

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID J. JENKINS,)
)
Respondent,)
)
v.)
)
WASHINGTON STATE)
DEPARTMENT OF SOCIAL AND)
HEALTH SERVICES,)
)
Appellant.)
)
-----)
VENETTA GASPER, and TOMMYE)
MYERS,)
)
Respondents,)
)
v.)
)
WASHINGTON STATE)
DEPARTMENT OF SOCIAL AND)
HEALTH SERVICES,)
)
Petitioner.)
_____)
)

No. 78652-6

En Banc

No. 78931-2

Filed May 3, 2007

C. JOHNSON, J.—This case involves a challenge to a Washington State Department of Social and Health Services (DSHS) regulation that reduces disabled

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recipients' benefits because they live with their paid caregivers. Under the regulation, amended and codified as WAC 388-106-0130(3)(b), formerly WAC 388-72A-0095 (2005), and referred to as the "shared living rule," DSHS reduces recipients' benefits by 15 percent if they live with their caregiver.

The three disabled recipients, David Jenkins, Vennetta Gasper, and Tommye Myers, challenge the shared living rule on several grounds, including challenges based on (1) the federal Medicaid comparability requirements under 42 U.S.C. § 1396; (2) the federal Medicaid free choice provider guaranty under 42 U.S.C. § 1396; (3) Title II of the Americans with Disabilities Act of 1990 under 42 U.S.C. § 12132; (4) the privileges and immunities clause under article I, section 12 of the Washington Constitution; (5) the equal protection clause under the fourteenth amendment to the United States Constitution; and (6) the due process clause under the fourteenth amendment to the United States Constitution.

In two cases consolidated in this appeal, the regulation was invalidated by the trial courts. In one case, the Court of Appeals affirmed and we granted direct review of the other case and consolidated the cases. We hold that DSHS's program, codified as WAC 388-106-0130(3)(b), to reduce benefits to eligible

disabled recipients, violates federal comparability requirements under 42 U.S.C. § 1396. Because we find WAC 388-106-0130(3)(b) is invalid based on the federal comparability requirements, we find it unnecessary to reach or decide any other issues. The decisions of the courts below are affirmed in part and reversed in part.¹

FACTUAL AND PROCEDURAL HISTORY

All three recipients in this case are functionally disabled individuals who receive paid in-home personal care services to help them with basic activities of daily living such as bathing, dressing, shopping, housekeeping, and meal preparation. The three recipients challenge the shared living rule, which is one component of an assessment tool used by DSHS. This assessment tool, entitled “Comprehensive Assessment Reporting Evaluation” or CARE, is used to determine an individual’s eligibility for in-home care under one of four programs.² *See* WAC 388-106-0045 through -0140.

¹ We also grant Jenkins’ motion passed to the merits, pursuant to RAP 10.3(8), and permit him to include as an appendix to his appellate brief excerpts from the federal guidance document on Medicaid waivers. We deny DSHS’s motion passed to the merits to include as an appendix to its appellate brief documents illustrating how the shared living rule operates with respect to hypothetical recipients.

² The four programs are (1) medical personal care; (2) the community options program entry system (COPES) waiver program; (3) the medically needy in-home waiver program; and (4) the chore program. WAC 388-106-0015.

In a CARE evaluation, the individual is scored on factors such as an individual's ability to perform daily activities and an individual's mental status. The resulting numerical scores are put into a formula that calculates the individual's base assistance level in hours of care, and places the individual into one of 14 residential classification groups. CARE classification groups range from "Group A Low" (level 1, requiring the least amount of assistance) to "Group E High" (level 14, requiring the most assistance). WAC 388-106-0125.

Once the individual qualifies as a recipient, the department determines whether informal supports, like friends or family members, are helping the recipient meet certain needs. If the recipient lives with a caregiver, a second formula is applied to reduce the number of care hours for which the recipient qualifies. This second formula, or shared living rule, was implemented on the theory that if caregivers must clean their own houses, go shopping, and cook meals for their own benefit, certain duplication of efforts are presumed, and, the theory goes, a state should not pay for those tasks that benefit the entire household despite the absence of any specific determination that these tasks are shared.

