



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049
(609) 586-6584

A copy of the administrative law judge's
decision is enclosed.

This decision was mailed to the
parties on OCT 2 2008.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 14-08

AGENCY DKT. NO. N/A

E.S.,

Petitioner,

v.

**DIVISION OF MEDICAL ASSISTANCE AND
HEALTH SERVICES AND MONMOUTH
COUNTY BOARD OF SOCIAL SERVICES,**
Respondent.

John W. Callinan, Esq., for petitioner

Margaret A. Freeman, Esq., for respondent

Record Closed: September 12, 2008

Decided: September 30, 2008

BEFORE STEPHANIE M. WAUTERS, ALJ:

PROCEDURAL HISTORY

The case was transmitted on January 4, 2008 to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Petitioner originally filed a motion for summary decision, but later withdrew the motion. The agency retained legal representation. A joint stipulation of facts was submitted on

July 14, 2008. Briefs were submitted. Attorneys provided oral argument at the hearing on September 12, 2008, upon which the record was closed.

QUESTION PRESENTED

Are the nursing home payments made by petitioner's son for petitioner's benefit countable resources for the purposes of determining Medicaid eligibility and the start date of a transfer penalty period?

BRIEF ANSWER

Yes, all of the payments made by petitioner's son are countable resources. Prior to the son's payments, respondent properly calculated a transfer penalty based on the total gifted amount. However, as both parties considered a large portion of the funds "returned," those funds had to have been spent down before petitioner could be considered financially eligible for benefits again. Although it was unnecessary to do so, respondent correctly formulated a new, shorter penalty period that would begin at a later date with the same eligibility date that was originally determined. Though petitioner makes numerous arguments for an earlier eligibility date, all of them are without merit. Accordingly, respondent's determination regarding petitioner's Medicaid eligibility start date is upheld and petitioner's appeal is dismissed.

FACTUAL DISCUSSION

Petitioner, E.S., is a 91 year old woman who has resided at Arnold Walter Nursing Home since April 2004. On September 6, 2006, petitioner transferred \$42,053 to her son as a gift, thereby making her financially eligible for Medicaid as of October 1st. Petitioner then applied for Medicaid benefits on September 20, 2006. Respondent, based on the amount of the gift, calculated a 6 month and 9 day transfer penalty that would run from October 1, 2006 and result in an eligibility start date of April 9, 2007. Using the gifted assets, petitioner's son pre-paid Arnold Walter Nursing Home on a month-to-month basis for petitioner's care. These payments were made using the gifted

funds from October 1, 2006 to February 1, 2007 and covered petitioner's care through the entire month of February. Petitioner and respondent agreed that the payments made by petitioner's son to the nursing home (\$30,488) would be considered his returning the assets to petitioner, assets which would otherwise have been treated as having been transfer for less than fair market value and subject to the original penalty period.

The remaining funds (\$11,605) were treated as an improper transfer and both parties agreed that a reduced transfer penalty of one month and nine days of ineligibility would be applied to petitioner's Medicaid application. Respondent decided that petitioner became financially eligible on March 1, 2007 and that the penalty period would delay her eligibility till April 9. Petitioner disagreed, arguing that the penalty period should have been applied beginning on October 1, 2006 and that the benefits should be available to her beginning on March 1st.

LEGAL DISCUSSION

I. Medicaid Eligibility and Transfer Penalties

There are a number of requirements that an applicant must establish before becoming eligible for Medicaid. Primarily, an applicant must meet both medical¹ and financial² requirements. To be financially eligible for the Medicaid program, the countable resources of an individual may not exceed \$2,000.00. N.J.A.C. 10:71-4.5(c). Additionally, if an individual transfers assets for less than fair market value within the applicable look-back period,³ he or she will be assessed a penalty period of ineligibility. 42 U.S.C.S. § 1396p(c); N.J.A.C. 10:71-4.10. The transfer penalty is calculated by

¹ See N.J.A.C. 10:71-3.10 through -3.12.

² See N.J.A.C. 10:71-4.1 through -5.9.

