



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

H.M.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES AND
UNION COUNTY BOARD OF
SOCIAL SERVICES,

RESPONDENTS.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 10869-2014

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. Respondent filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Decision is March 16, 2017 in accordance with an Order of Extension.

This matter arises from the denial of Petitioner's application for Medicaid. Petitioner sought to use the purchase of a \$173,815.79 annuity to pay for his nursing

home care while he served a penalty for transferring \$194,892.51. The Initial Decision confuses the regulations regarding the commitment of funds with the ownership of an available resource. In late March 2012 Petitioner withdrew \$173,815.79 from a bank account and gave a check to Phoenix Annuity. He had previously transferred funds totaling \$194,892.51. The annuity company must return those funds if requested during a statutorily mandated time period. While Petitioner's bank account balance may be below the standard, the use of the funds to purchase an annuity creates a new resource that is available until the statutorily mandated time renders the annuity irrevocable. Based on my review of the record and for the reasons set forth below, I hereby REVERSE the Initial Decision and AFFIRM the denial letter issued by Union County.

The Initial Decision's failed to recognize that Medicaid law actually does require Union County to follow the "money trail throughout the relevant month in order to determine the end game of the check drawn." ID at 9. "Medicaid is an intensely regulated program." H.K. v. State, 184 N.J. 367, 380 (2005). Generally, an applicant's countable available resources cannot exceed \$2,000 if they wish to qualify for Medicaid. N.J.A.C. 10:71-4.5(c). A resource is defined as:

any real or personal property which is owned by the applicant (or by those persons whose resources are deemed available to him or her, as described in N.J.A.C. 10:71-4.6) and which could be converted to cash to be used for his or her support and maintenance. Both liquid and non-liquid resources shall be considered in the determination of eligibility unless ... [they] are specifically excluded under ... N.J.A.C. 10:71-4.4(b).

[N.J.A.C. 10:71-4.1(b).]

Additionally, a resource cannot be transferred or disposed of for less than fair market value during or after the start of the sixty month period (the "look-back period") before the individual becomes institutionalized or applies for Medicaid as an

institutionalized individual. 42 U.S.C.A. § 1396p(c)(1); see also N.J.A.C. 10:71-4.10(a). All assets must be counted towards eligibility and when an individual has the right, power or authority to liquidate an asset, that asset is included in the Medicaid determination. Additionally, when the drawn funds are given to or used to purchase an item for another, a transfer penalty is assessed. Petitioner moved funds from a bank account to the annuity company and retained the right to liquidate the funds until the 10 day period had elapsed. Thus, I find that as of April 1, 2012, Petitioner had the right, power or authority to have those funds returned to him. See http://www.state.nj.us/dobi/bulletins/blt09_06.pdf.

The analogy that the purchase of a \$173,815.79 annuity is the same as the purchase of refrigerator is incongruent. This is not a return policy for a retailer as suggested by Petitioner but a safeguard for a highly regulated insurance product. The law does not require that a refrigerator seller "make reasonable efforts to obtain and record information about the suitability of the product for the solicited consumer and the consumer's acknowledgement of the information recorded." http://www.state.nj.us/dobi/bulletins/blt09_12.pdf. Nor is the sale of refrigerators governed by a statute that specifically states there must be at minimum a 10 day rescission period. See N.J.A.C. 17B:25-39 which requires annuity contracts to include "provisions or has attached to it a notice stating that during a period of not less than 10 days after the date the initial owner receives the annuity, the owner may cancel the annuity and receive from the insurer a prompt refund of any account value of the annuity, including any contract fees or other charges, by mailing or otherwise surrendering the annuity together with a written request for cancellation."

The funds that would eventually be converted into the irrevocable annuity were, in essence, held in trust for Petitioner until the time the 10 day period lapses. During that time the annuity company is statutorily required to hold the funds and promptly return the funds to the owner upon receipt of a request for cancellation. Petitioner's position creates a limbo where individuals can remove funds from an account and receive nothing tangible in return. Rather Union County's position that when the funds are used to purchase another asset, that asset is countable accords with state and federal law. N.J.A.C. 10:71-4.1(c). See also 42 U.S.C.A. § 1382b; 20 C.F.R. 416.1201(a); 42 U.S.C.A. § 1396r-5(c)(5); Chalmers v. Shalala, 23 F.3d 752, 754, 755 (3d Cir. 1994).

Petitioner's tendering of the funds to the annuity company falls within this definition as he retained the legal right to have those funds returned to him. Additionally, Petitioner provided a letter from Phoenix Annuity that clearly states he retained that to those funds until May 3, 2012. This prevents eligibility as of May 1, 2012. Having determined Petitioner was ineligible April 1, 2012 due to the funds held in trust by the annuity company, he is likewise ineligible as of May 1, 2012 as evidence by the letter from Phoenix.

Since the 25 month and 2 day penalty, which Petitioner readily accepts, can only begin on the date he is otherwise eligible and with his failure to establish eligibility for April and May 2012 as described above, the remaining terms of the August 7, 2014 outcome notice from Union County come into play. That notice states that "during the months of 05/01/12 through 07/31/14, [Petitioner] would not be income eligible until after the 31st day of the month." The Medically Needy Spend Down worksheet was attached to that August 7, 2014 notice but is not in the record nor did Petitioner contest it at the

fair hearing. If Petitioner did not meet Medically Needy spend down during those months, his eligibility and transfer penalty cannot be established until he does.¹ Additionally the notice also states that in June and July 2014, Petitioner's resources exceeded \$50,000 which would continue to render him ineligible. Again that was not contested at the hearing. It appears that this record indicates that the earliest date that Petitioner could be eligible so as to start the penalty is August 1, 2014, if he spent down the excess resources during July 2014. It is unclear if Petitioner reapplied for benefits during the pendency of the hearing. However, I hereby RETURN the matter to Union County to align this FAD with any further applications filed by Petitioner.


THEREFORE, it is on this 10th day of MARCH 2017,

ORDERED:

That the Initial Decision in this matter is hereby REVERSED;

That Petitioner's application was properly denied; and

That Union County will align this FAD with any pending or future applications by Petitioner.


Meghan Davey, Director
Division of Medical Assistance
and Health Services

¹ The Medically Needy Program is premised on using unpaid medical bills to reduce income to establish eligibility. N.J.A.C. 10:70-6.2. As Medically Needy sets payment for long term care "on the day following the day that spend down is met," absent an unpaid bill for services that could be covered by Medicaid, Petitioner would not be otherwise eligible for benefits. See Medicaid Communication No. 95-11 Instructions at 4.