

FILED
COURT OF APPEALS
DIVISION II

No. 37740-3-II
COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

08 NOV -5 PM 1:57

STATE OF WASHINGTON
BY [Signature]
DEPUTY

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

CHRISTOPHER GASTON,

Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Judicial review of Mr. Gaston's medical benefits termination based on a residency requires application of facts to the residency standard: WAC 388-468-0005(1) through (12). Contrary to the Department's arguments, WAC 388-468-0005 does not permit residency determinations based on where Mr. Gaston spends the majority of his time or where his guardians reside. Instead the residency regulation plainly states Mr. Gaston does "not need to live in Washington for a specified time to be a resident" and uses a guardian's residence to determine a client's residence only if the client is institutionalized.¹ WAC 388-468-0005(2) and 11(d). The regulation is consistent with the considerable body of law prohibiting the state from infringing on Mr. Gaston's constitutional right to travel. Yet, the Department asks this Court to look outside this regulation.

II. ARGUMENT

A. **The Department mischaracterizes recorded facts in an attempt to present a fact-based credibility dispute, which could limit the scope of this Court's review.**

The Department mischaracterizes Mr. Gaston's appeal by claiming that he "asks this Court to re-weigh the credibility of the evidence." Response Brief at 14. The Department then cites *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-372, 859 P.2d 610 (1993), to argue the

¹ It is uncontested that Mr. Gaston has never been institutionalized. Response Brief at 18.

Court must rule in the State's favor because it must give deference to the fact finding of the administrative proceeding. Response Brief at 11. In *Freeburg* the appellate issue was solely a "factual review" of a zoning commission's decision based upon contested facts in a variance case. *Id.* at 368-369. While affording deference to factual issues, the *Freeburg* court also held "the correct standard of review of legal issues is *de novo*..." *Id.* at 371.

Unlike *Freeburg*, the facts regarding Mr. Gaston's relationship with Washington are undisputed. From 2003 until recently,² it is agreed Mr. Gaston routinely spent part of each week in his home in Vancouver, Washington and part in his parents' home in Portland, Oregon. AR 91. It is also uncontested that Mr. Gaston has a home in Washington, voter registration in Washington, a Washington ID card, and a Washington State job coach (whose support allows Mr. Gaston to maintain the same job he has for over 12 years in Washington). AR 187, 188, 190, 192, and 215.

Mr. Gaston's appeal raises the legal question of whether the Department correctly applied the residency regulation to the set of facts. However, the Department attempts to reframe the issue as a factual dispute regarding credibility by presenting facts that are inconsistent with the

² On or about October 15, 2008, Mr. Gaston moved into adult family home in Vancouver, Washington, funded by the Department's Division of Developmental Disabilities (DDD).

record.³ A brief clarification of the recorded facts is necessary to dispel these red herrings before focusing on the legal issues before this Court.

The record reflects that Mr. Gaston's parents retired in Portland, Oregon, in April 2003, and he moved into his new Washington residence a few weeks later. RP at 58. However, the Department claims in its briefing, "Mr. Gaston did not report this change of address, as required by WAC 388-468-0005."⁴ Response Brief at 4. This claim is inconsistent with the record. Without prompting from the Department or anyone else, Mr. Gaston's mother called the Department on May 6, 2003, to timely report Mr. Gaston's new address in Vancouver, Washington. AR 43.

The Department also claims, "On or about May 9, 2006, Mr. Gaston's mother reported to the Department that her son 'stays in Vancouver 1 night per week when he has to work. The rest of the time he stays with [me] or his sister in Oregon.' AR 44." Response Brief at 5-6. The Department misuses this quote, changing the "her" to "[me]" in an attempt to create the appearance that Lynne Gaston made an inconsistent statement. However, this "statement" was the note of a DSHS case worker's impressions. AR 44. The record reflects Lynne Gaston

³ The ALJ did not identify any issues of credibility in the Department's decision, as would be required by RCW 34.05.461(3) ("Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified").

