RES-CARE OF NEW MEXICO, INC. V. STATE EX REL. DEP'T. OF HEALTH

RES-CARE OF NEW MEXICO, INC.
Plaintiff-Appellant,
v.
STATE OF NEW MEXICO ex rel., NEW MEXICO DEPARTMENT OF HEALTH, NEW MEXICO DEPARTMENT OF HUMAN SERVICES, and NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT,
Defendants-Appellees.

No. 31,521

COURT OF APPEALS OF NEW MEXICO

December 4, 2013

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY, Sarah M. Singleton, District Judge

COUNSEL

Yenson, Lynn, Allen & Wosick, P.C., Terrance P. Yenson, April D. White, Albuquerque, NM, Reed Wicker PLLC, Kent Wicker, Louisville, KY , for Appellant

New Mexico Department of Health, Chris Woodward, Assistant General Counsel, Santa Fe, NM, New Mexico Human Services Department, Robert J. Lennon, Assistant General Counsel, Santa Fe, NM, New Mexico Children, Youth and Families Department, Jennifer Saavedra, General Counsel, Santa Fe, NM, for Appellees

JUDGES

RODERICK T. KENNEDY, Chief Judge. WE CONCUR: CYNTHIA A. FRY, Judge, MICHAEL E. VIGIL, Judge

AUTHOR: RODERICK T. KENNEDY

MEMORANDUM OPINION

KENNEDY, Chief Judge.

{1} In this case, we affirm a district court's determination that a Medicaid service provider failed to exhaust available administrative remedies for denial of payments before bringing a breach of contract claim against various state agencies. Res-Care of New Mexico, Inc., a service provider to developmentally disabled people, appeals from a district court decision holding that Res-Care failed to pursue an administrative hearing, and it was not entitled under the regulations to receive notice that it could appeal. We agree with the district court that no matter the merits of Res-Care's claims against the New Mexico Department of Health, New Mexico Department of Human Services, and New Mexico Children, Youth and Families Department (collectively, the Departments), Res-Care should have first exhausted the administrative procedures available. Denial of a claim due to billing error is notice of an action that could be appealed and does not require notice of the right to appeal.

I. BACKGROUND

{2} Res-Care had contracts with the New Mexico Department of Health (DOH), Department of Human Services (HSD), and Children, Youth and Families Department (CYFD) to provide services for people with developmental disabilities. Res-Care was reimbursed for its services by the Departments through a complex system involving billing codes for authorization of services. Res-Care ceased providing services, and the contracts were terminated, but the Departments still owed some fees for services already provided.

{3} After much interaction with the Departments, Res-Care filed a breach of contract claim against the Departments, alleging that it had not been paid for the services it had provided under the contracts. The Departments moved to dismiss based on a statute of limitations issue, as well as a claim that, with regard to CYFD, there was no valid contract between Res-Care and CYFD. The district court dismissed CYFD after finding that there was no written contract at issue between CYFD and Res-Care. After being ordered to a settlement conference, the remaining parties returned to the district court, which eventually determined that Res-Care had failed to exhaust available administrative remedies and dismissed their case. Res-Care appealed.

II. DISCUSSION

A. Under Rule 1-054 NMRA, the Appeal Against CYFD is Not Timely

{4} In our notice of assignment to the general calendar, we asked the parties to brief the issue of whether the order granting summary judgment in favor of CYFD was a final order under Rule 1-054(B)(2) that should have been appealed within thirty days. The

rule states that, when multiple parties are involved, a judgment adjudicating all issues for one or more parties, but not all of them, is a final, appealable order. Rule 1-054(B)(2). All of the issues related to CYFD were adjudicated by the summary judgment in November 2010, over seven months before the dismissal of Res-Care's remaining claims. Res-Care timely appealed from the later disposition in favor of HSD and DOH and now argues that because the Departments are part of a single entity—the State of New Mexico—its appeal included the issues related to CYFD. We therefore initially examine whether state agencies are separate parties or the same party—the State—for the purposes of Rule 1-054. "Finality is a question of law [that] we review de novo." *Santa Fe Pac. Trust, Inc. v. City of Albuquerque*, 2012-NMSC-028, ¶ 10, 285 P.3d 595.

{5} New Mexico law invests broad powers in HSD and DOH. NMSA 1978, Section 27-1-2(B) (2007) provides that HSD has the power to make contracts to carry out its purposes, which include establishing and administering programs of old-age assistance and aid to dependent children and persons with a visual impairment, children with a disability or who have a condition that may lead to a disability, public welfare for children, and general relief, as well as supervising the administration of those services that are not administered directly by it. The purpose of DOH is

> to administer the laws and exercise the functions relating to health formerly administered and exercised by various organizational units of state government, including the state health agency, the scientific laboratory system[,] and an appropriate allocation of administrative support services of the health and social services department and the hospital and institutions department.

