



State of New Jersey

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
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Director

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

J.K.,
PETITIONER,
v.
DIVISION OF MEDICAL ASSISTANCE
& HEALTH SERVICES &
BERGEN COUNTY BOARD OF
SOCIAL SERVICES,
RESPONDENTS.
ADMINISTRATIVE ACTION
FINAL AGENCY DECISION
OAL DKT. NO. HMA 9932-2014

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the OAL case file and the documents filed below. Petitioner filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is January 25, 2016, in accordance with an Order of Extension.

Petitioner was found financially eligible for Medicaid benefits as of April 1, 2014. However, she was found to have transferred assets to her son and daughter totaling \$270,144.68 that resulted in a penalty of 28 months and 22 days. Her son held the Power of Attorney (POA) authority for Petitioner until guardianship proceedings appointed the Office of the Public Guardian (OPG) on November 21, 2014. The OPG subsequently filed suit in Superior Court against Petitioner's son seeking relief including return of \$184,516.29 of the transferred funds.¹ P-1A.

A resource cannot be transferred or disposed of for less than fair market value during or after the start of the five-year look-back period before the individual becomes institutionalized or applies for Medicaid as an institutionalized individual. 42 U.S.C.A. 1396p(c)(1); N.J.A.C. 10:71-4.10(a). "A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." Ibid. Congress's imposition of a penalty for the disposal of assets for less than fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid.

Petitioner contends she was entitled to a waiver of the transfer penalty in the amount of \$184,516.29 due to fulfillment of the requirements for an undue hardship. N.J.A.C. 10:71-4.10q(1) provides that a waiver of the transfer penalty may be granted when :

¹ Petitioner is not contesting the imposition of a penalty on \$85,628.39 of the assets which she claims was transferred prior to her son being named POA. Exceptions at 2.

- i. The application of the transfer of assets provisions would deprive the applicant/beneficiary of medical care such that his or her health or his or her life would be endangered. Undue hardship may also exist when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life; and
- ii. The applicant/beneficiary can irrefutably demonstrate the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred.

The Initial Decision concluded that Petitioner had not demonstrated that she met the two prongs needed for a waiver of the transfer penalty. Since the regulation requires that both conditions be met, failing to meet either is sufficient to deny the waiver request. The Initial Decision also found that Petitioner had not rebutted the presumption that the transfer were done to qualify for Medicaid. For the reasons that follow, I hereby ADOPT the Initial Decision.

Petitioner's son had presented receipts in an effort to have the transfers be deemed as compensation for care or services. ID at 6. However without any prior agreement as to the type or terms of the compensation, the transfers could not be treated as such. N.J.A.C. 10:71-4.10(b)(6)(ii). There is no other evidence to rebut the presumption that the funds were transferred to qualify for Medicaid. N.J.A.C. 10:71-4.10(j). Thus, I FIND that the transfer was properly imposed.

Turning to the waiver of the transfer penalty due an undue hardship, the Appellate Division recently reviewed and upheld the denial of the waiver in a very similar case. See R.P. v. DMAHS and Bergen County Board of Social Services, A-06148-11, (App. Div. Oct. 22, 2013). The Medicaid applicant, R.P., also had a son who transferred funds to himself and then left the country. R.P. was actually evicted from his

nursing home and wound up in a public facility. Slip Op. at 2. Similarly, R.P. filed suit against his son who started paying monthly restitution after a default judgment was entered.

In that case the Appellate Division upheld the Final Agency Decision that reversed the Initial Decision's finding that waiver should be granted. In doing so, the court found that R.P. had failed to present any evidence that he met the first prong. Moreover, the second prong was not met as the son was repaying the funds and "the assets are also recoverable pursuant to the final default judgment entered against" the son. Slip Op. at 11.

Petitioner argues that the hardship waiver regulation is not clear and seeks to apply hardship regulations in other states to this case.² The Appellate Division's recent review of the New Jersey regulation raised no such concerns. The regulation is nearly identical to the language contained in guidance from the Centers for Medicare and Medicaid Services (CMS), the federal agency charged with the administration of the Medicaid program. See State Medicaid Manual § 3258.10C.5.

Petitioner also argues that she is entitled to ancillary benefits while she is penalized for the transfer. Due to her high income, Petitioner's eligibility is established pursuant to the Medically Needy program that permits income over 300% of the Federal Benefit Rate which was \$2,163 in 2014. That program is limited in the services it covers. See N.J.S.A. 30:4D-6 g(3).³ Petitioner would be eligible for those discrete

² Petitioner also argues that 42 U.S.C. § 1395i-3 prohibits her discharge from the nursing facility. However, with certain protections and due process rights attached, that statute clearly provides that "a skilled nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility **unless--** . . . (v) the resident has failed, after reasonable and appropriate notice, to pay (or to have paid under this title or title XIX [42 USCS §§ 1395 et seq. or 1396 et seq.] on the resident's behalf) for a stay at the facility." 42 U.S.C. § 1395i-3(c)(2)(a)(v) emphasis added],

³ As of December 1, 2014, New Jersey no longer covered nursing home services under Medically Needy. However, this case predates that change.

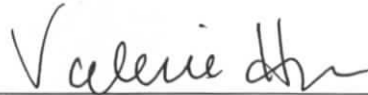
services. Thus, I hereby RETURN the matter to Bergen County for further action on
Petitioner's case.

THEREFORE, it is on this ^{22nd} day of JANUARY 2016

ORDERED:

That the Initial Decision is hereby ADOPTED: and

That the matter is RETURNED to Bergen County for further action on
Petitioner's eligibility for ancillary services.



Valerie Harr, Director
Division of Medical Assistance
and Health Services