

NO. 40811-2

**COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON**

FAITH FREEMAN,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

DSHS REPLY BRIEF ON CROSS-APPEAL

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I. REPLY ARGUMENT

This case involves cross appeals of a superior court order issued on a petition for judicial review of the Department of Social and Health Services' authorization of Medicaid personal care services to the Appellant, Faith Freeman. The Department identified error with the superior court's determination that Ms. Freeman's guardians must be compensated by the Department for providing personal care services to her prior to the completion of the assessment upon which those services are based and prior to the date those services were authorized. The Department also appealed the court's award of attorney fees.

More specifically, the issues raised in the Department's cross-appeal are:

(1) whether federal regulations that in some circumstances extend general Medicaid coverage to three months *prior to* the date of application also require the Department to compensate Ms. Freeman's parent-guardians for services provided *after* the date of her Medicaid application but prior to the date she completed all necessary steps to receive authorization for compensable personal care services, and

(2) whether the superior court failed to provide an objective and reasonable basis for its award of attorney fees given the duplicative nature of the attorney's work and the relatively narrow scope of issues upon which Ms. Freeman ultimately prevailed.

In a response that is largely without citation to the record or authority, Ms. Freeman asks this court to affirm the decision below. However, because the superior court applied federal retroactivity requirements that on their face clearly do not apply and because its award of attorney fees constituted an abuse of discretion, the Department respectfully requests these rulings be overturned.

A. The Superior Court's Misapplication of Retroactivity Regulations Constitutes Reversible Error

Under Department rules, which Ms. Freeman does not challenge, compensable personal care services begin at the time the Department authorizes these specific services. *See* former WAC 388-72A-0053. To receive Department authorization for Medicaid personal care services, the recipient must complete an assessment for these services, accept the services, and choose an authorized provider.¹ *See* former WAC 388-72A-0025; former WAC 388-72A-0053;¹ former WAC 388-72A-0060; RCW 74.09.520(3)(b)²; *see also* AR 62S, 94S-96S. As argued in the Department's Opening Brief on Cross-Appeal, these requirements are appropriate utilization controls under federal Medicaid law. *See* Department's Opening Br. at 43-45; 42 USC § 1396a(a)(30)(A); 42 C.F.R. § 440.230(d).

¹ A current, substantially similar, version of former WAC 388-72A-0053 is located at WAC 388-106-0215 ("Your eligibility for MPC begins the date the department authorizes services."). The regulations cited in this brief are those that were in effect at the time of the Department's actions that are at issue in this case.

² Note, RCW 74.09.520 has been amended multiple times since 2004, however, both in the time period relevant to this case and currently, the rule requires assessment prior to receipt of personal care services.

Instead of attacking the validity of these requirements as utilization controls, Ms. Freeman contends that requiring prior Department authorization of personal care services violates Medicaid retroactivity regulations that sometimes operate to extend general Medicaid coverage prior to the date of application for a Medicaid card. The superior court agreed, finding Ms. Freeman's guardians must be paid for personal care services before Ms. Freeman had been assessed for these services or authorized to receive them, beginning on the date of her general Medicaid coverage, July 1, 2004. CP 353. This ruling is in error.

Despite the superior court's statement that its ruling was based on Medicaid retroactivity regulations, the relevant question here never involved whether Ms. Freeman was entitled to retroactive eligibility for Medicaid coverage prior to applying for Medicaid. Instead the question presented is whether the Department can require completion of steps, such as assessment and prior authorization, before a Medicaid client is eligible to access a particular service. The time period in dispute here begins after Ms. Freeman's Medicaid application and eligibility in July of 2004. Ms. Freeman did not complete the required steps of assessment and acceptance of services until August 27, 2004, after which the Department authorized her to receive compensable personal care services provided by her parent-guardians effective September 1, 2004. AR 61-62S, 95-96S. As the time period of disputed eligibility for personal care services, July 1, 2004, to September 1, 2004, is not prior to Ms. Freeman's Medicaid coverage, the

retroactivity regulations relied on by Ms. Freeman and the superior court are simply not relevant. The superior court's ruling, therefore, must be overturned.