This second formula was largely derived from the development of the CARE

assessment tool which included a “time study report” of caregivers in different settings. DSHS confirmed that it relied on the study to conclude that the percentage of time devoted by live-in caregivers to household tasks ranged from 33 percent to 42 percent. Based on this study, DSHS decided to reduce any recipient’s qualified level of care hours by 15 percent if a caregiver resides with a recipient.

The 15 percent reduction is applied without any individual determination of a recipient’s needs and is applied as an irrebuttable presumption. DSHS determined 15 percent was appropriate based on the study’s conclusion that the percentage of time devoted by live-in caregivers to household tasks ranged from 33 percent to 42 percent but, DSHS does not explain in the study or elsewhere how it arrived at the 15 percent figure. In separate administrative hearings, the 15 percent reduction in care hours, or shared living rule, was challenged by Jenkins, Gasper, and Myers, who are disabled Medicaid recipients living with their paid caregivers.

Jenkins suffers from human immunodeficiency virus/acquired immune deficiency syndrome (HIV/AIDS), hepatitis, and liver failure. He has been evaluated by DSHS as “totally dependent” for meal preparation and housework; hence, Jenkins’ condition requires that he have a caregiver. His partner, Paul

Racchetta, has been Jenkins' caregiver for nine years. According to a CARE assessment, Jenkins requires 185 hours of care per month. Before the shared living rule was implemented, Jenkins received 185 hours of paid care per month. After DSHS applied the shared living rule (because Jenkins lives with his caregiver) Jenkins' 184 hours were cut to 153 hours of paid care per month. Jenkins Decl. (Sept.15, 2004) at 1-2.

Like Jenkins, Gasper's condition requires that she have a caregiver. Gasper is a 66-year-old severely developmentally disabled woman who has been evaluated by DSHS as "totally dependent" for meal preparation and housework. According to the assessment, Gasper requires 184 hours of care per month. After the shared living rule was applied, her hours were reduced initially to 116 and later changed to 152 hours per month.³ Gasper lives with Linda Green, an unrelated paid caregiver. Green estimates she spends more than 184 hours per month caring for Gasper, and after the reduction to 152 hours, Green said she is unwilling to provide additional unpaid care. In her declaration, Green stated that she must supervise Gasper

³ DSHS does not provide its reasons in the record for its initial reduction in Gasper's hours from 184 to 116 nor does it give reasons for its subsequent increase in Gasper's hours from 116 to 152 per month.

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constantly because of her developmental delays; Gasper is unable to perform basic tasks without assistance, such as eating and toileting. Green Decl. (May 13, 2004) at 1-5.

Like Jenkins and Gasper, Myers has been evaluated by DSHS as “totally dependent” for meal preparation and housework. Myers is an elderly woman with kidney disease; she is on dialysis three times per week. Additionally, Myers is an insulin dependent diabetic. She lives with her disabled son Ricky, her son John, and John’s wife. John is Myers’ caregiver. Before the shared living rule was implemented, Myers was entitled to receive 184 hours of paid care per month. The CARE assessment set Myers base hours at 190, but after applying the shared living rule, DSHS reduced her hours initially to 116 and then to 153 hours.⁴ Myers’ caregiver, John, estimates that he spends more than 184 hours per month on his mother’s care. In addition to the chores he performs for his family, he spends an extra eight hours per month shopping for his mother’s special diet, 100 hours per

⁴ Like Gasper, DSHS does not provide its reasons in the record for its initial reduction in Myer’s hours from 184 to 116 nor does it give reasons for its subsequent increase in Myer’s hours from 116 to 152 per month.

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month extra on housekeeping, and 45 hours per month extra on meal preparation.

Myers Decl. (May 27, 2004) at 1-5.

All three Medicaid recipients challenge the shared living rule, asserting that it does not recognize the additional hours their caregivers provide that do not benefit the caregivers or the household in general. None of the recipients here asked for additional reimbursement in excess of what their classifications allowed, only that their benefits not be reduced. In Jenkins' case, based on the classifications, he was "assessed" to receive 185 hours and in Gasper's and Myer's cases, based on the classifications, they were "assessed" to receive 184 hours. After unsuccessful administrative hearings, the three recipients appealed. The trial court in each case invalidated the shared living rule, WAC 388-106-0130(3)(b),⁵ finding it violated federal comparability requirements.

In Jenkins' case, DSHS appealed the King County Superior Court decision to Division One of the Court of Appeals. In May 2006, the Jenkins case was certified to this court for direct review.

