

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

KEVIN T. BURTYK,
APPELLANT,
VS.

CASE NO. 07CV-6376
JUDGE BESSEY

FINAL APPEALABLE ORDER

OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES,
APPELLEE.

TERMINATION NO. 10
BY *lg*

DECISION & ENTRY ON MERITS OF APPEAL

ENTERED THIS 21st DAY OF Sept., 2007.

BESSEY, J.

The instant action is an appeal by Kevin T. Burtyk from an April 11, 2007 Administrative Appeal Decision by the Ohio Department of Job and Family Services (ODJFS). That decision affirmed the Hearing Officer's decision dated March 26, 2007 denying Appellant's request for a specific electrical generator. The right of appeal to this Court is granted under R.C. 119.12 and 5101.35(E).

FACTUAL AND PROCEDURAL BACKGROUND

This appeal is the culmination of multiple appeals and determinations by ODJFS beginning in 2005. Appellant had requested, under the Ohio Home Care Waiver Program (program), modification of his residence and installation of a propane or natural gas back-up electrical generator. Appellant is a quadriplegic and as a result of a tracheotomy requires a ventilator. The gasoline powered back-up generator used by Appellant had been located in an outdoor shed. When weather caused an electrical outage, the use of the generator had set the shed on fire. The modification to the residence is not at issue. Appellant's original request was denied by the program's administrator, CareStar, as not

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covered under the program. The first Hearing Officer to consider Appellant's request determined that Appellant should have a natural gas or propane generator in response to CareStar's opinion that other alternatives were available and the generator was not covered.

The issue in this appeal has become the type of generator appropriate for Appellant's needs and within the scope of the program's allowance. After further consideration, Carestar determined that a 16kW natural gas generator costing \$5980 would be appropriate and within the \$10,000 cap under the program. Appellant disputed the appropriateness of that unit due to the requirement that the generator be shut down for an oil check for every 24 hours of operation. Another Hearing Officer determination was that Carestar should review information on an alternative generator offered by Appellant to determine if it could be approved. The Hearing Officer determined that while some of Appellant's life support equipment had battery back-up that could run for 2-3 hours, other medically necessary equipment did not.

Carestar's approved generator, apparently requires a daily down time for an oil check and has a automatic shut-off feature when the oil is low. The original generator proposed by Appellant, a 15kW Caterpillar Olympian, had a cost of \$19,993.60. At the last hearing, Appellant also offered an alternative of a 20kW unit with an installed price of \$9010 (Exhibits 13, 14) and which had no required shutdown interval. Appellant argued at the final hearing that the amount allowed under the program should accumulate if a yearly allowance was not used. This contention was rejected and is not being pursued on appeal. Likewise, the attempt to split the unit billing in to two separate components was not acceptable and is not on appeal.

STANDARD OF REVIEW

The Court has a defined standard for review of an administrative appeal under R.C. 119.12. Appeals from the Ohio Department of Human Services are, pursuant to R.C. 5101.35(E) to be considered under the same provisions. *Lewis v. Ohio Dep't of Human Servs.*, 137 Ohio App. 3d 458, 738 N.E.2d 1264, 2000; Discretionary appeal not allowed by: *Lewis v. Ohio Dep't of Human Servs.*, 89 Ohio St. 3d 1470, 732 N.E.2d 1001, 2000 See also *The Washington D." v.* (June 14, 2001), Franklin App. No. 00AP-939

A common pleas court must affirm the decision of the administrative agency when that decision is supported by reliable, probative, and substantial evidence and is in accordance with law. The court must give due deference to the administrative resolution of the matter, the agency's findings are not conclusive. *Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 110, 407 N.E.2d 1265

The Supreme Court of Ohio in *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St. 3d 570, 571, 589 N.E.2d 1303 defined the quality of evidence required by R.C. 119.12 to sustain an administrative decision as:

"(1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) 'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) 'Substantial' evidence is evidence with some weight; it must have importance and value."