1. The Medicaid Retroactivity Rule Is Inapposite To The Disputed Period In This Case

The trial court's application of Medicaid retroactivity regulations to the facts of this case belies a fundamental misunderstanding of Medicaid law, confusing the starting date of insurance coverage with the steps required to access a particular service in a manner that is compensable by the insurer. Ms. Freeman and the superior court correctly note that an agency must make Medicaid coverage effective three months prior to application, provided that the applicant would have been eligible had she applied during that time.^{3,4} 42 U.S.C. § 1396a(a)(34); 42 C.F.R. § 435.914(a)(2); *see* CP 353; Appellant's Resp. Br. at 16. They also correctly cite a regulation allowing general Medicaid coverage to be backdated to the first of the month in which both application and eligibility occurred. 42 C.F.R. § 435.914(b); *see* CP 353; Appellant's Resp. Br. at 16.⁵ While these regulations are cited accurately, they are immaterial to the question presented by this case. The Department did not refuse to compensate Ms. Freeman's guardians from July through August of 2004 because

³ The three-month retroactivity period is also referred to as the "look-back" period.

⁴ Notably, Ms. Freeman would not have been eligible during the three months prior to her application, as she could not have become eligible until the month of her 18th birthday, July 2004.

⁵ The superior court and Ms. Freeman cite to "42 C.F.R. § 914." Such a section does not exist. However, the substance of their citation regarding back-dating of eligibility is consistent with 42 C.F.R. § 435.914(b).

Ms. Freeman was not covered by Medicaid during this time period.⁶ Instead, compensation was not provided because the steps necessary to begin the service—including assessment, acceptance, and authorization—were not completed until September 1, 2004. AR 61-62S, 94-96S.

The parties agree that Ms. Freeman became eligible for Medicaid on her 18th birthday on July 18, 2004, and her Medicaid eligibility thus began on July 1, 2004. *See* Appellant's Resp. Br. at 16-17. Therefore, the three month "look-back" period of time prior to her eligibility is April 1, 2004, through June 30, 2004. Ms. Freeman has never argued that she should be compensated for services *during* the actual look-back period of April through June. She is presumably aware that she could not meet the retroactivity requirement of potential Medicaid eligibility during the look-back period as she did not become eligible until her 18th birthday. 42 U.S.C. § 1396a(a)(34); 42 C.F.R. § 435.914(a)(2). Instead, Ms. Freeman seeks entitlement to compensation to her parent-guardians for personal care services provided between July 1, 2004, and September 1, 2004, a period *following* her eligibility determination.

Because the three month pre-application look-back period would have occurred prior to July 1, 2004, the Medicaid retroactivity requirements relied

⁶ Indeed, Ms. Freeman *was* covered by Medicaid at that time. If Ms. Freeman had accessed a service in a manner consistent with the state rules for Medicaid coverage for that service, for example scheduling a doctor appointment that did not require prior authorization with an enrolled provider, that medical bill could have been paid through the state's Medicaid program.

upon by Ms. Freeman and the superior court are irrelevant and misapplied to the present case.

2. The *Cohen* Decision Cited In Ms. Freeman's Response Underscores How The Retroactivity Regulations Are Not Applicable To The Facts Of This Appeal

Ms. Freeman cites to a single federal district court case in support of her contention that the Department has violated federal retroactivity requirements. *See* Appellant's Resp. Br. at 17, citing *Cohen v. Quern*, 608 F. Supp. 1324, (N.D. Ill. 1984). The *Cohen* court considered whether Illinois could premise compensation for medical bills paid during the three month retroactivity period on a recipient's success in having a previously paid provider refund the recipient's money and accept a potentially lower rate paid by the state. 608 F. Supp 1324 at 1330-32 (N.D. Ill. 1984). Ms. Freeman offers no analysis of how these facts are analogous to the present case or support the superior court's findings.

Indeed, they do not. As stated by the *Cohen* court,

[t]he purpose of the three-month retroactive period is to "protect[] persons who are eligible for Medicaid but do not apply for assistance until after they have received care, either because they did not know about the Medicaid eligibility requirements, or because the sudden nature of their illness prevented their applying."

