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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SARA FRECKLE BROWN,
Plaintiff,

V.

DONNA SHALALA,
Defendant.

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CA No. 94-CV-10542-JLT

ORDER +

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August 3, 1995

TAURO, Ch.J.

For the reasons stated in the accompanying Memorandum, the court hereby orders as follows:

1. The Defendant's Motion to Affirm the Judgment of the Secretary is DENIED;

2. The decision of the Secretary to deny coverage is REVERSED.

IT IS SO ORDERED.


United States District Judge

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Prior to entering the hospital, Ms. Brown lived alone and received outpatient psychiatric services at a community day treatment center. (R.90) Atlanticare had previously admitted Ms. Brown in 1978, 1979, 1984, and most recently sometime in July, 1989. (R.94)

Upon admittance, a multi-disciplinary team consisting of her treating physician, Dr. Yoshiharu Akabane, a licensed social-worker, and a mental health therapist developed a treatment plan for Ms. Brown which was evaluated weekly. (R. 99) The goals of treatment were stabilization and return to a community day treatment center. (R.93) To this end, Ms. Brown underwent drug (Stelazine), group, individual, and milieu therapy. (R.99, 254) A central component of her milieu therapy were day passes which the staff used to "assess readiness for discharge." (R.234) On August 24, Dr. Akabane issued Ms. Brown her first unaccompanied day pass, and on September 1 authorized their daily issue. These passes allowed Ms. Brown to be away from the hospital for 6-8 hours a day, during which time she attended community college classes and outpatient day treatment. (R.256,258,166) Before and after each pass the hospital staff evaluated Ms. Brown's mental state. (R. 149-207)

September 1, when the hospital staff introduced the idea of a congregate living situation to Ms. Brown, also marked the beginning of discharge planning. (R.101-102) On September 13, Ms. Brown interviewed with a congregate lodge. Hospital records indicate that the issue of where Ms. Brown would go upon her discharge was

coverage until September 27, however, MassPro held Atlanticare financially responsible for care provided to Ms. Brown until that date.

On October 29, 1990, after a reconsideration requested by Plaintiff, MassPro affirmed their earlier decision. Consequently, Plaintiff requested and received on July 2, 1991, a hearing before the Administrative Law Judge (ALJ), who subsequently affirmed the denial of coverage from September 30 to October 6. Plaintiff appealed to the Appeals Council, which vacated the ALJ's decision and granted Plaintiff a new hearing on the grounds that Atlanticare had not been made a party to the first hearing. On July 27, 1993, the ALJ again affirmed the denial of coverage. The ALJ's decision became the final decision of the Secretary on January 21, 1994, when the Appeals Council denied review.

III. STANDARD OF REVIEW

Plaintiff brings this action pursuant to 42 U.S.C. § 405(g) (1982), which provides for District Court review of the final decision of the Secretary of Health and Human Services. In reviewing a decision of the Secretary, different standards of review apply to findings of fact and conclusions of law.

A: Findings of Fact

The Secretary's findings of fact must be upheld as long as they are supported by substantial evidence. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420. 28 L.Ed.2d 842 (1971); Deblois v. Secretary of HHS, 686 F.2d 76, 79 (1st Cir. 1982). Substantial evidence is defined as "more than a scintilla.

IV. ANALYSIS

The Medicare provision of Title XVIII of the Social Security Act provides for payment for inpatient services if a physician certifies and recertifies the need for such treatment with a frequency appropriate to the case involved. 42 U.S.C. § 1395f (a)(2)(A). The Health Care Financing Administration's (HCFA) Health Insurance Manual states that this period of certification and recertification is the period during which patients undergoing inpatient psychiatric care receive "active treatment." - HCFA Pub. 13, §3320. The "active treatment" standard for coverage of inpatient psychiatric hospital care differs from the "hospital level/skilled nursing facility" standard used to evaluate whether general (non-psychiatric) hospital inpatient care will be covered. The Health Insurance Manual, Part A Intermediary Manual, HCFA Pub. 13, sect 212.1 states that:

Payment for inpatient psychiatric hospital services is to be made only for "active treatment" which can reasonably be expected to improve the patient's condition Simply applying the skilled care definition for general hospitals (sect 261.1B) is not sufficient for determining whether payment may be made since that definition does not take into account the patient's potential for improvement nor was it designed to permit the more sophisticated judgements required by the concept of active treatment. HCFA Health Insurance Manual, Pub.10, § 212.1.

"Active treatment" is defined as those services which are:

- (a) provided under an individualized treatment or diagnostic plan
- (b) reasonably expected to improve the patient's condition or for the purpose of diagnosis, and
- (c) supervised and evaluated by a physician. HCFA Pub. 10, § 212.1A; See also Social Security Ruling 70-58.

treatment," to uncontested facts. It is the opinion of the court that the Secretary did not apply the standard correctly and did not come to the correct legal conclusion based on the facts. First, the Secretary failed to specifically apply each of the relevant "active treatment" criteria to the facts of this case. "When a rule sets forth specific criteria . . . the Secretary's determination must contain an application of the criteria to the particular facts of the case." Stein v. Secretary of Health and Human Services, 924 F.2d 431, 433 (2nd Cir. 1991) (remand to Secretary). Without such specific application of guideline criteria to the facts of the case, "a reviewing court has an inadequate basis for an analysis of the Secretary's decision." Id. at 433

The Secretary specifically referenced the "active treatment" standard in the decision affirming denial of coverage when it was stated:

Considering the entire record and the claimant's overall condition, it is reasonable to find that the claimant did not require or receive an inpatient level of care or skilled care from September 15 through October 6. Rather, she received "custodial" care and observation. Thus, it must be determined that the services rendered at Atlanticare Medical Center from September 15 through October 6 did not represent "active treatment." (R.18)

This does not, however, amount to an application of the "active treatment" standard promulgated in HCFA guidelines § 212.1. The Secretary did not specifically address each of the criteria for "active treatment" and how the services Ms. Brown received did or did not satisfy them. In addition, in the statement of decision the Secretary did not even reference the "active treatment"

did not reference the appropriate criteria for Medicare coverage of inpatient psychiatric care. The doctor concurred that Ms. Brown no longer needed hospital/skilled nursing level of care, but did not comment on her need for continued active treatment. Furthermore, the record notes that on September 17 Ms. Brown agreed to stay in the hospital until Dr. Akabane deemed discharge appropriate, which suggests that while he signed the concurrence, Dr. Akabane did not think Ms. Brown was ready for discharge. (R.176) On September 19, Dr. Akabane observed that Ms. Brown "requires [the] support of [the] unit to actualize placement and prevent severe decompensation." (R.233)

Finally, Defendant contends that the fact that neither Ms. Brown's medication or treatment plan was substantially changed after September 15 supports the conclusion that she ceased to receive "active treatment" after September 15. Nowhere in the active treatment criteria, however, does it say that once a patient's medication is stable active treatment ceases.

Because the Secretary failed to specifically apply the "active treatment" criteria to the facts of Ms. Brown's case, the record does not indicate any significant change in Ms. Brown's treatment before and after September 15, and Dr. Akabane's concurrence with Atlanticare's decision to deny coverage did not cite the relevant standard for Medicare coverage of inpatient psychiatric care, the court finds that Ms. Brown was still receiving "active treatment" after September 15, 1989.