⁴ The correct citation regarding *when* to report changes is WAC 388-418-0007. Since Mr. Gaston's circumstances changed in April 2003, he needed to report this change by the "tenth day of the month following the month the change happened." WAC 388-418-0007(3). The report by his guardian on May 6, 2003, was consistent with the law.

consistently provided the Department with the same information: Mr. Gaston has a home in Washington and spends between 2-4 nights a week there depending on his work and social obligations. AR 43, 91, 102, 233.

B. The agency’s Findings of Fact, regarding where Mr. Gaston “lives” based on the application of the residency legal standard, fails to consider the whole record and are conclusions of law subject to de novo review

The Department correctly states a reviewing court looks at the “whole record and the process of affording deference to the fact finder’s views regarding the credibility of witnesses” Response Brief at 11. However, the Department failed to respond to Appellant’s assertions that (1) the ALJ failed to address the record as a whole as indicated in the cursory language of the final order, and (2) findings of fact that require interpretation of legal standards are really questions of law, reviewable *de novo*. See Response Brief at 22, 30 and 32.

1. The agency’s findings of fact were not supported by substantial evidence in light of the whole record and lacked a basis for such findings.

The Department claims “there is substantial evidence to support each of the challenged findings of fact.” Response Brief at 11. The Department cites to *Kraft v. Dep’t of Soc. & Health Servs.*, No. 26189-1-III, 2008 WL 2649492⁵ as affording deference to the ALJ’s credibility

⁵ The Department mistakenly claims Mr. Gaston “improperly relies on two unpublished decisions of the court of appeals – *State v. Gardner*, 133 Wn. App. 1014 (2006), and

determinations. Response Brief at 15. The *Kraft* court did apply the Administrative Procedure Act (APA), RCW 34.05.570, and held that, “Factual findings made by the ALJ are sustained if they are supported by evidence that is substantial in light of the whole record. *Eidson v. Dep't of Licensing*, 108 Wash. App. 712, 723, 32 P.3d 1039 (2001).” *Id.* at 717.

The APA also requires an ALJ to specifically cite to the basis for such findings:

Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefore, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified.

RCW 34.05.461(3). *See also, Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

Here, the ALJ found the Petitioner “does reside” in his parents’ home several days a week but merely “stays with friends in Vancouver two to three days per week.” AR 8, FOF 4 & 6. She provided no basis for these findings and did not identify any credibility issues that would diminish the substantial evidence that conflicting with her finding.

Because the ALJ ‘s order is silent regarding the basis for her findings, it is not possible to determine how or if she weighed conflicting evidence or

Dammarell v. Dammarell, 96 Wn. App. 1031 (1999).” Response Brief at 13, footnote 8. Both cases are reported in the Washington Appellate Reports as required by GR 14.1.

judged credibility. Despite no indication the ALJ considered credibility issues, the Department argues for credibility deference and asks this Court to sift through the record for evidence supporting such a credibility finding. Response Brief at 14. Because the order contains no credibility findings; the Department's arguments are misplaced.

There is substantial evidence the ALJ ignored. She did not reference Mr. Gaston's voter registration in Washington, his Washington ID card, or his Washington State job coach (whose support allows Mr. Gaston to maintain the same job he has for over 12 years in Washington). AR 190, 192, 215, and 184. She also did not reference the discovery violations or the concerns with DSHS reliance upon a "clarification" from department staff instead of a publicly promulgated WAC. AR 222.

The order should be vacated because the findings are not supported by substantial evidence in light of the entire record.

2. The agency's findings of fact require interpretation of legal standards and are, therefore, questions of law.

This appeal does not involve a pure question of fact. For example, Mr. Gaston is not challenging a pure factual finding such as whether he has a disability, which requires medical evidence to establish. Rather, this

appeal involves the question of whether the facts *as applied to the legal standard*⁶ determine that Mr. Gaston is no longer a Washington resident.

