BEFORE THE COMMISSIONER OF THE TENNESSEE DEPARTMENT OF FINANCE AND ADMINISTRATION

IN THE MATTER OF:	)	
	)	
[REDACTED],	)	APPEAL to the DIVISION OF
Appellant.	)	TENNCARE
	)	
	)	Appeal # [Redacted]
	)	

PETITION FOR APPEAL

COMES NOW, [Redacted], Appellant, files this Petition for Appeal as follows:

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On August 26, 2022, an Initial Decision was entered in the above styled case. The TennCare Administrative Judge framed the issue presented as "whether TennCare properly determined the effective date of Petitioner's Medicaid coverage." (Initial Decision, p.14).The Initial Decision granted, in part, Appellant's claim that an incorrect effective date was used in determining her eligibility, and denied Appellant's claim that the correct effective date is January, 2021. Because no one had legal authority to liquidate Appellant's life insurance policy, the resource in issue, the Administrative Judge found Petitioner was eligible with an effective date of July 1, 2021. The Administrative Judge found "the denial for failure to provide the requested information for these applications was proper. As such, Petitioner's effective date can be no earlier than July 21, 2021, the date of her first approved application." (Initial Decision, p. 17). Petitioner contends the Administrative Judge's conclusion is incorrect and that the proper effective date is January 1, 2021.

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Appellant requests the transcript from the hearing be ordered. Since Appellant is indigent, Appellant requests the transcript be secured through funds available under 42 C.F.R. 431.250, or as otherwise available under TennCare rules. Appellant further requests that she be given sufficient time and the opportunity to Brief the Appeal after the transcript is available. One reason the transcript is necessary is because TennCare might claim that due process was not raised below. As discussed below, in addition to her civil rights claim, Appellant's counsel argued during closing argument that Appellant was mentally incapacitated at all relevant times and TennCare's notices were not sent to anyone with authority or ability to act on them.

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Due Process and TennCare's Notices

"It is undisputed that Petitioner was mentally incapacitated at all times pertinent hereto." (Initial Decision, p. 5, finding 10). During a recorded pre-trial conference held on July 28, 2022 at 2pm CT, TennCare stipulated Appellant lacked mental capacity at all relevant times "back to January" (The precise phrasing of the stipulation will be on the recording). Substantial evidence was presented at a hearing on August 2, 2022, that Appellant lacked mental capacity at all relevant times under consideration. TennCare's stipulation that Appellant lacked mental capacity was not extended to a lack of legal capacity, so the Affidavit of Dr. [redacted] was admitted as proof that, at all relevant times Appellant lacked legal and contractual capacity.

Beyond Appellant's closing argument at the August 2nd hearing and her argument regarding mental impairment in her Response to Motion to Dismiss based on Failure to State a Claim, legal capacity is a threshold issue in this case because numerous courts have held, as discussed in *What constitutes "colorable constitutional claim" to permit judicial review of final action taken by Secretary of Health and Human Services without hearing*, 94 A.L.R. Fed. 77, that "a colorable constitutional claim arises sufficient to confer jurisdiction to review final action of the Secretary taken without a hearing, where it is doubtful that the claimant was capable, due to an alleged mental impairment, of effectively pursuing his or her claim for benefits throughout the available administrative process" (emphasis added): *citing Manning v Secretary of Health & Human Services*, CCH Unemployment Ins Rep P 16098 (E.D. NY, 1985); *Penner v Schweiker*, 701 F2d 256 (3d Cir. 1983); *Brittingham v Schweiker*, 558 F. Supp. 60 (E.D. Pa. 1983); *Hines v Bowen*, 671 F. Supp. 10 (D. N.J. 1987); *Shrader v Harris*, 631 F2d 297 (4th Cir. 1980), later app, 754 F2d 142 (4th Cir.); *Brown v Harris*, 669 F2d 911 (4th Cir. 1981); *Case v Califano*, 441 F. Supp. 304 (D. S.C. 1977); ***Parker v Califano*, 644 F2d 1199 (6th Cir. 1981)**; ***Gosnell v Secretary of Health & Human Services*, 703 F2d 216 (6th Cir. 1983)**; ***Wills v Secretary, Health & Human Services*, 802 F2d 870 (6th Cir. 1986)**; Smith v Schweiker, CCH Unemployment Ins Rep P 14420 (N.D. Ill. 1982); *Blackburn v Heckler*, 615 F. Supp. 908 (N.D. Ill 1985); Todd v Heckler, CCH Unemployment Ins Rep P 16960 (8th Cir. 1988); *Kapp v Schweiker*, 556 F. Supp. 16 (N.D. Cal. 1981); *Vlacci v Schweiker*, CCH Unemployment Ins Rep P 14241 (N.D. Cal. 1982); *Elchediak v Heckler*, 750 F2d 892 (11th Cir. 1985); and *Peacock v Heckler*, 578 F. Supp. 192, (N.D. Ga. 1984), aff'd without opinion, 744 F2d 96 (11th Cir.).[1]

