not good reason to miss the filing deadline. If it were then every corrected initial decision would qualify as good reason, the exception has just swallowed the rule, and WAC 388-02-0555(2) and (4) are meaningless.

Good reason equates to "good cause" which requires "a substantial reason or legal justification" for failing to act. Examples of a substantial reason include hospitalization or inability to comprehend the language the

notice was written in, WAC 388-02-0020(2). A common thread runs through both examples. A good reason is some circumstance beyond your control. DSHS's failure to consult and comply with its own rule is not such a circumstance. DSHS could easily have done what Appellant did: consult the rule and file the request for review prior to the jurisdictional deadline. It did not, had no good reason for not doing it, and has lost its opportunity to requesting review.

DSHS's counsel provides the real reason DSHS missed the appeal deadline. He called DSHS's Board's secretary, and she told him over the phone that the appeal deadline ran from the date of the corrected order, AR 160s - 161s. This is not "good reason" under WAC 388-02-0580(3). Counsel's inquiry was well within the appeal deadline. If he had turned to DSHS's rule instead of the telephone, he would have received the correct information. It is significant to note that the Superior Court did not adopt DSHS's "good reason" rationale.

Neither the real reason, nor the reason relied on by DSHS's Board of Appeals', is good reason. One need look no further than DSHS's Board of Appeals' strict construction of jurisdictional filing deadlines in *Ruland*. That case had extenuating circumstances rising to the level of substantial

compliance, but DSHS's Board of Appeals found it was an error of law to do anything other than enforce the jurisdictional deadline. The Court should not allow DSHS's Board of Appeals to apply a strict construction to citizen appellants while providing a liberal construction to DSHS.

DSHS failed to invoke appellate jurisdiction of the ALJ's initial order. Ms. Freeman asks that its appeal of that order, and subsequent decisions entertaining that appeal, be dismissed for lack of subject matter jurisdiction.

3. Ms. Freeman is Entitled to Benefits Beginning with Her Date of Eligibility.

“The record clearly establishes Ms. Freeman’s Medicaid eligibility began July 1, 2004..” *See DSHS* response brief p. 44. Yet DSHS seeks to delay eligibility for services until DSHS approved Ms. Freeman’s specific providers. This delay contradicts federal Medicaid requirements.

DSHS must pay for Medicaid services retroactively up to three months prior to the date of application. 42 U.S.C. 1396a(a)34. Further, that eligibility extends to the first of the month if the individual was eligible at any time during the month. 42 C.F.R. 914(2)(b). Ms. Freeman applied for Medicaid benefits in July of 2004. She became eligible for those benefits when she turned 18 on July 18, 2004. Although DSHS did not complete its

determination until August and did not start payments until September, Ms. Freeman is entitled to coverage from July 1, 2004, forward. See *Cohen v. Quern*, 608 F.Supp. 1324, 1331 (N.D. Ill. 1984) noting participating state's "duty to make Medicaid 'available' and 'effective' no later than three months prior to the date of application."

While DSHS did not specifically attach her service providers to her contract until September of 2004, it had previously certified those providers in May. Ms. Freeman was eligible for services beginning July 1. Those services were provided by caregivers certified by DSHS. The fact that DSHS did not get around to processing the paperwork until September does not reduce her eligibility for benefits. If it did, then the federal retroactivity requirement would be meaningless. The ALJ and the Superior Court correctly determined that Ms. Freeman's benefit eligibility was retroactive to July, 2004. That determination should be upheld.

4. Ms. Freeman is Eligible for EPSDT.

Again, rather than re-present Ms. Freeman's EPSDT analysis from her opening brief, she incorporates that analysis by reference here and provides the following additional material in response to DSHS's reply brief.

Throughout its response brief DSHS alludes to the fact that Ms. Freeman's caretakers are her parents. This is a clear attempt to have the Court limit her EPSDT eligibility because she is being cared for by family members rather than strangers. Washington's Courts have repeatedly rejected DSHS's attempts to provide a lower level of compensated services to Medicaid recipients whose caretakers happen to be family members. Ms. Freeman asks this Court to follow those holdings and not penalize her for receiving care from her parents.

a. EPSDT Eligibility is Not Limited By DSHS's Rules.

EPSDT guarantees Medicaid recipients under 21 all forms of medical assistance defined by 42 U.S.C. §1396d(a) regardless of whether the State provides those benefits to all Medicaid beneficiaries. EPSDT requires those benefits be prescribed pursuant to an EPSDT screening, be within the federal definition of medical assistance, and be medically necessary. As explained in detail in Ms. Freeman's opening brief, the supervisory benefits prescribed by her physicians meet those requirements.

DSHS asks this Court to apply the limited version of MPCS it provides to all Medicaid recipients rather than the full definition provided by Federal Medicaid Law. It makes this attempt clear in its response brief by

stating: “The pertinent question, however, is whether the current applicable version of the Department’s rule comports with the definition of personal care in the Medicaid act.” That is a profound misstatement of the issue facing this Court.

