COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 01-907B

PALMIRA GARCIA

vs.

WENDY WARRING,
COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE

HAMPDEN COUNTY
SUPERIOR COURT
FILED
AUG 1 2002
CLERK-MAGISTRATE

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff, Palmira Garcia, ("Garcia"), brought this action for judicial review of the decision of Wendy Warring, Commissioner of the Division of Medical Assistance, denying her a waiver of the regulation prohibiting Medicaid payments to family members who act as personal care attendants, and for relief pursuant to 42 U.S.C. § 1983. She also claimed that the defendant's decision violates the Americans with Disabilities Act (ADA), § 504 of the Rehabilitation Act of 1973, and the Medicaid Act.[1] This matter is before the court on the plaintiff's motion for judgment on the pleadings pursuant to Mass. R. Civ. P. 12 (c). For the reasons set forth below, the plaintiff's motion for judgment on the pleadings is allowed.

BACKGROUND

The following facts are taken from the administrative record: Garcia is 74 years old and has been diagnosed with psychosis and dementia. She speaks only Portugese. The Division of Medical Assistance ("Division"), approved Garcia for forty-four hours per week of services from a personal care attendant ("PCA"), on April 12, 2000, and increased the approval one year later

[1] These claims are not before the court on the present motion. The plaintiff states that she will pursue these claims separately after completing discovery. Plaintiff's Memorandum at 7.

to fifty-six hours per week plus two hours of care per night. In May, 2000, after an adult day camp and five or six different care givers were unable to provide Garcia the daily care she required, Maria DeJesus, Garcia's daughter, ("DeJesus"), quit her job to act as her mother's PCA.

On March 7, 2001, the Division informed Garcia that it would no longer reimburse her for PCA services provided by DeJesus. Garcia appealed the action and the Board of Hearings conducted a hearing on June 20, 2001. Matthew Levin, the Hearing Officer, heard testimony and admitted several letters and documents which supported Garcia's need for her daughter's continuous care. The director of the day camp, from which Garcia was removed, wrote, "We were unable to meet her needs due to agitated behavior. She did not respond to anyone except her daughter who came at noon the second day to take her home. She is not appropriate for group care and will be very difficult to place in a nursing home." A former care giver wrote, "Mrs. Garcia's behavior was erratic and I had to stop caring for her. Specifically, she would not eat or rest comfortably for any amount of time. She screamed out much of the time asking for her daughter, Maria DeJesus. She had crying spells and memory lapses that made it difficult for me to care for her." Another former care giver wrote to Maria DeJesus,

> "Although I have made every attempt in continuing with her care, I find it impossible to take care of her. . . . She continues to ask for you and keeps on crying and screaming. When I change her diapers or dress her, she pushes me away and tells me she wants only you. . . . I also have little success with feeding her because she wants to wait for you to come and feed her. She needs to be watched every minute. It seems to me that you are the only one who really understands her and her ways. You are the only person that can give her the attention, patience, and care she so desperately needs."

Garcia's primary care physician, noting Garcia's deteriorating condition over the past several years, stated, "I do not believe that anyone could provide better care for Palmira Garcia than

Maria DeJesus. I believe that Palmira['s condition would worsen and she would require nursing home placement if her daughter, Maria DeJesus, is not allowed to continue as her personal care attendant."

Jennifer McCannon, a Skills Trainer from Stavros,[2] testified at the hearing that, "Through my course of working with them, we've tried many different routes, and finding PCA's and getting into Adult Day Programs, and nothing seems to work except to have Maria working for her mother." (Hearing Minutes ["H.M."], at 31). She also expressed her belief that Garcia would have to go to a nursing home if a waiver was not granted and that would compromise the quality and quantity of Garcia's life as well as defeat the purpose of the Stavros program. (H.M., at 31-32). Lois Brown, an Advocate from Stavros, added that "no nursing home could provide . . . comparable care that the daughter can provide." (H.M., at 32). She also stated that it would be more cost effective for the daughter to provide the care instead of placing Garcia in a nursing home. (H.M., at 33).

On June 26, 2001, the Board of Hearings (Levin, M., H.O.) denied the plaintiff's appeal and held that the Division correctly determined that DeJesus may not be paid as her mother's PCA:

> "In the case at hand the regulation is clear. MassHealth does not allow for family members to be paid as a PCA. 130 CMR 422.402 defines a family member as a child, spouse, parent, son-in-law or daughter-in-law. The appellant's 'team' testified in a very credible manner, and documented all the points they made. However, while the Hearing Officer is sympathetic to the appellant's situation, the regulation does not provide for any exceptions, or for the ability to grant a waiver. Unfortunately, this appeal must be denied."

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[2] Stavros Center for Independent Living, Inc., the fiscal intermediary, to which Garcia's primary care physician referred Garcia.

Garcia requested a rehearing pursuant to 130 CMR 610.091, asserting that the Division's failure to grant her a waiver constituted discrimination on the basis of her disability. The Commissioner denied that request. Garcia then filed the instant action for judicial review of the Division's decision pursuant to G.L. c. 30A, § 14, alleging that the decision is, among other things, based on an error of law or is arbitrary and capricious. She also seeks relief pursuant to 42 U.S.C. § 1983.

DISCUSSION

Garcia asserts that the Division's decision terminating payment to her daughter for PCA services is based on an error of law and is arbitrary and capricious because it violates the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act of 1973. She also seeks relief pursuant to 42 U.S.C. § 1983.[3] The Division counters that its decision is supported by substantial evidence and consistent with applicable law, and is not arbitrary or capricious.

The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 587 (1997); Boston v. Outdoor Advertising Bd., 41 Mass. App.Ct. 775, 782 (1996), citing Merisme v. Bd. of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989). In reviewing the agency decision, the court is required to give due weight to the agency's experience, technical competence, specialized knowledge, and the discretionary authority conferred upon it by statute. G.L. c. 30A, § 14 (7). See Iodice v. Architectural Access Bd., 424 Mass. 370, 375-376 (1997); Foxboro Harness, Inc. v. State Racing Comm'n, 42 Mass. App. Ct. 82, 87 (1997), rev. denied 424 Mass. 1107. The reviewing court may not substitute its judgment

[3] Neither party addresses 42 U.S.C. § 1983.

on questions of fact for that of the agency. Southern Worcester County Regional Vocational Sch. Dist. v. Labor Relations Comm'n, 386 Mass. 414, 420-421 (1982), quoting Olde Towne Liquor Store, Inc. v. Alcoholic Beverages Control Comm'n, 372 Mass. 152, 154 (1977). "The approach is one of judicial deference and restraint, but not abdication." Arnone v. Comm'r of the Dep't of Social Services, 43 Mass. App. Ct. 33, 34 (1997), citing Fafard v. Conservation Comm'n of Reading, 41 Mass. App. Ct 565,572 (19%). The court determines whether the agency's decision is arbitrary, capricious, or contrary to law. Rudow v. Comm'r of the Div. of Medical Assistance, 429 Mass. 218, 223 (1999); Tarin v. Comm'r of the Div. of Medical Assistance, 424 M&.743,750(1997), A party may not raise new claims on appeal if it did not also raise the claims at the administrative appeal. Arnoff v. Bd. of Registration in Medicine, 420 Mass. 830, 834 n. 5 (1995).

Personal Care Attendant Services provide eligible MassHealth[4] members with assistance with activities of daily living and instrumental activities of daily living. 130 Code Mass. Regs. §§ 422.402, 422.410. A Division of Medical Assistance regulation prohibits the payment of family members, including a child, spouse, parent, son-in-law or daughter-in-law, who provide the member with PCA services. 130 Code Mass. Regs. §§ 422.402, 422.411 (A)(1)(a), 422.412. Each member receiving PCA benefits has numerous responsibilities including hiring, firing, scheduling, and training PCAs. 130 Code Mass. Regs § 422.420.

The Americans with Disabilities Act (ADA) provides, in relevant part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in

[4] Massachusetts provides Medicaid coverage for Personal Care Services through MassHealth. G.L. c. 118E; 130 Code Mass. Regs. § 422.000.

or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. See also 35 C.F.R. § 35.130 (a). A "qualified individual with a disability" is:

> "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

42 U.S.C. § 12131 (2). See also 28 C.F.R. § 35.104. Furthermore,

> "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."

28 C.F.R. § 35.130 (b)(7). The plaintiff must show three elements to prevail on her ADA claim:

> (1) that she is a qualified individual with a disability; (2) that she was either excluded from participation in or denied the benefits of some public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and, (3) that such exclusion, denial of benefits or discrimination was by reason of the plaintiff's disability."

Darian v. Univ. of Massachusetts Boston, 980 F. Supp. 77, 84 (D. Mass. 1997), citing McDonald v. Commonwealth of Massachusetts, 901 F.Supp. 471,478 (D. Mass. 1995).

Garcia argues that the Hearing Officer failed to assess her case individually as the ADA requires and that the Division's denial of a waiver for payment to her daughter is a refusal to provide her with a reasonable accommodation. She asserts that the only way she can meaningfully access the program based on her disability is to have her daughter provide her with PCA services and that such payment would not fundamentally alter the program. Finally, she

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[3] The analysis of a claim for violation of Section 504 of the Rehabilitation Act is similar. Darian v. Univ. of Massachusetts Boston, 980 F. Supp. at 84-85. See also 42 U.S.C. § 12133.

argues that, if the Division does not pay her daughter, she will be placed in a nursing facility in violation of the integration mandate of the ADA.

The Division counters that Garcia is not a qualified individual with a disability because she cannot find a reimbursable PCA under the regulations.[4] It argues that a waiver of a reasonably necessary program requirements is not a reasonable accommodation. The Division also asserts that it did not deny Garcia benefits or subject her to discrimination because of her disability. Rather, it states that, through no fault of its own, Garcia cannot meet an essential eligibility requirement.

As an initial matter, contrary to the Division's assertion, the plaintiff has adequately preserved her discrimination claims for this court's review. The Division argues that the single issue that the parties fully litigated below was whether "the Division's decision to terminate payments to the Plaintiff's daughter for personal care services rendered to the Plaintiff was consistent with the Division's regulations." Defendant's Opposing Memorandum, at 13. Garcia counters that she preserved her claims at the initial hearing when she asked for a waiver or an exception to the regulation, and that, after the Disability Law Center began to represent her, her request for a rehearing included her discrimination claims. Plaintiff's Reply Memorandum, at 1-3. The agency had full opportunity to address Garcia's discrimination claims but declined to do so when it denied Garcia a rehearing. Under these circumstances, Garcia's present discrimination claims are properly before this court.

Garcia is a qualified individual for purposes of the ADA. The Division has already

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[4] The Division concedes that it is subject to the ADA. Defendant's Opposing Memorandum, at 15, n. 11. It also does not dispute that the plaintiff is disabled. Id. at 16.

approved Garcia's need for fifty-six hours per week plus two hours per night of PCA services. Garcia is denied the benefits of the services, however, because her disability prevents anyone other than her daughter to care for her, and the Division regulations prohibit a member's daughter from receiving payment for PCA services. Therefore, it is clear that Garcia will receive the only PCA services realistically available to her only if the Division allows MassHealth to pay Garcia's daughter. There is no evidence that such an exception to the regulations would "fundamentally alter the nature of the service." 28 C.F.R. § 35.130 (b)(7). Rather, it would ensure that Garcia, in her unique set of circumstances, will receive the services for which the Division has already qualified her.[5] Therefore, the Division's failure to grant a waiver of its regulations in this case to allow MassHealth to reimburse Garcia's daughter violates the ADA, and is, thus, contrary to law.[6]

In addition, there is no evidence which supports the Division's assertion that "this case is really about the Plaintiff's attempt to use the situation to elevate her personal preference for having her daughter as her PCA as her legal entitlement." This statement ignores the essence of Garcia's disability which Garcia detailed by testimony and documents at the hearing below. It

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[5] The Division argues that it expects family to provide members with assistance. However, this is not a substitute for PCA services. The regulations require the personal care agency to assume that family living with the member will provide assistance when it determines the number of hours of assistance a member requires. See 130 Code Mass. Regs. § 422.403 (C)(4). The agency determined that Garcia, who lives with DeJesus, required 56 hours per week plus two hours per night of PCA services.

[6] It is unnecessary, therefore, to determine whether the "integration mandate" would also support reimbursing DeJesus for PCA services. See generally Olmstead v. L. C. ex. rel. Zimrig, 527 U.S. 581 (1999). However, it is uncontested that Garcia would have to go to a nursing home if a waiver was not granted and that would compromise the quality and quantity of Garcia's life.

appears that Garcia and the people who support her have done everything within their power to find a suitable, reimbursable PCA. Likewise without merit or any support in the record is the Division's implication that, by seeking to obtain payment for her own interests, Garcia's daughter is "piggybacking" on the rights of disabled individuals. There is not one shred of proof in the record that Garcia or DeJesus are attempting to defraud the Division by requesting a waiver or an exception to the regulations. Rather, the Hearing Officer found credible Garcia's showing that, in May, 2000, after an adult day camp and five or six different care givers were unable to provide Garcia the daily care she required, DeJesus quit her job to act as her mother's PCA. (H.M., at 23, 25-26). He also expressed sympathy for Garcia's situation.

No remand, as requested by the Division, is necessary in this case. At the initial hearing, the Division failed to present any evidence that Garcia did not require the waiver she requested, and the Hearing Officer found Garcia's "'team' testified in a very credible manner, and documented all the points they made." The Hearing Officer believed, however, that he was unable to provide Garcia with a waiver to the regulations. Therefore, it remains undisputed that the plaintiff's daughter is the only person who can provide her the necessary PCA services. Moreover, the Division declined the opportunity to address at a rehearing whether its refusal to pay Garcia's daughter for these services constituted discrimination. Under these circumstances, the Court is able to determine, as a matter of law, that the Division's failure to grant Garcia a waiver of its regulations was contrary to law.

ORDER

For the foregoing reasons, the Plaintiff's Motion for Judgment on the Pleadings Under M.G.L. c. 30A is **ALLOWED**. It is, therefore, **ORDERED** that judgment enter for the plaintiff

on her first cause of action, pursuant to G.L. c. 30A, thereby reversing the decision of the Division of Medical Assistance Board of Hearings. It is further **ORDERED** that the Division of Medical Assistance shall restore Personal Care Attendant payments to the plaintiff for services provided by her daughter Maria DeJesus retroactive to March 7, 2001, the date such payments were terminated, and shall continue such payments for so long as the plaintiff otherwise remains eligible to receive such Personal Care Attendant services.

C. Brian McDonald
Justice of the Superior court

Date: July 29, 2002