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

R.B.,	
PETITIONER,	**ADMINISTRATIVE ACTION**
v.	**FINAL AGENCY DECISION**
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND CAMDEN COUNTY BOARD OF SOCIAL SERVICES,	**OAL DKT. NO. HMA 2461-2012**
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 July 15, 2016 in accordance with an Order of Extension.

The matter arises regarding the denial of Petitioner's Medicaid application. Petitioner applied for Medicaid benefits in November 2011. He was residing in a nursing home at that time and had been there since April 2010. Camden County determined that Petitioner was not eligible for benefits due to the couple's ownership of $223,814.45 in resources. Petitioner died January 23, 2012.

Petitioner argued on appeal that his wife was entitled to retain all of the resources to raise her income to the Minimum Monthly Maintenance Needs Allowance. (MMMNA). To make the arithmetic work out, Petitioner does not want Camden to consider the Department of Veteran's Affairs (VA) pension as available income for his wife. To support this, Petitioner claims that certain federal cases that dealt with counting specific types of VA pensions to determine Medicaid eligibility support his position. This is incorrect as Petitioner's VA pension is not counted as part of the eligibility determination but rather was correctly considered in determining Petitioner's post-eligibility treatment of income. Moreover, when the spousal impoverishment rules are applied to the correct calculation of Petitioner's post-eligibility income, it is clear that Petitioner was not eligible for Medicaid benefits due to excess resources even without taking the VA pension into account.

The Initial Decision's finding that certain VA pension benefits cannot be used to determine Petitioner's Medicaid eligibility is legally correct. However, it does not apply to the facts of this case. The cases cited deal with the initial eligibility determination for single individuals who received VA aid and attendance. Camden County did not use Petitioner's VA pension benefit to determine his eligibility as he was denied due to excess resources. It was only upon Petitioner's appeal of that denial that the use of the VA income in the post-eligibility treatment of income became an issue.

Petitioner is arguing that the VA income of $1,949 and later $2,019 cannot be used in the post-eligibility treatment of income. This argument would have Petitioner's wife retain all of the couple's income of $4,292.54 plus resources in excess of $200,000 while the taxpayers pay for his care. Using the correct law and calculations, it is clear that Petitioner is not entitled to preserve additional resources and that there was sufficient income to meet the MMMNA. Thus, for the reasons that follow, I hereby REVERSE the Initial Decision and FIND that Camden County correctly denied Petitioner's application for Medicaid benefits.

First, it must be noted that even if Petitioner was correct in arguing that his wife should be able to protect additional resources, his own, albeit incorrect, calculation sets the new resource limit at $211,408.40. (This amount includes a legally and factually unsupported $3,000 "set aside of funds for taxi-rides".) See Petitioner's submission dated February 27, 2015. However, Petitioner's application was denied due to resources in the amount of $223,814.45 as of August 2011. If Petitioner believed eligibility could be established with $211,408.40 in assets, he exceeded that amount by $12,406.05 and his own submission supports Camden County's denial due to excess resources.

However, Petitioner's calculations showing a deficit when comparing the MMMNA to the couple's available post-eligibility income are both legally and mathematically incorrect. The figures used by Petitioner in his February 27, 2015 calculation are incorrect. The Medicaid Communication No. 11-09 sets the 2011 excess shelter amount at $551.63 (not $567.38) and the 2011 standard spousal allowance at $1,838.75 (not $1,891.25). See ID at 9.

When the correct numbers are used and the calculation is done in accordance with the federal and state law, even without using the VA pension, Petitioner's wife has total income of $2,387.16 which exceeds the MMMNA of $2,343.54.

By way of background, in 1988 Congress enacted the Medicare Catastrophic Coverage Act ("MCCA"), 102 Stat. 683 (1988); 42 U.S.C.A. § 1396r-5, whose chief purpose was "to protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance." Wisconsin Dep't of Health and Family Services v. Blumer, 534 U.S. 473, 480 (2002) (noting that the bill seeks to meet its goal "by assuring that the community spouse has a sufficient – but not excessive – amount of income and resources available." H.R. Rep. No. 100-105, pt. 2, at 65). Thus, the MCCA sought a balance between allowing sufficient income and resources to the community spouse while also "preclud[ing] couples who possessed substantial resources from qualifying for Medicaid." Cleary v. Waldman, 167 F.3d 801, 805 (3d Cir. 1999), cert. denied, 528 U.S. 870 (1999). To that end Medicaid permits the community spouse to retain a specific amount of assets or resources, which is called a community spouse resource allowance (CSRA) while still qualifying the institutionalized spouse for Medicaid as well as guaranteeing a minimum level of income sufficient to meet the community spouse's basic needs called the "minimum monthly maintenance needs allowance" (MMMNA).

The MCCA permits an increase to the CSRA "if either spouse shows, at a state-administered hearing, that the community spouse will not be able to maintain the statutorily defined minimum level of income on which to live after the institutionalized spouse gains Medicaid eligibility." Blumer, 534 U.S. at 478 (emphasis added); 42 U.S.C.A. § 1396r-5(e)(2)(C). 42 U.S.C.A. § 1396r-5(d)(6) reads in relevant part that "a

State must consider that all income of the institutionalized spouse that could be made available to a community spouse . . . has been made available before the State allocates to the community spouse an amount of resources adequate to provide the difference between the [MMMNA] and all income available to the community spouse."

Petitioner has created a deficit in reaching the MMMNA by incorrectly using his net income as well as ignoring the clear mandate that all income be used before increasing the protected resources. The federal regulation clearly states that all of Petitioner's income, including "income that was disregarded in determining eligibility must be considered" and deducted "in the following amounts, in the following order, from the individual's total income,"

> **(1)** ***Personal needs allowance.*** A personal needs allowance that is reasonable in amount for clothing and other personal needs of the individual while in the institution. . .
>
> **(2)** ***Maintenance needs of spouse.*** For an individual with only a spouse at home, an additional amount for the maintenance needs of the spouse. .
> .
>
> **(4)** ***Expenses not subject to third party payment.*** Amounts for incurred expenses for medical or remedial care that are not subject to payment by a third party, including—
> **(i)** Medicare and other health insurance premiums, deductibles, or coinsurance charges . . .
>
> [42 C.F.R. § 435.725]

Petitioner has reduced his income by his Medicare and health insurance premiums prior to making the income available to his wife. See Petitioner's February 27, 2015 submission. The law clearly requires that his income be used to help his community spouse prior to paying for health insurance. As Medicaid will now be covering nursing home costs, his need for other health insurance is diminished.

Even assuming Petitioner's argument that the VA benefit cannot be used in the post-eligibility treatment of income, the following calculation demonstrates that the couple's other available income was sufficient to meet the MMMNA. Petitioner's gross income of $2,105.45 would be reduced by $35 for PNA. This leaves $2,070.45 available to meet the MMMNA. Petitioner's wife has gross income of $236.40 which raises the couple's total income to $2,306.85. Petitioner's wife is entitled to a MMMNA of $2,343.54 so she has a deficit of $36.69.

The federal law requires that in order to compensate when there is not enough income from both spouses and "either member can establish at the fair hearing that the income generated from the community spouse's share of the couples' resources is inadequate to raise the community spouse's income . . . to the maximum authorized level, additional resources . . . may be set aside for the community spouse." N.J.A.C. 10:71-5.7(d) and 42 U.S.C.A. § 1399r-5(e)(2)(C) (emphasis added). Petitioner's wife was entitled to retain $95,325.46 as the CSRA.[1] See N.J.A.C. 10:71-4.8(a)(1); 42 U.S.C.A. § 1396r-5(c)(1)(A); 42 U.S.C.A. § 1396r-5(f)(2). Petitioner used a 1.011% interest rate to impute the income generated from the CSRA to get monthly income of $80.31. ($95,325.46 x 1.011% / 12 months). That amount is more than adequate to cover the $36.69 deficit. Petitioner and his wife have income of $2,387.16 which exceeds the MMMNA of $2,343.54. Thus, even when disregarding Petitioner's VA pension from the post-eligibility treatment of income, I hereby FIND that Petitioner is not entitled to protect additional resources as there is no shortfall of available income to reach the MMMNA.

[1] The Initial Decision uses $95,325.46 as the CSRA. ID at 16. Based on the snapshot of $190,650.82 resources as of March 2010, Petitioner's wife may retain half of that amount up to the $109,560 limit. Medicaid Communication 11-09. The parties used a higher, incorrect amount in their submissions.

However, the fact remains that the VA pension must be used in the post-eligibility calculation. The Initial Decision's conclusion that Petitioner's "VA benefits . . . are properly excluded as income in determining whether [his wife] is entitled to an increased CSRA" misstates the cited case law. ID at 15. The reliance on Galletta v. Velez, 2014 U.S. Dist. LEXIS 75248 (D.N.J. June 3, 2014) and Mitson v. Coler, 670 F. Supp. 1568 (S.D. Fla. 1987) fails to recognize that those cases dealt with the use of the VA pension in determining if the applicant met the Medicaid income standard. The Initial Decision cites to Galletta that when the VA Pension meets certain requirements "'then the entire [VA] benefit should be excluded from income for Medicaid-eligibility purposes. Id. at 25. '" (emphasis added). ID at 13.

There is simply no evidence that Camden County used the VA pension to calculate Petitioner's income so as to determine his Medicaid eligibility. Petitioner was denied Medicaid eligibility due to excess resources, not excess income. Moreover, Petitioner has provided no support for his argument that the VA income is excluded in the MMMNA calculation or the post-eligibility deductions to determine his contribution to his medical care. Thus, I REVERSE the Initial Decision's conclusion that the VA pension cannot be used for these purposes.

The federal law clearly requires that the VA pension be used in the MMMNA calculation and in the post-eligibility treatment of income. Congress requires that "a State must consider that all income of the institutionalized spouse that could be made available to a community spouse . . . has been made available before the State allocates to the community spouse an amount of resources adequate to provide the difference between the [MMMNA] and all income available to the community spouse." 42 U.S.C.A. § 1396r-5(d)(6) (emphasis added). Similarly the regulations require that

"[i]ncome that was disregarded in determining eligibility must be considered in" determining the post-eligibility deductions. 42 C.F.R. § 435.725(c) (emphasis added).

The record clearly shows that the VA pension was granted to support both Petitioner and his wife. The VA's instructions to Petitioner's legal custodian required her to pay "known and authorized routine/recurring expenditures" from the VA Pension. Respondent's January 16, 2015 submission at Exhibit C. The VA unambiguously identified the "known and authorized routine/recurring expenditures" as $1,009.00 for Petitioner's wife's rent, $77.20 for medication insurance for Petitioner and his spouse, $469.24 in "United Health Care Insurance" for Petitioner and his spouse and $250.00 for medications for Petitioner and his spouse. Ibid. Had he been found resource eligible, Petitioner's VA pension would have been correctly attributed to both the MMMNA and applied to his cost of care.

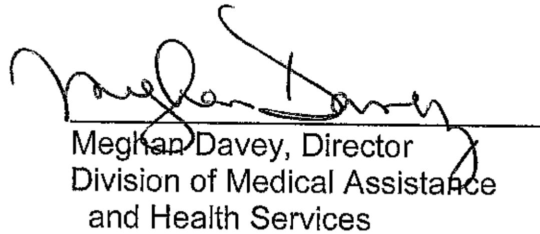
Thus, there is no support for Petitioner's claim that the funds received from the VA are excluded from the Medicaid calculation set up to ensure his wife has funds to pay for her expenses in the community. The purpose of the VA income is to pay for the couple's expenses. Petitioner has failed to provide any support for his contention that his wife should be guaranteed income of $4,292.54 from two different federal programs as well as retain resources in excess of the federally set maximum.

THEREFORE, it is on this 22nd day of JUNE 2016,

ORDERED:

That the Initial Decision is hereby REVERSED; and

That Petitioner was not entitled to protect additional resources and was correctly denied Medicaid benefits due to excess resources.



Meghan Davey, Director
Division of Medical Assistance
and Health Services