Circuit Court for Prince George's County
Case No. CAL 19-21494

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 418

September Term, 2021

SCOTT PERRY

v.

MARYLAND DEPARTMENT OF HEALTH

Berger,
Reed,
Beachley,

JJ.

Opinion by Berger, J.

Filed: March 28, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case involves an appeal of two denials of Long Term Care Medical Assistance benefits applications. The applications for benefits were filed by an individual's authorized representatives. Two different authorized representatives filed applications for benefits on behalf of Scott Perry, the appellant, and each application was denied. After a guardian was appointed to act on Mr. Perry's behalf, the denials were appealed to the Office of Administrative Hearings. By the time of the appeals, 312 days had passed since the denial of the first application, and 219 days had passed since the denial of the second application.

The Bureau of Long Term Care ("the Bureau"), acting on behalf of the Maryland Department of Health, moved to dismiss the appeals as untimely filed. After a hearing before an administrative law judge ("ALJ"), the ALJ issued a summary decision in favor of the Bureau and dismissed the appeals as untimely filed. Mr. Perry filed a petition for judicial review in the Circuit Court for Prince George's County. The circuit court affirmed the ALJ's decision and denied the petition for judicial review.

Mr. Perry presents a single issue for our review on appeal, which we set forth verbatim as presented in Mr. Perry's brief:

> Did the Circuit Court err in dismissing the petition for judicial review and affirming the Administrative Law Judge's dismissal of the administrative Medicaid appeals as untimely when at the time the denials were issued, there was no one authorized and capable of receiving and responding to the agency's notices?

We shall answer the appellant's question in the negative and affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

The facts underlying this appeal are undisputed by the parties and are largely drawn from the opinion issued by the ALJ. Scott Perry is a resident at Clinton Nursing and Rehabilitation Center ("Clinton"), a nursing facility owned by CommuniCare. It is undisputed that at all times relevant to this appeal, Mr. Perry lacked the capacity to manage his affairs and to designate an authorized representative.

On January 2, 2018, Leslie Perry, Mr. Perry's spouse, submitted an application for Long Term Care Medical Assistance ("LTC-MA") benefits.[1] The application listed Ms. Perry as Mr. Perry's authorized representative and included an authorized representative form entitled Self-Identification of a Person Acting Responsibly on Behalf of an Individual in Need of Medicaid Services and Lacking Capacity to Appoint a Representative. Ms. Perry signed the form under penalty of perjury and affirmed that she was acting responsibly on behalf of Mr. Perry in his best interests. Ms. Perry further affirmed that Mr. Perry lacked legal capacity and that she would fulfill all responsibilities in the scope of her representation. The Bureau sent Ms. Perry a Request for Information to Verify Eligibility, but she did not respond. CommuniCare, the party seeking payment pursuant to Mr. Perry's LTC-MA benefits, requested Ms. Perry to obtain the verifications that the Bureau had

[1] The appellant refers to the benefits as "Long Term Care Medical Assistance (aka Medicaid)," while the appellee refers to the benefits as "Medicaid long term care ('MA-LTC') benefits." The ALJ refers to the benefits as "Long Term Care Medical Assistance (LTC-MA)" benefits. For consistency, we adopt the terminology used by the ALJ.

requested, but Ms. Perry did not assist CommuniCare with obtaining verifications, nor did Ms. Perry assist in any way after filing the initial application.

The Bureau denied the first application on June 4, 2018, via a Notice of Ineligibility (the "First Denial"). The First Denial included a statement informing Ms. Perry that the applicant had ninety days within which to file an appeal. The ALJ found that CommuniCare was aware of the denial when the Bureau issued the First Denial.