⁵ Effective June 17, 2005, former WAC 388-72A-0095 (2004) was amended and recodified as WAC 388-106-0130(3)(b).

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The appeals of Gasper and Myers were consolidated by Thurston County Superior Court. Division Two of the Court of Appeals affirmed the superior court decision that the shared living rule violates federal Medicaid comparability requirements. *Gasper v. Dep't of Soc. & Health Servs.*, 132 Wn. App. 42, 129 P.3d 849 (2006). We granted review (157 Wn.2d 1017 (2006)), and consolidated the cases.

ISSUE

Whether the shared living rule, WAC 388-106-0130(3)(b), violates the federal Medicaid comparability requirement.

ANALYSIS

Standard of Review

The Administrative Procedure Act, chapter 34.05 RCW, sets out the standard of review for decisions involving administrative rules. The relevant portion of the statute provides:

In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

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RCW 34.05.570(2)(c).

Here, the question is whether DSHS exceeded its statutory authority by promulgating a rule that conflicts with federal law, namely 42 U.S.C. § 1396a(a)(10)(B). The DSHS shared living rule, codified as WAC 388-106-0130(3)(b), establishes an irrebuttable presumption that the recipient's need for assistance is met for instrumental activities of daily living (IADL) of meal preparation, housekeeping, shopping, and wood supply. If a need is met under the DSHS assessment, it receives a score that is put into a mathematical formula that translates the sum of scores into a cumulative percentage by which the recipient's base hours are adjusted. Here, after making an initial assessment of each recipient's hours of need, DSHS reduced each recipient's hours of care by 15 percent after applying this mathematical formula.

No one disputes that the exact mathematical formula used by DSHS results in an across-the-board 15 percent reduction where a recipient lives with a caregiver, despite the fact that WAC 388-106-0130 does not have, verbatim, the 15 percent amount; rather, the 15 percent reduction can be demonstrated by manually performing the complex calculations described under WAC 388-106-0130. The

relevant portion of the DSHS rule, or WAC, provides:

(a) The CARE tool determines the adjustment for informal supports by determining the amount of assistance available to meet your needs, assigns it a numeric percentage, and reduces the base hours assigned to the classification group by the numeric percentage

. . . .

(b) If you and your paid provider live in the same household, the status under subsection (2)(a) of this section must be met for the following IADLs:

- (i) Meal preparation,
- (ii) Housekeeping,
- (iii) Shopping, and
- (iv) Wood supply.

WAC 388-106-0130(2)(a), (3)(b).

We review an agency’s interpretation of federal law de novo under an “error of law” standard. *Skamania County v. Columbia River Gorge Comm’n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001) (citing *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 175-76, 4 P.3d 123 (2000)).

Comparability Requirement

The federal Medicaid comparability requirement mandates that the medical assistance a state provides for any categorically needy individual “shall not be less in amount, duration, or scope” than the assistance provided to any other

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categorically needy individual. The relevant portion of the federal Medicaid comparability statute provides:

(B) that the medical assistance made available to any individual described in subparagraph (A) –

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in subparagraph (A);

42 U.S.C. § 1396a(a)(10).

The agency rule that interprets the federal Medicaid comparability statute provides:

(b) The plan must provide that the services available to any individual in the following groups are equal in amount, duration, and scope for all recipients within the group:

(1) The categorically needy

(2) A covered medically needy group

42 C.F.R. § 440.240.

Courts have consistently recognized this requirement and found that states violated the comparability requirement when some recipients are treated differently from other recipients where each has the same level of need. *Schott v. Olszewski*,

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401 F.3d 682, 688-89 (6th Cir. 2005) (finding treatment was not comparable when Medicaid did not reimburse recipient for medical expenses she paid out of pocket after she was wrongfully denied coverage); *White v. Beal*, 555 F.2d 1146, 1151-52 (3d Cir. 1977) (finding statute was illegal when it covered eyeglasses for those suffering from eye diseases but did not cover glasses for patients when refractive error caused poor eyesight).

