SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5886-09T3

V.M.,

Petitioner-Appellant,

v.

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

Respondents-Respondents.

Submitted May 4, 2011 - Decided May 23, 2011

Before Judges Cuff and Simonelli.

On appeal from the Division of Medical Assistance and Health Services.

Law Office of Donald D. Vanarelli, attorneys for appellant (Donald D. Vanarelli, of counsel; Mr. Vanarelli and Whitney W. Bremer, on the brief).

Paula T. Dow, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Julie Hubbs, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner V.M. appeals from the final agency decision of the Director (Director) of Division of Medical Assistance and Health Services (DMAHS) adopting the initial decision of the

Administrative Law Judge (ALJ), which affirmed the decision of respondent Union County Board of Social Services (UCBSS) to deny V.M.'s application for Medicaid benefits. We affirm.

We derive the following facts from the evidence presented to the ALJ.

In January 2002, V.M. appointed two of his children, P.M. and C.S., as co-attorneys under a Power of Attorney (POA). The POA authorized the children to control their father's financial interests, sell his real and personal property, and execute his tax returns, among other things. Except for debts and obligations incurred by the children in connection with the POA, there was no provision for their compensation for services rendered to or expenses incurred pursuant to the POA.

In July 2007, V.M. was admitted to a nursing home and rehabilitation center. In August 2007, he applied for nursing home Medicaid benefits and was approved as of July 1, 2007. He will likely require nursing home care for the rest of his life.

V.M.'s home in Westfield was sold in January 2008. He received net proceeds of $202,747.63. In May 2008, P.M. and C.S. filed a verified complaint and order to show cause (OTSC) in the Superior Court, Chancery Division seeking an order authorizing payment for various services they allegedly rendered to their father pursuant to the POA, such as house and yard

maintenance and repair, grocery shopping, the paying of bills and running of errands, transportation to family gatherings on birthdays and other events, and the preparation for and negotiation of the sale of V.M.'s home. In total, they sought $102,555 for services rendered at the rate of $15 per hour, and $24,400 for expenses allegedly incurred on V.M.'s behalf between January 22, 2002 and March 2008. They offered no details about the dates and times they rendered the services and who performed which services, and provided no receipts for expenses incurred. Also, they did not advise the court that V.M. was receiving Medicaid benefits at the time of the OTSC, and they did not serve the verified complaint and OTSC on DMAHS or UCBSS.

In a June 11, 2008 order, the court granted P.M.'s and C.S.'s unopposed application and authorized the payment of $102,555.55 for services rendered and $24,400 for expenses incurred. This left a balance from which V.M. paid $2798.24 for attorney's fees, $10,000 for prepaid funeral expenses and $63,775.32 for medical care and nursing home bills.

P.M. and C.S. reported the sale of V.M.'s home to UCBSS, and in September 2008, UCBSS terminated V.M.'s Medicaid benefits effective June 30, 2008, because his resources exceeded eligibility limits at that time. UCBSS notified V.M. that he

could re-apply for benefits when his resources were reduced to approximately $10,000.

V.M. re-applied for nursing home Medicaid benefits pursuant to the Medically Needy Program (MNP), N.J.A.C. 10:70-1.1 to -7.3. UCBSS denied the application because V.M. had transferred $126,955 in contravention of N.J.A.C. 10:71-4.10, that is, he transferred assets to his children within the thirty-six month look-back period for less than fair market value (FMV). V.M. appealed, and the matter was transferred to the Office of Administrative Law for a hearing.

The matter proceeded summarily before the ALJ. V.M. argued that (1) the court-ordered transfer issued pursuant to N.J.S.A. 46:2B-8.12 rebutted the presumption established by N.J.A.C. 10:71-4.10(b)6.ii that any transfer of resources during the look-back period was done in order to obtain Medicaid eligibility; (2) the court-ordered transfer barred DMAHS from denying him Medicaid eligibility; and (3) DMAHS's decision is inconsistent with N.J.S.A. 46:2B-8.12. The ALJ rejected these contentions and affirmed the denial of V.M.'s application. She noted that DMAHS neither received notice of the verified complaint or OTSC nor had an opportunity to be heard, and the issue of V.M.'s Medicaid eligibility was not before the court.

Citing N.J.A.C. 10:71-4.10(k)2, the ALJ found the court-ordered transfer did not rebut the presumption established by N.J.A.C. 10:71-4.10(b)6.ii. First, the order was not conclusive rebuttal evidence but merely one factor, among others, that DMAHS could consider. Second, the court was acting on the children's request, not V.M.'s, to authorize payments to themselves, not to others such as judgment creditors or lienholders, as N.J.A.C. 10:71-4.10(k)2 contemplates.

The ALJ also found P.M. and C.S. rendered services for free at the time they were provided between January 2002 and July 2007, and the children did not request compensation until their father received the proceeds from the sale of his home. The ALJ concluded V.M. failed to provide "credible documentary evidence pre-existing the delivery of the care services" to rebut the presumption established by N.J.A.C. 10:71-4.10(b)6.ii that care services provided by a child or relative for free at the time they are rendered are presumed to have been provided for no compensation.

The ALJ further found N.J.S.A. 46:2B-8.12 did not bar "DMAHS from determining that [the court-ordered] transfer was a transfer exclusively made for a purpose other than to make V.M. Medicaid eligible." She found there was no conflict between N.J.S.A. 46:2B-8.12 and N.J.A.C. 10:71-4.10(b)6.ii because the

court proceeding did not involve a determination of V.M.'s Medicaid eligibility. She concluded the Medicaid regulations merely required V.M. to rebut the presumption established by N.J.A.C. 10:71-4.10(b)6.ii. She also concluded that

> the facts support that the court-ordered transfer was made to circumvent Medicaid law and make V.M. Medicaid eligible. The services that were provided occurred between 2002 and 2007; they were provided then without compensation. There was no pre-existing documentation addressing compensation for those services. The timing and sequence of the events including the [OTSC] filed in Superior Court lead one to conclude that the transfer of assets occurred for the purpose of making V.M. Medicaid eligible.

The Director adopted the ALJ's initial decision. He found that V.M. "was paying $15 an hour for 'services' that occurred between 2002 and 2007 with no documentation other than a certification by his children[,]" which contained "no break down of who performed what 'service'." Thus, he concluded V.M. did not prove he received FMV for the services rendered.

The Director also rejected V.M.'s contention that P.M. and C.S. were no longer simply acting as his children but were acting as his agents instead and performed services that "'went above and beyond those usually expected of children[.]'" The Director found that very little of the services for which the children sought compensation at $15 per hour were specified

duties under the POA. Rather, the types of services for which the children sought compensation, such as "[t]ransportation and [d]inner at [c]hildren's [h]omes[,]" are services not specified as a duty under the POA, but rather, are things "often expected of children and done out of a desire to spend time with a parent."[1] He emphasized the children apparently considered "that most, if not all, of their social interactions with their father were . . . billable events that they expected to be paid for . . . ."

Regarding the expenses, the Director found they were not supported by receipts or any other documentation, and there was no proof that V.M. did not previously pay them. The Director also questioned the validity of the expenses, noting that

> each expense is a multiple of 10 with not a single number in the ones column or after the decimal point to represent cents. If these were true purchases, the numbers would not be as neat and tidy since purchased items, such as lights and motion detectors, are taxable and create odd numbers.

In addition, the Director rejected as "specious" V.M.'s contention that because the transfer was court-ordered, it must be accepted as "bona fide" and not for the purpose of becoming

[1] P.M. and C.S. sought $30,000 for 2000 hours they spent providing "transportation and dinner at children's homes" services, and $7800 for 520 hours for errands to the post office, stores, and social and family events.

Medicaid eligible. He found the children had sought to have the money transferred out of V.M.'s control at a time V.M. was no longer Medicaid eligible because of the sale of his home and "[t]he fact that there is a court order does not change the fact that the transfer was done to qualify for Medicaid or that there is no evidence that [V.M.] received [FMV] for the services under a pre-existing agreement." This appeal followed.

On appeal, V.M. contends the court-ordered transfers constituted payment for services rendered and expenses incurred by the co-agents under the POA rather than transfers for less than FMV. Thus, according to V.M., the Director's decision that the transfers were for less than FMV pursuant to N.J.A.C. 10:71-4.10 conflicts with N.J.S.A. 46:2B-8.12, which permits such payment. Alternatively, V.M. contends even if the transfers were uncompensated transfers for less than FMV, he rebutted the presumption they were made in order to establish Medicaid eligibility through evidence that the transfer was made pursuant to court order and the POA and detailed time records kept by P.M and C.S. preexisted the delivery of services. V.M. further contends there is no evidence the $24,400 transfer for expenses was for less than FMV.

Our role in reviewing the decision of an administrative agency is limited. In re Anthony Stallworth, ___ N.J. ___, ___

(2011) (slip op. at 13). We will affirm an agency decision so long as it is supported by the evidence, even if we may question the wisdom of the decision or would have reached a different result. Id. at 14-15.

"Moreover, a 'strong presumption of reasonableness attaches to [an agency decision].'" In re Carroll, 339 N.J. Super. 429, 437 (App. Div.) (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993), aff'd, 135 N.J. 306 (1994)), certif. denied, 170 N.J. 85 (2001). We will reverse an agency's judgment if we find that the agency's decision is "'arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole.'" Stallworth, supra, slip op. at 14 (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)).

In determining whether agency action is arbitrary, capricious or unreasonable, we must examine:

> "(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors."
>
> [Stallworth, supra, slip op. at 14 (quoting In re Carter, 191 N.J. 474, 482-83 (2007)).]

Furthermore, "[i]t is settled that '[a]n administrative agency's interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to our deference.'" E.S v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 355 (App. Div. 2010) (second alteration in original) (quoting Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001)).

This matter concerns Medicaid eligibility. It does not concern the POA or P.M.'s and C.S.'s right to compensation as V.M.'s attorneys-in-fact. Accordingly, the statutes and regulations applicable to a determination of V.M.'s Medicaid eligibility, not N.J.S.A. 46:2B-8.12, apply in this case, and we find no conflict between them in the context of this case.

That being said, we note that the purpose of the New Jersey Medical Assistance and Health Services Act (Act), N.J.S.A. 30:4D-1 to -19.1, is "to provide medical assistance, insofar as practicable, on behalf of persons whose resources are determined to be inadequate to enable them to secure quality medical care at their own expense[.]" N.J.S.A. 30:4D-2. Eligibility for medical assistance is governed by regulations adopted in accordance with the authority granted to the Commissioner of the New Jersey Department of Human Services (DHS). N.J.S.A. 30:4D-

6.6, -7, -15. DHS, through DMAHS, implements and administers the Medicaid program by those regulations. N.J.S.A. 30:4D-5.

V.M. applied for benefits from the MNP. The MNP "extends limited Medicaid program benefits to certain groups of medically needy persons whose income and/or resources exceeds the standards for the Medicaid program but are within the standards for the [MNP], or whose income exceeds the standards for the [MNP] but is insufficient to meet their medical expenses . . . ." N.J.A.C. 10:70-1.1(a). The resource eligibility requirements for the MNP are the same as those for the Medicaid Only Program (MOP), N.J.A.C. 10:71-1.1 to -9.5, except that the limit for individuals for the MNP is $4000 instead of $2000. Compare N.J.A.C. 10:70-5.1, with 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 . . . 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). "Both liquid and nonliquid resources" must be considered unless specifically excluded under N.J.A.C. 10:71-4.4(b). N.J.A.C. 10:71-4.1(b). A resource cannot be transferred or disposed of for less than FMV[2]

[2] FMV is defined as

> [a]n estimate of the value of an asset, based on generally available market
> (continued)

during or after the thirty-six month "look-back" period[3] before the applicant becomes institutionalized or applies for Medicaid. 42 U.S.C.A. § 1396p(c)(1); N.J.A.C. 10:71-4.10(a). If an applicant has made such a transfer, he or she will be subject to a period of ineligibility determined in accordance with 42 U.S.C.A. § 1396p(c)(1)(E). N.J.A.C. 10:71-4.10(a), (m)1. Under the MNP's transfer of resources provision, transfers made on or after June 1, 2001, such as the one here, are governed by N.J.A.C. 10:71-4.10.[4] N.J.A.C. 10:70-5.4(b). Thus,

> [a]n individual shall be ineligible for . . . the Medicaid program if he or she (or his or her spouse) has disposed of assets at less than [FMV] at any time during or after the 36 month period, or the 60 month period

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(continued)

> information, if sold at the prevailing price at the time it was actually transferred. Value shall be based on the criteria for evaluating assets as found in N.J.A.C. 10:71-4.1(d).
>
> [N.J.A.C. 10:71-4.10(b)6.]

[3] On February 8, 2006, the Deficit Reduction Act of 2005 enlarged the look-back period to sixty months. Deficit Reduction Act of 2005, S. 1932, 109th Cong. (2006); 42 U.S.C.A. § 1396p(c)(1)(B)(i). However, many New Jersey counties continue to use the thirty-six month period in calculating ineligibility. E.S., supra, 412 N.J. Super. at 344 n.1.

[4] The language in the MNP refers only to a transfer of "resources." N.J.A.C. 10:70-5.4. However, under the MOP, N.J.A.C. 10:71-4.7 is entitled "Transfer of resources" and N.J.A.C. 10:71-4.10 is entitled "Transfer of assets." We shall use "resource" and "asset" interchangeably.

> in the case of a transfer to a trust, immediately before: . . . the date the individual applies for Medicaid as an institutionalized individual.
>
> [N.J.A.C. 10:71-4.10(a)2.]

Congress contemplated applicants seeking court approval of the transfer of their assets. The term "assets" includes

> all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action . . . by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse[.]
>
> [42 U.S.C.A. § 1396p(h)(1)(B).]

Thus, notwithstanding a court order, transfers made pursuant to a court order must be closely examined to determine if an ineligibility period applies. N.J.A.C. 10:71-4.10(b)6.ii governs such examination, and provides as follows:

> In regard to transfers intended . . . [or] allegedly intended to compensate a friend or a relative for care or services that were provided in the past, care and services provided for free at the time they were delivered shall be presumed to have been intended to be delivered without compensation. Thus, a transfer of assets to a friend or relative for the alleged purpose of compensating for care or services provided free in the past shall be presumed to have been transferred for no compensation. This presumption may be rebutted by the presentation of credible documentary evidence preexisting the

> delivery of the care or services indicating the type and terms of compensation. Further, the amount of compensation of the [FMV] of the transferred asset shall not be greater than the prevailing rates for similar care or services in the community. That portion of compensation in excess of the prevailing rate shall be considered to be uncompensated value.

A transfer of resources for less than FMV creates a presumption that the assets were transferred to establish Medicaid eligibility. N.J.A.C. 10:71-4.10(i)1. To rebut that presumption, the applicant must present "convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The "convincing evidence" language nevertheless still requires proof by a preponderance of the credible evidence. E.F. v. Div. of Med. & Health Servs., HMA 2676-00, Initial Decision (Dec. 12, 2000), http://lawlibrary.rutgers.edu/oal/search.html.

There are several factors that, "while not conclusive, may indicate that the assets were transferred exclusively for some purpose other than establishing Medicaid eligibility . . . ." N.J.A.C. 10:71-4.10(k). One such factor is where there has been a "[c]ourt-ordered transfer (when the court is not acting on behalf of, or at the direction of, the individual or the individual's spouse)[.]" N.J.A.C. 10:71-4.10(k)2 (emphasis added). If the applicant fails to rebut the presumption, he or

she will be subject to a penalty period, which is determined by calculating "the number of months equal to the total, cumulative uncompensated value of all assets transferred by the individual, on or after the look-back date, divided by the average monthly cost of nursing home services in the State of New Jersey . . . ." N.J.A.C. 10:71-4.10(m)1.

V.M.'s children are relatives who provided services to him in the past for free at the time the services were delivered. Thus, the presumption established by N.J.A.C. 10:71-4.10(b)6.ii applies and must be rebutted by preexisting "credible documentary evidence . . . indicating the type and terms of compensation." N.J.A.C. 10:71-4.10(b)6.ii. No such evidence exists in this case. Although there is a preexisting POA, it is silent about the type and terms of compensation for the services or expenses the children seek here. Accordingly, V.M. failed to rebut the presumption that the transfers were made in order to establish Medicaid eligibility.

The court order does not change this result. The court entered the order at the children's request and for their benefit, not V.M.'s benefit. Accordingly, N.J.A.C. 10:71-4.10(k)2 does not apply.

Finally, we will not disturb the Director's decision regarding the expenses. We defer to his expertise and

interpretation of N.J.A.C. 10:71-4.10(b)6.ii to include the transfer of assets for reimbursement of expenses incurred in the calculation of the penalty period and his credibility determination on this issue.

Affirmed.