Id. at 1332, quoting H.Rep No.92-231, 92 Cong., 2d Sess. The court's analysis in *Cohen* highlights the inapplicability of the retroactivity regulations to the issues presented here. Ms. Freeman is not requesting compensation for a covered service for a time period during which she was eligible for Medicaid but, for some

reason, had not applied. As the record reflects, Ms. Freeman (via her guardians) was well aware of her upcoming eligibility, applied for Medicaid as soon as she became eligible on her 18th birthday, and initiated a conversation with the Division of Developmental Disabilities regarding services prior to her eligibility. AR 51S, 59S; AR 1067, 1070-72.

While Ms. Freeman relies on *Cohen* for the proposition that Medicaid services must be made “available” three months prior to application, she ignores the very next sentence of the opinion noting that the retroactivity regulation requires recipients be treated throughout the look-back period under the same terms that would apply after application. *See* Appellant’s Resp. Br. at 17; *Cohen v. Quern*, 608 F. Supp. 1324 at 1331 (N.D. Ill. 1984). Ms. Freeman is not seeking compensation for services she received (or did not receive) during the look-back period of April to June.⁷ Although not articulated as such, she appears to contend (without argument or authority) that all potentially covered Medicaid services must automatically be compensated from the date of general Medicaid coverage, even when the applicant has not completed state utilization requirements to establish they are eligible for a specific service at a particular level, such as the

⁷ The assessment and authorization steps required of Ms. Freeman would be required of any Medicaid client seeking to access personal care services, regardless of how long that client held Medicaid coverage. For example, a client could have a Medicaid card for years and not seek personal care services. To begin receiving services, that client would follow the same assessment and authorization steps required of Ms. Freeman. And just like Ms. Freeman, the “look-back” regulations, a three-month period of time years earlier, would have nothing to do with the date at which that client successfully completed the utilization procedures necessary to receive compensation to providers for provision of personal care.

assessment and prior authorization required for personal care services. This position is untenable.

3. Ms. Freeman Is Not Entitled To Compensation To Personal Care Providers Via The State's Medicaid Program Prior To Authorization Of Personal Care Services

Under the Administrative Procedure Act the “burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” RCW 34.05.570(1)(a). A reviewing court applies the Administrative Procedure Act standards directly to the agency final order, sitting in the same position as the trial court, which was sitting in its appellate capacity. *Verizon Nw., Inc. v. Empl. Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). States are granted broad discretion to place boundaries on access to services through utilization control procedures, even if the service itself is of a type mandated by the Medicaid program. *Utah Women's Clinic, Inc. v. Graham*, 892 F. Supp. 1379, 1384 (D. Utah, 1995) (quoting *Beal v. Doe*, 432 U.S. 438, 441, 97 S.Ct. 2366 (1977)). The court will not consider claims unsupported by citation to authority or references to the record. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosely*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Ms. Freeman has failed to meet her burden to establish that the assessment and Department authorization required by rule prior to the receipt of covered Medicaid personal care services are impermissible requirements under Medicaid or any other law.

The lack of case law applying the retroactivity requirements to facts analogous to those presented by this case—e.g. to a time period following application and eligibility for Medicaid coverage—is unsurprising, as the retroactivity rules are inapposite to the question of whether a recipient has successfully accessed a compensable service post application. Nonetheless, the decision in *Seittlemen v. Sabol*, 91 N.Y. 2d 618, 697 N.E. 2d 154 (NY 1998), is instructive as to the distinction between a request for compensation for a covered service provided during the pre-application look-back period and the ability of states to require recipients to follow state rules and procedures for accessing a Medicaid service, such as prior authorization, following application. In *Seittelman*, the court reviewed legislation which limited compensation for services received during the three month look-back period to those provided by Medicaid enrolled providers. In reaching its ruling, the court found that while the state might be required to compensate a recipient for services received from an un-enrolled provider during the retroactivity period; once an individual applies for Medicaid coverage, states can limit eligibility for specific services to recipients who comply with state requirements for accessing a covered Medicaid service, such as choosing an enrolled provider. *Id.* at 627. Similarly here, the Department, as the state’s Medicaid agency, could and did require Ms. Freeman to follow state procedures for prior authorization of personal care services in order

to be eligible to have those services compensated as a component of her coverage under the state's Medicaid program.