Here, DSHS asks that we defer to its interpretation of the Medicaid statute's comparability provision because of its expertise in administering that law. We reject this argument because the Medicaid comparability provision is specific in demonstrating Congress' intent to provide comparable services to similarly situated recipients. 42 U.S.C. § 1396a(a)(10)(B); *Martin v. Taft*, 222 F. Supp. 2d 940, 977 (S.D. Ohio 2002) (finding concepts of comparability and equality are neither vague nor ambiguous). Medicaid's manifest purpose is to provide for an individual recipient's needs; thus, the comparability provision requires comparable services when individuals have comparable needs. The question here is whether the three respondents were offered the same amount of medical assistance available to "any other such individual." 42 U.S.C. § 1396a(a)(10)(B)(i).

The respondents argue that the comparability provision focuses on parity between individuals. We agree. The requirement of comparability is not merely for parity between groups as argued by DSHS. On the contrary, the plain language of the comparability statute provides that “assistance made available to *any other such individual* . . . shall not be less [than that] made available to *individuals*. 42 U.S.C. § 1396a(a)(10)(B)(i), (ii).

Also, respondents argue that DSHS violates comparability when it allocates paid services using the presumption of the shared living rule, rather than an individualized determination of each recipient’s need for paid services. In fact, DSHS has promulgated a rule where recipients like Jenkins, Gasper, and Myers will have certain needs unmet while others with comparable disabilities will receive adequate services. This is so because DSHS neither addresses nor evaluates the variation of individual situations where caregivers perform household tasks that may benefit both the recipient and the household generally. Without such an evaluation, DSHS cannot automatically reduce, in shared living situations, a recipient’s need for assistance with housekeeping, shopping, meal preparation, and wood supply; rather, DSHS must assess those needs in the same way and to the same extent that services

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are provided to the meet the needs of other recipients who do not live in a shared living situation. Individual households may differ in both the total number of hours spent on chores and in each household member's ability to do the work, but this does not change an individual's overall need for assistance.

DSHS argues there is no provision of Medicaid law requiring an individualized determination of public assistance benefits and cites to *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975) to support its contention. In *Weinberger*, the central issue concerned a law designed to bar social security payments to surviving spouses when the only purpose of the marriage was to obtain those benefits. The court stated that administrative difficulties of individual eligibility determinations are matters which policy makers may consider when determining whether to rely on rules which sweep broadly. *Weinberger*, 422 U.S. at 784-85.

Weinberger is distinguishable because the present case does not deal with individuals who are attempting to *qualify* for federal benefits; rather, the individuals here are already eligible recipients of Medicaid. Moreover, DSHS decided on individualized determinations of public assistance benefits for this categorically

needy group of Medicaid recipients; yet, DSHS's refusal to consider the individual needs of Jenkins, Gasper, and Myers for assistance with housekeeping, shopping, and meal preparation violates their right to be treated in the same manner as all other categorically needy Medicaid recipients who are individually assessed for the same needs.

Also, DSHS argues that the shared living rule is a valid part of their CARE assessment in determining the level of need for public assistance. We agree that DSHS may use the CARE assessment program to initially classify, rate, and determine a recipient's level of need because this process is consistent with the Medicaid program's purpose. DSHS violates the comparability requirement when it reduces a recipient's benefits based on a consideration other than the recipient's actual need. A 15 percent reduction across the board for all recipients who live with their caregivers does not address, and in fact ignores, the realities of the recipients' individual situations.

Neither DSHS nor the study provides any explanation of how the 15 percent amount is derived from the study's data. Furthermore, the study does not provide data to distinguish clients who are clinically complex from clients who are not. In

each case before us, the evidence established that before any reduction, the hours required to provide for the needs of the individual plaintiffs greatly exceeded the hours actually reimbursed.

Once a person is assessed to require and receive a certain number of care hours, the assessment cannot be reduced absent a specific showing that fewer hours are required. To “presume” some recipients need fewer hours of care without individualized determination violates the comparability requirement. A recipient who *does not* live with a caregiver is assessed an amount needed for meal preparation, housekeeping, and shopping under WAC 388-106-0130. Likewise, a recipient who *does* live with a caregiver should also be assessed with the same criteria for those same needs on an individualized basis. The needs of a recipient are *not* presumed met without an individual assessment.

We conclude that no reduction is justified unless an individual determination is made supporting that reclassification. Accordingly, we invalidate WAC 388-106-0130(3)(b) to the extent that it presumes certain needs of the recipient are met without an individualized determination, and, the presumption results in an automatic 15 percent reduction in the recipient’s assessed number of allotted care

hours based only on the fact that the recipient lives with a caregiver.

