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

T.H.	
PETITIONER,	**ADMINISTRATIVE ACTION**
v.	**FINAL AGENCY DECISION**
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND ESSEX COUNTY BOARD OF SOCIAL SERVICES,	**OAL DKT. NO. HMA 10908-2016**
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 March 13, 2017 in accordance with an Order of Extension.

The matter arises regarding the termination Petitioner's Medicaid eligibility related to her income and ownership of life insurance policies and the imposition of a penalty due to her November 2015 transfer of her home to her daughter. The former

created a period of incorrectly paid benefits and the latter created a transfer penalty. Petitioner had been receiving Medicaid benefits under the home and community based waiver program since May 2014.[1] It is undisputed that her income at that time exceeded the income limit for this Medicaid program. The applications filed in 2013 and 2014 stated that her pension check was about $600 and paid monthly. This is incorrect. Petitioner pension was paid bi-monthly and, while her exact income is not clear, her November 2015 application signed by her daughter states her total monthly income was $2,387. In 2015, the income limit was $2,199. In 2014, the income limit was $2,163. See Medicaid Communication No.14-02 and No. 15-03.

By way of background, as of December 1, 2014, New Jersey received federal authority to cease covering nursing home services under Medically Needy and permit applicants, who needed institutional level of care in a nursing facility, an AL facility or home and had income in excess of $2,163 (currently $2,199) to place the excess income in a QIT, also known as a Miller Trust, and obtain Medicaid benefits. See 42 U.S.C. § 1396p(d)(4)(B). Prior to this, individuals with income above that amount were not eligible for home and community based services. Petitioner's income renders her ineligible until December 2014. By placing the excess income in a QIT, Essex County is able to exclude that amount from the income limit. Unless and until she placed funds in excess of $2,199 amount into the QIT, her income would be considered over the limit. This was not done until November 2015.

[1] I note that, beginning July 1, 2014, participants in the home and community based waivers, which are now encompassed by the Comprehensive Medicaid Waiver, were enrolled in the Managed Long Term Services and Supports (MLTSS) program through a Medicaid managed care organization (MCO). The MLTSS program provides comprehensive services and supports to help eligible beneficiaries remain living in the community rather than in a nursing facility.

Petitioner's claim that she was misled by Essex County regarding the QIT is curious to say the least. At some point prior to November 20, 2015, Petitioner enlisted an attorney to engage in Medicaid planning by executing a deed in favor of her daughter as well as a caregiver agreement to pay her daughter $2,913 a month for rent and "caregiving" services. R-2 at 9. This elder law attorney also advised to set up a QIT. ID at 5. This counters her claim that the agency failed to advise her as Petitioner had access to legal counsel specifically related to Medicaid planning.

The Initial Decision found that the "lump sum back payment" made in July 2016 represents excess resources for 15 months back to May 1, 2015[2] and "resolves that over-income issue." ID at 6. It does not. Petitioner appears to have made a voluntary repayment to DMAHS of $3,037.13. P-1 at 2. This does not obviate the fact that from December 2014 through November 2015 when she set up the QIT, her income was in excess of the limit. Prior to December 2014, QIT's were not permitted and Petitioner's income could not have exceeded $2,163.

It is a bright line rule that even a dollar over income limit creates ineligibility. Petitioner needed to meet the income standard of $2,163 in 2014 and $2,199 in 2015 and the resources standard of $2,000. See Medicaid Communication No.14-02 and No. 15-03. Her monthly income of $2,387 rendered her ineligible until December 2014 at which time she could only establish eligibility if she placed income in excess of $2,163 into the QIT each and every month from December 2014 forward. Petitioner cannot be eligible prior to that date as her income exceeded the standard. Income eligibility can

[2] The Initial Decision states that the July 2016 payment of $3,037.13 represented 15 months of Petitioner's income that exceeded the income standard back to May 2015. While immaterial to her claim, I believe this date should be May 2014 which begins Petitioner's first period of eligibility. Fifteen months prior to July 2016 is April 2015. As Petitioner had been placing her excess income into the QIT since the end of November 2015; there was no excess income for the nine months prior to July 2016.

only be established when she set up and funded the QIT. Thus, I FIND that Essex County properly found Petitioner to be over the income limit from May 2014 through November 2015.

