IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SHIRLEY WYNINGER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**No. 03-2484 Ml**
TOMMY THOMPSON, Secretary, Department of Health and Human Services,	)	
	)	
	)	
Defendant.	)	
	)	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This case is before the Court on Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Memorandum in Support of Motion to Dismiss, filed August 27, 2003. Plaintiff responded in opposition on October 10, 2003. Defendant filed a reply on October 29, 2003, to which Plaintiff filed a supplemental response on January 14, 2004.

Plaintiff filed this action seeking a declaration from the Court as to Medicare's rights, if any, to the proceeds of a monetary settlement of a tort claim between Mrs. Wyninger and Perkins Restaurant. The tort case concerned injuries that Plaintiff's husband, Mr. Wyninger, sustained when he fell outside a Perkins Restaurant. Mr. Wyninger received medical treatment for his injuries, which was apparently paid for in part by

Medicare. Plaintiff is concerned that Medicare may pursue a reimbursement claim against the proceeds of the settlement in order to recover funds Medicare previously paid on behalf of Mr. Wyninger. She seeks a declaration that Medicare has no right to reimbursement under the Medicare Secondary Payer provisions, 42 U.S.C. § 1395(y) ("MSP"), in this situation.

The Secretary filed a motion to dismiss on the grounds that the United States has not agreed to waive its sovereign immunity in this case and that Plaintiff failed to exhaust her administrative remedies prior to filing suit.

I. Standard of Review

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal for lack of subject matter jurisdiction. The plaintiff has the burden of proving that the court has subject matter jurisdiction in order to survive a Rule 12(b)(1) motion. Moir v. Greater Cleveland Reg'l Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990). "[O]n a Rule 12(b)(1) motion challenge to subject matter jurisdiction, the court is empowered to resolve factual disputes." Rogers v. Stratton Indus., Inc., 798 F.2d 913, 915 (6th Cir. 1986). If a court determines that it lacks subject matter jurisdiction, "the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3).

II. Analysis

Defendant argues that the Court lacks subject matter

jurisdiction over this case because Plaintiff has failed to exhaust her administrative remedies. She has not presented her claim to the Secretary and received an initial decision, nor has she proceeded through the administrative appeals process and received a final decision from the Secretary.

Plaintiff argues in response that there is no administrative review process for her claim that Medicare is not entitled to seek reimbursement under the MSP provisions. She maintains that administrative review is only available for determinations of Medicare eligibility or benefits amounts. In the absence of the availability of administrative review, Plaintiff argues that she may bring her case to Court pursuant to the Administrative Procedure Act because the Secretary's decision is final. She further argues that in the event she is required to undertake administrative review under the Medicare Act, the Secretary's position in this matter constitutes finality, which absolves her from the requirement of pursuing administrative remedies.

A. Judicial Review of Medicare Claims

The Court's jurisdiction over Medicare cases is proscribed by 42 U.S.C. §§ 405(g) & (h), which specifically prevent a claimant from pursuing judicial review of claims "arising under" the Medicare Act, 42 U.S.C. § 1395, *et seq.*, except where the Secretary issues a "final decision", as provided in 42 U.S.C. §

405(g). Pursuant to 42 U.S.C. § 405(h)[1], "No action against the United States, [the Secretary], or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter."[2] According to the Supreme Court, it is clear "that § 405, to the exclusion of 28 U.S.C. § 1331, is the sole avenue for judicial review for all '[claims] arising under' the Medicare Act." Heckler v. Ringer, 466 U.S. 602, 615 (1984) (alteration in original). The Supreme Court broadly construes the "arising under" language in § 405(h) to include claims where the Medicare Act provides "both the standing and the substantive basis for the presentation of" the claims. Weinberger v. Salfi, 422 U.S. 749, 760-61 (1975) (discussing § 405 in the context of a Social Security Act claim).

In this case, Plaintiff seeks a determination as to whether the Secretary can seek reimbursement from her settlement proceeds under the MSP provisions, arguing that payment may only be sought where the settlement could "reasonably be expected to be made promptly". 42 U.S.C. § 1395y(b)(2)(A)(ii). She maintains that the settlement offer at issue was not made promptly and,

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[1] This section of the Social Security Act is applicable to Medicare claims pursuant to 42 U.S.C. § 1395ii.

[2] Section 1331 provides for federal court jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

therefore, can not be recovered by Medicare under the MSP provisions. Because Plaintiff challenges the applicability of the MSP provisions, the Medicare Act provides the applicable statutory scheme for analyzing Plaintiff's claims in this case. Fanning v. United States, 346 F.3d 386, 400 (3d Cir. 2003) (finding that the MSP provisions provided the standing and the substantive basis for Plaintiff's claim that the Secretary was not entitled to seek reimbursement from settlement proceeds).