The Department asserts this Court should review the finding that Mr. Gaston “lives” in Oregon as a “factual question.” Response Brief, p. 22. Yet, the only evidence the Department asserts to support the ALJ’s findings of fact include (1) a legal analysis outside the scope of the residency regulation that implements a “majority of time” rule (Response Brief at 8); (2) confusing DSHS forms listing Mr. Gaston’s residence as Vancouver (Response Brief, p 4); (3) case worker impressions inconsistent with the record as a whole (Response Brief at 5); and (4) irrelevant claims regarding receipt of “*in home*” DDD services in Oregon.⁷ Response Brief at 2, 7, 18. This evidence fails to meet the substantial standard in light of the whole record. Further, findings applying a legal analysis outside the scope of the ascertainable legal standard are errors of law, reviewable *de novo*.

⁶ The Department’s Board of Appeals determined that where Mr. Gaston lives is a legal, not factual, question. The Department claims the Order for Remand is not properly before this court. Response Brief at 7, footnote 3. However, the Order is properly identified in this appeal’s Clerk’s Papers, SUB #36.

⁷ Notably, DDD considers the receipt of MPC benefits in Portland the same as if provided in Washington. WAC 388-501-0180.

C. The agency’s Conclusion of Law 5, finding that Mr. Gaston’s residency follows that of his guardians, as set forth in WAC 388-468-0005(11)(d)(ii), when he is not an institutionalized person, is an error of law reviewable de novo.

The Department admits that it “is undisputed that Mr. Gaston is not institutionalized” Response Brief at 18. Yet, the Department continues to argue that the residence of the guardian correctly establishes Mr. Gaston’s residency. *Id.* Despite this “residency follows guardian” argument, the Department also argues that the ALJ did not specifically cite to subsection 11(d) (proscribing residency of institutionalized individuals follows that of their guardians) and instead claims the ALJ meant to refer to subsection 11(c) (residency is where the noninstitutionalized individual lives when Medicaid eligibility is based on blindness or disability). Respondent’s Brief at 17.

Again, the ALJ failed to include the basis for her decision leaving subsequent reviewers guessing as to the standard she applied. However, the order lacks any reference to “the noninstitutionalized individual” or Medicaid eligibility based on disability (both factors of subsection 11(c)). While it is understandable that the Department would prefer to interpret the ALJ’s silence as an application of a correct standard, the decision itself does not provide support for that position.

A full and accurate reading of Conclusion of Law 5 indicates the ALJ applied Section 11(d), not (c) as implied by the Department:

The undersigned concludes that the more applicable section is Section 11. The undersigned concludes that where the Appellant's legal guardians have moved to another state, his residency has moved with them.

AR 8. This language of the ALJ clearly mirrors the language found only in Section 11(d)(ii):

For purposes of medical programs, a client's residence is the state... Where the parent or legal guardian, if appointed, for an institutionalized... Client twenty-one years of age or older, who became incapable of determining residential intent before reaching age twenty-one.

The Department admits that Mr. Gaston has never been institutionalized and therefore Section 11(d) is not applicable. Such a clear error of law should be reviewed *de novo*.⁸

D. Determining Mr. Gaston's residency based on a "majority of the time" imposes a requirement that is a durational and directly violates the plain language of the law.

The Department asserts that the final order does not impose a durational residency requirement (Response Brief at 24) while also arguing Mr. Gaston's must meet a "majority of time" requirement (Response Brief at 8, 18, 20, 31).

⁸ See also Department Board of Appeals Order for Remand (determining the Final Order on Appeal #1 [the appeal before this Court] was based solely on subsection (11)(d)(ii) of WAC 388-468-0005, a subsection that has nothing in common with the DDD residency rule." (emphasis in original).

If the Department's premise is upheld, individuals with disabilities who visit family out-of-state, even just across the state line, would have to keep a log of their time to ensure that a "majority of time" was spent in Washington. There are no legal standards to support the Department's premise and it is unclear if the majority of a day, week, month or year would be sufficient to establish residency. The lack of standards further evidences that this proposition is arbitrary, capricious, and not supported by law.⁹ Rather the Department is applying a *de facto* durational requirement violating Mr. Gaston's constitutional right to travel.

