IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BRIAN J. SHANNON, a Minor, by and through his Father and Guardian, KEVIN R. SHANNON, Appellant,	)	
v.	)	C.A. No. 05A-07-002-PLA
VINCENT P. MECONI, in his official capacity as Secretary of the Delaware Department of Health and Social Services, Appellee.	)	

Submitted: October 26, 2005
Decided: January 5, 2006

ON APPEAL FROM A REVISED DECISION OF
THE DIVISION OF SOCIAL SERVICES ON REMAND
REVERSED.

Kevin R. Shannon, Esquire, as Father and Guardian of Appellant, Brian J. Shannon.

A. Ann Woolfolk, Esquire, Deputy Attorney General, Attorney for Appellee.

ABLEMAN, JUDGE

Currently before the Court is an appeal from a revised decision of the Delaware Division of Social Services (hereinafter "DSS") issued on remand from this Court. Plaintiff Brian Shannon (hereinafter "Brian") argues that his Medicaid benefits were improperly terminated by DSS, and that the DSS Hearing Officer failed to comply with this Court's remand instructions.[1] Plaintiff additionally requests an award of costs and attorney's fees as a result of what Plaintiff alleges to be bad faith delay and unnecessary litigation.

For the reasons that follow, the Court finds that DSS was in error in terminating Appellant's Medicaid benefits. DSS failed to provide substantial evidence establishing a change in Appellant's condition or other good cause justifying termination. The decision of the Hearing Officer is therefore **REVERSED**. The Court, however, declines to sanction DSS at this time.

Facts

Appellant Brian Shannon was born May 7, 1998 with cystic fibrosis, an incurable disease that is progressive in nature and ultimately fatal. On April 21, 1999, when Brian was eleven months old, DSS approved Brian's application for Medicaid benefits so he could receive treatment from his parents at home, rather than be institutionalized.

The treatment Brian has received from his parents has apparently been successful in helping to control his symptoms. When DSS reviewed

[1] *Shannon ex rel. Shannon v. Meconi*, 2005 WL 927150 (Del. Super.).

Brian's file in the spring of 2004, the Agency found Brian to be participating in life largely as a normal six-year-old, including attending school and playing on a soccer team. DSS therefore decided that Brian had improved such that he no longer required his Medicaid benefits. Thereupon his benefits were terminated.

Brian, through his parents, demanded a hearing on the termination, which was conducted on September 17, 2004. At this hearing, Brian's treating physician, Dr. Aaron Chidekel, opined that Brian's condition had not, and indeed could not, improve because there is no cure for cystic fibrosis. Dr. Chidekel further testified that he had cared for Brian since he was diagnosed and that Brian's condition has been functionally stable his entire life.

DSS presented the testimony of Dr. Anthony Brazen. As this Court noted in its previous decision, Dr. Brazen's testimony was plagued by misstatements, inaccurate assumptions, and admissions that other DSS personnel had made significant errors in reviewing Brian's case. Dr. Brazen testified that he believed that Brian had improved because Brian had not required hospitalization for some time. In fact, no evidence was ever produced that Brian had ever been hospitalized.

The Hearing Officer, on behalf of DSS, issued his opinion on November 19, 2004, affirming the denial of benefits. The Officer based this opinion on the ground that DSS did not need to prove that Brian's condition had improved, but must only show a change in circumstances

or other good cause. The Hearing Officer then proceeded to find that Medicaid law had changed since Brian's approval, and stated that it now required recipients to meet a seven criteria evaluation process as well as SSI medical disability standards. The Hearing Officer found that Brian is not disabled under the SSI disability standards and therefore affirmed the denial of benefits.

Brian appealed that decision. This Court held that neither DSS nor Brian had argued that Brian could be denied benefits based on anything other than an improvement in Brian's condition. As a result, this Court held that Brian was denied due process because he never had the opportunity to prepare for or rebut the change in law grounds upon which the Hearing Officer decided the matter. The matter was remanded to the Hearing Officer for a hearing limited to the change of law question.