However, Petitioner was also ineligible during this time period due to excess resources. Petitioner failed to disclose her ownership of life insurance policies which had a total cash value of $8,874.94 in the 2013, 2014 or 2015 applications. See R-1. This amount renders her ineligible as her resources exceeded $2,000. It appears that this was resolved in May 2016 when the policies were used to fund an irrevocable funeral trust. While the trust was established with $500 in September 2015, she failed to convert the insurance policies until May 9, 2016. As noted above, Petitioner had sought legal advice in or around September 2015 to set up the funeral trust as well as other Medicaid planning. The failure to remove her access to these policies until May 2016 permits her to establish eligibility as of June 1, 2016. As such I FIND that the correct period of ineligibility was from May 1, 2014 through May 30, 2016 and the overpayment should be adjusted to reflect this.

The Initial Decision found that "petitioner's legal interest in her excess income and resources were effectively terminated no later than November 2015, even if there were some "I's" to be dotted and "t's" to be crossed." ID at 10. That is not how Medicaid works. "Medicaid is an intensely regulated program." H.K. v. Div. of Med. Assistance & Health Servs., 184 N.J. 367, 380 (2005). DMAHS is obligated to administer New Jersey's Medicaid program in a fiscally responsible manner to ensure that the limited funds available are maximized for all program participants, Dougherty v. Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 91 N.J. 1, 4-5 (1982); Estate of

DeMartino v. Div. of Med. Assistance & Health Servs., 373 N.J. Super. 210, 217-19 (App. Div. 2004), certif. denied, 182 N.J. 425 (2005).

The statement that Essex County failed to assist Petitioner and, thus, raises equitable considerations does not recognize that the courts in New Jersey have rarely applied the doctrine of estoppel to governmental entities absent a finding of malice, Cipriano v. Department of Civil Serv., 151 N.J.Super. 86, 91, 376 A.2d 571 (App.Div.1977), particularly when estoppel would "interfere with essential governmental functions." Vogt v. Borough of Belmar, 14 N.J. 195, 205, 101 A.2d 849 (1954). Where public benefits are concerned, courts have gone farther to recognize that "[e]ven detrimental reliance on misinformation obtained from a seemingly authorized government agent will not excuse a failure to qualify for the benefits under the relevant statutes and regulations." Gressley v. Califano, 609 F.2d 1265, 1267 (7th Cir.1979). See also Office of Personnel Management v. Richmond, 496 U.S. 414, 110 S. Ct. 2465, 110 L.Ed. 2d 387 (1990) and Johnson v. Guhl, 357 F. 3d 403 (3rd Cir. 2004).

The Initial Decision also states that Petitioner was not "properly or actually noticed . . . that her 2014 approved Medicaid case was being terminated." ID at 10. The notice dated March 9, 2016 terminated her for being over resources. Those resources were owned by her the entire time she was eligible and, with the excess income, form the bases for the incorrectly paid benefits. Thus, I FIND she was properly noticed.

Finally, the Initial Decision turns to the transfer of Petitioner's share of her home to her daughter. This was done in November 2015 with an elder law attorney who also invented a rental and care agreement. R-2 at 9. The ALJ found that Petitioner had provided proof that the transfer of the home fell under the caregiver exemption. For the

reasons that follow, I hereby REVERSE that determination as it does not comport with the law or the record.

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).

Petitioner became an institutionalized individual in 2014, when she was found eligible for home and community based waiver services. The documents she provided fail to show she met the caregiver exemption. As Petitioner became an institutionalized individual in May 2014, the two year period required by the exemption began in May 2012. The record is devoid of mention of Petitioner's condition at that time. The doctor's letters are hearsay and are all dated January 2016 or later. None of the letters set forth any dates for the care Petitioner's daughter provided and one letter does not even indicate that Petitioner is her patient. P-1 at 7. The statements by Petitioner's attorney indicate that she began attending an adult day care 2-3 days a week in April 2013. P-6. When the staff noticed her "health was markedly declining", the staff applied for Medicaid. This would appear to indicate that the decline began in April 2013 which would not permit Petitioner's daughter to meet the two year requirement prior to May 2014.

Additionally, I FIND that the recitation of care on page 3 of the Initial Decision is of recent origin. The matter was heard on October 31, 2016 and Petitioner's daughter stated she had just completed "four months of chemotherapy." ID at 3. The May 10, 2016 letter from an oncology group talks about Petitioner receiving a "reduce dose chemotherapy" in the future. P-6 at 7. It appears that the hearsay doctor's notes may support the daughter's description of her current condition in 2016 but nothing in the record addresses Petitioner's condition from May 2012 to May 2014. As stated above the period at issue is May 2012 through May 2014 for Petitioner's daughter to have demonstrated that she provided are that exceeded 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). I FIND she has not done so.

Since May 2014 Petitioner has been receiving home and community-based services through Medicaid including adult day care from 9:00 to 1:00 five days a week and then Personal Care Assistance (PCA) hours from 1:30 to 4:30. ID at 4. While Petitioner's daughter may have supplemented her care, it was the services Petitioner received through and paid for by the Medicaid program that allowed her to remain at home and avoid an institutional facility.

The Appellate Division has addressed this very issue and held that an individual, receiving caregiving services paid for by Medicaid, cannot transfer her home to her daughter under the exemption. "Although appellant cared for her mother during the relevant time period, the key factor that permitted G.B. to remain in her home until 2009 was the Medicaid assistance she received through the services provided by the [Medicaid program]." Estate of G.B. (deceased) by M.B.-M., as Executor v. DMAHS and Somerset County Board of Social Services, Docket No. A-5086-12T1, decided September 15, 2015, slip op. at 8. In that case, G.B. received 30 hours of caregiving services a week under a Medicaid waiver program that permitted her to remain at home. Id. at 7. Despite the finding by the ALJ that the daughter "tended her mother in decline for many years, and assisted her mother in avoiding institutionalization," the Appellate Division upheld the Final Agency Decision that overturned that finding and held that G.B. was not entitled to a caregiver exemption. Id. at 5. The same holding applies here.

Additionally the ALJ found that Petitioner had been cared for by her daughter "for almost four years." ID at 9. The hearing was held in October 2016 and the decision was written in December 2016. Giving the every benefit of the doubt and using a full four years from those dates, Petitioner's care would have begun either October 2012 or

December 2012. Neither of those dates extends back to the required May 2012 date to meet the two year requirement.

As Appellate Division noted in reviewing the caregiver exemption, the "receipt of Medicaid benefits is not automatic. Understanding the State's need to conserve limited financial resources to assure monies are paid to those who meet the circumscribed eligibility requirements, we will not merely assume the criteria was satisfied. Rather, proof must be forthcoming specifically establishing each requirement of the exception to obtain its application." M.K. v. DMAHS and Burlington County Board of Social Services, Docket No. A-0790-14T3, decided May 13, 2016, slip op. at 17.

In M.K., the court had "no doubt [the daughter] extended love and care to her mother that added to M.K.'s comfort, welfare and happiness during those years when she was living in her own home, despite significant medical challenges". M.K., Slip op. at 17. However, during the two years prior to entering a nursing home, M.K. moved in with her son for a period of five months. The court found that as ""Medicaid is an intensely regulated program' H.K., supra, 184 N.J. at 380, and its requirements are strictly enforced;" a five month break in "the mandated two-year time period for care" meant that the caregiver exemption had not been met. M.K., Slip op. at 15. Likewise, taking Petitioner's own recitation of facts to be true and extending the time to a full four years rather than the "almost four years" as found by the ALJ, the care the daughter expended simply did not stretch back the full two-year period. With every benefit of the doubt, the care was at best five months (May 2012 to October 2012) or six months (May 2012 to December 2012) too short. Thus, I FIND that Petitioner did not meet the caregiver exemption.

Although not addressed in the Initial Decision, the record contains a care agreement entered into by Petitioner and her daughter in November 2015. This was done in the course of consulting with an elder care attorney. Petitioner had been receiving Medicaid benefits since May 2014 and would have had her care and needs managed by her managed care organization. The agreement which required Petitioner to pay her daughter $2,913 a month for rent and "caregiving" service also exceeds Petitioner's total income. R-21 at 9. It is unclear if Petitioner made any payments under this agreement but there is no evidence that the $1,233 is fair market value for the rent or that the $1,680 for caregiving services is fair market value and/or duplicative of Medicaid benefits. Essex County should review Petitioner's financial transactions surrounding this agreement and take any appropriate action.

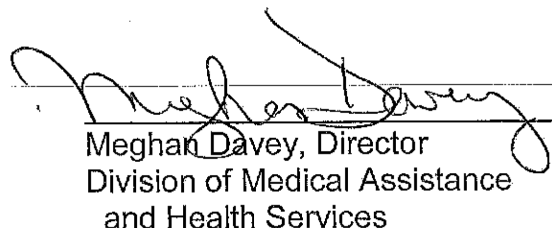
THEREFORE, it is on this 10th day of MARCH 2017

ORDERED:

That the Initial Decision is hereby REVERSED as set forth above;

That the transfer penalty duration is modified to begin on June 1, 2016 and run for 16 months and 19 days; and

That Essex County shall take necessary steps to implement this FAD.



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