Federal Medicaid law allows States to decline to provide MPCS and, if they do provide it, to limit the services provided to less than the full scope of the federal definition of that service. Washington has chosen to provide MPCS but has limited its application. Both the EPSDT statute and DSHS’s own rules are very clear that those limits do not apply Medicaid recipient’s under the age of 21.

The pertinent question is whether the supervisory services prescribed in Ms. Freeman’s EPSDT screenings are within the definition of medical assistance and medically necessary.

b. Supervisory Care is Medical Assistance.

DSHS attempts to distinguish supervisory care from the definition of medical assistance fail. DSHS apparently argues that its former rule including supervisory care within MPCS was invalid under federal law. It offers nothing to substantiate this, other than to state that the rule, along with dozens of others, was altered after a federal audit. There is no evidence that

the federal audit invalidated the inclusion of supervisory benefits within MPCS. Indeed, if there was such evidence there can be little doubt that DSHS would have produced it. Such evidence would prove their case. No such evidence has been presented because no such evidence exists. Supervisory care is covered by the Federal definition of medical assistance.

c. DSHS Relies on the Rationale Overturned by the Superior Court.

Beginning on page 27 of its reply brief, DSHS argues for the reversal of the Superior Courts Conclusion of Law no. 3. That conclusion rejected the Board's rationale for denying Ms. Freeman's EPSDT claim. DSHS did not assign error to that conclusion, thus its argument for the Court to readopt it is outside the scope of this appeal.

Even if it were properly raised on appeal, the Superior Court's conclusion of law would stand. As the evidence presented amply shows, medical assistance under Medicaid is not limited to medical services, and all forms of medical assistance under Medicaid must be provided under EPSDT if medically necessary and diagnosed in an EPSDT screening

d. DSHS Must Incorporate the EPSDT Screening.

DSHS argues that Ms. Freeman's doctors lack the requisite skills and experience to evaluate her condition and diagnose its treatment. The

EPSDT law holds to the contrary. DSHS repeatedly states that its staff are the “experts” in determining the necessary level of care. This is another attempt to limit EPSDT to the scope of DSHS’s MPCs rules.

While DSHS staff may be experts at applying the CARE tool (though the record indicates this expertise is recent), application of the CARE tool is not at issue here. EPSDT is. As the Board found, DSHS knew nothing about EPSDT prior to this case, it was Ms. Freeman’s guardians who had to educate them. As discussed in more detail in Ms. Freeman’s opening brief, when it comes to determining the level of care required by EPSDT, it is the treating physician who is the expert.

5. Mr. Freeman is Entitled to Attorney’s Fees.

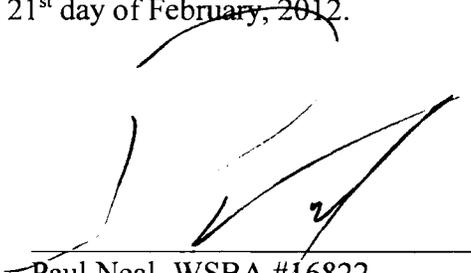
DSHS attempts to undercut the Superior Court judge’s exercise of discretion in setting attorney’s fees. The Judge’s award is well supported. Ms. Freeman was successful in obtaining the benefits due her under the CARE tool, obtaining retroactive benefits, and reversing DSHS’s EPSDT holding. There was ample support for the Judge’s award of 70% of Ms. Freeman’s fees. If anything, that award should have been higher.

DSHS’s claim that Ms. Freeman’s fees award is duplicative is

unsubstantiated. It is true that she briefed her full case before the Thurston County Superior Court before it was remanded, and that a number of those issued survived on her second trip to Superior Court. That does not make the legal work duplicative. The work done in the first Superior Court action was waiting there on the second trip. That work was incorporated into the later briefing and reduced the amount of time expended in those briefings. The work was not duplicative, it was cumulative. The Superior Court's award should stand.

Ms. Freeman is also entitled to additional attorney's fees and costs incurred before the Court of Appeals and request leave to present those fees and costs in a supplemental proceeding.

Respectfully submitted this 21st day of February, 2012.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

FAITH FREEMAN

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH
SERVICES

Docket No. 40811-2-II

DECLARATION OF SERVICE

On February 21st, 2012, I emailed a complete copy of Faith Freeman's Reply brief to Assistant Attorney General Christina Mach at ChristinaM@atg.wa.gov. My assistant arrived at the Attorney General's offices at 5:00 to deliver a hard copy and found the building closed. I personally delivered a copy to Ms. Mach at her office at 7141 Cleanwater drive SW in Tumwater on the morning of February 22nd, 2012.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Olympia, Washington on this 24th day of November, 2011.



Paul Neal, WSBA #16822

Declaration of Service

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