Thus, there is no question that she may only pursue judicial review under 42 U.S.C. §§ 405(g) & (h) after exhausting her administrative remedies. However, in an attempt to avoid the exhaustion requirement of §§ 405(g) & (h), Plaintiff offers several arguments. She contends that administrative review is not actually available for decisions regarding reimbursement under the MSP provisions. She maintains that judicial review is available pursuant to the Administrative Procedure Act because the Secretary's decision regarding waiver is final. She also contends that exhaustion would be futile, because the Secretary's position regarding its right to reimbursement under the Medicare Act is clear.

B. Availability of Administrative Review

First, the Court will address Plaintiff's argument that administrative review is not available for decisions regarding MSP overpayments and reimbursement. Plaintiff correctly noted in

her brief that administrative review is available on the questions of "whether an individual is entitled to benefits" and "the amount of benefits available to the individual". 42 U.S.C. §§ 1395ff(a)(1)(A) & (B). She argues that a request by Medicare for reimbursement of an overpayment pursuant to the MSP provisions does not fall into either one of these categories and, therefore, administrative review of the decision is actually unavailable to her. See Shalala v. Illinois Council on Long Term Care, 529 U.S. 1, 17 (2000) (noting that judicial review under 28 U.S.C. § 1331 may be sought in a category of cases, such as Part B methodology cases, where administrative review is unavailable and the lack of judicial review "would mean no review at all").

Plaintiff's argument that she lacks an avenue for administrative review stands in opposition to the Supreme Court's decisions elaborating on the broad nature of claims that should be channeled through administrative review via §§ 405(g) & (h). Plaintiff attempts to draw a distinction between a "determination of the amount of benefits" or a "determination of whether an individual is entitled to benefits" under § 1395ff(a)(1)(A)-(B), and her claim that the Secretary is not entitled to a reimbursement of benefits previously paid. This distinction is untenable in light of the Supreme Court's decisions in Shalala v. Illinois Council on Long Term Care and Heckler v. Ringer. The Court described its jurisprudence regarding claims that must

proceed through administrative review as follows:

> [Prior Supreme Court] cases themselves foreclose distinctions based upon the "potential future" versus the "actual present" nature of the claim, the "general legal" versus the "fact-specific" nature of the challenge, the "collateral" versus "non-collateral" nature of the issues, or the "declaratory" versus "injunctive" nature of the relief sought. Nor can we accept a distinction that limits the scope of § 405(h) to claims for monetary benefits. Claims for money, claims for other benefits, claims of program eligibility, and claims that contest a sanction or remedy may all similarly rest upon individual fact-related circumstances, may all similarly dispute agency policy determinations, or may all similarly involve the application, interpretation, or constitutionality of interrelated regulations or statutory provisions. There is no reason to distinguish among them in terms of the language or in terms of the purposes of § 405(h). Section 1395ii's blanket incorporation of that provision into the Medicare Act as a whole certainly contains no such distinction.

Illinois Council on Long Term Care, 529 U.S. at 14. This discussion clearly indicates the Court's adherence to a rule that "demands the 'channeling' of virtually all legal attacks through the agency". Id. at 13.

In Illinois Council on Long Term Care, the Supreme Court refused to hear nursing homes' claims that, for planning purposes, they needed advanced knowledge of whether certain Medicare regulations violate various statutes and the Constitution. Id. at 23-25. The nursing homes argued they could be subject to fines, or even closure, if they could not challenge

the regulations in court. Id. at 21-22. The Supreme Court stated, "At a minimum, . . . the matter must be presented to the agency prior to review in federal court." Id. at 24. The Supreme Court also noted that "[p]roceeding through the agency . . . provides the agency the opportunity to reconsider its policies, interpretations, and regulations in light of those challenges." Id. at 23.

The Supreme Court addressed a request for a prospective benefits determination in Ringer and found that the plaintiff was not entitled to an advance determination from the Supreme Court as to whether Medicare would provide coverage for a specific medical procedure. The plaintiff claimed he had not had surgery because he could not afford it without Medicare. 466 U.S. at 610.[3] The Court held that a plaintiff who sought a pre-determination that a surgical procedure would be covered by Medicare made "essentially a claim for benefits." Id. at 620. The Supreme Court found that the plaintiff was required to utilize the administrative review process set forth in the statute and that he could undertake the surgery and seek payment from Medicare through the specified administrative processes after the fact. Id. at 625-27.

