

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-162

NOVEMBER TERM, 2007

In re Appeal of James/Paul Erena	}	APPEALED FROM:
	}	
	}	Human Services Board
	}	
	}	FAIR HEARING NO. 19,297

In the above-entitled cause, the Clerk will enter:

Father of petitioner James Erena appeals pro se on petitioner's behalf, challenging the denial of petitioner's requests for reimbursement for the cost of a wheelchair lift and reimbursement for parents' costs of transporting him to necessary medical appointments. We affirm.

This case has a somewhat lengthy procedural history, which we recount in pertinent part below. The record indicates the following. Petitioner is a seventeen-year-old boy with a rare and severe disorder of the central nervous system affecting motor control. Petitioner cannot independently sit up, stand, or control his arms and legs. He uses a custom-made motorized wheelchair to sit up and move around. Petitioner lives at home with his parents and attends public school. He has a constant need for reliable medical transportation. His parents provided transportation for petitioner until they became unable to transfer him safely from his wheelchair into their vehicle. In 2004, parents tried using a private transportation provider, but they experienced reliability and other problems with this service. Petitioner requested Medicaid coverage for a lift mechanism that they could install in their family van so that they could transport petitioner to medical appointments themselves. There were a series of decisions and remands on this issue. At some point after the Human Services Board's second remand, petitioner informed the Office of Vermont Health Access (OVHA) that his family had purchased another van and retrofitted it with a lift to accommodate petitioner's wheelchair. Since that time, petitioner's family has continued to furnish petitioner with virtually all of his transportation.

The Human Services Board ultimately affirmed the OVHA's decision not to provide Medicaid coverage for the purchase of the van lift. The Board explained that it was undisputed that OVHA was required under the regulations to provide petitioner with transportation necessary to meet his medical needs. It was clearly established that the reliability of transportation to medical appointments was critically important to petitioner's health. The Board found that nothing in the plain language of the relevant regulation, however, could reasonably be read as providing or contemplating coverage for either the purchase of a private motor vehicle or the purchase of modifications to a privately owned vehicle. Although petitioner demonstrated

his need for reliable transportation and produced evidence to show the potential unreliability of the alternatives thus far suggested by OVHA, he had not shown, as required, that if he did not have a wheelchair lift (or a van), then he could not access necessary medical care from his home and he would have to be institutionalized.

The Board turned next to petitioner's request that his parents be covered as Medicaid transportation providers as his "personal choice drivers." OVHA had denied the request based on its reading of a Medicaid regulation governing transportation. It indicated that its policy was to deny coverage for any Medicaid transportation "if the family owns an adequately equipped vehicle for transporting a disabled family member." The Board reversed OVHA's decision, finding it to be an overly restrictive reading of the transportation regulation and concluding that it did not meet the requirements of the "early and periodic screening, diagnostic, and treatment services" (EPSDT) provisions under 42 U.S.C. § 1396d(a),(r)(5). There was no dispute, the Board explained, that the law requires OVHA to provide Medicaid recipients with transportation to procure necessary medical services. The Board reasoned that because parents would be approved under the regulation to hire another person with a suitable van to drive petitioner to his medical appointments if his parents did not own a van sufficiently equipped to carry him, it would be unfair to deny payment to parents for providing the exact same service. In other words, the Board stated, because petitioner's medical needs were such that he could obtain Medicaid coverage for another person to be his personal choice driver, it must be concluded that the criterion in the transportation regulation—that transportation be "not otherwise available"—was met. Even if OVHA would contest whether other suitable personal choice drivers were available, the Board continued, it made no sense either as a matter of law or policy to require a recipient whose family already owned a suitable vehicle to hire a third party to provide transportation, rather than simply reimbursing a family who could provide the exact same service with indisputably greater convenience and reliability.

On review, the Secretary of the Agency of Human Services affirmed the Board's denial of petitioner's request for reimbursement for the wheelchair lift, but reversed the Board's decision to allow petitioner's parents to be reimbursed for transporting petitioner to necessary medical services. The Secretary found that the Board's order contradicted agency policy, which excluded Medicaid reimbursements to parents for the costs of transporting their children. As the Secretary explained, the transportation regulation provided that "transportation to and from necessary medical services is covered and available to eligible Medicaid recipients on a state-wide basis," subject to some limitations. In cases where public transportation was unavailable or inappropriate, the program allowed for reimbursement for "personal choice drivers," also called "volunteers" to deliver the needed transportation. These drivers were required to meet certain requirements and to be enrolled with the Medicaid program.

The Secretary explained that the transportation regulation limited coverage for transportation costs to situations where "transportation is not otherwise available to the Medicaid client." If a family owned an adequately equipped vehicle for transporting a disabled family member, as here, then there was no meaningful sense in which it could be said that transportation was not "otherwise available" to that person. Medicaid reimbursement was thus precluded by the regulation's plain language. The Secretary explained that this conclusion was also required by OVHA's written policy manual interpreting and implementing the federal Medicaid regulation. The manual interpreted the phrase "not otherwise available" to mean "[s]ituations

where transportation is either unnecessary or free, including transports: (a) In the client's own vehicle (if not eligible for hardship mileage); (b) That could be provided by family members or friends[.]” The manual also provided that parents were responsible for transport when they had a vehicle, and the Secretary stated that one of the primary reasons for service denials was clients' ownership of a vehicle.