The "majority of time" standard, as argued by the Department, would also significantly alter the standard for residency in the existing regulation at issue – WAC 388-468-0005. The regulation does not impose a durational residency requirement. *Id.* The Department correctly identifies that WAC 388-468-0005(2) rejects a "majority of time" analysis: "[a] person does not need to live in the state for specific period of time to be considered a resident." Response Brief at 24. However, the

⁹ The Department argues Mr. Gaston is precluded from bringing arbitrary and capricious claims because such claims were not raised in his Superior Court appeal. Response Brief pgs. 29-30. There are two problems with this argument. First, relief is permitted when the final agency decision is **arbitrary and capricious** or inconsistent with the agency rule. RCW 34.05.570(3)(i) and (h)(emphasis added). Second, Mr. Gaston's arbitrary and capricious claims relate to the application of a durational residency standard outside the law and erroneously determining Mr. Gaston's residency follows that of his guardians. These two claims were identified in issues 3 and 4 of Mr. Gaston's Second Amended Petition for Review, p 2.

Department continues to defend the final order primarily by scrutinizing the period of time Mr. Gaston spends in Washington in direct conflict to the relevant law. Response Brief at 8, 18, 20, 31.

The Department seeks to distinguish *Shapiro*, 394 U.S. 618 (1969), and *Mem'l Hosp.*, 415 U.S. 250 (1974), both of which reject durational requirements as a condition to receive public benefits, by pointing out that those cases pertain to year long waiting periods. Response Brief at 26. However, if the Department's "majority of time" premise is upheld, a 240-day waiting period (a super majority of a year) would **not qualify as a** durational requirement but a 360-day waiting period would be a durational residency requirement and would be invalid.

The Department also correctly identifies that *Mem'l Hosp* ruling recognized "the validity of appropriately defined and uniformly applied bona fide residency requirements." Response Brief at 26. However, the Department is asking this Court to look outside Washington's bona fide twelve-factor residency requirements and instead consider a "majority of time" requirement that is neither uniform nor appropriately defined.

The Department argues that the "majority of the time" legal analysis is a bona fide residency requirement citing, in part, to *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, 647 (1976) (upholding a continuing residency requirement in order to remain a municipal

employee). Response Brief at 26. However, this decision was distinguished by the court in *Walsh v. City and County of Honolulu*, 423 F. Supp.2d 1094 (D. Hawaii 2006). The *Walsh* court held the *McCarthy* decision was proper only “because the fact of residency itself is distinct from a durational residency requirement.” *Id.* at 1102. The *Walsh* court applied the plain language of the state residency rule to the documentary evidence of tax returns, registering to vote, or obtaining a state driver’s license. *Id.* at 1103. Like the appellant in *Walsh*, Mr. Gaston seeks this court’s application of Washington’s residency regulation to his whole record including his 2005 tax return listing his home address in Vancouver, Washington, registering to vote in Washington, and obtaining a Washington State identification card. AR 188, 190 and 192.

The Department also relies on *Dunn v. Blumstein*, 405 U.S. 330, 334 (1972), to support its argument that a “majority of time” analysis is a bona fide requirement. Response Brief at 24. The *Dunn* court held no requirements, durational or otherwise, could be used to force people “to choose between travel and the basic right to vote.” *Id.* at 342.

Although in *Shapiro* we specifically did not decide whether durational residence requirements could be used to determine voting eligibility, *id.*, 394 U.S., at 638 n. 21, 89 S. Ct., at 1333, we concluded that since the right to travel was a constitutionally protected right, ‘any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a

compelling governmental interest, is unconstitutional.’ *Id.*, at 634, 89 S. Ct., at 1331.

....
‘It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . . ‘Constitutional rights would be of little value if they could be . . . indirectly denied,’ ...’