A second application for LTC-MA benefits was filed on July 31, 2018. This application listed Latia Smith, a CommuniCare employee, as the authorized representative. Ms. Smith, like Ms. Perry had done in connection the first application, executed an authorized representative form entitled Self-Identification of a Person Acting Responsibly on Behalf of an Individual in Need of Medicaid Services and Lacking Capacity to Appoint a Representative. Ms. Smith signed the form under penalty of perjury and affirmed that "as an officer or employee signing for a provider of nursing home services . . . , I declare that . . . my organization has a direct financial interest in the disposition of this Medicaid application." Ms. Smith further declared that she had "diligently pursued all reasonable means of identifying a family member or an existing authorized representative and no other individual or organization has the authority and/or is willing to act as authorized representative on behalf of the applicant or recipient." At some point after filing the second application on July 31, 2018, Ms. Smith left her employment with CommuniCare.

On August 3, 2018, The Bureau issued a Request for Information to Verify Eligibility to Ms. Smith. Neither Ms. Smith nor any other employee or representative of

CommuniCare responded to the verification request. The Bureau issued a second Notice of Ineligibility (the "Second Denial") on September 5, 2018. The Second Denial was sent to Ms. Smith at the address she had listed on the July 31, 2018 application as her contact address. The reason given for the Second Denial was "failure to give information to establish eligibility." The Second Denial advised that "[i]f you do not agree with this decision, you have the right to appeal within 90 days of the date of this notice." (Emphasis in original.) CommuniCare did not seek to substitute a new authorized representative for Mr. Perry.

Because CommuniCare was having challenges obtaining verification, CommuniCare filed for guardianship of Mr. Perry on October 4, 2018. Specifically, CommuniCare was unable to obtain bank statements. A CommuniCare employee communicated with a Bureau employee regarding the guardianship action. Caren Webb, Esquire, was appointed as Mr. Perry's guardian by the circuit court on February 4, 2019. On March 27, 2019, Ms. Webb designated CommuniCare employee Shannon Winters to act as Mr. Perry's authorized representative in connection with LTC-MA benefits.

On April 12, 2019, Ms. Winter filed an appeal of the First Denial, and on April 15, 2019, Ms. Winter filed an appeal of the Second Denial. After a hearing, the ALJ issued a summary decision in favor of the Bureau and dismissed the appeals as untimely filed because each appeal was filed well beyond the ninety-day appeal deadline. Mr. Perry subsequently filed a petition for judicial review in the Circuit Court for Prince George's County. The circuit court affirmed, and this appeal followed.

STANDARD OF REVIEW

When reviewing the decision of an administrative agency, "we 'look[ ] through the circuit court's . . . decision[ ], although applying the same standards of review, and evaluate [] the decision of the agency.'" *Piney Orchard Cmty. Ass'n v. Maryland Dep't of the Env't*, 231 Md. App. 80, 91 (2016) (quoting *People's Counsel v. Surina*, 400 Md. 662, 681 (2007)). "[J]udicial review of an administrative agency action 'is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Bd. of Liquor License Comm'rs for Balt. City v. Kougl*, 451 Md. 507, 514 (2017) (quoting *United Parcel Serv., Inc. v. People's Counsel for Balt. Cnty.*, 336 Md. 569, 577 (1994)). "Although judicial review of an agency's factual findings is 'quite narrow,' 'it is always within our prerogative to determine whether an agency's conclusions of law are correct.'" *Id.* (quoting *Adventist Health Care, Inc. v. Md. Health Care Comm'n*, 392 Md. 103, 120-21 (2006)). We will not uphold an agency's conclusion when it is based on an error of law. *Id.*

The Court of Appeals has explained, however, that "[e]ven with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency." *Id.* at 514 (quotation and citation omitted). "Appellate courts should ordinarily give 'considerable weight' to 'an administrative agency's interpretation and application of the statute which the agency administers.'" *Id.* (quoting *Md. Aviation Admin. v. Noland*, 386 Md. 556, 572 (2005)).

DISCUSSION

The narrow question at issue in this appeal is whether the appeals of the First and Second Denials filed by Mr. Perry, which Mr. Perry concedes were filed well over ninety days after the First and Second Denials were mailed, were untimely. Mr. Perry contends that the appeals were not untimely because time limits to appeal cannot run from invalid notices. As we shall explain, we are not persuaded by Mr. Perry's assertion that the notices were invalid.

