



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 1998-13

AGENCY DKT. NO. 11A

M.W.,

Petitioner,

v.

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

Respondents.

Linda Ershow-Levenberg, Esq., for petitioner (Fink Rosner Ershow Levenberg
attorneys)

Anamaria Bercik, Esq., and Brian P. Trelease, Esq., for respondents (Assistant
County Counsel, Union County, attorneys)

Division of Medical Assistance and Health Services, for respondents,
appearing without a representative pursuant to N.J.A.C. 1:1-5. (a)

Record Closed: July 12, 2013

Decided: July 31, 2013

BEFORE TAHESHA L. WAY, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, M.W., appeals the denial of Medicaid benefits by respondents Division of Medical Assistance and Health Services (DMAHS) and Union County Board of Social Services (UCBSS). By letter of April 24, 2013, the UCBSS informed M.W. that her Medicaid Only Program application was denied on the basis of resource ineligibility in connection with an annuity valued at \$80,010.58. The issue is whether the subject annuity is exempt under Medicaid regulations.

M.W. appealed and the matter was transmitted to the Office of Administrative Law where it was filed on February 27, 2013, for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. After the May 10, 2013, hearing date was adjourned at the request of M.W., a hearing occurred on June 28, 2013, and the record closed upon receipt of post-hearing submissions.

FACTUAL DISCUSSION

Based upon a consideration of the totality of the evidence presented, both testimonial as well as documentary, I **FIND** the following material **FACTS** in this case.

M.W. is an eighty-seven-year-old woman who has resided at the Clark Nursing Home in Clark, New Jersey since August 23, 2006. She is physically unable to care for herself as the result of suffering a stroke. (J-1.) Around November 19, 2012, an in-person Medicaid application was made on behalf of M.W. through her attorney with UCBSS caseworker Kenyatta Greene.¹ (J-1.) Although M.W.'s application did not specify her ownership of an annuity valued at \$80,010.58 purchased with the Croatian Fraternal Union of America, the annuity contract was included in M.W.'s application package. (J-8.) The annuity's effective date is September 5, 2012, with eleven equal payments of \$7,280.97 made to M.W. on the fifteenth of the respective month. Lastly, the State of New Jersey-DMAHS is the primary remainder beneficiary with M.W.'s son,

¹ Greene has worked as a UCBSS caseworker since March 2000, and M.W.'s specific authorized agent was Irene Quesada.

M.A.W., who also serves as her attorney-in-fact, deemed the secondary beneficiary. (J-8; J-9; J-10.)

Greene subsequently reviewed M.W.'s application with his supervisor, Nancy Moharter.² The annuity was not considered an uncompensated transfer of assets, but Moharter ultimately determined M.W. resource ineligible given the annuity's value and the requisite resource regulations included in the State's Medicaid Manual (1994). That is, although the annuity's contract indicated it is irrevocable, non-assignable, and actuarially sound, Moharter considered the annuity a countable resource as it was felt M.W. purposely made the \$80,010.58 unavailable several months prior to her application. Moharter also acknowledged that the annuity cannot be converted to cash or loan, but reiterated the denial was appropriate given the non-explanation as to why M.W. chose to purchase an annuity instead of opting to pay for her nursing home care. Therefore, on April 24, 2012, the UCBSS denied M.W.'s application effective September 1, 2012, due to having an annuity valued at \$80,010.58, which exceeds the regulatory resource standard of \$2,000.³ (J-7.)

LEGAL DISCUSSION

Medicaid is a program established by Title XIX of the Social Security Act. 42 U.S.C.A. §§ 1396 *et seq.* A cooperative state and federal effort, its purpose is "to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services." L.M. v. Div. of Med. Assistance and Health Servs., 140 N.J. 480, 484 (1995) (quoting Atkins v. Rivera, 477 U.S. 154, 156, 106 S. Ct. 2456, 2458, 91 L. Ed. 2d 131, 137 (1986)). New Jersey's Medicaid program derives its authority from the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5, and the regulations promulgated pursuant thereto, N.J.A.C. 10:49 *et seq.* Consistent with the recognized policy that Medicaid is designed for needy individuals, the Legislature has directed that Medicaid benefits "shall be least resource benefits notwithstanding any provisions contained in contracts, wills, agreements or

² Moharter has worked for the UCBSS for thirty years, and has been a supervisor for ten.