Id. at 339-341 (emphasis added). Applying a strict scrutiny test, the court determined the state failed to meet its heavy burden of presenting an adequate justification for its durational residence laws because there were less restrictive means to achieve the state’s interest in preventing double voting or voting fraud. *Id.* at 343, 346, and 360.

Unlike the state in *Dunn*, the Department seeks to impose an additional “majority of time” requirement outside the bona fide residency regulation, fails to establish a compelling state interest, and fails to explain why the “majority of time rule” is narrowly tailored to achieve that interest. The Department has one sentence in their brief regarding the state interest:

The Department is simply seeking to limit Medicaid at Washington taxpayers’ expense to actual residents of Washington, which is authorized and required to do.

Response Brief at 29 (citations omitted). Even if this were a compelling state interest the State, as in *Dunn*, has less restrictive means available to determine Washington residency, namely the agency’s own promulgated rule. Further, like in *Dunn*, the Department’s decision forces Mr. Gaston

to choose between his constitutional right to travel and receipt of critical medical benefits.¹⁰ Such a requirement denies Mr. Gaston his constitutional right to travel and should not be upheld.

E. The residency regulation is unambiguous and is written in the disjunctive supporting Mr. Gaston's residency in Washington.

The Department argues that the agency interpreting its own rules should be afforded considerable deference by this Court. Response Brief at 16 (citing to *D.W. Close Co., Inc. v. Washington State Dep't of Labor & Industries*, 143 Wash. App. 118, 177 P.3d 143 (2008) (court provided deference when agency sought to clarify ambiguity regarding the scope of work under the Prevailing Wage Act). There, however, the court only afforded deference because the language of the regulation was ambiguous. *Id.* at 129. Here, the Department argument is inconsistent with both the

¹⁰ The Department argues that nothing in the record suggests Mr. Gaston would be forced to choose between Medicaid services and visiting his family because he can simply accept the Department decision, move to Oregon, and receive Medicaid there. Response Brief at 14, footnote 6. As evidenced in this very appeal as well as the argument at both the administrative hearing and Superior Court review, Mr. Gaston's receipt of medical benefits in Washington allow him to maintain the uniquely tailored social and employment support structure needed to maintain his independence despite severe disabilities. Administrative Hearing VR at 41-42; Superior Court VR at 9-11. In particular, as a Washington resident, Mr. Gaston has received supported work environment through the local Social Security office in Vancouver, Washington. AR 215. This support allows Mr. Gaston to maintain his job of twelve years and would be impossible to duplicate in Oregon or anywhere else. AR 215, #2 & #10. Yet, the Department argument fails to reflect Mr. Gaston's facts regarding his disabilities and his long-standing ties to Washington. Instead, the Department, acting outside the legal residency requirements, asks Mr. Gaston and his aging parents to recreate in Oregon what took them decades to establish in Washington.

unambiguous language of WAC 388-468-0005 and the applicable rules of regulatory and statutory construction.

The rules of statutory construction apply to agency regulations as well as statutes. *Mader v. Health Care Auth.*, 149 Wash.2d 458, 472 (2003). The language of an unambiguous regulation is given its plain and ordinary meaning unless legislative intent indicates to the contrary. *Stevens v. Brink's Home Sec., Inc.*, 162 Wash.2d 42, 47 (2007). The court may consider statutes related to the regulation to discern the regulation's plain meaning. *Mader*, 149 Wash.2d at 473.

Here, the applicable provision of WAC 388-468-0005 is unambiguous. It defines separate and distinct classes of residency for recipients of medical assistance. Mr. Gaston falls into at least one of them: he is a noninstitutionalized person who is eligible to receive medical assistance based upon his disability and he lives in Washington. WAC 388-468-0005(11)(c). No further analysis of the regulation should have been necessary given its clear and unambiguous terms. .