The Hearing Officer, however, declined to hold a hearing on the issue because both Brian and DSS agreed that there had been no change in the law that would affect Brian's eligibility for benefits. Instead of issuing a new opinion taking into account that no change in law had occurred, the Hearing Officer merely added a few paragraphs to his original opinion, and issued an opinion that was essentially verbatim of the original opinion, again denying Brian benefits. The remand opinion continues to be riddled with errors. It still contains the erroneous change-in-law analysis (ironically now acknowledged by the Hearing Officer to be erroneous on page three, but relied upon to deny benefits on

page eight), sometimes refers to Brian as 'Bryon,' and states both that "as will be shown, the SSI criteria for determining whether or not a disability exists are crucial but not determinative in a determination of eligibility for the program," but that "a child, in addition to meeting a qualifying level of care, is also required to meet the SSI medical disability standards." Brian then brought this timely appeal.

Standard of Review

The role of this Court on appeal is to determine whether there is substantial, competent evidence to support the Hearing Officer's factual findings and to correct errors of law.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] It is also defined as more than a scintilla but less than a preponderance of the evidence.[4]

Analysis

This Court has previously recognized that Medicaid benefits are property rights that may not be denied without due process of law. As a result, the concepts of fairness and reasonableness inherent in due process require that those benefits not be terminated without a demonstration of a change in circumstances or other good cause.[5]

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[2] *Harris v. Eichler*, 1991 WL 18111 (Del Super.) *citing Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[3] *Id*.
[4] *Id.*
[5] *Collins v. Eichler*, 1991 WL 53447 (Del. Super.).

DSS concedes that the Hearing Officer's remand opinion failed to comply with this Court's remand instructions. The main point of contention in this appeal, therefore, appears to be whether this Court should again remand Brian's case. DSS argues that the case should be remanded because the Hearing Officer apparently did not understand the remand instructions.

A case may be remanded for a number of reasons: to take newly discovered evidence that creates a material conflict of fact,[6] to complete the record,[7] to direct the agency to apply the correct legal rule or standard where an incorrect standard was previously applied[8] or, as this Court did before, to correct a deficiency in due process.[9]

It appears that this matter may be decided without remand. This Court has previously noted that adequate factual testimony in this case has already been taken. Although the Hearing Officer failed to follow this Court's instructions in essentially re-issuing his former opinion, the Hearing Officer did find that no change of law affected Brian's eligibility for benefits. Accordingly, the opinion was plainly in error in finding a change in circumstances or other good cause justifying the termination of benefits because DSS failed to establish Brian's condition when he was deemed eligible for services, making it impossible to determine whether

[6] *Rohner v. Niemann*, 380 A.2d 549 (Del. 1977); *Star Pub. Co. v. Martin*, 95 A.2d 465 (Del. 1953).
[7] *State Farm Mutual Auto. Ins. Co. v. Hale*, 297 A.2d 416 (Del. 1972).
[8] *Sabo v. Pestex*, 2004 WL 2827902 (Del. Super.).
[9] *Shannon v. Meconi*, 2005 WL 927150 (Del. Super.).

circumstances had actually changed, and otherwise relied on an incorrect statement of the law.

The Hearing Officer's finding of a change in circumstances is plain error and is unsupported by even a scintilla of evidence. The Hearing Officer notes that Brian is able to attend school and participate in sports teams. This evidence cannot be deemed a change in circumstance in that Brian's activities do not reflect an improvement in Brian's condition, but that Brian is simply older. Brian was unable to do these things when he was approved for benefits because he was only nine months old at the time.

The only expert witness DSS presented, Dr. Brazen, concluded that Brian's condition had improved because he no longer required frequent hospitalization, even though no evidence was produced indicating that Brian had ever required frequent hospitalization. The Hearing Officer additionally pointed to pulmonary function tests that were within a normal range. However, these tests had apparently never been conducted on Brian previously, reportedly because Brian was too young, thereby rendering them incapable of showing a change in Brian's condition. Indeed, Dr. Chidekel testified that Brian's condition has been functionally the same throughout his entire life.

It is true that this Court previously recognized that if the Hearing Officer decided that sufficient expert testimony had been submitted that Brian's "stabilization" could be considered "improvement" the Court

would likely defer to that interpretation of the facts. The Hearing Officer declined to find that stabilization constituted improvement, however, and instead found, without sufficient evidence, that there had been a change in Brian's circumstances. It is additionally notable that Brian has a fatal disease that requires institutional level care, which should be enough to justify benefits despite the ups and downs of the course of the disease. The Court does not consider it appropriate to re-hear the arguments presented here every time Brian has a brief improvement in his condition.