As we recently explained in *Turner v. Md. Dep't of Health*, 245 Md. App. 248, 268 (2020) (quoting *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 479 (2002)), "[t]he Medicaid program is a voluntary, cooperative federal-state program, which generally provides 'funding to States that reimburse needy persons for the cost of medical care.'" Each state that elects to participate in Medicaid "must develop and submit for federal approval a State Medicaid Plan that complies with the Medicaid Act and regulations promulgated by the Secretary of the United States Department of Health and Human Services." *Id.* at 268-69 (citing *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 112 (2001) (citing 42 U.S.C. § 1396)). Federal regulations set forth certain requirements for state medical assistance programs while allowing the states to establish additional requirements. *Id.* at 269. For example, we have explained:

> Federal law establishes minimum requirements under 42 C.F.R. § 435.923 for the designation of an authorized representative, generally defined as an individual or entity designated to act on behalf of an applicant or beneficiary of Medicaid benefits. The federal regulation requires state agencies, such as [the Maryland Department of Health], to

> recognize Medicaid authorized representatives that meet the requirements of the federal regulation, but also permits states to establish their own requirements under state law:
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> > Authority for an individual to act on behalf of an applicant or beneficiary ***accorded under state law***, including but not limited to, a court order establishing legal guardianship or a power of attorney, ***must be treated as a written designation*** by the application or beneficiary of authorized representation.
>
> 42 C.F.R. § 435.923(a)(2) (emphasis added).

Turner, *supra*, 245 Md. App. at 269.

The regulations establishing the determination of eligibility for the Maryland Medical Assistance Program, including the LTC-MA benefits at issue in this case, are set forth in COMAR 10.09.24.01 – 10.09.24.17.[2] Pursuant to COMAR 10.01.04.12, an "authorized representative" can be designated to act on behalf of the applicant or recipient. COMAR 10.01.04.12B(2)(b) and B(3) provide that when an applicant lacks capacity to designate an authorized representative, an individual or organization with legal authority to act on behalf of the applicant can become the applicant's authorized representative. An individual or organization with a direct financial interest in the outcome of the application -- including a nursing facility that is pursuing payment for the applicant's care, such as CommuniCare in this case -- can only serve as the applicant's authorized

[2] Medical Assistance "means the program administered by the State under Title XIX which provides comprehensive medical and other health-related care for eligible categorically and medically needy persons." COMAR 10.09.24.02B(33). "Medicaid" is "Medical Assistance provided under the State Plan approved under Title XIX of the Social Security Act." COMAR 10.09.24.02B(32).

representative if no disinterested individual or organization is available to serve as authorized representative. COMAR 10.01.04.12B.

An authorized representative can be designated "at any time, including, but not limited to, the time of application, upon redetermination, upon filing an appeal, and at the appeal hearing." COMAR 10.01.04.12C. The authorized representative continues to have the power to act as authorized representative

> until the applicant or recipient modifies the authorization or notifies the agency that the representative is no longer authorized to act on his or her behalf, or the authorized representative informs the agency that the authorized representative is no longer acting in such capacity, or there is a change in the legal authority upon which the individual or organization's authority was based.

COMAR 10.01.04.12D. Notification must be in writing and must be signed by either the applicant or authorized representative. *Id.* This is the framework within which Ms. Perry and CommuniCare's employee, Ms. Smith, were each designated to serve as Mr. Perry's authorized representative.

The regulations governing appeals and hearings in Medical Assistance cases specifically provide that an applicant shall have an opportunity for a fair hearing if their application is denied. COMAR 10.01.04.02A. Critically, a request for a fair hearing may not be granted unless the request is:

> Postmarked, delivered in person, or sent by facsimile to the Office of Administrative Hearings; or emailed to Maryland Health Benefit Exchange; telephoned or faxed to the Consolidated Services Center or postmarked, telephoned, faxed, or delivered in person to the delegate agency **within 90 days of the receipt of the notification specified in**

> **Regulation .03A of this chapter if the appeal concerns the appellant's eligibility**.

COMAR 10.01.04.04D(3) (emphasis added). *See also* 42 C.F.R. § 431.221(d) ("The agency must allow the applicant . . . a reasonable time, not to exceed 90 days from the date that notice of action is mailed, to request a hearing.").

As required by COMAR 10.01.04.03A, when the Bureau sent written notice of the denial of each of the MA-LTC applications filed by Mr. Perry's authorized representatives, the Bureau advised the applicant of the right to a hearing and the method of obtaining a hearing. Each denial included language advising the applicant of the ninety-day time period for appeal and explained in detail the procedures by which an appeal could be filed. The First Denial was mailed on June 4, 2018, and the Second Denial was mailed on September 5, 2018.

Rather than file an appeal of the denial of LTC-MA benefits after receiving the First and Second Denials, CommuniCare initiated the process of having a guardian appointed for Mr. Perry. It was not until after the guardian was appointed that appeals of the First and Second Denial were filed on April 12, 2019, and April 15, 2019.[3] As of April 12, 2019, 312 days had passed since the Bureau had sent notice of the First Denial, and 219 days had passed since the Bureau had sent notice of the Second Denial.

Mr. Perry does not dispute that the appeals of the First and Second Denials were filed well beyond ninety days after notice of the First and Second Denials were mailed.

[3] One letter of appeal was faxed on April 12, 2019, and the other was mailed and subsequently received on April 15, 2019.

Instead, he asserts that notices of the First and Second Denials were defective because Mr. Perry was incompetent and no guardian had been appointed for him. Citing *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970), Mr. Perry contends that his right to due process requires that the ninety-day time limit for filing an appeal not begin until a guardian was appointed for him. We are not persuaded.

In *Goldberg*, *supra*, the United States Supreme Court held that the failure to provide a welfare recipient an opportunity to be heard prior to cutting off welfare benefits violated due process. The *Goldberg* Court explained that due process requires that, prior to termination of public assistance benefits, the welfare recipient must be given "timely and adequate notice detailing the reasons for a proposed termination," and, at a hearing, the welfare recipient must be afforded "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Id.* at 267-68. The Supreme Court explained that the interests of the participant in the "uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." *Id.* at 266

In this case, Mr. Perry was entitled to appeal the First and Second Denial of LTC-MA benefits, and express instructions regarding how to appeal were sent to his authorized representative. Mr. Perry emphasizes that the *Goldberg* Court noted that the "opportunity to be heard must be tailored to capacities and circumstances of those who are to be heard," *id.* at 269, and contends that, in this case, the notices of the First and Second

Denials were invalid because there was no one authorized and capable of pursuing his appeal rights. Indeed, after the First Denial, Ms. Perry could have pursued appeal rights on Mr. Perry's behalf, and, after the Second Denial, Ms. Smith could have pursued appeal rights on Mr. Perry's behalf. CommuniCare was apparently aware that its employee, Ms. Smith, had left her prior employment and was no longer acting as Mr. Perry's authorized representative. Notably, CommuniCare did not seek to substitute a replacement to serve as the authorized representative for Mr. Perry pursuant to COMAR 10.01.04.12B(5). Pursuant to COMAR 10.01.04.12C, a new authorized representative for Mr. Perry could have been designated "at any time, including, but not limited to, the time of application, upon redetermination, upon filing an appeal, and at the appeal hearing." We disagree that due process requires that a guardian be appointed before notice of an MA-LTC eligibility denial can be considered effective and start the clock on the ninety-day appeal period.

Moreover, the action proposed by Mr. Perry would in many cases render the ninety-day time period meaningless whenever a self-designated authorized representative for an incompetent individual fails to pursue a timely appeal during the applicable ninety-day period after a denial. COMAR 10.01.04.12 specifically provides that an "authorized representative" can be designated to act on behalf of the applicant or recipient with respect to applying for medical assistance benefits. The Bureau was not required to investigate whether Mr. Perry's authorized representatives had abandoned their roles and was entitled to rely upon the authorized representative designations that had previously been provided.