NMSA 1978, § 9-7-3 (2004).

{6} Res-Care alleged in its complaint that it had contracts with the individual agencies made at separate times and for different purposes, not a single contract with the State of New Mexico. The contracts in question are between the agencies and contractors. The Departments contracted to pay out of the individual agency budgets for specific services provided by Res-Care, among other service providers. This supports our view that the Departments are separate parties for Rule 1-054 purposes. The district court completely resolved the issue of CYFD's alleged contract with Res-Care on November 2, 2010, thus completely resolving all issues related to that party and rendering the appeal against CYFD untimely. Rule 12-201(A)(2) NMRA (stating that a notice of appeal shall be filed within thirty days of the judgment being appealed).

{7} As the parties rightly point out, we lack case law addressing this situation. We have dealt with related issues when determining whether the state or a particular agency may be held liable under the Tort Claims Act (TCA). *Abalos v. Bernalillo Cnty. Dist. Atty's Office*, 1987-NMCA-026, ¶ 12, 105 N.M. 554, 734 P.2d 794. Because the TCA waives immunity for certain government entities, the ability to reach the state through the actions of its employees is central to a claim's success, and our courts have established a preference for claims to be directed at specific agencies. "The reasoning behind naming the particular entity rather than the state is that only the party

responsible for the alleged harm should be named." *Id.* ¶ 21. In *Abalos*, we stated that the state may be dismissed from a case when it is "too remote an actor" to the harm done. *Id.* In another instance, the state was regarded as too remote from a claim brought against it by the relatives of a decedent whose body was subjected to an autopsy against their religious beliefs, and we upheld dismissal of the claims against the state for that reason. *Begay v. State*, 1985-NMCA-117, ¶ 9, 104 N.M. 483, 723 P.2d 252 ("There is no claim that the [s]tate . . . did anything wrong or has any responsibility for the alleged harm suffered by [the] plaintiffs."), *rev'd on other grounds sub nom. Smialek v. Begay*, 1986-NMSC-049, 104 N.M. 375, 721 P.2d 1306. We concluded in *Abalos* that only the particular agency involved should be named in order to avoid the burden otherwise forced upon the state by defending against an action with which it had little direct involvement. 1987-NMCA-026, ¶ 21. We have clearly stated that "the negligent governmental entity, that is, the particular agency, is the entity that may be liable, not the state," in the context of the TCA. *Wittkowski v. State Corr. Dep't*, 1985-NMCA-066, ¶ 15, 103 N.M. 526, 710 P.2d 93, *overruled on other grounds by Silva v. State*, 1987-NMSC-107, 106 N.M. 472, 745 P.2d 380. In this case, under Rule 1-054, we must determine whether the Departments are extensions of a single defendant for the purposes of timeliness of appeal. While we recognize that the considerations are different, we agree with the *Wittkowski* court and conclude that, in the Rule 1-054 context, a claim against a particular agency is not necessarily a claim against the state. The separate agencies that Res-Care had contracts with are not different pieces of a single party.

{8} Res-Care cites no authority to support its claim that the agencies are all part of a single entity. It offers a theory based on agency principles, stating that the agencies act as agents of the principal—the State—in contracts with third-party contractors, such as Res-Care. However, it does not offer authority for extending this reasoning to governmental agencies, which, as we see from the TCA cases, have been classified as separate parties than the State. There is no compelling reason to consider the agencies, their contracts, and their budgets as agents for a single entity, and a single party—the State—for the purposes of Rule 1-054.

{9} Therefore, we dismiss Res-Care's appeal against CYFD as untimely under Rule 1-054 and consider it no further. We now turn to Res-Care's claims against DOH and HSD.

B. Res-Care Could Have Appealed the Rejections

{10} To prevail on appeal, Res-Care must demonstrate that it had administrative remedies available and completely exhausted them as required under New Mexico law. *Feldman v. Regents of Univ. of N.M.*, 1975-NMCA-111, ¶ 8, 88 N.M. 392, 540 P.2d 872 ("Before [the] plaintiff can apply to the courts for relief, he must first exhaust his administrative remedies."). We also examine whether Res-Care received appropriate and regulatory-mandated notice of appeal from which it could have pursued administrative remedies. The district court held that once Res-Care received notice of a denial of its claim for payment in the form of a remittance advice, that denial constituted

an “adjustment,” which is a final HSD action from which Res-Care could have appealed. The district court also held that the notice of a final action was not required by the regulations to include notice of a right to appeal. Res-Care argues that notice of the right to an appeal is required, and the remittance advices do not contain such notice based on the testimony of one of its witnesses. The district court was correct. A court’s interpretation of an administrative regulation is a question of law that we review de novo. *Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 24, 147 N.M. 583, 227 P.3d 73.