³ For record purposes, during the time of M.W.'s application it was disclosed that M. V. had gifted \$43,190.53 to M.A.W. on August 31, 2012.

other instruments." N.J.S.A. 30:4D-2. In the application process for benefits, the applicant bears the burden of establishing program eligibility. Alford v. Somerset County Welfare Bd., 158 N.J. Super. 302, 310 (App. Div. 1978).

Regulations governing New Jersey's Medicaid Only Program are found at N.J.A.C. 10:71-1.1 to -9.5. The resource criteria and eligibility standards set forth in those regulations apply to all applicants and recipients, and benefits will 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), (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); see also 42 C.F.R. § 416.1201(a)(1) (noting that a resource is considered available if the individual has the right, authority and power to liquidate the property); the Supplemental Security Income Programs Operations Manual System (POMS) § SI 01110.115 (indicating that assets are not resources if an individual does not have the right, authority, or power to liquidate them)⁴.

Unless specifically excluded, all liquid and non-liquid resources 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). The kinds of resources that qualify as excludable are limited. N.J.A.C. 10:71-4.4. Among the specified excludable resources are the "value of resources which are not accessible to an individual through no fault of his or her own," including "irrevocable trust funds." N.J.A.C. 10:71-4.4(b)(6); see also 42 U.S.C.A. § 1382b. Moreover, in deciding whether a resource or payment stream is an available resource, an agency is mandated by federal law to utilize the resource standards of the SSI program and may not evaluate Medicaid eligibility on income or resources that is more restrictive than that used by SSI. 42 U.S.C.A. § 1396a(a)(10)(A)(ii); 42 U.S.C.A. § 1396a(a)(10)(C)(i)(III).

The Deficit Reduction Act of 2005 (DRA) provided new detailed requirements with respect to the treatment of annuities purchased on or after February 3, 2006, for

⁴ SSI POMS serves as the operating instructions for processing of Social Security claims.

the purposes of determining Medicaid eligibility. In particular, a description of any interest the applicant has in an annuity must get disclosed. 42 U.S.C.A. § 1396p(e)(1). Additionally, a transfer penalty shall not be imposed for the purchase of an annuity if the state is named the first primary beneficiary, the annuity has actuarially sound payments, is irrevocable, and non-assignable. 42 U.S.C.A. § 1396p(c)(1)(F) and (G).⁵ Yet, a state could deny eligibility on the basis of income or resources derived from an annuity. 42 U.S.C.A. § 1396p(e)(4).

Additionally, annuities have been considered countable resources in the context of Medicaid eligibility. In N.M. v. Division of Medical Assistance and Health Services, 405 N.J. Super. 353 (App. Div. 2009), the Appellate Division held that under 42 U.S.C.A. §1396p(e)(4), a state may consider the income or resources derived from an annuity purchased for the benefit of a community spouse as a countable resource for Medicaid eligibility purposes. Id. at 364-365. In so ruling, the N.M. court acknowledged the parties' stipulated fact that the subject annuity's stream of income could be sold on the open market thus making it an available resource. Additionally, in D.N. v. Division of Medical Assistance and Health Services, HMA 6394-06, Initial Decision (April 5, 2007), adopted, Commissioner (June 11, 2007), <<http://njlaw.rutgers.edu/collections/oal/>>, the annuity was treated as a countable resource for Medicaid eligibility given it was uncontroverted that the annuity could be converted to cash.