The Department also argues that the ALJ properly applied WAC 388-468-0005(1)(a) when it issued its findings of fact that Mr. Gaston did not live in Washington but failed to consider his demonstrated intent. Response Brief at 19. The regulation states:

A resident is a person who [c]urrently lives in Washington **and** intends to continue living here permanently or for an indefinite period of time.

WAC 388-468-0005(1)(a) (emphasis added). The Department then “sets out a two part test” and argues that the “second part of the test is not relevant”. Response Brief at 19. The Department argues as if “or” means “and’ in the regulation, ignores the “or” that follows subsection (1)(a), and concludes that the provisions of the regulation related to institutionalized persons apply to him. *Id.* This construction is directly contrary to controlling rules of statutory construction. As the Washington Supreme Court recently held in *Tesoro Refining and Marketing Co. v. Dept. of Revenue*, 190 P.3d 28 (2008):

As a default rule, the word “or” does not mean “and” unless legislative intent clearly indicates to the contrary. We assess the plain meaning of a statute “viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole We also consider the subject, nature, and purpose of the statute as well as the consequences of adopting one interpretation over another. .

The fact Tesoro conceived of an alternative interpretation of RCW 82.21.020 fails to render the statute ambiguous. The word “or” in the definition of “ ‘[c]ontrol’ ” is not susceptible to multiple reasonable interpretations-it is clearly disjunctive. We hold RCW 82.21.030 is plain on its face and therefore the Court of Appeals did not err because the statute lacked any ambiguity to construe in Tesoro's favor.

(internal citations and footnote omitted).

The Department has offered no evidence that the regulation supports a disjunctive interpretation. The regulation clearly defines separate classes of residency for recipients of medical assistance and plainly distinguishes between institutionalized and noninstitutionalized recipients.¹¹ Ultimately, the residency regulation is unambiguous. It is written in the conjunctive and supports Mr. Gaston's residency in Washington.

F. The Constitution requires both substantive and procedural due process protections affording fair and just administration of public benefits.

The Department claims, "Due process does not require timely and adequate notice of the internal process of *evaluating* whether to terminate benefits." Response Brief at 21. However, due process requires objective procedures in connection with termination of financial aid. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). The Department by-passed its own residency rule and instead terminated Mr. Gaston's benefits based on an undisclosed clarification process involving no known legal authority.

In *Goldberg*, the plaintiff class consisted of New York City residents who were receiving welfare benefits from either federal or state sources. *Id.* Plaintiffs claimed that defendant erred in eliminating their

¹¹ Moreover there is a reasonable basis for such a distinction. A noninstitutionalized client may determine their own residency. An institutionalized client may not be able to so it makes sense that an institutionalized client's residency be based upon other factors such as the residency of their legal guardians.

benefits without following the procedures set forth in the law. *Id* at 257.

The Supreme Court held that public benefits recipients have the right to due process especially when an agency evaluation terminates the very means by which they live:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny.'

Id. at 270. (emphasis added).

Here, the evidence relied upon was an ad hoc clarification that appears to have been based in large part upon the subjective opinions of a Department caseworker. Further, the Department did not respond to Mr. Gaston's numerous discovery requests including who in the Attorney General's Office issued the response and what evidence was considered. AR 345. Failing to respond to Mr. Gaston's evidentiary requests and relying on this clarification process as the basis for termination not only

caused undue delay and need for several continuances, it deprived him of his constitutional right to confront the evidence and witnesses used by the Department to terminate his benefits.

G. The Appellant Should be Awarded his Attorney's Fees, Costs and Expenses on Appeal

The Department argues that Mr. Gaston should not be awarded his attorney's fees, costs and expenses on appeal because he did not comply with RAP 18.1(b) which ordinarily requires that an appellant requesting such fees and costs devote a section of his opening brief to his request. Response Brief at 33. Citing *Johnson v. Cash Store*, 116 Wash. App. 833 (Div. III 2003) (appellant, there, cited to RCW 26.18.160 only authorizing attorneys fees in child support or maintenance orders). The Department correctly states the general rule: cursory inclusion of such a request for fees and costs in the conclusion of an opening brief, without more, fails to satisfy the requirements of RAP 18.1(b). The Department fails, however, to cite the exception to the general rule established by RAP 18.1(b) relied upon by Mr. Gaston here.