Ms. Freeman's response does not challenge the Department's authority to require assessment and authorization of personal care services prior to approving that service for compensation to a particular provider under any theory other than the federal retroactivity regulations. *See* Appellant's Resp. Br. at 16-17. Notably, she does not respond to—or acknowledge—the Department's contention that its assessment and authorization requirements are appropriate utilization controls per 42 C.F.R. 440.230(d). *See* Department's Opening Br. At 43-45. While Ms. Freeman appears to take issue with the amount of time taken to complete the assessment and authorization, she offers no legal argument as to why this procedure is impermissible.⁸ Ms. Freeman has not established, nor attempted to

⁸ Without citation to the record, Ms. Freeman makes a variety of factual allegations in support of her position that the Department inexplicably delayed services until "approval of Ms. Freeman's providers". Again, without any analysis as to how such action, even if accepted as true, violates any particular law or rule, these facts are irrelevant to the present appeal. However, a number of factual errors merit correction or clarification. The process of service authorization required that Ms. Freeman be assessed for and accept the personal care services awarded and choose a qualified provider. Ms. Freeman turned 18 on July 18, 2004. AR 50S. Ms. Freeman applied for eligibility in the month of her 18th birthday, with Medicaid eligibility backdated to July 1, 2004. AR 51S, 59S; AR 1067. The Department began to assess Ms. Freeman in anticipation of her 18th birthday. *See* AR 1070-72 (letter from Ms. Freeman's guardian to the Department dated June 25, 2004). She was assessed prior to her birthday on July 9, 2004, and received an opportunity to review her assessment beginning July 18, 2004. AR 51S, 62S. Ms. Freeman's guardians continued to provide the Department with additional information for consideration following the assessment. *See* e.g. AR 1083-85 (letter from Ms. Freeman's guardians to the Department dated July 14, 2004). Ms. Freeman, via her guardians, did not return the service summary accepting such services until August 27, 2004. AR 51S, 61-62S. Ms. Freeman was authorized to receive her assessed personal care services from her parent-guardians as chosen providers effective less than a week after she returned the signed service summary, September 1, 2007. AR 62S; AR 1068-

establish, that the Department's utilization controls requiring assessment, acceptance, and authorization to a client's chosen provider prior to receipt of personal care services violates Medicaid or any other law.

The retroactivity requirements relied on by Ms. Freeman and the superior court are inapposite to whether Ms. Freeman was entitled to receive paid personal care services via the state's Medicaid program for the time period following her general Medicaid coverage but preceding her authorization for that service. Therefore, the ruling below must be overturned. Consistent with the Department of Social and Health Services Board of Appeals (Board of Appeals) Final Order, the Department should not be required to compensate Ms. Freeman's guardians for personal care services prior to September 1, 2004.

B. The Superior Court Abused Its Discretion In Awarding Attorney Fees For Duplicative Claims Or Claims Upon Which Ms. Freeman Did Not Prevail

In response to the Department's appeal of awarded attorney fees, Ms. Freeman provides a series of self-serving conclusory statements that the amount awarded was justified. *See* Appellant's Resp. Br. at 21-22. Ms. Freeman declares there is "ample support" for the lower court's award of 70 percent of total attorney fees but fails to identify this support with a single citation to the record or relevant authority. *Id.* Like the superior court, Ms. Freeman concludes that she prevailed on substantial claims without explaining how she determined

69. Ms. Freeman's implication that services were delayed through Department "foot dragging" is entirely inconsistent with the actual factual record of this case.

the amount of time spent on the prevailing claims compared to the non-prevailing claims. Further, like the superior court, Ms. Freeman appears to assume she is entitled to attorney's fees on issues raised regarding Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) requirements, even though she was not a prevailing party on EPSDT issues.

Ms. Freeman states she prevailed by obtaining additional benefits under the CARE tool, obtaining "retroactive" benefits, and reversing the Department's EPSDT holding under federal Medicaid law. Appellant's Resp. Br. at 21. In its opening brief, the Department argued that the definition of prevailing party utilized by the Equal Access to Justice Act—a party that has obtained relief on a significant issue *that achieves some benefit the qualified party sought*—is instructive as to whether Ms. Freeman is entitled to attorney fees in this case. See Department's Opening Br. at 47; RCW 4.84.350(1) (emphasis added); RCW 74.80.080(3). Ms. Freeman offers no argument to the contrary, no alternative definition, and no explanation of how she can be considered a prevailing party on her EPSDT claims. Appellant's Resp. Br. at 21-22.

