



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

O.T.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE

AND HEALTH SERVICES AND

PASSAIC COUNTY BOARD OF

SOCIAL SERVICES,

RESPONDENTS.

ADMINISTRATIVE ACTION

ORDER OF REMAND

OAL DKT. NO. HMA 5459-2016

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 October 21, 2016 in accordance with an Order of Extension.

The matter arises regarding Petitioner's transfer of her home to her son during the lookback period. Petitioner has been residing in a nursing home since October

2015. She applied for Medicaid in November 2016 and transferred her home the same day of her application. Passaic County found Petitioner was eligible as of March 1, 2016 and imposed a penalty for the transfer of the house.

The Initial Decision found that Petitioner's transfer of her home met 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.

The purpose of the caregiver exemption is to compensate a son or daughter who has provided care to such an extent that the applicant remained out in the community and not on Medicaid for at least two years. Petitioner produced evidence to claim that she met the caregiver exemption at the fair hearing. However, I do not find that the medical documents support the finding that Petitioner needed nursing home level of care during the two years prior to her October 2015 institutionalization so as to remove the November 2015 transfer of the home from penalty.

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 two letters from her physician as well as testimony from Petitioner's son and a neighbor. ID at 3-4. The letters from the neighbors, including M.C. who testified at the hearing, recount a son that took care of the house, did cooking and cleaning, cut the grass and shoveled snow. These general chores show he took care of his aging mother and their shared home but they do not 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). The Initial Decision states Petitioner's neighbors "witnessed" her son "feeding her, bathing her, managing her medication, taking her to doctors' appointments, maintaining her home, equipping her home with safety devices and helping maintain her house as well as helping elderly neighbors around him. (P1 through P-11)." ID at 5-6. The support for this finding is P-1 through 11 which does not contain the written statements from the neighbors, which are described above, but does contain the Petitioner's brief, which is not a substitution for testimony. The written statements, which were submitted to Passaic County with the application, contain no mention that the neighbors witnessed Petitioner's son bathing, feeding, managing medication or installing safety devices. Similarly, the Initial Decision describes M.C., the neighbor who testified, as "checking in on" Petitioner "daily" but M.C. makes no mention of that in her October 2015 statement. Compare ID at 5 and P-12. Moreover, there is no time or date reference in any of the written statements that would show the

care provided by her son to keep Petitioner out of a nursing home for at least the full two years prior to her October 2015 institutionalization. Rather the Initial Decision described the "network of caretakers" providing care to Petitioner "especially in 2015 when she became most ill and prone to injury." ID at 5. As Petitioner was institutionalized in October 2015, Petitioner must have needed and been receiving such care from October 2013 so as to prevent institutionalization. I FIND that the record does not support that she met that condition.

Similarly, I FIND that the record does not contain any medical testimony or records concerning the specific conditions that caused Petitioner's need for institutional level of care for the full two years prior to entering the nursing home. Rather the only specific physician notes that contain any diagnoses or assessment of Petitioner's medical condition are from the latter half of 2015 and January 2016 and are related to falls and subsequent hospitalizations in 2015 that resulted in Petitioner's entry into the nursing home in October 2015. The October 30 and November 2, 2015 letters from her primary physician do not indicate when Petitioner was in need of nursing home care, what medical conditions led to the need for such care and how Petitioner's son provided special care to meet those needs. The letters are summary in nature and appear to be inconsistent with the son's testimony. The son stated he moved in 15 years ago to care for his father until his death. He then stayed on to care for his mother as she declined and the only date in the Initial Decision regarding some of this care is 2010. Petitioner's physician states the son "has been the primary caregiver to his mother for at least the past 20 years," indicating the need for hands-on care existed for two decades. See letter dated October 30, 2015 from Sylvia Coscia, M.D. Dr. Coscia's two letters do not

give any indication that Petitioner's medical diagnoses were such that she would have been in a nursing facility in October 2013 but for her son's care.


Additionally, despite the recitation of the testimony that the son used "his vacation time to care for his mother including her numerous visits and tests", the only medical encounters in the record begin in August 2015, some two months before Petitioner enters the nursing home. See ID at 3, ¶14. The statute requires that the care provided by the son be of a magnitude that Petitioner did not enter the nursing home for at least two years. Nothing in the record shows any clinical diagnoses or specific explanation that Petitioner's medical history was deleterious enough that she needed nursing home care prior to the August 2015 episodes. Thus, I FIND there is no competent medical evidence that Petitioner's medical diagnoses and condition during the two years prior to her institutionalization was at a level that she would have needed, and her son provided, special care; without which Petitioner would have been in a nursing home.

THEREFORE, it is on this <sup>8<sup>th</sup></sup> 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 diagnosis.

  
Meghan Davey, Director  
Division of Medical Assistance  
and Health Services