{11} The regulations governing reimbursement and disputes concerning payment are part of the mechanism HSD has developed in order to supervise its aid programs. The complex claim processing system, which the district court ably described, begins with prior authorization requests. The recipient of services from an agency like Res-Care must receive a level of care determination, which may result in a requirement for prior authorization for certain procedures and services. 8.314.5.16(A) NMAC (11/1/2012). “Services for which prior authorization was obtained remain subject to utilization review at any point in the payment process.” *Id.* Under New Mexico Administrative Code 8.314.5.16(C), “[p]roviders who disagree with the denial of a prior authorization request or other review decisions may request a reconsideration.” *See* 8.350.2.10 NMAC (12/15/2011). No notice of a right to request a reconsideration of these actions by the department is required by the regulation.

{12} Reconsideration of utilization review decisions is available at the request of a provider who is dissatisfied with a decision or on behalf of the recipient. 8.350.2.10. If a reconsideration results in termination, modification, or denial of the services, the eligible recipient is entitled to notification, and the provider may assist or act on behalf of the recipient in requesting an administrative hearing. 8.350.2.11 NMAC (12/15/2011). Additionally, a provider may request a hearing if it disagrees with HSD decisions concerning its participation in the Medicaid program, recovering overpayments caused by provider billing error, and sanctions. 8.353.2.9 NMAC (2/1/2012). This hearing process begins when a provider requests a hearing “in response to an HSD action notice.” 8.353.2.10(A) NMAC (5/1/2010). When the action the provider responds to is a sanction or overpayment recovery, written notice must be sent to the provider and include various information, including the provider’s right to request a hearing. 8.351.2.14(A)(3) NMAC (7/1/2003). Those requirements are included under New Mexico Administrative Code 8.106.100.7(B)(12) (7/10/2013), which defines notice of adverse action as

> a written or electronic notice sent [thirteen] days in advance of an action to reduce, suspend or terminate benefits that includes a statement of the action the department intends to take, the reason for the action, the benefit group’s right to a fair hearing, who to contact for additional information, the availability of continued benefits, and liability of the benefit group for any overpayment received if the hearing decision is adverse to the benefit group.

In addition, a provider like Res-Care can submit a request for a hearing if “the provider disagrees with a decision . . . with respect to utilization review, overpayment,

recoupment, claims adjustment, or imposition of a sanction or other remedy." 8.353.2.10(C)(1)(c) NMAC (7/1/2001). And, by regulation, a provider like Res-Care, "upon enrollment, . . . receive[s] written notice of hearing rights along with any HSD action notice concerning provider agreement termination, overpayment, or sanction." 8.353.2.9(B) NMAC (7/1/2001). The question in this case, in light of these regulations, is whether Res-Care should have pursued an administrative hearing regarding the denial of payment and, if so, whether it was given proper notice.

{13} Administrative Law Judge Louise Schaffer testified that a remittance advice would not give notice to the care provider of the right to appeal. She stated that a provider would get notice whenever the department denied something. The district court held that, because the remittance advices were denials of claims or claims adjustments, Res-Care should have pursued an administrative hearing. Because it did not do so, it failed to exhaust its administrative remedies. As well, the district court found Judge Schaffer's testimony unpersuasive and determined that no facts or law indicated that Res-Care was entitled to notice of a right to appeal from the remittance advices. We agree.

{14} The remittance advices informed Res-Care of errors in its billing. The claims were therefore still subject to the utilization review and reconsideration processes, and Res-Care could have requested a hearing under the regulations. 8.350.2.9, -.10 NMAC. No notice was given of this right to appeal, but none was required at this stage of the process. Therefore, we affirm the district court's decision that Res-Care failed to exhaust its administrative remedies.

III. CONCLUSION

{15} Because separate agencies should be considered separate parties for the purposes of appeal under Rule 1-054, rather than branches of the State as a single entity, Res-Care's appeal as to its claims against CYFD is untimely. Res-Care failed to exhaust its administrative remedies as to its claims against DOH and HSD. We therefore affirm the district court's dismissal.

{16} IT IS SO ORDERED.

RODERICK T. KENNEDY, Chief Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

MICHAEL E. VIGIL, Judge