A further consideration in the instant matter is that Medicaid services provided by ODJFS must be the lowest cost alternative that effectively addresses and treats the medical problem. O.A.C. 5101:3-1-01(A)

ASSIGNED ERROR

Appellant's only assigned error is that the Hearing Officer and Hearing Authority ignored the alternative generator (3-26-07, Finding of Fact 23) that fell under the program cap and the agency reversed its earlier rejection of the generator chose by Carestar, even though Carestar had not appealed its earlier rejection.

The third or 11-06-06 Hearing Officer decision was that "Carestar is directed to review the new information submitted by the Appellant to determine if this generator can or not be approved for the Appellant." (page 3) That Hearing Officer acknowledged that Appellant had presented documentation for the alternative generator. She also concluded that it had been established that other necessary equipment did not have battery back-up. Ostensibly, the new information referenced in her directive included evaluation of the lesser cost Ohio Cat 20kW unit. The fourth and final decision ignored Appellant's proposal to substitute a lower cost system in place of the Olympian generator. It simply reaffirmed provision of the earlier questioned 16kW air cooled unit. The decision also returned to a finding that battery back-up was sufficient to offset any maintenance down time.

The substantive consideration in this action is whether the failure of the agency to consider the lower cost alternative proposed by Appellant is reversible error. The record reflects the Cat unit was offered by Appellant. The language of the third Hearing Officer does not seem to direct Carestar to evaluate the lesser cost alternative. The final decision again notes that a lower cost alternative had been proposed by Appellant, but the decision discusses only the more costly Olympian generator, the inability to split its installation cost into two billings and the inability to accumulate yearly amounts to pay the Olympian's cost of \$19993.60.

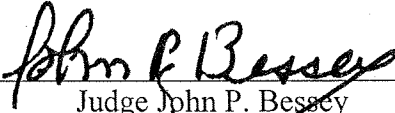
The Court is hampered in review of the record as there are no transcripts or recordings provided for any of the hearings. Evaluation of the testimony offered by the witnesses is impossible and examination of the record to determine the specific issue of battery back-up is likewise not possible. Further, the documentary evidence offered at the third record hearing has not been produced. The failure to include these materials is problematic under the standard of review mandated by R.C. 119.12. However, Appellant has limited the issue for the Court's consideration to whether it was error for the agency to not require evaluation of the generator offered by Appellant that fell within the cost cap.

After full consideration, the Court finds the error well-taken.

At stake in this appeal is the ability of Appellant to be protected from a life-threatening power outage. His dispute with the provider is based upon whether the back-up generator must be turned off every 24 hours or whether a more expensive unit should be supplied which does not require the turn off period. The Court recognizes budgetary limitations are a serious constraint and O.A.C. 5101:3-1-01(5) specifically requires, *inter alia*, that the medical assistance be "Be the lowest cost alternative that effectively addresses and treats the medical problem." The above consideration does not negate the error committed by ODJFS in this instance. Appellant proposed an alternative to his original generator request that fell below the cap of \$10,000 required by O.A.C. 5101:3-46-04(E). Two separate Hearing Officer gave recognition of the proposed unit, but neither required Carestar to evaluate the unit. While there is a \$2,000 difference, consideration should have been given in light of the possible significance of the difference between the unit as suggested by Carestar and the Cat unit desired by Appellant. Since the record does not offer substantive evidence that medically necessary

equipment to sustain Appellant are all battery backed up, then the Court will not presume such, since the issue of life support is obviously of paramount importance.

Appellee asserts that the record reveals the generator proposed by Carestar meets Appellant's needs and complies with both the annual cap, O.A.C. 5101:3-46(E) and is the lowest cost choice. O.A.C. 5101:3-1-01(A) The record does not offer reliable, probative, and substantial evidence of that assertion. While the Carestar proposal is the lowest cost, no evidence has been found considering Appellant's alternative generator. The Court accepts and Appellant does not offer contrary argument, that the Olympian generator is above the cap and that there is no provision to allow accumulation of the annual \$10,000 cap or to allow a split billing for the unit. The Court cannot accept that the agency properly considered Appellant's lower cost alternative. The Court further finds that the failure constitutes an error which requires a remand to the agency for further consideration.



Judge John P. Bessey

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