³ The current look-back period according to New Jersey regulations is 36 months. N.J.A.C. 10:71-4.10(a). However, the Federal Medicaid rules require a look back period of 60 months for transfers made after February 8, 2006. 42 U.S.C.A. § 1396p(c)(1)(B)(i). New Jersey has yet to update its regulations accordingly, though there is no difference in the application of the rules at this time as fewer than 36 months have passed since February 6, 2006.

dividing the uncompensated portion of the transferred resource by the monthly average cost of nursing home care in this State. N.J.A.C. 10:71-4.7(b)(4); 10:71-4.10(c). Transfers of resources within the stated time frame are presumed to be improperly motivated to obtain Medicaid eligibility, a presumption which can be rebutted by proofs "that the assets were transferred exclusively (that is, solely) for some other purpose" than Medicaid qualifications. N.J.A.C. 10:71-4.10(j). Federal law now requires that the penalty period begin on the later of three dates: 1) the first day of a month during which assets have been transferred for less than fair market value; 2) the first day of a month after which assets have been transferred for less than fair market value; or 3) the date when the individual becomes eligible for medical assistance and would be receiving institutional level care based on an approved application if not for the penalty. 42 U.S.C.S. § 1396p(c)(1)(D)(ii); See EB v. Div. of Med. Assistance and Health Servs., HMA 2289-07, Initial Decision (Aug. 23, 2007), adopted, Director (Nov. 19, 2007) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

The Federal rule plainly states that the penalty period would begin under the third option when the applicant 1) is eligible for medical assistance under the state plan, and 2) would otherwise be receiving home- or community-based services based on an approved application for such care, 3) but for the application of the penalty period. O.B. v. DMAHS, HMA 06519-07, Initial Decision (April 9, 2008) <<http://lawlibrary.rutgers.edu/oal/search.html>>.⁴ "Simply stated, the penalty start date is the point in time when the applicant is eligible and would otherwise be receiving services, but for the penalty period." Ibid. In other words, the penalty period does not begin when the applicant is merely financially eligible or merely medically eligible, but rather when the applicant meets all of the requirements for Medicaid eligibility under the State plan.

Here, petitioner was medically eligible for Medicaid benefits after she had completed pre-admission screening on April 9, 2004. Petitioner's finances precluded her from being financially eligible until October 1, 2006 when her accounts fell below the \$2,000 maximum. However, petitioner only became financially eligible in October due to her transfer of \$42,053 for less than fair market value to her son. When petitioner

⁴ No Final Decision has been publicly reported on this matter as of the date of this decision.

applied for Medicaid, respondent properly viewed the entire \$42,053 as an improper transfer and calculated a six month and nine day penalty, running from the date petitioner would otherwise have been receiving Medicaid benefits but for the penalty period (October 1, 2006). Petitioner's benefits start date was thus determined to be April 9, 2007. Accordingly, petitioner's appeal should fail and respondent's actions should be upheld. Although petitioner raises numerous arguments, some of which even respondent incorrectly gives credit to, these arguments are without merit.

II. "Returned" Assets

The main force behind the dispute between the parties arises from the treatment of the payments made by petitioner's son for petitioner's nursing home care. Petitioner cites the rulemaking history associated with amendments made to the treatment of trusts and the transfer of assets under the New Jersey Medicaid program for the proposition that "[t]ransfers where the assets are spent for the medically necessary care of the transferor are exempted" from the imposition of a penalty period. 33 N.J.R. 2196.⁵ Petitioner points out, and respondent agrees, that "[w]hen a part of the asset has been returned, the penalty can be modified proportionally." Ibid. Though neither of the cited statements are contained in any statute or regulation, state or federal, both parties agree that these principles apply to the Medicaid program as it has been established in this state.

