



State of New Jersey

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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

L.K.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
v.	:	ORDER OF REMAND
	:	
DIVISION OF MEDICAL ASSISTANCE	:	OAL DKT. NO. HMA 5437-2016
	:	
AND HEALTH SERVICES AND	:	
	:	
BERGEN COUNTY BOARD OF	:	
	:	
SOCIAL SERVICES,	:	
	:	
RESPONDENTS.	:	

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. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is September 22, 2016 in accordance with an Order of Extension.

The matter arises regarding Petitioner's request for a caregiver exemption so she can transfer her share of her home to her son. Petitioner had added her son and daughter-in-law to the deed in 2005. Petitioner has been residing in a nursing home

since September 2015. She applied for Medicaid in January 2016. The record contains a deed dated June 17, 2016 but it is not a filed copy. Bergen County found Petitioner was eligible as of January 1, 2016. There is no penalty on this case and Bergen County determined the home was inaccessible due to the son's refusal to sell.

The Initial Decision found that Petitioner's future transfer of her home would meet the caregiver exemption so that there would be no penalty period. Based on the record before me, I hereby REVERSE the Initial Decision as the record does not support the findings and REMAND the matter to OAL for further development of the record.

By way of background, when an individual is seeking benefits which require meeting an institutional level of care, any transfers of resources are scrutinized. N.J.A.C. 10:71-4.10. Under the regulations, "[i]f an individual . . . (including any person acting with power of attorney or as a guardian for such individual) has sold, given away, or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period" a transfer penalty of ineligibility is assessed. N.J.A.C. 10:71-4.10 (c). Individuals who transfer or dispose of resources for less than fair market value during or after the start of the sixty-month look-back period before the individual becomes institutionalized or applies for Medicaid as an institutionalized individual, are penalized for making the transfer. 42 U.S.C.A. § 1396p(c)(1); N.J.A.C. 10:71-4.10(m)(1). Such individuals are treated as though they still have the resources they transferred and are personally paying for their medical care as a private patient, rather than receiving services paid for by public funds. In other words, the transfer penalty is meant to penalize individuals by denying them Medicaid benefits during that period when they should have been using the transferred resources for their medical

care. See W.T. v. Div. of Med. Assistance & Health Servs., 391 N.J. Super. 25, 37 (App. Div. 2007).

Limited exemptions to the transfer penalty rules exist. For example, the caregiver exemption provides that an individual will not be subject to a penalty when the individual transfers the "equity interest in a home which serves (or served immediately prior to entry into institutional care) as the individual's principal place of residence" and when "title to the home" is transferred to a son or daughter under certain circumstances. N.J.A.C. 10:71-4.10(d). The son or daughter must have "resid[ed] in the individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual" and "provided care to such individual which permitted the individual to reside at home rather than in an institution or facility." N.J.A.C. 10:71-4.10(d)(4) (emphasis added). This exemption mirrors the federal Medicaid statute. 42 U.S.C.A. § 1396p(c)(2)(A)(iv).

The federal statute calls for an explicit exemption from the transfer rules and is meant to compensate the child for caring for the parent. The New Jersey regulations regarding this transfer exemption are based on the federal statute. Compare 42 U.S.C. § 1396p(c)(2)(A)(iv) and N.J.A.C. 10:71-4.10(d). The statute provides that if the "equity interest in a home" is transferred by title to a son or daughter who provided such care that prevented institutionalization for at least two years, the transfer is exempt from penalty. The care provided must exceed normal personal support activities and Petitioner's physical or mental condition must be such as to "require special attention and care." N.J.A.C. 10:71-4.10(d). It is Petitioner's burden to prove that she is entitled to the exemption.

In finding that Petitioner met her burden, the Initial Decision relied on a letter from her physician as well as testimony from Petitioner's son and daughter-in-law. ID at 3. Petitioner's doctor described her as suffering from non-insulin dependent diabetes, "hypertension, severe bilateral osteoarthritis in lower extremities, anxiety/depression, insomnia and intertrochanteric fracture of the right leg since 08/25/2015." R-1 at 20.¹ Other than the August 2015 date of Petitioner's hip fracture, there is no timeline for onset of these conditions. Nor is there any explanation how Petitioner's medical conditions affected Petitioner to such a degree that she needed special attention and care from her son. A finding of fact based on hearsay must be supported by competent evidence. N.J.A.C. 1:1-15.5(b), the **residuum rule**, requires "some legally competent evidence" to exist "to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." The facts surrounding Petitioner's level of care were based on a narrative letter from Petitioner's physician. There was no expert testimony or contemporaneous medical notes or bills. Thus, I find that the letter from her doctor is insufficient to support the finding that Petitioner needed nursing home level of care during the two years prior to her September 2015 institutionalization. Moreover, the record contains no written statements from the son and daughter-in-law and the summary of their testimony does not go much beyond what is contained the physician's letters. There are no specific examples of what Petitioner's son did that would indicate he exceeded normal personal support activities and Petitioner's physical or mental condition was such as to "require special attention and care." N.J.A.C. 10:71-4.10 (d).

¹ Petitioner's doctor also stated "[h]ad [R.] not devoted himself to caring for [Petitioner], it would have been necessary for her to have been placed in a skilled nursing facility." R-1 at 20. The son's name is L. It is unclear who is R. and to what extent he cared for Petitioner.

The only attempt to give examples of how her son cared for her is in an undated letter to the previously assigned ALJ wherein Petitioner's representative argued that it was "important to note" that Petitioner had to have her "blood sugar level monitored two to three times per day." I would not consider that to be special care that permitted Petitioner to remain out of a nursing home.


While pointing to a prior fair hearing, S.E. v. DMAHS and Bergen County, OAL Dkt. No. HMA 15582-2015 to support her position, Petitioner fails to recognize that that decision contains specific and detailed descriptions of the care that was necessary for that Medicaid applicant who suffered from dementia. That is simply not the case here. The record does not show what diagnoses caused Petitioner to need special support and care and how the son provided that specialized support. As Petitioner was institutionalized in September 2015, Petitioner must have had the diagnosis and been receiving such care from September 2013 so as to prevent institutionalization. I FIND that the record does not support that she met the caregiver exemption.

THEREFORE, it is on this ^{20th} day of SEPTEMBER 2016,

ORDERED:

That the Initial Decision is hereby REVERSED in that the record does not support the finding that the caregiver exemption was met; and

That the matter is REMANDED to the Office of Administrative Law for further evidence regarding Petitioner's condition and examples of the care that permitted her to remain in the home.



Meghan Davey, Director
Division of Medical Assistance
and Health Services