In the conclusion of his opening brief, Mr. Gaston requested an award of attorney's fees, costs and expenses on appeal "pursuant to RCW 4.84.350 and RCW 74.08.080". Opening Brief at 41. RCW 4.84.350 is the Equal Access to Justice Act (EAJA). It is well settled that such a

“cursory” request for an award of attorney’s fees, costs and expenses on appeal that might otherwise fail to meet the requirements of RAP 18.1(b) will be acceptable when made for such fees and costs under EAJA. As the court explained in *Schrom v. Board of Firefighters*, 117 Wash. App. 542, 551 (Div. III 2003), *rev. on other grounds*, 153 Wash.2d 19 (2004):

The Equal Access to Justice Act provides for an award of reasonable attorney fees and expenses to “a qualified party that prevails in a judicial review of an agency action ..., unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.” RCW 4.84.350.

[The Appellants’] request for attorney fees is contained in a single sentence at the end of the “Conclusion” section of their brief. The Board contends the request does not comply with RAP 18.1(b), which requires a party seeking an award of reasonable attorney fees and costs to “devote a section of the brief” to the request. This argument fails to recognize that the Board bears the burden of demonstrating a party is not entitled to an award. *See Constr. Indus. Training Council v. Wash. Apprenticeship & Training Council*, 96 Wash. App. 59, 68 (Div. I 1999). In this context, the simple request in the brief adequately raised the issue and placed the burden on the Board to respond.

See also Aponte v. Department of Soc. & Health Servs., 92 Wn. App. 604, 623 (Div. I 1998), *review denied*, 137 Wn.2d 1028 (1999).

Like EAJA, RCW 74.08.080 establishes the right of a prevailing party in the appeal of a public assistance case to an award of attorney’s fees and costs against an agency, specifically the Department. The statute provides, in pertinent part, that: “[i]n the event that the superior court, the court of appeals, or the supreme court renders a decision in favor of the

appellant, said appellant shall be entitled to reasonable attorneys' fees and costs". RCW 74.08.080(3). Accordingly, the burden of proof, like the analysis under EAJA, is on the Department to show that such an award is unjustified. Where the burden of proof is on the agency to show that the award is not justified an appellant satisfies the requirements of RAP 18.1(b) by merely stating his statutory entitlement to such fees and costs as a prevailing party and need not devote a section of his opening brief to arguing his entitlement.

Here the Department has not carried its burden of contesting the Appellant's right to such an award of fees and costs under either EAJA or RCW 74.08.080(3). Instead the Department has only asserted that the Appellant has not adequately presented or briefed such a request. This argument fails. Accordingly the Appellant should be awarded his attorney's fees, costs and expenses on appeal.

II. CONCLUSION

For the foregoing reasons, the final order should be vacated and medical benefits should be restored effective the date of his wrongful denial.

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Dated this 5th day of November, 2008.

DISABILITY RIGHTS WASHINGTON

A handwritten signature in black ink, appearing to be 'Emily Cooper', written over a horizontal line.

EMILY COOPER, WSBA # 34406
REGAN BAILEY, WSBA # 39142
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(206) 324-1521

I hereby certify that on the 5th day of November, 2008, I caused to be served by legal messenger a copy of the foregoing APPELLANT'S REPLY BRIEF to the following:

Scott Middleton
Assistant Attorney General
7141 Cleanwater Drive SW
Olympia, WA 98504-0124

I declare under penalty of perjury of the laws of the state of Washington that the forgoing is true and correct.

Dated this 5th day of November, 2008, at Seattle, Washington.

Mona Rennie
Mona Rennie

FILED
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DIVISION II
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STATE OF WASHINGTON
BY [Signature]
DEPUTY