Having made numerous payments for the "medically necessary care" of the petitioner (or transferor), petitioner argues that her son (the transferee) effectively returned those assets to her, that these assets are exempt from being considered countable resources, and that the penalty period should be modified accordingly. Petitioner's argument is without merit. Petitioner misinterprets the language in the comments section that states that "[t]ransfers where the assets are spent for the medically necessary care of the transferor are exempted." 33 N.J.R. 2196. It is clear that this language only pertains to situations where the transferred assets were spent

⁵ Response to Comment 7.

for the care of the transferor during the look back period but **prior** to the application for Medicaid.⁶ The reasoning behind the "exemption" is that transferred assets that are ultimately used for the applicant's care are not truly transferred. This does not mean, however, that once a penalty period has been established all payments made with the transferred assets are "exempt." If petitioner's interpretation of the language were correct, respondent would be forced to reassess penalty periods every time a transferee spent even the smallest amount of the transferred assets for the transferor's care. More importantly, petitioner's reasoning undermines the entire purpose of instituting a penalty period in the first place. Medicaid exists "to provide medical assistance to persons whose income and resources are not sufficient to meet the costs of necessary care and services." L.M. v. Division of Medical Assistance & Health Services, 140 N.J. 480, 484 (1995), (quoting Atkins v. Rivera, 477 U.S. 154, 156, 106 S.Ct. 2456, 91 L.Ed. 2d 131 (1986)). Consistent with the recognized policy that Medicaid is designed for needy individuals, the Legislature has directed that Medicaid benefits "shall be last resource benefits." N.J.S.A. 30:4D-2. Medicaid will not provide for those who intentionally make themselves financially destitute and who, if not for the improper transfer, would not otherwise have been receiving benefits.

Petitioner essentially argues that if respondent were to issue a penalty period based on the improper transfer of assets and the transferee used those same assets for the transferor's care, the penalty period must be reassessed and reduced accordingly. In addition, petitioner argues that the newly reduced penalty period must run from the original date of eligibility, regardless of the fact that the assets spent are considered "returned" to the transferor. If this were the case and petitioner's argument were upheld, it would result in extremely absurd situations and applications of the Medicaid rules which would allow applicants to defraud the system and transfer assets without fear of a penalty. Unfortunately, respondent appears to have agreed that the payments towards petitioner's care by the petitioner's son constituted "returned assets." Respondent reassessed the penalty period by subtracting the amount of "returned" assets (\$30,488 paid to nursing home) from that of the original transfer (\$42,053).

⁶ For example: "A" transfers \$10,000 to her son, "B". B spends \$5,000 of this gift for A's nursing home care. Afterwards, A applies for Medicaid. The CBOSS will only apply a penalty period based on a gift of \$5,000, as half of the original gift was used for the medically necessary care of A.

Though respondent was not required to recalculate the penalty in this way, the new penalty period of one month and nine days resulted in the same start date as before, April 9, 2007.⁷ However, petitioner argues that the penalty period should not run from March 1, 2007, which was the first of the month for which petitioner's son no longer paid petitioner's care. Instead, petitioner argues the reduced penalty period should run from the initial date of financial eligibility, October 1, 2006. Again, petitioner's argument is without merit.

The following is an example of petitioner's logic put to use, for illustration purposes only. Assume person "A" is medically eligible for Medicaid, and that the average cost of nursing home care in New Jersey is \$10,000. In December 2006, "A" gives "B" \$40,000 as a gift. "A" then applies for Medicaid benefits with a start date of January 1, 2007. The County Board assesses a 4 month penalty period (\$40,000 divided by \$10,000 per month) with an eligibility start date of May 1, 2007. After the penalty period begins, "B" then spends \$10,000 of the gifted money for "A" to be in a nursing home for the month of January. Under petitioner's logic, this money is considered "returned" and is exempt from the penalty period. Further, the penalty must be reassessed as the non-exempt gift now totals only \$30,000 instead of \$40,000. Accordingly, the new penalty period should be 3 months, running from January 1 and with a new start date of April 1 instead of May 1. Taking the example further, "B" spends another \$10,000 for the care of "A", this time for the month of February. Again, under petitioner's logic the penalty period is reduced, this time to two months (\$20,000 non-exempt gift remaining divided by \$10,000 per month). The new penalty again runs from January 1 with a new eligibility start date of March 1, 2007. Since "B" has already paid for February, "A" begins receiving benefits March 1st and has no break in coverage. "B," however, has only spent \$20,000 of the original \$40,000 gift before Medicaid picked up the bill for "A". If petitioner's argument was correct, "B" would have received an uncompensated \$20,000 gift from "A", having only spent half of the original \$40,000 gift for the care of "A". Thus "A" would have successfully transferred assets for the sole