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[3] Four plaintiffs pursued judicial remedies in Ringer, only one of whom had not yet undergone the surgical procedure and sought prospective relief. The Court's decision primarily addressed the situation of this particular plaintiff.

In Ringer, the Supreme Court also found that "[i]t [was] of no importance" that the plaintiff in that case sought only declaratory and injunctive relief, rather than an actual award of benefits, because "only essentially ministerial details [would] remain" before the plaintiff would receive reimbursement. Id. at 615. The Court expressed disdain for allowing courts to provide advisory opinions concerning the Medicare Act before the Secretary has the opportunity to issue an opinion, noting that "we would be inviting [plaintiffs] to bypass the exhaustion requirements of the Medicare Act by simply bringing declaratory judgment actions in federal court." Id. at 621.

Plaintiff here seeks a predetermination that Medicare is not entitled to reimbursement under the MSP provisions. Plaintiff makes "essentially a claim for benefits". She seeks to keep benefits already paid on behalf of Mr. Wyninger. This is no different than the plaintiff in Ringer who sought an advance determination as to whether his surgery would be covered by Medicare. If the Supreme Court was not inclined to consider the plaintiffs' prospective claims for relief or declaratory judgment prior to administrative review in cases such as Ringer and Illinois Council on Long Term Care, it would appear even less likely that the Court would consider a request for prospective relief where, as here, the plaintiff simply requests an advance determination as to Medicare's reimbursement rights to settlement

proceeds. Plaintiff's claim to keep the Medicare benefits her husband already received can and should proceed through the appeals process provided in 42 U.S.C. § 1395ff.

The Third Circuit reached the same conclusion on facts similar to the case at bar. Fanning, 346 F.3d at 400. In Fanning, the plaintiffs sought a declaration from the court that the Secretary could not seek reimbursement under the MSP statute for the proceeds of a class action settlement of claims pertaining to orthopedic bone screws. Id. at 390. The Court held that:

> It is obvious that when another insurer makes a payment for medical services Medicare has already paid for, a duplicate payment results. In the absence of reimbursement to Medicare, the duplicate payment is an overpayment of Medicare under the MSP. See 42 C.F.R. § 405.704(b)(13); Buckner v. Heckler, 804 F.2d 258, 259 (4th Cir. 1986). As we have discussed, the MSP allows the Secretary to obtain reimbursement of the overpayment. 42 U.S.C. §§ 1395y(b)(2)(A)(ii), 1395y(b)(2)(B)(ii). However, a beneficiary who disagrees with the Secretary's determination that an overpayment of Medicare benefits has been made on his or her behalf is entitled to a hearing before the Secretary as provided in 42 U.S.C. § 405(b). See 42 U.S.C. § 1395ff(b)(1). If the beneficiary is dissatisfied with the Secretary's final decision after a hearing, the beneficiary is entitled to judicial review of that decision as provided in 42 U.S.C. § 405(g).

Id. at 391.

As the Third Circuit discussed in Fanning, the duplicate payment Plaintiff will receive from the settlement is actually an

overpayment by Medicare under the MSP provisions. Plaintiff is entitled to an "initial determination" from the Secretary with respect to that overpayment pursuant to § 1395ff(a)(1) and 42 C.F.R. § 405.704(b)(13)-(14) (defining "initial determination" to include whether there has been an overpayment of benefits or whether waiver or adjustment of recovery is appropriate). The "initial determination" under § 1395ff(a)(1) is the beginning of the administrative review and appeals process that is available to Plaintiff.

In short, the Medicare Act permits Plaintiff to seek a waiver of Medicare's rights under the MSP waiver provision, 42 U.S.C. § 1395(y)(b)(2)(B)(iv). She has a right to an initial determination from the Secretary regarding the waiver under 42 U.S.C. § 1395ff(a)(1) and 42 C.F.R. § 405.704(b). If the Secretary determines that he will seek reimbursement and denies Plaintiff's waiver request, Plaintiff should pursue appropriate administrative review under the appeals process set forth in further detail in 42 U.S.C. § 1395ff. Plaintiff does have an avenue for administrative review, which she is required to pursue, and the Court now must determine whether such a course of action would be futile.