The Hearing Officer additionally found that good cause permits the termination of Brian's benefits because a change in law required Brian to meet SSI medical disability standards. In this appeal DSS acknowledges that this is an incorrect statement and that the law has not changed. In fact, the Hearing Officer (in a weak attempt to comply with this Court's remand) added a paragraph in its remand opinion stating "I find that the law has not changed from the time Brian first became eligible for Medicaid benefits under the Disabled Children's Program…" Yet, the change in law analysis remains in the remand opinion as good cause support for Brian's termination.[10] Brian is not required to meet the SSI medical disability standards in qualifying for benefits. The Hearing Officer did not point to any other good cause for denying Brian's benefits. Consequently, the Hearing Officer's determination is manifestly incorrect

[10] The Court notes that the Hearing Officer essentially re-issuing his original opinion with a few minor changes constitutes blatant disregard for this Court.

as a matter of law, is not supported by sufficient evidence, and is clearly in error.

The question of sanctioning DSS arose during briefing, with Brian arguing that DSS has unnecessarily delayed the resolution of the matter in bad faith and caused Brian needless increase in the cost of litigation by defending a position known to be meritless. Brian asks that DSS be prohibited from challenging his benefits for five years. He also seeks attorney's fees.

This Court may shift costs and attorney's fees via two sources of law. First, Superior Court Civil Rule 11(c) permits the award of attorney's fees under certain specified circumstances, which include introducing litigation for improper purposes, such as to harass or cause unnecessary delay or increase in the cost of litigation, or presentation of frivolous arguments of law. Significant procedural requirements are associated with this rule, however, including the fact that a motion made under the rule "shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate [the rule]." Failure to comply with these requirements has been held to be grounds for denying such a motion.[11]

The Court also maintains an "inherent power" to sanction parties to litigation where bad faith conduct exists. Such power, "exercised with

[11] *Speidel v. St. Francis Hospital*, 2003 WL 21524694 (Del. Super.). Superior Court Civil Rule 11(c)(1)(B) does provide for the Court to *sua sponte* sanction a party for improper behavior, however the Court declines to do so in this case.

great restraint,"[12] permits the Court to deter abusive litigation and protect the integrity of the judicial process.[13] Brian cites to a number of cases wherein this power was exercised by the Courts of Delaware. In each of these cases, however, the bad faith conduct included falsifying evidence,[14] advancing a "bewildering array of theories" minimally grounded in law or fact to justify misconduct,[15] and manufacturing testimony for use as evidence at trial.[16] Although Brian maintains that DSS has delayed resolution of the matter by defending a meritless position, sanctions for such actions are generally awarded where the defense relied on fraud.[17]

In this instance, there being no similar egregious circumstances, the Court does not deem that sanctions are appropriate at this stage. However, DSS is hereby placed on notice that this Court will seriously in the future entertain motions for sanctions on the grounds of additional and excessive delay.

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[12] *Gilmour v. PEP Modular Computers, Inc.*, 1995 WL 791001 (Del. Super.). Indeed, the Court of Chancery has held that, in awarding attorney's fees for bad faith litigation conduct, "a higher or more stringent standard of proof [is required]." *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 232 (Del. Ch. 1997).
[13] *Montgomery Cellular Holding Co. Inc. v. Dobler*, 2005 WL 1936157 (Del. Supr.).
[14] *Id.*
[15] *RGC Int'l Investors, LDC v. Greka Energy Corp.*, 2001 WL 984689 (Del. Ch.).
[16] *Johnston v. Arbitrium (Cayman Islands) Handels*, 720 A.2d 542 (Del. 1998).
[17] *See, e.g., Reagan v. Randell*, 2002 WL 1402233 (Del. Ch.) (awarding sanctions where the defendant manufactured evidence necessary to his claim).

For the foregoing reasons, the Hearing Officer's decision affirming the denial of benefits is hereby **REVERSED**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge