

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1042

Filed: 2 June 2015

Wake County, No. 13 CVS 16560

KATHRYN SHORT, Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
Respondent,

and

SMOKY MOUNTAIN CENTER, Respondent-Intervenor.

Appeal by petitioner from order entered 9 June 2014 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 18 March 2015.

*WILLIAMS MULLEN, by Mark S. Thomas and Gordon & Rees, LLP, by Knicole C. Emanuel and Robert W. Shaw, for petitioner Kathryn Short.*

*Attorney General Roy Cooper, by Assistant Attorney General Neal T. McHenry, for respondent North Carolina Department of Health and Human Services.*

*Nelson Mullins Riley & Scarborough, LLP, by Stephen D. Martin and Thomas E. Kelly, for respondent-intervenor Smoky Mountain Center.*

ELMORE, Judge.

Petitioner appeals from a Superior Court order entered pursuant to a Petition For Judicial Review affirming a Final Decision by Administrative Law Judge Robin Anderson. After careful consideration, we affirm.

**I. Background**

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Kathryn Short (“petitioner”) is an adult woman diagnosed with Tuberous Sclerosis Complex, a rare genetic disorder that significantly impacts her mental capacity and functional skill level. Petitioner receives Medicaid and also receives behavioral healthcare services pursuant to the North Carolina Innovations Waiver (“the Waiver”). The Waiver is a Medicaid managed health care plan for qualified consumers who require behavioral healthcare services for certain disabilities. Smoky Mountain Center (“SMC” or “respondent-intervenor”) operates the Waiver as a Pre-Paid Inpatient Health Plan (“PIHP”) in twenty-three counties in western North Carolina, including Alexander County where petitioner lives, pursuant to an agreement with the North Carolina Department of Health and Human Services, Division of Medical Assistance (“DMA” or “respondent”).

The Waiver places limits on specific services, including: “Adult participants who live in private homes: No more than 84 hours per week is authorized for any combination of Community Networking, Day Supports, Supported Employment, Personal Care, and/or In-Home Skill Building.” In October 2012, SMC received a service authorization request from petitioner for the plan year of 1 November 2012 through 31 October 2013. Petitioner requested Personal Care Services for 12 hours per day and In-Home Skill Building for 4 hours per day, for a total of 16 hours per day (112 hours per week) of combined services. SMC granted petitioner’s request, in part, allowing her to receive the maximum of 84 service hours per week (12 hours per

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day) as authorized by the Waiver. However, SMC denied petitioner's request for an additional 28 hours of services per week.

Petitioner timely appealed the decision through SMC's reconsideration review process, and after the decision was upheld, petitioner filed for a Contested Case in the Office of Administrative Hearings. On 18 November 2013, Administrative Law Judge Robin Adams Anderson ("the ALJ") entered a Final Decision determining that respondents "did not substantially prejudice Petitioner's rights nor act outside its authority, act erroneously, act arbitrarily and capriciously, use improper procedure, or fail to act as required by rule or law when it denied Petitioner Personal Care Services in excess of the maximum allowed under t[he] DMA policy."

Petitioner filed a Petition for Judicial Review of the ALJ's Final decision on 17 December 2013 in Wake County Superior Court on the grounds that the ALJ "erroneously upheld the reduction of Medicaid services to Petitioner." On 9 June 2014, Superior Court Judge Michael R. Morgan affirmed the ALJ's Final Decision. Petitioner now appeals to this Court.

**II. Analysis**

**a.) Significant Risk of Institutionalization**

Petitioner contends the trial court erred by affirming the ALJ's Final Decision to deny, in part, her request for 112 hours of services per week. Specifically, petitioner argues no substantial evidence supported the Superior Court's finding that

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she failed to demonstrate that “in the absence of receiving 112 hours per week of paid services, she would be at a significant risk of institutionalization.” We disagree.

Upon appeal of a superior court judge’s order pursuant to a review of an ALJ’s Final Decision, we must “determine whether [the superior court judge] utilized the appropriate scope of review and, if so, whether the [superior court judge] did so correctly.” *Dillingham v. N.C. Dep’t of Human Res.*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999). Our standard of review depends on the type of error asserted by appellant:

[I]f the appellant contends the agency’s decision was affected by a legal error, G.S. § 150B-51(b)(1)(2)(3) & (4), *de novo* review is required; if the appellant contends the agency decision was not supported by the evidence, G.S. § 150B-51(b)(5), or was arbitrary or capricious, G.S. § 150B-51(b)(6), the whole record test is utilized.

*Id.* We review defendant’s issue under the whole record test. Under the whole record test, we “must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence.” *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (quotation marks omitted). We cannot substitute our judgment in place of the agency’s “even though th[is] court could justifiably have reached a different result had the matter been before it *de novo*.” *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

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North Carolina participates in the federal Medicaid Program. *See* N.C. Gen. Stat. § 108A-54 (2013). As such, this State “must comply with the requirements of federal law.” *Lackey v. N.C. Dep’t of Human Res., Div. of Med. Assistance*, 306 N.C. 231, 235, 293 S.E.2d 171, 175 (1982). Title II of the Americans With Disabilities Act (ADA), in pertinent part, states: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in 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. As such, the ADA provides, “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). The “most integrated settings” consist of “those that enable individuals with disabilities to interact with nondisabled persons to the fullest extent possible.” *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013) (internal citations and quotation marks omitted).

The Supreme Court has recognized “unjustified institutional isolation of persons with disabilities [as] a form of discrimination[.]” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600, 119 S. Ct. 2176, 2187, 144 L. Ed. 2d 540 (1999). One method to establish that such a discriminatory violation has occurred is for a petitioner to demonstrate that she faces a “significant risk of institutionalization due to the termination of [her services].” *See Pashby*, 709 F.3d at 322. A causal

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relationship between the modification of services and the significant risk of institutionalization must be present. *Clinton L. v. Wos*, No. 1:10CV123, 2014 WL 4274251, at \*8 (M.D.N.C. Aug. 28, 2014). The determination of whether a “significant risk of institutionalization” exists is “fact-intensive and is affected by numerous variables.” *Id.* at \*6. The dispositive inquiry is “whether the reduction in [services] will likely cause a decline in health, safety, or welfare that would lead to the individual’s eventual placement in an institution.” *Id.* at \*7 (internal quotation marks omitted).

The crux of petitioner’s argument is that the 84 hours per week service limit created a 4 hour per day shortfall in her provider-supervised care. In support of petitioner’s contention that the shortfall in the additional supervision service hours would place her at a significant risk of institutionalization, her mother testified:

Q: Can you explain why that four hours would cause Institutionalization?

MOTHER: Right. Without 16 hours a day of paid support, as legal guardian, I can’t account for four hours a day that aren’t being provided by anybody. As legal guardian, my primary responsibility is to see that care is provided. It’s not to provide care. I have the legal responsibility. So the way [SMC] approved the plan where [petitioner is] alone four hours a day, suddenly, I am very aware that care isn’t being provided four hours a day. So, through the appeals process and the continuation of services, we’re good to go. But as soon as that’s gone, then as legal guardian, I will again be aware that she is unsupervised for four hours a day. So, as a legal guardian, I will have no choice but to resign my legal guardianship, and the new legal guardian

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will have to figure out where it is she's going to live, because it's not with me.

...

So [petitioner's] services—if it's upheld, then I will resign my guardianship, and the new guardian will have some decisions to make.

...

Q: Is it your anticipation that, if you had to resign your guardianship, that [petitioner] would be placed in a residential setting?

MOTHER: It's whatever the legal—legal guardian would decide, because it's the legal—it's somebody else. It wouldn't be me making those decisions. . . . We get to have a service plan meeting—a service team meeting, and they get to decide the services they're going to apply for.

Petitioner also offered an affidavit of her primary care physician, Dr. Gina Licause, which stated:

It is my professional medical opinion that [petitioner] requires 24-hour a day supervision for health and safety and total care for activities of daily living and [incidental activities of daily living]. . . . [Petitioner] resides with her mother, Mary Short, who is her main caretaker and guardian. [Petitioner] does not attend a day program and, therefore, her home supports, personal care services and in-home skill building are responsible for all of her personal care and habilitative training[.]

The significant risk of institutionalization, according to petitioner, occurs because the Waiver constraints only allow her to receive 12 hours of paid support each day instead of 16 hours. Due to this shortfall in service hours, petitioner argues,

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her mother would make the choice to resign guardianship, require petitioner to live outside her home, and allow a new guardian to make placement decisions, which might include community-care options or possible institutionalization. Thus, to the extent petitioner has exhibited any risk of institutionalization, petitioner has failed to show it was caused by SMC's actions. Rather, petitioner's mother's own potential actions would create any purported risk of institutionalization. Moreover, the speculative nature of what might happen in the future as a consequence of petitioner's mother's actions might provide some evidence of the possibility of institutionalization, but it lacks the specificity to meet the "significant risk" standard.