C. Futility of Exhaustion

Plaintiff argues that exhaustion of administrative remedies is not required in this case because it would be futile. The

Supreme Court has held that "the exhaustion requirement of § 405(g) consists of a nonwaivable requirement that a 'claim for benefits shall have been presented to the Secretary,' Matthews v. Eldridge, [424 U.S. 319, 328 (1976)], and a waivable requirement that the administrative remedies prescribed by the Secretary be pursued fully by the claimant." Ringer, 466 U.S. at 617. The exhaustion requirement "assures the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts." Illinois Council on Long Term Care, Inc., 529 U.S. at 13.

In Ringer, the Court found that because the plaintiff "[had] not given the Secretary an opportunity to rule on a concrete claim for reimbursement, he [had] not satisfied the nonwaivable exhaustion requirement of § 405(g)." Ringer, 466 U.S. at 622.

Similarly here, Plaintiff has not even satisfied the nonwaivable presentment requirement because she has not received an initial decision from the Secretary. Her counsel apparently mailed a letter on June 6, 2003 to the Office of General Counsel for the Department of Health and Human Services regarding Medicare's potential reimbursement claim, but filed this action on June 27, 2003 before receiving a response. (Def.'s Mot. to

Dism. at Exh. 1.)[4] She sent a second letter to the Centers for Medicare and Medicaid Services ("CMS") on November 3, 2003 requesting that Medicare waive its claim of reimbursement to her tort settlement. (Pla.'s Supp. Resp. at Exh. B.) The response she received on December 20, 2003 indicates that CMS will not make a decision regarding the potential claim for reimbursement under the MSP provisions until the settlement terms are finalized.[5] The letter from CMS states in part:

> This letter acknowledges your/your client's request for waiver of recovery of a Medicare overpayment resulting from the liability settlement you/your client received. In reviewing our file, our records indicate that this case has not been finalized. *Since a waiver can only be requested after settlement has been concluded, we are unable to comply with your request at this time*.
>
> Once settlement is reached and proceeds have been received, please notify our office. We will then calculate a reduction of Medicare's

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[4] In her response to the motion to dismiss, she argues that "Counsel for Medicare (Gary Kurz) made it clear that . . . Medicare would not be waiving its claim for reimbursement in this case." (Pla.'s Resp. at 3.) However, there is no evidence in the record, in the form of an affidavit or otherwise, by which the Court can consider this allegation. If Plaintiff ever received a written response to counsel's June 6, 2003 query, it has not been filed with this Court. It is, of course, Plaintiff's burden to establish that the Court has subject matter jurisdiction and in the absence of such evidence, the Court is empowered to resolve factual disputes in favor of Defendant.

[5] Because Plaintiff made acceptance of the settlement with Perkins Restaurant contingent upon satisfactory resolution of any MSP reimbursement claims, which the Secretary will not determine until the settlement is finalized, at the moment the situation is at an impasse.

> claim amount in accordance with 42 C.F.R. 411.37. . . . We will then issue our demand for payment setting out the beneficiary's waiver rights and you may submit your waiver request.

(Pla.'s Supp. Resp. at Exh. A) (Emphasis added). Because Plaintiff's settlement has not yet been finalized, she has not received even an initial determination regarding reimbursement or waiver under the Medicare Act. This does not satisfy the nonwaivable presentment requirement.

However, even if the Court were to find that Plaintiff has satisfied the nonwaivable presentment requirement, it is unquestioned that Plaintiff has not fully pursued the administrative remedies available to her under the Medicare Act. Because the Secretary has not issued even an initial determination as to whether it will seek reimbursement from the settlement proceeds, it follows that Plaintiff can not make a colorable showing that exhaustion of administrative remedies would be futile in this case.[6] The letter Plaintiff received from CMS does not compel such a determination. Rather, it indicates that Plaintiff will have the right to submit a waiver request after the settlement of her tort claim is finalized. See

[6] For this reason, Plaintiff's argument under Section 704 of the Administrative Procedure Act is equally unavailing. Even if the APA applied to this case, she can not show an agency action which is even arguably "final", nor can she show the "consummation of the agency's decision-making process" as required by Bennet v. Spear, 520 U.S. 154, 178 (1997).

Fanning, 346 F.3d at 401-02 (finding that the court could not define the agency's demand letters requesting payment under MSP provisions as final action because the letters advised the plaintiffs of their administrative review rights). Because Plaintiff has not exhausted these administrative remedies and received a "final decision" from the Secretary, her suit is clearly foreclosed based on §§ 405(g) & (h).

III. Conclusion

For the foregoing reasons, the Court GRANTS the Secretary's motion to dismiss for lack of subject matter jurisdiction.

SO ORDERED this ____ day of March, 2004.

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JON P. McCALLA
UNITED STATES DISTRICT JUDGE