



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 13634-15

AGENCY REF. NO. 0310031912

A.F.,

Petitioner,

v.

**BURLINGTON COUNTY BOARD
OF SOCIAL SERVICES,**

Respondent.

Jane M. Fearn-Zimmer, Esq. for petitioner (Rothkoff Law Group, attorneys)

Catherine Kadar, Fair Hearing Liaison, for respondent pursuant to N.J.A.C. 1:1-5.4(a)3

Record closed: February 2, 2018

Decided: February 22, 2018

BEFORE SARAH G. CROWLEY, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, A.F., appeals the decision by respondent, the Burlington County Board of Social Services (BCBSS) denying her application for a caregiver's exemption for her son pursuant to N.J.A.C. 10:71-4.10(d). Petitioner requested a Fair Hearing, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on

August 5, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was held on February 2, 2018, and the record closed on that date.

TESTIMONY

For respondent:

Catherine Kadar testified on behalf of the BCBSS. She is a paralegal specialist for the BCBSS and is familiar with the facts in this matter. BCBSS determined that the petitioner's son, J.F. did not meet the criteria for caregiver's exception under N.J.A.C. 10:71-4.10(d). This finding was predicated on A.F.'s husband being listed on A.F.'s medical and/or insurance documents as primary care giver. In addition, they found that the fact that the son worked excluded him from being a caregiver under the regulations¹. Ms. Kadar also referred to one record which listed A.F. as being "alert and oriented" and thus, implied that notwithstanding the 2007 diagnosis of Alzheimer's disease, since she appeared alert and oriented at one appointment, she did not need nursing home level of care. Ms. Kadar's continued to maintain that since J.F. worked, he did not meet the criteria for a caregiver exemption. She did no analysis of the level of care he was providing in the home and did not dispute that he was in fact living in the home for the requisite period of time. There was no allegation that J.F.'s father was able to care for her or what care, if any he provided; except that he was present during at least one doctor's visit. Finally, Ms. Kadar did not dispute or challenge any of the medical documentation regarding A.F. or her husband, T.F.

For petitioner:

J.F. testified on behalf of the petitioner. He is the son of A.F. and T.F. He testified that he moved into his parents' house in 2007, to help them due to both of their failing health. His mother was diagnosed with Alzheimer's in 2007. She also had osteoarthritis and had difficulty walking. She had taken several falls in the home. His father was also in failing health, and had significant mobility issues. His father was

¹ The denial was predicated in part of the caregiver's employment status. This issue was challenged in federal court in *Fisher v. Connelly*, No. 1:16-cv-00720 (D.N.J.) That litigation was resolved after the County withdrew its position barring any employment by a caregiver. The instant matter was placed on the inactive list during the pendency of the federal court litigation.

unable to care for this mother and could not care for himself either. However, he was very proud and wanted to be there for her. He would come to doctors' appointments when he could. However, he was diagnosed in 2012 with Parkinson's Disease. He also had back surgery in 2013, and suffered badly from COPD. J.F.'s father was diagnosed with prostate cancer in 2013, and died of lung cancer in 2015. He was in very poor health and was unable to care for his mother between 2012 and when he died. His dad struggled with ambulation due to a lumbar condition and was a heavy smoker. He testified that he took his mother to almost all her doctor's appointments and had the help of his sister on occasion. The records from all the doctors confirm that his dad was in poor health and was unable to help with any of mom's daily living activities. Therefore J.F. moved into the home in 2007 to help care for them.

His mother needed assistance with all her daily living activities, including bathing and toileting. He eventually got a commode in her room, as she had taken many falls trying to get the bathroom in the middle of the night. He would have to get up and assist her. He had placed alarms on her bed, walker, front door and other locations in the house where she could call for him at any time if she needed assistance. He never left her alone in the house and his father was unable to provide proper care for her due to his own ongoing medical issues. He took both of them to their medical appointments and he made sure he was there to talk to the doctors. His father would come, but was not capable of managing her medical care. He did all the cooking and cleaning and took care of all the home maintenance.