Substantial evidence also establishes that petitioner has other 24 hour per day community-based placements available to safeguard against her purported significant risk of institutionalization. Although petitioner argues on appeal that community-based placement in a group home setting would be inappropriate for her, SMC denied petitioner's request for the additional service hours under the Waiver because her "request for 24 hours per day of supports under the [Waiver] would be appropriately met through residential supports in a group home setting." At the hearing before the ALJ, petitioner presented no evidence that a group home would be inappropriate to meet her needs. Rather, the record reflects that petitioner had previously lived in a group home for five years in California, but petitioner's mother took her out of the home because she "was so afraid of [petitioner] being an



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institutional child, jumping from one group home to another” and was concerned about potential abuse by staff members. Although petitioner’s mother testified that petitioner suffered abuse in North Carolina while she was placed in an Intermediate Care Facilities for Individuals with Mental Retardation (an institutional/non-community placement), the evidence presented did not indicate that the available *community based options* in this State would fail such that petitioner would face a significant risk of institutionalization.

Additionally, as previously discussed, in order for petitioner to succeed on appeal, the significant risk of institutionalization must be causally related to SMC’s reduction in available service hours per day. *Clinton L.*, at \*8. The test is whether SMC’s actions are “substantially related” to petitioner’s significant risk of institutionalization. *Id.*

A provision of the Waiver states: “Adult and child participants who live in private homes with intensive support needs: These participants may receive up to an additional 12 hours per day in-home intensive supports to allow for 24 hours per day of support with the prior approval of THE PIHP.” Thus, despite SMC’s decision to only grant petitioner with 84 hours of services pursuant to the Waiver limitations, an explicit exception would have allowed petitioner to receive 24 hours of “in-home” support services. However, the petitioner never applied for the additional hours. As a result, SMC denied the personal care service request in excess of the 84 hour limit

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set by the Waiver. Thus, any purported risk of institutionalization was also caused by petitioner's failure to take advantage of the 24 hour support exception that would keep her in the home.

For the foregoing reasons, we hold that substantial evidence in the record supports the Superior Court's finding that petitioner failed to establish that absent the 112 hours per week of paid services, she would be at a significant risk of institutionalization. As such, the Superior Court did not err by affirming the ALJ's Final Decision to deny, in part, petitioner's request for 112 hours of services per week.

**b.) CAP-MR/DD Transition**

Petitioner also argues the Superior Court erred by affirming the ALJ's Final Decision, including the 84 hour per week service limit, by denying petitioner's rights to maintain her level of services under her CAP-MR/DD budget.

"When a superior court exercises judicial review over an [ALJ's] final decision, it acts in the capacity of an appellate court." *Bernold v. Bd. of Governors of Univ. of N.C.*, 200 N.C. App. 295, 297, 683 S.E.2d 428, 430 (2009) (quotation marks omitted). A superior court can affirm, remand, reverse, or modify the ALJ's final decision. *Id.* "It is a well-established rule in our appellate courts that a contention not raised and argued in the trial court may not be raised and argued for the first time on appeal." *Robinson v. Shanahan*, \_\_ N.C. App. \_\_, \_\_, 755 S.E.2d 398, 400 (2014) (internal quotation marks omitted). "The theory upon which a case is tried in the lower court

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must control in construing the record and determining the validity of the exceptions.” *State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (1991) (internal quotation marks omitted).

At the review hearing before the Superior Court, it is uncontested that petitioner raised the CAP-MR/DD budget argument for the first time. Petitioner did not advance the argument before the ALJ, in her Petition For Judicial Review, or in her brief to the Superior Court. Because petitioner did not argue said theory to the ALJ, the ALJ necessarily never ruled on it. As such, the CAP-MR/DD budget argument was not properly before the Superior Court, nor is it properly before this Court for review. *See* N.C. R. App. P. R. 10(a)(1) (“In order to preserve an issue for appellate review, a party must . . . obtain a ruling upon the party’s request, objection, or motion.”). We dismiss this argument on appeal.

**III. Conclusion**

In sum, we affirm the Superior Court’s order affirming the ALJ’s Final Decision because substantial evidence in the record supports the Superior Court’s finding that petitioner failed to establish that absent the 112 hours per week of paid services, she would be at a significant risk of institutionalization. Additionally, we dismiss petitioner’s second issue on appeal because it is not preserved for our review.

AFFIRMED.

Judges GEER and INMAN concur.