⁷ Although it is not clear why respondent agreed to treat the assets used to pay for petitioner's care as "returned" or "exempt," it is likely that they did so because the penalty period was calculated to be the same no matter how the funds were treated.

purpose of qualifying for Medicaid, contrary to the stated purpose and policies of the Medicaid program.

Although the facts in this case are not quite as neat and clear cut as those used in the example above, if petitioner's argument were given credence than petitioner's son would see a windfall of \$11,605 that should otherwise have been spent down by petitioner before her becoming eligible for Medicaid. Petitioner attempts to have it both ways. Either the entire amount of the assets transferred should be calculated against petitioner and a penalty period assessed accordingly, or the \$30,488 spent for petitioner's care should be considered "returned." If the assets were "returned," then petitioner cannot have been financially eligible for Medicaid on October 1, 2006. The issue would then be at what point were the returned assets appropriately spent down. If petitioner's son wrote the last check towards petitioner's care after 2/1/07,⁸ then petitioner's eligibility date, absent the transfer penalty, would have inarguably been 3/1/07 with a start date of 4/9/07. However, petitioner paid the nursing facility for the month of February 2007 prior to 2/1/07, which would arguably lead to an eligibility date of 2/1/07 and a start date of 3/9/07. It is only after all of this, assuming that petitioner's tortured logic has so far been correct, at which there is then an issue as to whether the money pre-paid to the nursing home can be considered "available" to petitioner.

III. Availability of Assets

The resource criteria and eligibility standards apply to all applicants and recipients, and participation in the Medicaid Only program must be denied or terminated if an individual's resources exceed certain prescribed limits. N.J.A.C. 10:71-4.1(a); N.J.A.C. 10:71-4.5(c) and (d). A resource is defined as any real or personal property which is owned by the applicant and which could be converted to cash to be used for his/her support and maintenance. N.J.A.C. 10:71-4.1(b). In order to be considered in the determination of Medicaid eligibility the resource must also be "available." 42 U.S.C.A. §1396a(a)(17)(B); N.J.A.C. 10:71-4.1(c). A resource is considered available to an individual when the person has the right, authority, or power to liquidate real or

personal property, or his or her share of it or if, in accordance with the provisions of N.J.A.C. 10:71-4.6. N.J.A.C. 10:71-4.1(c)1 and 2. As in all welfare eligibility determinations, the Medicaid Special applicant bears the burden of establishing program eligibility. Alford v. Somerset County Welfare Board, 158 N.J. Super. 302, 310 (App. Div. 1978).

Petitioner argues that the payments made by petitioner's son were not available to petitioner and should therefore not be held against her for the purpose of determining the transfer penalty period. First, this argument ignores the fact, discussed above, that the assets cannot be considered both "returned" yet at the same time "unavailable." At best, petitioner could argue that the last payment, made at the end of January 2007, reduced petitioner's assets prior to 2/1/07 and thus petitioner's Medicaid start date should be 3/9/07.⁹ Petitioner claims that the pre-payment of a nursing bill does not constitute an improper transfer of assets and that the money held by the nursing home until it is actually due is not an available resource to be held against petitioner. Respondent, however, correctly points out that "resources held in the institution (for example, trust funds, personal needs accounts)" are counted against an applicant's resource maximum in determining financial eligibility and are considered "available." N.J.A.C. 10:71-4.5(d). Respondent claims that by pre-paying the nursing home, the funds are held by the home for petitioner's care until the services are actually rendered. In other words, despite the fact that the payment for the month of February was made before 2/1/07, the funds were not expended until after 2/1/07 and could be considered available to petitioner until those services were rendered.

Petitioner responds that the act of pre-paying for services does not create an available resource such as a when a patient opens a private spending account with a facility, but instead the pre-payment would at best entitle her to a claim for a refund if she hypothetically left the facility. Petitioner argues that this right to a refund could only be considered an illiquid resource as petitioner would not have the ability to liquidate it

⁸ Checks drawn prior to the first of the month are considered to reduce the account balance at the time the check is written, not when they are cashed. N.J.A.C. 10:71-4.1(e)(2).

⁹ Petitioner argues that the start date should be 3/1/07 not 3/9/07, but this argument assumed her prevailing on the issues discussed in Part II, supra.

within 20 days.¹⁰ However, all liquid and non-liquid resources unless specifically excluded are considered countable in the determination of Medicaid Only eligibility. N.J.A.C. 10:71-4.1(b); N.J.A.C. 10:71-4.2(a). Petitioner points to an internal policy that respondent will give an applicant three months to liquidate illiquid funds before counting the resource against the applicant. Medicaid Comm. No. 87-26, Sept. 24, 1987. Even if this policy were binding on respondent, the only effect, hypothetically, would be that petitioner would be granted benefits one month early and then receive a break in her coverage three months later when the "illiquid" funds were liquidated and her accounts rose above the \$2,000 limit. As petitioner correctly points out, however, all of this is purely speculative and inapposite to the underlying matter. The purpose of the refund scenario is just to illustrate the fact that the assets held by the nursing home due to the pre-payment of petitioner's bill are not legally due to the nursing facility until after services have been rendered.

The following scenario demonstrates petitioner's argument put to effect. "A" enters a nursing home on January 1, 2007. Prior to being admitted, the nursing home requires the entire year to be paid in advanced to a total of \$120,000. "A" exhausts her total assets to make the payment, reducing her accounts below \$2,000. "A" then applies for Medicaid benefits, requesting that the benefits begin on January 1, 2007, the moment at which her assets have fallen below the resource maximum. If petitioner were correct, then Medicaid must begin payments resulting in two possible scenarios. Either the nursing facility is now double paid for A's care (paid once by "A" herself, then again by Medicaid), or A's \$120,000 is returned to her. If the money is returned, A is no longer financially eligible for Medicaid. Petitioner's logic is circular in the most tortured way and cannot stand.

CONCLUSION

The underlying issue in this case is whether petitioner made a transfer of assets for less than fair market value and what the appropriate penalty period should be. |

¹⁰ The parties dispute whether Arnold Walter issues refunds within 20 or 30 days. This issue is inapposite to the underlying matter at hand, and for the purpose of this discussion it will be assumed in petitioner's favor that refunds are not made within 20 days.

CONCLUDE that respondent correctly calculated a six month and nine day penalty to run from October 1, 2006 to April 9, 2007. I also **CONCLUDE** that even if the penalty was recalculated due to petitioner's son "returning" assets by paying for petitioner's care, respondent was still correct in applying a one month and nine day penalty from March 1, 2007 to April 9, 2007 based on the amount of gifted assets held by the son and the determination that petitioner's assets were not spent down until March 1. Finally, I **CONCLUDE** that petitioner's attempt at classifying the resources held by Arnold Walter Nursing Home is a red herring and is inapposite to the matter at hand.

ORDER

Based on the foregoing, I **ORDER** that petitioner's appeal of the date of the Medicaid eligibility is hereby **DENIED**.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within seven days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, Mail Code #3, PO Box 712, Trenton, New Jersey 08625-0712**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 30, 2008
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Date Received at Agency:

September 30, 2008

Mailed to Parties:

[Signature]

[Signature]

OFFICE OF ADMINISTRATIVE LAW

OCT 2 2008

DATE

cmo

APPENDIX
EXHIBITS IN EVIDENCE:

Joint:

J-1 Stipulation of Facts

For Petitioner:

None

For Respondent:

None

WITNESSES

For Petitioner:

None

For Respondent:

None