Dr. James Bonner

Dr. Bonner was qualified as an expert by the petitioner's attorney. Dr. Bonner reviewed all the medical records from A.F. and T.F. Dr. Bonner testified that within a reasonable degree of medical certainty A.F. required skilled nursing level care from 2011 to 2015, when she was admitted to the nursing home. He also reviewed the medical records of T.F. and confirmed that he had Parkinson disease and had ambulation issues as early as 2012. He also had back surgery in 2013, COPD, prostate cancer and finally, lung cancer that he died from in early 2015. He testified

that based upon his review of the medical records that T.F. was unable to care for his wife and that A.F. needed assistance with all daily life activities from 2011 to 2015. She would not have been able to remain in her home during this period without the assistance of her son, J.F. He reviewed the report for all the doctors and referred to the report for Dr. Mest, who was A.F.'s doctor which stated that she needed skilled nursing level of care for at least two years prior to A.F. being institutionalized.

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that all of the witnesses were honest and sincere in their testimony, and the above testimony is FOUND as **FACT**.

LEGAL ANALYSIS AND CONCLUSION

The Medicaid program is a cooperative federal-state venture established by Title XIX of the Social Security Act. 42 U.S.C.A. §1396 et seq. (the Medicaid Act). It "is designed to provide medical assistance to persons whose income and resources are insufficient 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) See Mistrick v. Division of Medical Assistance & Health Services, 154 N.J. 158, 165 (1998).

Although a State's participation in the Medicaid program is optional, those that elect to participate must comply with the requirements imposed by the Medicaid Act and the regulations adopted by the Secretary of the United States Department of Health and Human Services (HHS). Harris v. McRae, 448 U.S. 297, 301, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980); Mistrick, supra, 154 N.J. at 166. In exchange for administering a Medicaid program developed in accordance with the parameters dictated by federal law and regulations, the federal government contributes financial assistance to defray part of the costs of providing certain medical services. Bergen Pines Hosp. v. Dept. of Human Services, 96 N.J. 456, 462 (1984). A participating State must devise and submit a State plan for approval by the Secretary of HHS. 42 U.S.C.A. §1396a. That plan must, among other things, comply with the provisions of the Medicaid Act

governing the transfer of assets and the treatment of certain trusts and include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives" of the Medicaid Act. 42 U.S.C.A. §1396a(a)(17)(A); 42 U.S.C.A. §1396a(a)(18). An individual will be entitled to receive Medicaid benefits if he fulfills the criteria established by the State in which he lives. Schweiker v. Gray Panthers, 453 U.S. 34, 36-37, 101 S. Ct. 2633, 2636, 69 L. Ed. 2d 460, 465 (1981).

New Jersey has elected to participate in the Medicaid program through the enactment of the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.1. As permitted by the Medicaid Act, New Jersey has opted to provide Medicaid coverage to "optionally categorically needy" individuals receiving long term care in a medical institution through the Medicaid Only program. Mistrick, supra, 154 N.J. at 167. Consistent with the recognized policy that Medicaid is designed for needy individuals, the Legislature has directed that Medicaid benefits "shall be last resource benefits notwithstanding any provisions contained in contracts, wills, agreements or other instruments." N.J.S.A. 30:4D-2.

Medicaid eligibility is based upon an applicant's income and resources, and participation in the Medicaid Only Program will be denied where the total value of an individual's resources exceeds \$2,000. N.J.A.C. 10:71-4.5(c) and (d). A penalty of ineligibility is assessed for transfers of assets, including all income and resources, for less than fair market value which occur during or after the look-back period which, in this instance, is sixty months. N.J.A.C. 10:71-4.10(a) and -4.10(b)(9)(iv). The penalty period is the period of time during which payment for long-term care level services is denied, N.J.A.C. 10:71-4.10(m), and is 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] . . ." N.J.A.C. 10:71-4.10(m)1.

