

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE, PART I

| | | |
|-------------------------------------|---|---------------------------------|
| SEAN SMITH, |) | |
| |) | |
| <i>Petitioner,</i> |) | |
| |) | Case No. 24-0074-I |
| v. |) | |
| |) | Chancellor Patricia Head Moskal |
| TENNESSEE DEPARTMENT OF |) | |
| FINANCE & ADMINISTRATION, |) | |
| DIVISION OF TENNCARE; and |) | |
| |) | |
| STEPHEN SMITH, DIRECTOR OF |) | |
| TENNCARE, in his official capacity, |) | |
| |) | |
| <i>Respondents.</i> |) | |

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED
COMPLAINT AND PETITION FOR REVIEW

Petitioner's *Response in Opposition to Respondent's Motion to Dismiss* illustrates that even Petitioner is unsure of what suit or claims he has brought. If, as indicated, Plaintiff intends to seek a petition for judicial review, he has not done so here. The denial of appeal attached to Plaintiff's petition pertains to physical therapy/rehabilitative treatment, but Petitioner disclaims that his petition relates to such treatment. Petition ("Pet.") ¶ 9. Instead, Petitioner seeks relief regarding undefined "misconduct" which is concededly "described in lesser detail." *Id.* ¶ 14.

If Petitioner intended to file a complaint regarding a denial of services under TennCare, he must demonstrate that he exhausted his administrative remedies or is excused from doing so. Tenn. Code Ann. § 4-5-225(b). However, the only claims for which he has arguably demonstrated exhaustion are the rehabilitative services which, according to Petitioner, are not at issue in this case. Nor does he allege that any TennCare rule is facially unconstitutional, as would excuse his failure to exhaust.

In either event, his claims are not timely. By his own account, Petitioner is seeking relief for denials of service going back to 2019. An appeal from the denial of coverage must be made within 60 days of notice, not years later. Petitioner fails to identify any basis for which TennCare's timeliness-based denial of his appeal is in error.

For all these reasons, and as further explained below, the Court must dismiss the *Complaint and Petition for Judicial Review* with prejudice as to untimely claims and without prejudice as to improperly raised claims.

ARGUMENT

A. Petitioner Does Not Seek Review of a Final Order under Tenn. Code Ann. § 4-5-322.

As identified in Respondents' Motion to Dismiss, Petitioner has not raised issues that are proper for resolution under a Petition for Review. A petition for review must be filed by a "person who is aggrieved by a final decision in a contested case." Tenn. Code Ann. § 4-5-322. Here, TennCare closed Petitioner's appeal from denial for rehabilitative services stretching back to 2019 as untimely. Pet. Ex. A; *Id.* Ex. D. Under the UAPA, Petitioner could seek review of that closure. However, Petitioner repeatedly, in his Complaint and Response, disclaims that this matter seeks review of that closure. Pet. ¶ 9.

Similarly, Petitioner fails to identify *any* adverse determination that is subject to the appeal. It is wholly insufficient for Petitioner to assert that he was harmed by some undefined denial of medical treatment, he must, at minimum, identify the treatment whose denial he seeks to appeal to establish a "distinct, concrete injury in fact." *Am. C.L. Union of Tennessee v. Darnell*, 195 S.W.3d 612, 625 (Tenn. 2006). Without that, there is no basis for this Court to determine that TennCare's closure of the appeal was violative of any provision in § 4-5-322(h).

B. Petitioner Fails to Otherwise State a Claim under Tenn. Code Ann. § 4-5-322.

Even assuming that Petitioner has properly sought review of the closure of his appeal, he has not alleged facts that would support a claim under Tenn. Code Ann. § 4-5-322(h). The appeal was closed because TennCare’s rules “say that you only have 60 days to appeal after you find out there’s a problem.” Pet. Ex. A (citing Tenn. Comp. R. & Regs. 1200-13-13); *see also* Tenn. Comp. R. & Regs. 1200-13-13.11(2)(d).

Petitioner’s TennCare appeal was mailed on November 18, 2023. Pet. ¶ 1. Accordingly, any adverse benefits determination occurring before September 19, 2023, would be time-barred. Here, Plaintiff failed to identify any adverse benefits determinations that he timely challenged, either in the appeal form or in the 88-page letter accompanying the appeal. Indeed, neither document identifies a denial of coverage occurring in either 2022 or 2023. Rather, the most recent event identified in either document was a July 27, 2021 phone call with certain persons who seem to be Cigna representatives discussing the failure to authorize a \$1000 payment for services that were provided in 2018 and submitted in 2019. Pet. Ex. B at 30-31.

