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DARLINE LIDDELL-TONEY, APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., APPELLEES.

797 N.W.2d 28

Filed May 13, 2011. No. S-10-527.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
2. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
3. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Administrative Law: Appeal and Error.** An appellate court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent.
5. **Administrative Law: Statutes: Public Assistance: Medical Assistance: Time.** Pursuant to 468 Neb. Admin. Code, ch. 2, § 020.02(2)(b) (2009), a cash benefit recipient under the Welfare Reform Act, Neb. Rev. Stat. § 68-1708 et seq. (Reissue 2009), is exempt from Employment First participation if the recipient is incapacitated with a medically determinable physical impairment which prevents the individual from entering employment for a period exceeding 3 months.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed and remanded with directions.

Scott M. Mertz, of Legal Aid of Nebraska, for appellant.

Jon Bruning, Attorney General, and Michael J. Rumbaugh for appellees.

HEAVICAN, C.J., GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

The Nebraska Department of Health and Human Services (DHHS) determined that Darline Liddell-Toney was required

to participate in a self-sufficiency program in order to receive cash assistance benefits under the Welfare Reform Act, despite her documented disability. The district court affirmed the determination of DHHS, and Liddell-Toney timely appeals. For the following reasons, we reverse the judgment of the district court and remand the cause with directions.

BACKGROUND

Liddell-Toney is a 36-year-old single mother who is disabled by degenerative disk disease. Liddell-Toney receives cash assistance benefits pursuant to the Welfare Reform Act (hereinafter the Act).[1] Under the Act, families in which at least one adult has the capacity to work must participate in the Employment First self-sufficiency program, pursuant to a "self-sufficiency contract" which sets forth certain approved work-related activities in which recipients must engage.[2] Liddell-Toney received cash assistance benefits from the Aid to Dependent Children program and applied for an exemption from Employment First because of her medical condition. Pending determination of whether Liddell-Toney was exempt from participating in Employment First, DHHS granted Liddell-Toney a temporary exemption in April 2009.

Before the DHHS state review team, Liddell-Toney presented a physician's confidential report as evidence of her inability to enter the workforce. The report stated that Liddell-Toney suffered from degenerative disk disease, first onset in 2006, and had a reduced range of motion, a loss of normal curvature of her spine, and bilateral neuropathy of her lower extremities. The report also stated that the disease was anticipated to be of lifetime duration; that the prognosis, including rehabilitation potential, was "[p]oor"; that Liddell-Toney was unable to walk without a cane and was restricted to limited standing and walking, and that Liddell-Toney was unable to work due to the disease. The report also noted that Liddell-Toney was prescribed numerous medications, which included morphine, hydrocodone, and oxycodone. Nonetheless, the state review

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[1] Neb. Rev. Stat. § 68-1708 et seq. (Reissue 2009).

[2] See §§ 68-1719 and 68-1723.

team denied Liddell-Toney's request for an Employment First exemption on June 18, 2009, finding that Liddell-Toney was not incapacitated and could participate in the Employment First program.

Liddell-Toney then requested a hearing, wherein DHHS received other evidence of Liddell-Toney's degenerative disk disease. This evidence included a supplement to the physician's confidential report, in which her treating physician indicated that in his professional judgment, Liddell-Toney was currently able to participate in work or job readiness activities for 0 hours per week. However, he indicated that Liddell-Toney was able to participate in some job search skills training, such as resume writing, learning to complete an application, and interview training. Her physician noted that Liddell-Toney would require more than 6 months of treatment before she could complete the work requirements of the Employment First program. Also received into evidence were radiology reports from a medical center in Omaha, Nebraska, indicating that Liddell-Toney suffered degenerative disk disease and noting various abnormalities in regard to Liddell-Toney's spine. In the margins of the reports are handwritten notes which read "Mild DDD." Also received at hearing was a medication profile for Liddell-Toney for June 2009. The profile lists Liddell-Toney's medications as including Cymbalta, diazepam, Lidoderm, nortriptyline, hydroxyzine, morphine, oxycodone, and cyclobenzaprine.

After the hearing, DHHS affirmed the state review team's denial of the Employment First exemption, noting that though Liddell-Toney had physical impairments, those impairments did not prevent her from participating in the Employment First program. DHHS noted that the Nebraska Administrative Code provides that an individual is not required to participate in Employment First component activities if that individual

> [i]s incapacitated with a medically determinable physical or mental impairment which, by itself or in conjunction with age, prevents the individual from entering employment or participating in another [Employment First] component activity(ies) and which is expected to exist for a continuous period exceeding three months. The incapacity

must be evaluated in the context of activities available through the Employment First program.[3]

DHHS found that the evidence presented by Liddell-Toney did not indicate "objective signs or symptoms to support the allegation that . . . Liddell-Toney is unable to participate in any component of [Employment First]." DHHS also noted that though Liddell-Toney's physician indicated that Liddell-Toney had severe degenerative disk disease, the radiology reports only noted "mild degenerative disc disease." DHHS determined that Liddell-Toney was not incapacitated for the purposes of an Employment First exemption under § 020.02(2)(b).

Liddell-Toney petitioned for judicial review. The district court, citing evidence that Liddell-Toney was participating in another rehabilitation program at the time she requested an exemption from the Employment First program, inferred that if Liddell-Toney was able to participate in one vocational rehabilitation program, she was also able to participate in Employment First. The district court found that Liddell-Toney was not so limited or incapacitated that she was physically precluded from engaging in Employment First program activities.

Though the district court recognized that § 020.02(2)(b) provides an exception to participating in the Employment First program where an individual is unable to engage in employment or participate in some Employment First component activities, the court found that the evidence supported the finding that Liddell-Toney was able to participate in some Employment First component activities and that this evidence was a sufficient basis for denying Liddell-Toney an Employment First exemption. Liddell-Toney appeals.

ASSIGNMENTS OF ERROR

Liddell-Toney assigns that the district court erred in finding that (1) DHHS can deny an exemption from participation in the Employment First program even if the person requesting the exemption demonstrates that he or she is unable to engage in employment and (2) DHHS presented sufficient evidence to

[3] 468 Neb. Admin. Code, ch. 2, § 020.02(2)(b) (2009).

find that Liddell-Toney is not entitled to an exemption from participation in the Employment First program.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[4] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.[5] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.[6]

[3,4] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[7] An appellate court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent.[8]

ANALYSIS

[5] As noted above, under the Act, families "with at least one adult with the capacity to work" must participate in an Employment First self-sufficiency contract "as a condition of receiving cash assistance."[9] Accordingly, § 020.02(2)(b) allows an Employment First exemption for a recipient whose

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[4] *Travelers Indem. Co. v. Gridiron Mgmt. Group, ante* p. 113, 794 N.W.2d 143 (2011).

[5] *Id.*

[6] *Id.*

[7] *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

[8] *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002).

[9] § 68-1723(2).

impairment "prevents the individual from entering employment *or* participating in another [Employment First] component activity(ies)."[10] Liddell-Toney argues that the plain language of the regulation, consistent with the statutory requirement of an adult "with the capacity to work," allows an exception to Employment First participation if a recipient's impairment *either* prevents the recipient from entering employment *or* prevents them from participating in an Employment First component activity. We agree with this commonsense reading of the regulation.

The word "or," when used properly, is disjunctive.[11] If a recipient's impairment prevents him or her from entering the workforce, the first exemption contained in § 020.02(2)(b) is satisfied and the recipient need not establish that he or she also cannot participate in Employment First component activities. Contrary to DHHS' determination, Liddell-Toney was not required to establish that she was incapable of participating in all components of Employment First to be granted an exemption. Instead, presenting uncontroverted evidence that the impairment prevented her from entering employment sufficed, as it should, to qualify her for an Employment First exception under the first condition of § 020.02(2)(b).