To the contrary, Ms. Freeman is clearly not a prevailing party as to her EPSDT claims. While the superior court changed one aspect of the Board of Appeals' reasoning, this change was immaterial to the outcome of her appeal and

provided Ms. Freeman with no additional relief. CP 352-353.⁹ Instead, the superior court, like the Board of Appeals, concluded that the Department had not violated Medicaid EPSDT requirements and refused to award the additional benefits Ms. Freeman sought under these claims. *Id.*

Ms. Freeman's EPSDT claims dominate all issues raised by her appeal both in terms of complexity and relative time spent to argue. Assuming the superior court's application of Medicaid retroactivity requirements is reversed, the only claim identified in Ms. Freeman's Response Brief on which she will have substantially prevailed is her claim of entitlement to additional hours under the Department's CARE tool. *See* Appellant's Resp. Br. at 21. As noted, Ms. Freeman has failed to identify how much time was reasonably spent on this aspect of the appeal.¹⁰ However, this argument required approximately 2 of the roughly 16 pages devoted to argument in Ms. Freeman's opening brief. CP 398-414; *see especially* section III(B)(1)(b) at CP 409-411. In her reply brief, Ms. Freeman dedicated roughly two of seven pages of analysis to this issue, concentrating a substantial portion of even those two pages to the non-prevailing argument that the Board of Appeals could not consider the Department's position at all. CP 675-682; *see especially* CP 679-681.

⁹ For comparison to the superior court order, the Review Decision and Final Agency Order is located at AR 14S-109S.

¹⁰ To the extent these issues were briefed before the superior court, this briefing is not part of the administrative record certified on appeal.

In light of these facts, the superior court order fails to provide a sufficient objective basis explaining how Ms. Freeman's attorney expended 70 percent of the time spent on the appeal on prevailing claims. *See* Department's Opening Br. at 46-47; *Mahler v. Szucs*, 135 Wn.2d 398, 434-45, 957 P.2d 632 (1998); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 599, 675 P.2d 193 (1983). In awarding 70 percent of fees remaining from the remanded appeal, the court order similarly failed to provide any analysis identifying the claims renewed from the first appeal, which of these claims Ms. Freeman prevailed upon, or how duplicative arguments were taken into account in the award. *See* Department's Opening Br. at 46-47; *Mahler v. Szucs*, 135 Wn.2d at 434-35; CP 351-54. Ms. Freeman's response provides no additional explanation, other than a claim without citation to any evidence that the work was "cummulative [sic]." Appellant's Resp. Br. at 22.

The court did not sufficiently explain an objective basis for the fee award through findings in support of the decision to award 70 percent of fees at either stage of review. *See* Department's Opening Br. at 46-49 citing to *Mahler v. Szucs*, 135 Wn.2d at 434-45 and *Housing Auth. of Seattle v. Bin*, 163 Wn. App. 367, 378, 260 P.3d 900 (2011). The court's order awarding attorney fees must be reversed and remanded with instructions to the court below to sufficiently and objectively establish a basis for its award consistent with the time spent on any issues upon which Ms. Freeman ultimately prevails following this appeal.

II. CONCLUSION

Federal retroactivity regulations imposing a three month pre-application look-back period are inapplicable to the dispute in this case, which involves a post-application time period. Ms. Freeman failed to meet her burden to establish that the Department's utilization controls required for accessing personal care services are invalid under any other theory. Indeed, Ms. Freeman failed to proffer *any* explanation justifying her claim for entitlement to personal care services prior to her assessment for and authorization of those services, other than citation to the inapplicable retroactivity regulations. The Department's final agency order finding Ms. Freeman's compensable personal care services began September 1, 2004, must, therefore, be upheld and the superior court's order overturned. The Department respectfully requests this court also reverse the court's order awarding attorney fees.

RESPECTFULLY SUBMITTED this 5th day of April, 2012.

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PROOF OF SERVICE

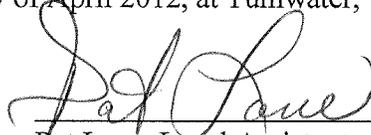
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