No Exemptions from Comparability Requirement

DSHS argues that the Court of Appeals erred in holding the comparability requirement applies to Washington’s two Medicaid waiver programs, community options program entry system (COPES) and medically needy in-home waiver (MNIW). The COPES program, through which Myers and Jenkins receive services and the MNIW program are authorized by the legislature.⁶ As waiver programs, both COPES and MNIW operate under a waiver granted by authority of the Social Security Act. 42 U.S.C. § 1396n(c)(1). As part of the framework for home and community-based services (HCBS) waivers, Medicaid law provides that a waiver granted pursuant to its authority “may include a waiver of the requirements of [42 U.S.C. § 1396a(a)(10)(B)] (relating to comparability).” 42 U.S.C. § 1396n(c)(3). Here, DSHS did not provide any information regarding the CARE assessment tool or the shared living rule in its COPES waiver application. In fact, the application language requested a waiver of requirements “in order that services not otherwise

⁶ The MNIW waiver application is not present in the record, nor is it discussed by the parties in their briefing so we limit our finding to the COPES program.

available under the approved Medicaid State plan may be provided to individuals served on the waiver.” Jenkins Br. of Resp’t App.1 at 4. Therefore, we hold the COPES waiver program is not exempt from the federal comparability requirement.

Attorney Fees

Respondents request attorney fees on appeal under RCW 74.08.080(3).⁷ Because they prevail, we grant their request pursuant to RAP 18.1 and remand for determination of reasonable fees.⁸ Additionally, DSHS disputes the \$1,552 in costs awarded to Jenkins by the trial court that included, “photocopying, postage, telecommunication, and ‘other’.” Jenkins Br. of Appellant at 70. DSHS argues that Washington courts have consistently limited cost awards under RCW 4.84.010 to those items specifically recoverable under the statute.

RCW 4.84.010 lists particular types of expenses and defines “costs” as the “prevailing party’s expenses in the action . . . including, in addition to costs

⁷ RCW 74.08.080(3) states: “When a person files a petition for judicial review . . . of an adjudicative order entered in a public assistance program, no filing fee shall be collected . . . ; 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.”

⁸ Jenkins asks this court to review the trial court’s ruling denying fees and costs for co-counsel. However, Jenkins did not cross-appeal any of the superior court’s rulings; thus, the issue is not properly before this court.

otherwise authorized by law.” The superior court’s order stated that the cost awards made under RCW 74.08.080(3) are not limited to statutory costs. We agree. RCW 74.08.080(3) provides that the appellant who prevails “shall be entitled to reasonable attorneys’ fees and costs.” Because RCW 4.84.010 includes costs “otherwise authorized by law” and RCW 74.08.080(3) awards the prevailing party reasonable costs, we affirm the superior court’s order awarding reasonable costs to Jenkins.

Interest on Award

DSHS argues that the superior court’s award of interest on Jenkins’ award of back benefits was improper. RCW 4.56.110 provides that judgments shall bear interest from the date of entry. We have held this statute does not apply to public agencies absent a clear waiver of sovereign immunity. Specifically, the general rule is that the State cannot be held to interest on its debts without its consent, despite the fact that RCW 4.56.110 does not expressly exempt the state from its operation. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 455-56, 842 P.2d 956 (1993). While this general rule is different in the context of contracts between a state agency and a private entity, here the parties, or Medicaid recipients, did not

contract with the State. The recipients argue that their caregivers contracted with the State to provide the care hours awarded; however, the caregivers are not parties in this action. Therefore, we find no basis to support an award of interest.

CONCLUSION

We affirm in part and reverse in part. We affirm both the Court of Appeals decision and the trial court decision that WAC 388-106-0130(3)(b) violates the federal comparability requirement. We remand for determination, consistent with this opinion, of the amount of personal care hours DSHS wrongfully withheld from the respondents for their unmet need for assistance with housekeeping, shopping, meal preparation services, and wood supply, retroactive to the date the shared living rule was applied to their cases. We affirm the trial court's award of costs but reverse the trial court's award of interest to Jenkins and remand for re-computation. We grant respondents' reasonable attorney fees and costs on appeal.

AUTHOR:

Justice Charles W. Johnson

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WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Tom Chambers

Justice Susan Owens

Justice Richard B. Sanders

Justice James M. Johnson