The Maryland law governing authorized representatives is consistent with federal law. Federal regulations specifically require state medical assistance programs to "permit applicants and beneficiaries to designate an individual or organization to act responsibly on their behalf in assisting with the individual's application and renewal of eligibility and other ongoing communications with the agency." 42 C.F.R. § 435.923(a)(1). The federal regulation regarding authorized representatives includes language nearly identical to that set forth in Maryland state regulations, providing as follows:

> The power to act as an authorized representative is valid until the applicant or beneficiary modifies the authorization or notifies the agency that the representative is no longer authorized to act on his or her behalf, or the authorized representative informs the agency that he or she no longer is acting in such capacity, or there is a change in the legal authority upon which the individual or organization's authority was based.

42 C.F.R. § 435.923(c). *Compare* COMAR 10.01.04.12D ("The power to act as an authorized representative is valid until the applicant or recipient modifies the authorization or notifies the agency that the representative is no longer authorized to act on his or her behalf, or the authorized representative informs the agency that the authorized representative is no longer acting in such capacity, or there is a change in the legal authority upon which the individual or organization's authority was based."). We have expressly considered whether Maryland's authorized representative regulations satisfy the requirements of federal regulation, explaining that "[o]ur examination of COMAR

10.01.04.12 confirms that it meets the minimum requirements provided in 42 C.F.R. § 435.923." *Turner*, *supra*, 245 Md. App. at 271.[4]

Mr. Perry asserts that there was no one available to file an appeal after Ms. Smith left her employment with CommuniCare until a guardian was appointed. The ALJ specifically rejected this argument, explaining:

> Furthermore, the Clerk's office at the [Office of Administrative Hearings] does not refuse to accept for filing an appeal filed without guardianship papers. If an issue exists regarding whether there is a proper authorized representative, the Clerk's office would docket the case in the ordinary course and leave such an issue to be raised by motion and decided by an Administrative Law Judge.
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> Ms. Perry and later Ms. Smith were authorized representatives for [Mr. Perry]. They were authorized not only to file applications on his behalf, but to pursue appeals. CommuniCare did nothing to appoint a new authorized representative when Ms. Perry proved less than helpful and when Ms. Smith left the employment of CommuniCare. Both appeals were filed well beyond the deadline and were untimely.

We agree with the ALJ that each of the denial notices sent to Mr. Perry via his authorized representatives were valid and effective notice.[5] CommuniCare could have designated a

[4] In his reply brief, Mr. Perry asserts that *Turner* is not relevant because it involved the issue of standing in the context of a nursing home acting as a representative of a deceased patient, while this case involves a living individual who was incompetent. In our view, *Turner* is relevant given its discussion of the interplay between state and federal regulations governing authorized representatives in medical assistance cases.

[5] Mr. Perry asserts that after Ms. Smith left her employment at CommuniCare, a representative of the Bureau told a CommuniCare employee that she could not become the authorized representative until another application was submitted. Mr. Perry contends that the Bureau refused to allow CommuniCare to assist Mr. Perry after Ms. Smith left her

substitute authorized representative but failed to do so. By the time a guardian had been appointed for Mr. Perry, the time to appeal had long expired. Because the appeals were not filed within the applicable ninety-day period, the ALJ properly determined that the appeals were untimely. Accordingly, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

employment and asserts that the Bureau "cannot have it both ways" and that Clinton was "prevented from" seeking to substitute authorized representative status. The Department of Health does not concede that their representative provided this information to a CommuniCare employee.

We shall not address these disputed factual allegations in this appeal. Regardless of whether a CommuniCare employee may have received information from a Bureau representative that led the CommuniCare employee to seek the appointment of a guardian rather than seek to designate a substitute authorized representative and file an appeal, which Department of Health does not concede, the regulatory deadline for filing an appeal of a denial of LTC-MA benefits remains ninety days.