

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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### ATTORNEYS FOR APPELLANT

Theodore E. Rokita  
Attorney General of Indiana

Frances Barrow  
Deputy Attorney General  
Aaron T. Craft  
Section Chief, Civil Appeals  
Indianapolis, Indiana

### ATTORNEY FOR APPELLEE

Thomas W. Blessing  
Massillamany Jeter & Carson LLP  
Fishers, Indiana

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## IN THE COURT OF APPEALS OF INDIANA

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Indiana Family and Social  
Services Administration,  
*Appellant-Respondent,*

v.

Connor Blessing, by and through  
his legal guardians, Thomas  
Blessing and Victoria Blessing-  
Wade,  
*Appellee-Petitioner.*

March 28, 2022

Court of Appeals Case No.  
21A-PL-1707

Appeal from the  
Boone Circuit Court

The Honorable  
Lori N. Schein, Judge

Trial Court Cause No.  
06C01-2007-PL-849

**Molter, Judge.**

[1] The Indiana Family and Social Services Administration (“FSSA”) denied Connor Blessing’s request to cover his Applied Behavioral Analysis therapy expenses stemming from his Autism Spectrum Disorder on the sole basis that an administrative rule limited that coverage to individuals under twenty-one years of age. Because it based the denial on an age restriction, FSSA did not determine whether the therapy was medically necessary. Connor<sup>1</sup> sought administrative review of this denial, which was upheld on review and again after an administrative appeal hearing. Connor then sought judicial review, and the trial court set aside the denial because the age restriction was arbitrary; because it unlawfully denied access to medically necessary services without appropriate justification; and because it discriminated on the basis of disability.

[2] The trial court concluded that Connor had been prejudiced as a result of FSSA’s denial and remanded the matter to FSSA. FSSA does not appeal the trial court’s decision to set aside the denial or its remand to FSSA for a coverage determination, so that portion of the trial court’s order is affirmed. However, the trial court went further and directed that, on remand, FSSA shall “determine coverage of Connor’s ABA therapy consistent with this Order” and that Connor’s benefits “shall be retroactive to Connor’s 21st birthday.” Appellant’s App. Vol. 2 at 19. Agreeing with FSSA that the trial court lacked authority to direct any particular coverage-related determination other than to set aside the age restriction retroactive to the date Connor made his request, we

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<sup>1</sup> Because both parties and the trial court referred to Appellee as “Connor,” we do the same.

reverse only that portion of the trial court’s order, and the issue on remand is whether the therapy was medically necessary.

## **Facts and Procedural History**

[3] Medicaid in Indiana is administrated by FSSA. Indiana Medicaid provides programs and services to Indiana residents who are aged, disabled, blind, pregnant, or meet other eligibility requirements, and those programs and services are incorporated under the umbrella of Indiana Health Coverage Programs.<sup>2</sup> ABA therapy, provided to autistic individuals, is the “design, implementation, and evaluation of environmental modification using behavioral stimuli and consequences to produce socially significant improvement in human behavior.” Appellant’s App. Vol. 3 at 56. ABA therapy services must be available to an individual who is eligible for Medicaid services, has been diagnosed with autism by a qualified provider, and has a completed diagnostic evaluation. 405 Ind. Admin. Code 5-22-12(a).

[4] All covered ABA therapy services are subject to FSSA’s prior authorization. 405 Ind. Admin. Code 5-22-12(f). Indiana’s Medicaid rules define prior authorization as “the procedure for the managed care organization’s prior review and authorization, modification, or denial of coverage for medical services and supplies within plan allowable limitations, based upon medical necessity and other criteria.” Ind. Admin. Code 10-2-1(44). Both the initial

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<sup>2</sup> See <https://www.in.gov/medicaid/providers/about-ihcp-programs/ihcp-programs-and-services/>.

course of ABA therapy and continuation of ABA therapy are subject to prior authorization. Appellant's App. Vol. 3 at 56, 57. A prior authorization request for ABA therapy must include, at a minimum, the person's treatment plan and supporting documentation, the number of therapy hours requested and supporting documentation, and other documents as requested to support medical necessity. *Id.* at 60.