The Secretary also noted that substantial costs would be imposed on the Medicaid transportation program if, as the Board found, Medicaid were required to reimburse parents for driving their children to medical appointments. She explained that the Medicaid program was neither presently required nor funded to bear such costs. The Secretary found it rational for Medicaid, in order to conserve limited funds and target them where they were most needed, to limit transportation funding to situations where recipients did not have transportation otherwise available to them. Because petitioner had access to necessary transportation, both through his family vehicle and through the Medicaid transportation system, the requirements of EPSDT were met, and payment to petitioner's parents was not required to meet them. The Secretary thus modified the Board's decision by adopting it in part and reversing it with regard to the issue of personal choice drivers, thus affirming and reinstating OVHA's decision not to pay petitioners' parents for transporting petitioner to necessary medical services. This appeal followed.

On appeal, petitioner challenges the denial of his requests for reimbursement of the wheelchair lift and for the costs of transporting him to necessary medical appointments. He argues that the purchase of a wheelchair lift was medically necessary, and that the lift makes safe transportation possible. He argues that the evidence showed that the Medicaid transportation system was unreliable and sometimes unsafe, and it was unsuited to meet petitioner's medical needs. Petitioner also asserts that the wheelchair lift is necessary to avoid petitioner being institutionalized because he needs transportation to receive his needed medical services. Petitioner argues, alternatively, that the Secretary erred in denying his request that parents be reimbursed as his personal choice drivers. He asks the Court to affirm the Board's decision that OVHA's reading of the transportation regulation is “overly restrictive” and inconsistent with the requirements of EPSDT. He maintains that any policies found in OVHA's manual cannot override the legal requirements set forth in EPSDT, and he notes that paying a family member as a personal choice driver results in the same cost to Medicaid as that incurred if Medicaid paid a for-profit company to provide transportation. He also asserts that the Secretary erred in finding that there were public transit services available to petitioner.

While we are sympathetic to petitioner's arguments, we affirm the Secretary's decision. On review, we generally defer to the Secretary's interpretation of OVHA's governing statutes and regulations, and we “will not disturb the Secretary's interpretations absent a compelling indication of error.” Jacobus v. Dep't of PATH, 2004 VT 70, ¶ 23, 177 Vt. 496 (mem.). We do not defer, however, to the Secretary's interpretation of federal law and regulations. Id. We review the Board's findings, almost all of which were affirmed by the Secretary, for clear error. Thus, the findings will stand if the record contains any credible evidence to reasonably support them. Id. ¶ 7.

We begin with the denial of petitioner's request for reimbursement for the wheelchair lift. As the Board found, a Medicaid regulation identifies the criteria that OVHA should consider in deciding whether to pay for an item that is not included in the list of a covered items. Medicaid

Manual § M108, 5 Code of Vermont Rules 13 170 008-24. One such criterion asks if there are “extenuating circumstances that are unique to the beneficiary such that there would be serious detrimental health consequences if the service or item were not provided.” *Id.* The record showed that having reliable transportation to medical appointments was critically important to petitioner’s health, and petitioner was entitled to have transportation necessary to meet his medical needs. While the Board acknowledged the potential unreliability of the Medicaid transportation system, it did not find the system inherently unreliable. Given the nature of the request, we agree that petitioner needed to demonstrate more than the potential unreliability of the transportation services offered by Medicaid. The Board reasoned that because petitioner had not conclusively established that he would have to choose between reimbursement for the family vehicle or being institutionalized, and given the potentially huge policy and monetary implications of expanding the regulation to include such coverage, and given that reimbursement under the regulation was largely discretionary, it would uphold OVHA’s denial of the reimbursement request. In light of these factors, we similarly agree that no abuse of discretion has been demonstrated.

We similarly find no error in the Secretary’s decision that parents could not be reimbursed as petitioner’s “personal choice drivers.” As the Secretary explained, the relevant regulation provides that transportation to and from necessary medical services is covered, with limitations including a requirement that “[t]ransportation is not otherwise available to the Medicaid recipient.” Medicaid Manual § M755, 5 Vermont Code of Rules 13 170 008-120. We agree that the plain meaning of this regulation precludes its application in this case. As the Secretary found, petitioner does have transportation available to him through his parents. This interpretation is consistent with provisions in the OVHA manual, and the Secretary was not suggesting that these provisions trumped the provisions in the EPSDT. Rather, as the Secretary explained, the requirements of the EPSDT were satisfied because petitioner had necessary transportation access, both through his family vehicle and through the Medicaid transportation system. Its finding that Medicaid transportation is available to petitioner, even if potentially unreliable, is supported by evidence in the record. We therefore affirm the Secretary’s decision.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice