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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-710-2

Filed: 6 August 2019

Mecklenburg County, No. 15 CVS 19217

CARLOS PACHAS, by his attorney in fact, JULISSA PACHAS, Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

On remand by opinion of the North Carolina Supreme Court on 1 February 2019 in *Pachas v. North Carolina Dep't of Health & Hum. Servs.*, __ N.C. __, 822 S.E.2d 847 (Feb. 1, 2019), vacating and remanding this Court's decision filed 17 April 2018. Case originally appealed by petitioner from order entered 21 April 2017 by Judge W. Robert Bell in Mecklenburg County Superior Court.

Legal Services of Southern Piedmont, by Madison Hardee and Douglas Stuart Sea, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Lee J. Miller, for respondent-appellee.

DIETZ, Judge

Carlos Pachas was a Medicaid recipient. In 2016, he challenged the deductible applied to his Medicaid coverage. After losing throughout the administrative process,

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Pachas ultimately prevailed on judicial review in the trial court. The court held that the applicable Medicaid statute required the State to use the federal poverty level for a family, not an individual, to calculate Pachas's income limit.

Later, Pachas qualified for an alternative Medicaid program known as CAP/DA. The local Department of Social Services then asserted that the State had a federal waiver of the family-size income limits under the CAP/DA program (unlike traditional Medicaid) and therefore Pachas was required to pay the higher deductible for an individual, rather than the lower deductible based on his family size for his new CAP/DA coverage.

Pachas returned to the trial court with a motion to enforce the court's previous order and a petition for writ of mandamus, arguing that DSS's decision violated the trial court's earlier order. The trial court dismissed the motion and petition for failure to exhaust administrative remedies, holding that "Petitioner must resort to the administrative process governed by N.C.G.S. § 108A-79."

This Court affirmed the trial court's order. *Pachas v. North Carolina Dep't of Health & Hum. Servs.*, __ N.C. App. __, __, 814 S.E.2d 136, 137 (2018), *vacated and remanded*, __ N.C. __, 822 S.E.2d 847 (2019).

The Supreme Court reversed. The Court remanded the case to this Court with instructions to "address DHHS's argument that the agency did not violate the 17 March 2016 order because it allegedly obtained a waiver under 42 U.S.C. § 1396n(c),

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permitting it to create its own rules for CAP-DA eligibility apart from the requirements of 42 U.S.C. § 1396a(m).” *Pachas*, __ N.C. at __, 822 S.E.2d at 857.

In its brief to this Court, DHHS asserted that in the “application to the federal government for the CAP/DA Waiver, and pursuant to 42 U.S.C. § 1396n(c)(3), the Department was granted a waiver of the State Plan requirements for determining an applicant’s income and resources.” To support this assertion, DHHS cites to pages 183-84 of the record on appeal which, according to DHHS, is its application to the federal government seeking the waiver. We have reviewed that application document and do not see any portion that plainly indicates a request for the specific waiver at issue in this case.

In any event, even assuming these pages from the record show that DHHS *requested* a waiver of the income and resource rules for CAP/DA participants, DHHS conceded in oral argument before this Court that the record does not contain any documents showing the federal government *granted* that waiver:

JUDGE DIETZ: Isn’t whether the Secretary was granted a waiver a fact question? I mean, that’s a fact, right? That’s not a legal issue.

COUNSEL FOR DHHS: Right. And the waiver was—

JUDGE DIETZ: I can’t figure that out.

COUNSEL FOR DHHS: Yes, and the waiver was granted, otherwise we would not be—

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JUDGE DIETZ: Well, that's your position. And, of course, there's a disagreement about that. Right? Isn't that a fact dispute that typically gets decided by a fact-finder and not by an appellate court?

COUNSEL FOR DHHS: Certainly.

JUDGE HUNTER: Well, it's a documentary question, isn't it? Have you provided us with a document which says the waiver was granted?

COUNSEL FOR DHHS: Um, I would be happy to provide supplemental information to the Court.

JUDGE HUNTER: Well wait a minute, is it in the record as it exists today?

COUNSEL FOR DHHS: Again, that was not—the factual record was never created in this case.

To be sure, as this exchange demonstrates, DHHS offered to “provide supplemental information” showing that the federal government granted the waiver. But DHHS never filed any supplemental briefing and never moved to amend the record in this Court or at the Supreme Court to include documentation that the federal government granted the waiver. Thus, the record on appeal fails to establish that the State obtained a waiver of the rules governing income and resource calculations for deductibles for CAP/DA participants.

We therefore reverse the trial court's order and remand for entry of an order granting the relief sought in the motion and petition.

REVERSED AND REMANDED.

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Judges COLLINS and BROOK concur.

Report per Rule 30(e).