[5] The Indiana Health Coverage Programs provided coverage for ABA therapy for those with autism who are under twenty-one years of age. *Id.* at 60. Critical here, ABA therapy is covered only when it is medically necessary for the treatment of autism. *Id.* The therapy may be approved for up to six months, but no longer, and to continue the therapy, a provider must submit a new prior authorization request and receive approval. *Id.* at 57, 58; 405 Ind. Admin. Code 5-22-12(h).

[6] Connor was first diagnosed with autism on August 3, 1998, when he was fifteen months old, and his diagnosis was confirmed in 2012, when he was fifteen years old. He received ABA therapy through Little Star Center, Inc. In March 2018, when Connor was twenty years old, FSSA had approved a request for prior authorization benefits for Connor's ABA therapy. This was Connor's last-approved prior authorization request for ABA therapy through FSSA and was processed on March 28, 2018 by the Indiana Health Coverage Programs claim-processing contractor. The decision notes that prior authorization was from March 22, 2018, to April 10, 2018, and that after this date Connor would

be over the age of twenty and “no longer eligible for ABA services through [IHCP].” Appellant’s App. Vol. 2 at 167.

[7] On January 9, 2020, Little Star submitted a prior authorization request for ABA therapy through FSSA for Connor. Connor was twenty-two years old at the time. On February 6, 2020, FSSA denied the prior authorization request, stating that “IHCP does not cover ABA services for members over [twenty] years of age.” Appellant’s App. Vol. 3 at 55. On February 10, 2020, Little Star requested administrative review of the denied prior authorization request. FSSA upheld the denial of the prior authorization request, explaining that “IHCP does not cover ABA services for members over [twenty] years of age.” *Id.* at 40.

[8] Connor requested an administrative hearing with FSSA’s Office of Hearings and Appeals. An administrative law judge (“ALJ”) conducted a hearing. On May 11, 2020, the ALJ, citing the Indiana Administrative Code and Medicaid policy, issued a decision upholding the denial of the prior authorization request for ABA therapy services. Appellant’s App. Vol. 3 at 180–87. The ALJ noted: “The issue of medical necessity was not addressed when reviewing this [prior authorization] request for ABA Therapy due to the Member being over the age of [twenty].” *Id.* at 186. Connor requested FSSA review of the ALJ’s decision, and on June 17, 2020, FSSA issued a Notice of Final Agency Action affirming the ALJ’s decision.

[9] Connor challenged the final agency action by filing his verified petition for judicial review and complaint for declaratory judgment. He later filed a motion for summary judgment, and after a hearing, the trial court issued its findings of fact and conclusions of law on May 21, 2021. The trial court granted Connor's petition for judicial review and concluded that FSSA's denial of prior authorization was invalid because the age restriction for ABA therapy coverage was arbitrary in that it applied an age restriction without a reasonable basis. The trial court further concluded that the age restriction was invalid because it unlawfully denied medically necessary services for autism in violation of federal Medicaid law, and it violated the Americans with Disabilities Act because it denied medically necessary therapy based on a disability—autism. The trial court ordered the following relief:

- a. The FSSA's Final Agency Action is set aside.
- b. The matter is remanded back to FSSA.
- c. FSSA shall determine coverage of Connor's ABA therapy consistent with this Order.
- d. Connor's ABA therapy benefits shall be retroactive to Connor's 21st birthday.

Appellant's App. Vol. 2 at 19. FSSA now appeals only the remedy ordered by the trial court.

## Discussion and Decision

[10] FSSA argues that the trial court improperly ordered relief in excess of the relief that the Administrative Orders and Procedures Act (“AOPA”) permits. While the legislature has granted courts the power to review the action of state government agencies taken pursuant to the AOPA, this power of judicial review is limited. *Ind. Alcohol & Tobacco Comm’n v. Lebamoff Enters., Inc.*, 27 N.E.3d 802, 806 (Ind. Ct. App. 2015). A court must grant relief if it determines that a person seeking judicial relief has been prejudiced by an agency action that is:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to constitutional right, power, privilege, or immunity;
- (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (4) without observance of procedure required by law; or
- (5) unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14(d). The party seeking judicial review bears the burden to show that the agency’s action is invalid. Ind. Code § 4-21.5-5-14(a).

[11] The trial court proceeding is not intended to be a trial de novo, but rather the court simply analyzes the record as a whole to determine whether the administrative findings are supported by substantial evidence. *Lebamoff Enters.*,

27 N.E.3d at 806. When reviewing an administrative agency’s decision, appellate courts stand in the same position as the trial court. *Id.* Courts that review administrative determinations, at both the trial and appellate level, are prohibited from reweighing the evidence and judging the credibility of witnesses and must accept the facts as found by the administrative body. *Id.* at 806–07.