The evidence clearly indicates that Liddell-Toney is prevented from entering employment for a substantial period of time, if at all, due to her disability. Her treating physician determined that Liddell-Toney's degenerative disk disease reduced her range of motion and restricted her to limited standing and walking, which required the use of a cane. Her treating physician also noted that the disease would be of lifetime duration, that the prognosis and rehabilitation potential were poor, and that Liddell-Toney was able to participate in work or job readiness activities for 0 hours per week. And though the radiology reports contained handwritten notes of "Mild DDD" in the margins, even assuming that Liddell-Toney's degenerative disk

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[10] See § 020.02(2)(b) (emphasis supplied).

[11] *Goodyear Tire & Rubber Co. v. State*, 275 Neb. 594, 748 N.W.2d 42 (2008).

disease is "mild," the record contains no evidence which would indicate that Liddell-Toney is able to enter the workforce in the reasonably foreseeable future. In fact, the evidence in the record which indicates that Liddell-Toney is unable to enter the workforce is uncontroverted. Liddell-Toney therefore has met the requirements for an exemption under § 020.02(2)(b), and the district court erred when it affirmed DHHS' determination that Liddell-Toney failed to meet the requirements for an exemption under DHHS regulations.

The district court noted that Liddell-Toney's ability to participate in some Employment First component activities was a sufficient basis for denying her an Employment First exemption. DHHS argues that an individualized Employment First program contract could be formulated which would be tailored to fit Liddell-Toney's physical limitations and notes that Liddell-Toney was engaged in workplace training around the time she requested an Employment First exemption.

However, because the uncontroverted evidence indicates that Liddell-Toney's impairment prevents her from entering employment, she meets the first exemption under the plain language of § 020.02(2)(b), and the question whether she is able to perform some Employment First activities under the second exemption contained within § 020.02(2)(b) becomes moot. Because DHHS' interpretation of § 020.02(2)(b) is inconsistent with the plain language of the regulation, we do not accord that interpretation deference. The uncontroverted evidence in the record indicates that Liddell-Toney is presently unable to enter the workforce for a substantial period of time, if at all, and as such, she is entitled to an Employment First exemption under § 020.02(2)(b) as a matter of law.

At oral argument in this appeal, DHHS conceded that if Liddell-Toney was permanently unable to work, she would be entitled to an Employment First exemption. And this certainly makes sense. It would seem absurd to require an individual to participate in resume writing and interview training activities if that individual is incapable of entering the workforce at the conclusion of the training sessions. At argument, DHHS merely asserted that the evidence was not sufficient to establish the potential duration of Liddell-Toney's disability. But the record

simply does not support DHHS' argument. Liddell-Toney's evidence established that her condition was disabling and that her prognoses for rehabilitation and recovery were poor. There is no reasonable interpretation of the record under which Liddell-Toney did not establish that her condition "prevents [her] from entering employment" and "is expected to exist for a continuous period exceeding three months."[12]

CONCLUSION

The district court erred when it affirmed DHHS' determination that Liddell-Toney did not qualify for an exemption from participating in the Employment First program. The evidence clearly indicates that Liddell-Toney's impairment prevents her from entering employment for a period exceeding 3 months, if at all, and she therefore qualifies for an exemption to the Employment First program under § 020.02(2)(b). The judgment of the district court is reversed, and the cause remanded with directions to reverse the determination made by DHHS.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., participating on briefs.

WRIGHT, J., not participating.

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[12] See § 020.02(2)(b).

J.M., AS GUARDIAN AND CONSERVATOR FOR HIS MINOR CHILD, C.M., APPELLANT, V. BILLY L. HOBBS, APPELLEE.

797 N.W.2d 227

Filed May 13, 2011. No. S-10-600.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.
2. **Statutes.** Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
3. ____. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.