Parker v. Califano, a Sixth Circuit decision, is of particular interest. The Court described the claim as follows:

[1] In addition to Appellant's closing argument on August 2, 2022, that TennCare's denial notices, the one for Appellant's January 22, 2021 application in particular, were ineffective, Appellant filed a civil rights on June 27, 2022. The claim was acknowledged on June 28, 2022, Report of Different Treatment Case Number FY 21-22 # 116, by Talley Olson, Office of Civil Rights Compliance. That claim remains pending, presumably because if eligibility is approved, it would resolve itself. Thus, although not discussed in the Initial Decision, civil rights and due process arguments are not new to this case.

> The claim presented here by Parker alleges, in effect, that it is a denial of due process for a claimant to be precluded from litigating her claim for benefits because of a failure to proceed in a timely fashion from one administrative stage to the next when the claimant did not receive meaningful notice and the opportunity to be heard. The alleged defect in notification does not concern the content of the standard notices, which were admittedly mailed and received, but relates to the ability of the claimant to understand and act upon them. Parker's contention is that, because she did not have the mental ability to understand and comply with the notice of further administrative procedures, she did not receive meaningful notice and an opportunity to be heard. *Parker*, at 1203 (emphasis added).
>
> ...
> The claim presented here by Parker alleges, in effect, that it is a denial of due process for a claimant to be precluded from litigating her claim for benefits because of a failure to proceed in a timely fashion from one administrative stage to the next when the claimant did not receive meaningful notice and the opportunity to be heard. The alleged defect in notification does not concern the content of the standard notices, which were admittedly mailed and received, but relates to the ability of the claimant to understand and act upon them. Parker's contention is that, because she did not have the mental ability to understand and comply with the notice of further administrative procedures, she did not receive meaningful notice and an opportunity to be heard.

Cases rejecting these due process arguments are those where insufficient evidence was introduced to demonstrate incapacity. In this case, however, incapacity "is undisputed." (Initial Order, p. 5, finding 10). As a result, Appellant could not designate an authorized representative in writing. *See* 42 C.F.R. § 435.923(a)(2). Since Appellant could not, herself, request a hearing and she had authorized representative, Appellant could not respond to any denial prior to the appointment of her conservator and request a hearing. *See* 42 C.F.R. § 431.221(a)(1). This placed Appellant in the same position the Sixth Circuit address in *Parker v. Califano*, to wit: Appellant's ability to understand and act upon TennCare's notices.

Sufficiency of the notice, as well as other civil rights violations, were raised below. During the August 2nd hearing, the Administrative Judge asked witness [Redacted] whether she received TennCare's notices. (Initial Decision, p. 17). Witness [Redacted] said she did. The Administrative Judge found [Redacted]'s receipt of notice sufficient to deny Appellant's eligibility claims even though: (1) evidence at the hearing made it abundantly clear witness [Redacted] was a nursing home employee with no authority to act for Appellant; (2) no one connected with the nursing home ever had legal authority to act for Appellant; and (3) TennCare presented no evidence whatsoever that Appellant ever had the ability to understand and act on its denial notices. Although there is

evidence unauthorized helpers working for the nursing home received notice, there is absolutely no evidence to support the Administrative Judge's finding that "Petitioner was duly notified of the outcome of these applications,…" (Initial Decision, p. 8, emphasis added).[2] Under federal law, the Administrative Judge's conclusion would require that Appellant herself could understand and act on the notices or that Appellant have an authorized representative capable of doing so. Neither was the case.

Further, prior to appointment of a conservator, Appellant had no power to hire a lawyer to explain her rights and provide advocacy. After listening to the Administrative Judge's questions concerning notice, during closing arguments (which should appear in the transcript) Appellant's counsel argued no one with legal capacity or authority to act for Appellant received notice that Appellant's January 22, 2021 application was denied. Appellant has seen nothing indicating that application was "re-denied" after her conservator was appointed. Appellant contends, therefore, if notice of TennCare's denial was ineffective under the due process requirement stated in 42 C.F.R. § 431.205(d) mandating that Medicaid agencies meet the due process standards set forth in *Goldberg v. Kelly*, 397 US 254 (1970), then it remains "not denied." At the time of the August 2nd hearing, and through this date, no one with authority to request a hearing received a denial of the January, 2021 application during a period when a hearing could be requested. As such, Appellant has been denied a hearing on that application as required by federal Medicaid law, regulations and the due process clause of the Constitution. *See Mullane v. Central Hanover Bank & Trust Co. et al.*, 339 U.S. 306, at 314-315, (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). For that reason, and others stated herein, Appellant takes issue with the Administrative Judge's conclusion that the prior applications were properly denied and contends the effective date is January 2021.

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[2] The right to a hearing belongs to Appellant, not [Redacted]. *See Bd. of Regents v. Roth*, 408 U.S. 564 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so."). *see also Bellin v. Zucker*, 6 F.4th 463 (2nd Cir. 2021) ("A constitutionally protected interest exists where "one has a legitimate claim of entitlement to the benefit…."). Since it is undisputed that Petitioner was mentally incapacitated at all times pertinent hereto." (Initial Decision, p. 5, finding 10), and the record clearly established Appellant had no ability to access resources prior to appointment of a conservator, how could notice to [Redacted], who was not an authorized representative, diminish Appellant's property right to a hearing? It could not.

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Failure to Follow TennCare's Written Policy Regarding Mental Incapacity

Theoretically, Medicaid should be simple. In this case, however, it's anything but simple. The Medicaid program should be administered in the best interests of Medicaid recipients. *See* 42 C.F.R. § 435.902. Further, 42 U.S.C. § 1396a(a)(19) Medicaid agencies must "provide [in the State Plan] such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients."

Nonetheless, despite a written policy directing caseworkers to exclude resources if an individual's mental impairment precludes negotiating the sale of a resource, the caseworker denied Appellant eligibility. *See* TennCare Policy Manual Number 110.060(3). From the date TennCare reviewed and approved Petitioner's PAE, "[i]t is undisputed that Petitioner was mentally incapacitated at all times pertinent hereto," (Initial Decision, p. 5, finding 10). If TennCare had simply followed its own policy at 110.060(3), the January 22, 2021 application would have been approved until a conservator was appointed and the conservator had Court authority and direction to spend down any countable resources. For that reason, and others stated herein, Appellant takes issue with the Administrative Judge's conclusion that the prior applications were properly denied and contends the effective date is January 2021.

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Reliance on TennCare's Agents

Although Appellant did not (and could not) appoint the nursing home as her authorized representative, nursing homes are authorized to file Medicaid applications for residents. Evidence was presented during the August 2, 2022 hearing that nursing home employees assisting Appellant relied on statements made by the caseworker initially processing Appellants application, as well as TennCare's past and continuing practice. In fact, in denying TennCare's Motion to Dismiss for Untimeliness, the Administrative Judge held "Based on Ms. [Redacted]'s reliance on the statement by TennCare's agent, good cause has been established for Petitioner's failure to timely appeal the denial of her January and April applications. Tenn. Comp. R & Regs. 1200-13-19-02(20)." (Initial Decision, p.9). Later, the Administrative Judge recites TennCare's refusal to provide retroactive coverage pursuant to its 1115 and states "the remaining questions are whether TennCare properly denied Petitioner's earlier applications."

The Initial Decision acknowledges evidence showing Appellant's family and the nursing home experienced difficulty securing verification for her prior applications. When witness [Redacted] requested an extension of time, TennCare's agent told her to

file another application.[3] TennCare's practice, as testimony showed, was to have applicant's file overlapping applications which protected the date, creating a continuous application chain. Most probably, caseworkers handle applications in this manner to avoid unnecessary appeals and remands where the issue is difficulty securing verification, not eligibility. The Administrative Judge gave this evidence little consideration and rejected Appellant' argument stating: "The argument that Petitioner's family members did not provide the resources to Standifer Place, and that no individual was legally permitted to act on her behalf is not well-taken." (Emphasis added). The Administrative Judge then found the prior applications were denied for failure to provide documentation and, as such, Appellant's effective date can be no earlier than July 21, 2022.

With all due respect to the Administrative Judge, this finding is logically (and legally) inconsistent with her finding that Appellant was eligible when the July 2021 application was filed.[4] The Administrative Judge stated in that regard, "the record establishes, and it is uncontested, that Petitioner did not have access to this resource herself at the time of application, as Mr. [Redacted] was appointed conservator… [and] the life insurance policy was inaccessible to Mr. [Redacted], or to anyone acting on Petitioner's behalf, at the time of the July 21, 2021 application and so should not have been considered as an accessible resource at the time." (Initial Decision, p. 19-20).

The Administrative Judge's finding that Appellant was legally incapable of accessing a resource **due to** the conservatorship, which was **due to** Appellant's undisputed mental incapacity, begs the question. … Where is the justice in expecting Appellant to do the impossible securing verification? The Initial Decision recognizes, on

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[3] In point of fact, witness [Redacted] could not have requested a hearing under the federal regulations so filing a new overlapping application was her only option. Under federal regulations, only the applicant or the applicant's authorized representative may request a hearing. 42 C.F.R. § 431.221(a)(1). The designation of an authorized representative must be in writing, signed by the applicant, 42 C.F.R. § 435.923(a)(1), or the designated representative must be an individual or entity accorded authority to act on behalf of an applicant or beneficiary under state law, including but not limited to, a court order establishing legal guardianship or a power of attorney. 42 C.F.R. § 435.923(a)(2). Since it is undisputed Appellant was mentally impaired at all times relevant to this proceeding (Initial Decision, finding 10), Appellant could not designate an authorized representative in writing and could not file an appeal herself. Thus, under the federal regulations, No one had power or authority to appeal denial of the January 2021 application. It was legally impossible to request a hearing at the time the January application was denied. Legal impossibility should constitute "good cause" under Tenn. Comp. R & Regs. 1200-13-19-02(20). Last year, a Georgia administrative law judge reached this conclusion. In *Weeks v. DHS*, the ALJ held a nursing home lacked standing to request a hearing, noting that authority to file a Medicaid application is broader than the authority to appeal the denial of an application, available at https://administrativelawreport.com/wp-content/uploads/2021/07/2117014-Reviewed.pdf.

[4] Appellant is fully aware that part of her argument here is logically inconsistent. Since Standifer Place and its employees were not authorized representatives under federal law, how can Appellant benefit from their reliance on statements by TennCare's agents? The answer regarding the January 2021 application is that TennCare gave Appellant that right by authorizing nursing facility representatives to submit Medicaid applications under Policy Manual Number: 200.030(5)(f). With regard to the April 2021 application, Mr. [Redacted] testified that he thought the dates were protected based on what he was told, which came from TennCare's agent by way of Standifer Place.

the one hand, "no individual was legally permitted to act on her behalf," in support of the finding Appellant was eligible when the July 2021 application was filed because Appellant's life insurance policy could not be liquidated (*see* 20 C.F.R. § 416.1201(a)); on the other hand, Appellant's undisputed mental and legal incapacity was not good cause to provide an extension for purposes of securing verification. These conflicting conclusions are at loggerheads. If legal impossibility is not "Good cause" as defined in Tenn. Comp. R & Regs. 1200-13-19-02(20) for failing to timely provide verification, then the "Good cause" definition should be excised from Tennessee's rules and regulations because it is meaningless. For that reason, and others stated herein, Appellant takes issue with the Administrative Judge's conclusion that the prior applications were properly denied and contends the effective date is January 2021.

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The 1115 Waiver Does Not Prevent Earlier Cover Under the Facts of this Case

TennCare's 1115 Waiver remains subject to 42 C.F.R. § 435.915 unless the 1115 Waiver expressly waives its application under the facts of Appellant's case. That section provides:

> (a) The agency **must** make eligibility for Medicaid effective no later than the third month before the month of application **if** the individual -
>
> (1) **Received Medicaid services**, at any time during that period, of a type covered under the plan; and
>
> (2) **Would have been eligible** for Medicaid at the time he received the services **if he had applied** (or someone had applied for him), regardless of whether the individual is alive when application for Medicaid is made.
>
> (b) The agency may make eligibility for Medicaid effective on the first day of a month if an individual was eligible at any time during that month.
>
> (c) The State plan must specify the date on which eligibility will be made effective.
>
> (Emphasis added)

TennCare drafted its agreement (contract) with CMS and 42 C.F.R. § 431.420(a)(1) provides: "Any provision of the Social Security Act **that is not expressly waived** by CMS in its approval of the demonstration project **are not waived**," (Emphasis added). TennCare acknowledged it must follow all required provisions (e.g., required elements of the State Plan under 42 U.S.C. § 1396a, other Medicaid statutes, regulations, Social Security rules relating to Supplemental Security Income) not expressly waived since it cited 42 C.F.R. § 431.420 at page 14 of its Notice of Hearing.

Since ambiguous contracts are usually construed against the drafter, Appellant contends it is worth exploring the text of TennCare's 1115 waiver. The precise text of TennCare's waiver is "To enable the state not to extend eligibility prior to the date that

an application for assistance is made."[5] It is undisputed Appellant had a pending and un-denied application when her July application (the approved application) was filed. (*See* Initial Decision, p. 4, Findings of Fact 6 & 7). For that reason, and others stated herein, Appellant takes issue with the Administrative Judge's conclusion that the prior applications were properly denied and contends the effective date is January 2021.

WHEREFORE, Appellant prays that her Petition for Appeal be granted, that the Initial Decision be modified to reflect an effective date of January 1, 2021.

Respectfully submitted this _____ day of September, 2022.

_____

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[5] TennCare III Demonstration Approval Period: January 8, 2021 – December 31, 2030, available at https://www.tn.gov/content/dam/tn/tenncare/documents/tenncarewaiver.pdf. *See also* TennCare's Notice of Hearing, section 5.3, at page 13.

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IN THE MATTER OF:	)
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[REDACTED],	) APPEAL to the DIVISION OF
Appellant.	) TENNCARE
	)
	) Appeal # [Redacted]
	)

CERTIFICATE OF SERVICE OF PETITION FOR APPEAL

The undersigned hereby certifies that this day true and correct copies of the foregoing Appellant's Response was sent as follows:

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Respectfully submitted this _____ day of September, 2022.

_____
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