However, annuities have not been deemed countable resources. In James v. Richman, 547 F.3d 214 (3d Cir. Pa. 2008), the Department of Welfare's treatment of the annuity as an available resource was reversed. Although pre-ERA 2001, the Third Circuit underscored the SSI regulations which still provide that an available resource is considered property that an individual could liquidate; the community spouse James lacked this power. It was further emphasized that an irrevocable, non-assignable annuity did not fit the federal statutory definition of an available resource. Id. at 219. More recently, in Weatherbee v. Richman, 351 Fed. Appx. 786 (3d Cir. Pa. 2009) it was held

⁵ Subsequent to the passage of the DRA, the Federal Center for Medicare and Medicaid Services (CMS), which is the agency within the Federal Department of Health and Human Services administering and overseeing Medicaid, issued Bulletin 2007-09, seeking to clarify certain aspects of the treatment of annuities, including sections (F) and (G) of the DRA.

that the income from a compliant annuity for a community spouse could not be considered a resource under the DRA. While it was submitted that a state could deny Medicaid eligibility under U.S.C.A. § 1396p(e)(4), the Third Circuit noted that treating a DRA compliant annuity's income as an available resource was contrary to the treatment of annuities under the Medicaid Act.

In the case at bar, the annuity contract clearly indicates that it is irrevocable and inalienable with the State named as the first remainder beneficiary. It also reflects that the annuity is actuarially sound and cannot be converted into cash or loan, which the Board's witness acknowledged. Further, the Board submitted that in its assessment of M.W.'s application, a transfer penalty was not imposed in light of the foregoing. Accordingly, an analysis of this case is governed by 42 U.S.C.A. § 1396p(e)(4) as the annuity complies with the requirements of 42 U.S.C.A. § 1396p(e)(1) and 42 U.S.C.A. § 1396p(c)(1)(F) and (G).

In support of the adverse determination the Board emphasizes that 42 U.S.C.A. § 1396p(e)(4) permits states to consider annuities as countable resource. However while this may be exact, based on the facts and applicable law, I **CONCLUDE** that the Board's denial of M.W.'s Medicaid application was improper. The Board relies upon N.M. and D.M. Yet this analysis is flawed in that the instant annuity is fundamentally distinct given it cannot be converted into cash or a loan. Even more, one cannot overlook the fundamental tenet(s) of federal statutes/regulations, 42 U.S.C.A. § 1396p(e)(4), and state regulations, which define a resource countable if it has the ability to get liquidated and converted into cash or a loan. Additionally, although James was pre-DRA and Weatherbee can only serve as guidance, both consistently recognize that an annuity's treatment as a resource is contrary to federal law when the individual does not have the power to liquidate it. Logically, M.W.'s annuity cannot be considered countable resource and thus an analysis of the Board's ancillary non-exempt resource argument under N.J.A.C. 10:71-4.4(b)(6) is of no consequence.

For completeness of the record, counsel for M.W. also seeks an award of attorney's fees under 42 U.S.C.A. § 1983 and § 1988 asserting M.W.'s rights under the federal Medicaid program have been deprived. Case law establishing the three-prong

test to be a prevailing party has been presented, but none addressed it in the context of otherwise compliant annuities improperly considered available resources. Thus absent this proper showing, this claim need not get addressed in this forum.

ORDER

It is therefore **ORDERED** that the decision to deny Medical eligibility to M.W. is **REVERSED**.

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, P.O. 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.

July 31, 2013

DATE



TAHESHA L. WAY ALJ

Date Received at Agency:

07/31/13

Date Mailed to Parties:

08/02/13

/rr

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

Kenyatta Greene

Nancy Moharter

EXHIBITS

Joint:

- J-1 M.W.'s Medicaid Application, November 19, 2012
- J-2 Verifications Needed Form, November 19, 2012
- J-3 Special Information for Nursing Home Form, November 19, 2012
- J-4 Affidavit of Understanding Form, November 19, 2012
- J-5 Estate Recovery of Acknowledgment Form, November 19, 2012
- J-6 Declaration of Citizenship/Legal Alien Status Form, November 19, 2012
- J-7 Denial notice to M.W., April 24, 2013
- J-8 M.W. annuity contract, effective September 5, 2012
- J-9 M.W. annuity application, August 30, 2012
- J-10 Durable Power of Attorney