Accordingly, even if Petitioner seeks review of TennCare’s closure of his appeal, he has not identified any error with the determination that his appeal, which references events occurring more than two years earlier, was timely.

C. Petitioner Has Not Exhausted His Administrative Remedies Under the Uniform Administrative Procedure Act.

As Petitioner states in his Response, “I think whether or not that [settling this matter with respondents] or any other administrative remedy gets accessed now would be at my discretion...” Resp. at 51. By his own admission, Petitioner has not exhausted his administrative remedies. He must do so if this Court is to ever have jurisdiction under the UAPA.

1. Petitioner has not exhausted claims not raised in his TennCare Appeal.

Nor, even read liberally, can the Court allow this matter to proceed by construing the initiating instrument as a Complaint. Petitioner's response suggests that the issues he seeks review of are not limited to TennCare's closure of his appeal. Rather, he suggests his case "extend[s] beyond the strict confines of the UAPA." Response ("Resp.") at 13.

Any relief sought regarding the improper denial of services under TennCare must first be administratively exhausted. Tenn. Code Ann. § 4-5-225(b) ("A declaratory judgment shall not be rendered concerning the validity or applicability of a statute, rule or order unless the complainant has petitioned the agency for a declaratory order and the agency has refused to issue a declaratory order."). The Division of TennCare has adopted extensive regulations regarding the administrative appeals process for adverse benefit determinations, including the time limits beneficiaries must bring those appeals. *See* Tenn. Comp. R. & Regs. 1200-13-13-.11. Any challenge to those regulations, including the applicability of the 60-day requirement for filing must be administratively exhausted. "[W]hen exhaustion of administrative remedies is required by statute, the failure to do so will deprive the court of subject matter jurisdiction." *Chattanooga-Hamilton Cnty. Hosp. Auth. v. UnitedHealthcare Plan of the River Valley, Inc.*, 475 S.W.3d 746, 758 (Tenn. 2015).

2. Petitioner is not excused from exhausting his remedies.

Petitioner may be excused from exhausting his administrative remedies if (1) exhaustion is futile, or (2) he is facially challenging the validity of a statute. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 839 (Tenn. 2008). Here, Petitioner meets neither requirement.

Petitioner attempts to argue futility by claiming that TennCare has failed to provide him with an administrative remedy since 2019. Resp. at 50¹. But “[t]he mere fact that an agency probably will deny relief is not a sufficient excuse for failure to exhaust available remedies.” *Id.* Rather, an aggrieved party “must demonstrate some ‘clear and positive indication of futility’ and certainty that [his] claim will be denied on appeal.” *Hall v. Methodist Healthcare—Memphis Hosp.*, No. 08-CV-02387-JPM-TMP, 2011 WL 13161535, at *7 (W.D. Tenn. May 31, 2011).

As to facial invalidity, Petitioner suggests that a rule requiring allowing only 40 days, rather than 60 days, may be facially unconstitutional because federal law would require 60 days. Resp. at 16. However, TennCare indicated that it used a 60-day period to determine that Plaintiff’s appeal was untimely filed. Pet. Ex. A. Moreover, as indicated above, Petitioner fails to identify any denial of service occurring within *two years* before his appeal, so the application of the 60 day period would offer no redress. His appeal is untimely under either rule. And it is well-settled in procedural due process jurisprudence that the mere adoption of reasonable filing deadlines is not inherently unconstitutional. *See, generally, Woodford v. Ngo*, 548 U.S. 81, 101-02 (2006).

Petitioner further points to several other statutes that he believes are relevant, that were not included in his *Complaint and Petition for Judicial Review*. Pet. Resp. pgs. 7; 11; 30. Nor have they been subject to the required exhaustion. Accordingly, Petitioner has made no claim against TennCare or the State of Tennessee that this Court can redress.

¹ Throughout Petitioner’s *Response* he mentions that his complaint-appeal is related to multiple events of Respondents “misconduct,” not just the denial of his request for rehabilitative treatment. (Pet. Resp. pg. 17).

CONCLUSION

For the reasons stated in this *Reply in Support of Respondents' Motion to Dismiss*, Respondents move this Court to dismiss this suit with prejudice for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction.

Respectfully Submitted,

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ATTORNEY GENERAL & REPORTER

/s/ Haylie C. Robbins

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this motion, memorandum in support, and all attached exhibits have been served via email and electronic filing on June 5, 2024, upon the following recipients:

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