[12] Here, the trial court determined that Connor had been prejudiced by FSSA’s action of denying his prior authorization request based on 405 Ind. Admin. Code 5-22-12(b), which only allowed ABA therapy to be covered until the age of twenty. The trial court concluded that the denial of prior authorization was invalid because the age restriction was arbitrary in that it applied an age restriction without a reasonable basis, because it unlawfully denied medically necessary services for autism in violation of federal Medicaid law, and because it denied medically necessary therapy based on a disability—autism— which violated the Americans with Disabilities Act. FSSA does not challenge this ruling.

[13] After determining that Connor had been prejudiced by FSSA’s actions, the trial court ordered that the action be set aside and remanded to FSSA. *Id.* at 19. FSSA also takes no issue with this action by the trial court. However, the trial court went further and also ordered that “FSSA shall determine coverage of Connor’s ABA therapy consistent with this Order . . . [and that] Connor’s ABA therapy benefits shall be retroactive to Connor’s 21st birthday.” *Id.*

[14] FSSA asserts that this was improper because it compelled agency action in violation of Indiana Code section 4-21.5-5-15, which provides:

If the court finds that a person has been prejudiced under section 14 of this chapter, the court may set aside an agency action and:

(1) remand the case to the agency for further proceedings; or

(2) compel agency action that has been unreasonably delayed or unlawfully withheld.

[15] FSSA contends that, under subsection (1), the trial court only had authority to remand the case to the agency for further proceedings without dictating the procedure or outcome on remand. Connor responds that, under subsection (2), the trial court had the authority to compel agency action, that is, to require FSSA to pay Connor's benefits retroactively to his twenty-first birthday, because the agency unreasonably delayed and unlawfully withheld that action.

[16] Our precedents make clear that although the trial court correctly ordered the case to be remanded, it exceeded its authority to the extent it went beyond setting aside the age restriction (retroactive to when Connor submitted his request) and ordered FSSA to reach any particular coverage conclusion on remand. The precursor to Indiana Code section 4-21.5-5-15 contained substantially the same language as the current section. As to that statute, our court stated:

The express intent of this part of the statute is to limit the reviewing court's authority to remand the case to the

administrative agency for further proceedings after a proper determination that the agency's decision was contrary to law. If upon remand the agency unlawfully withholds or unreasonably delays the redetermination of the case, then the trial court may compel agency action by direct order. Otherwise the reviewing court does not have power to compel agency action as part of the initial review function. It may only remand the cause for rehearing.

*Ind. Alcoholic Beverage Comm'n v. Johnson*, 303 N.E.2d 64, 69 (Ind. Ct. App. 1973). As to remanding the case to the agency, our Supreme Court has stated:

Remanding [the case] to the administrative body gives it an opportunity to correct the irregularities in its proceedings as determined by the court. At the same time it avoids the court's encroachment upon [the agency's] administrative functions. There is no more reason for assuming that the commission will disregard the law as fixed by this reviewing court than that a lower trial court will do so.

*Pub. Serv. Comm'n of Ind. v. Chicago, Indianapolis & Louisville Ry. Co.*, 132 N.E.2d 698, 702 (Ind. 1956).

[17] Based on the reasoning in *Johnson*, we have often concluded that remand (without compelling any specific agency action) is the appropriate remedy for improper administrative agency action. See *Ind. St. Bd. of Health Facility Adm'rs v. Werner*, 841 N.E.2d 1196, 1209-10 (Ind. Ct. App. 2006), *trans. denied*; *Ind. Fam. & Soc. Servs. Admin. v. Culley*, 769 N.E.2d 680, 685 (Ind. Ct. App. 2002); *Ind. Alcoholic Beverage Comm'n v. Edwards*, 659 N.E.2d 631, 636 (Ind. Ct. App. 1995); *Bolerjack v. Forsythe*, 461 N.E.2d 1126, 1131-32 (Ind. Ct. App. 1984).

“When an agency errs in its analysis, it makes sense to provide an opportunity for the agency to reconsider its decision by applying the correct analysis.” *City of Indianapolis v. Bentley*, 56 N.E.3d 1163, 1168 (Ind. Ct. App. 2016).

[18] This is consistent with federal law and general administrative law principles. The Federal Administrative Procedure Act limits judicial review of agency actions to deciding all relevant questions of law, interpreting constitutional and statutory provisions, and determining the meaning or applicability of the terms of an agency action. 5 U.S.C.A. § 706. As in our Indiana cases, federal cases hold that “if a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency’s action and remand the case—even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason.” *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 25 (1998) (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)); see also *Delgado v. United States Dep’t of Just.*, 979 F.3d 550, 553 (7th Cir. 2020).

[19] To be sure, our court has recognized limited circumstances where compelling specific agency action rather than remanding for further consideration is appropriate because the broader remand would serve no purpose; *Indiana State Board of Education v. Brownsburg Community School Corp.*, 865 N.E.2d 660, 668–69 (Ind. Ct. App. 2007) (finding remand would serve no purpose because no additional issues remained for determination); *Indiana Civil Rights Commission v. Union Township Trustee*, 590 N.E.2d 1119, 1122 (Ind. Ct. App. 1992) (finding remand would be pointless when there were no damages issues to be raised on remand), *trans. denied, disapproved of on other grounds by Indiana Civil Rights*

*Commission v. Alder*, 714 N.E.2d 632 (Ind. 1999); because an agency dragged its feet in making a determination, *Real Estate Appraiser License & Certification Board v. Stewart*, 695 N.E.2d 962, 965 (Ind. Ct. App. 1998); or because no evidence was designated to support an agency decision, *Bentley*, 56 N.E.3d at 668. The trial court did not find that there was agency foot dragging or a lack of designated evidence.

[20] Connor does point to *Bentley* and argues that the trial court could compel a specific coverage decision because further agency consideration would be futile. In *Bentley*, an Indianapolis police sergeant appealed his demotion to patrol officer. *Id.* at 1164–65. The civilian merit board upheld the demotion, and the officer filed a petition for judicial review under AOPA. *Id.* at 1165. After the officer moved for summary judgment, the board’s evidence—the transcript from the review hearing—was stricken as untimely, so it had no evidence to support its decision. *Id.* The trial court found there was insufficient evidence in the record to support the board’s decision and therefore reversed the board’s ruling and ordered it to restore the officer to the rank of sergeant with retroactive back pay. *Id.* at 1166.

[21] The City argued on appeal that the trial court exceeded its authority in ordering the board to take particular action and not remanding for further proceedings. *Id.* at 1168. Our court acknowledged that, in general, a trial court is required to remand to the agency for reconsideration following a trial court’s decision to reverse an agency determination. *Id.* But we upheld the trial court’s decision because that was not a case where there was an error in the agency’s analysis.

Instead, the agency’s evidence had been stricken, and remanding would be an unfair end-run around that ruling which would, in essence, offer the City the “chance of a second bite of the apple.” *Id.*

[22] This case is different. FSSA is not seeking a “second bite of the apple” because it never took the first bite. As the trial court found, “[t]he issue of whether ABA therapy for Connor is ‘medically necessary’ was not addressed in the denial of coverage due to Connor being over twenty (20) years of age.” Appellant’s App. Vol. 2 at 9. Unlike *Bentley*, this is a case in which the agency erred in its analysis, and remand will provide FSSA an opportunity to reconsider its decision by applying the correct analysis and conducting appropriate factfinding on the medical necessity issue. We, therefore, cannot conclude that a remand for further consideration would be futile as Connor argues.

[23] Accordingly, to the extent the trial court’s directive specified a particular coverage determination on remand, we reverse the trial court’s order. *See Ind. Fam. & Soc. Servs. Admin. v. Jones*, 691 N.E.2d 1354, 1358 (Ind. Ct. App. 1998) (holding that the trial court’s authority on review is limited to remand for further proceedings and that it may not dictate or specify a particular procedure to be utilized upon remand; however, the agency must proceed in accordance with applicable law on remand). However, the trial court’s order is affirmed in its determinations that FSSA’s denial of Connor’s benefits shall be set aside and that the matter must be remanded to FSSA for further proceedings consistent with the determination that the age restriction is unlawful. *Id.*

[24] Affirmed in part, reversed in part, and remanded.

Riley, J., and Robb, J., concur.