A conveyance made during the look-back period raises a rebuttable presumption that the resource was transferred for the purpose of establishing Medicaid

eligibility. N.J.A.C. 10:71-4.10(j)1.; H.K. v. State of New Jersey, Department of Human Services, Division of Medical Assistance and Health Services, 184 N.J. 367, 380 (2005). An applicant may rebut the presumption that assets were transferred to establish Medicaid eligibility and it is the applicant's burden of proof by convincing evidence to show that the asset was transferred exclusively for some other purpose. N.J.A.C. 10:71-4.10(j). Evidence that the transfer was appropriate may include the applicant's reasons for transferring the asset, attempts to dispose of the asset at fair market value, reasons for accepting less than the fair market value for the asset, plans for supporting herself after the transfer, and relationship to the person to whom the asset was transferred. N.J.A.C. 10:71-4.10(j)(1). While not conclusive, other factors may also indicate that the assets were transferred exclusively for some purpose other than to establish Medicaid eligibility for long-term care services, including "the occurrence after transfer of the asset of: the traumatic onset of disability . . ." N.J.A.C. 10:71-4.10(k)(1)(i) (emphasis added).

The presumption is successfully rebutted only upon a showing that the transfer was made exclusively for some other purpose. N.J.A.C. 10:71-4.10(l)(1). If the applicant had some other purpose for transferring the asset, but establishing Medicaid eligibility appears to have been a factor in his or her decision to transfer, the presumption shall not be considered successfully rebutted. N.J.A.C. 10:71-4.10(l)(2). In addition to the foregoing exceptions, an exception exists for a son or daughter who resides in the home and cares for an aging parent. The exception provides and follows:

(d) [A]n individual shall not be ineligible for an institutional level of care because of the transfer of his or her 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 the title to the home was transferred to:

4. A son or daughter of the institutionalized individual . . . who was residing in the individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual and who has provided care to such individual who permitted the individual to reside in the home rather than in an institution or facility.

i. The care provided by the individual's son or daughter for the purposes of this subchapter shall have exceeded normal personal support activities (for example, routine transportation and shopping). The individual's physical or mental condition shall have been such as to require special attention and care. The care provided by the son or daughter shall have been essential to the health and safety of the individual and shall have consisted of activities such as, but not limited to, supervision of medication, monitoring of nutritional status, and insuring the safety of the individual.

N.J.A.C.10:71-4.10(d).

The issue in this matter is whether the care provided by J.F. meets the requirement of the regulations. The respondent maintains that the care provided failed to satisfy the criteria of N.J.A.C. 10:71-10(d). The respondent position is predicated on the fact that J.F. worked at home and that A.F.'s husband was listed as her primary care giver on insurance and medical documents. It is unclear if the Board reconsidered this issue after the federal court decision. The respondent had no other basis for determination that J.F. did not provide nursing home level of care for his mother for the two years preceding her entering the nursing home, and in fact, conceded that they did no such analysis. The respondent did not dispute or challenge the medical records which indicate that A.F. was diagnosed with Alzheimer's in 2007 and that her husband had significant medial issues, which prevented him from providing care to his wife.

In the case of V.P. v. Dept. of Human Services, N.J. Super., App. Div., No. A-2362-09T1, (Sept. 2, 2011), the Appellate Division upheld the A.L.J. in reversing the disqualification and granting the caregiver exemption to a child caregiver. The Board denied the application, in part, because the sole caretaker left the parent home while he was at work. The Appellant Division found that such a factor did not disqualify one from meeting the caregiver's exception. The facts in V.P. are analogous to the within case. In V.P., the petitioner's son had provided similar care for an aging mother. He ensured proper safety measures were in place for both of his parents and never left them alone. Similarly, in this case, J.F. worked. However, he worked from home as a consultant and worked on his own hours so he could care for his parents whenever they needed

him. He assisted his mother in all her daily living activities, including dressing, grooming, bathing, toileting and providing meals. He also took care of all the shopping, laundry, her doctor's appointments and everything relating to the home.

Petitioner has shown by a preponderance of the credible evidence that the caregiver's exemption should have been granted. Petitioner's son, J.F. epitomizes the dutiful, caring, loving son who gave up all his free time to take care of his mother as well as his father, both of whom were unable to care for themselves. J.F. was sincere and credible in his testimony and earnestly spoke of the failing health of both his mother and father and his quest to keep them in their home for as long as possible. This is the type of care that exemplifies the reason the caregiver exemption was drafted. I have **FOUND** that J.F. cared for his mother with a nursing home level of care for the two years preceding her entering the nursing home in June 2015, and I **CONCLUDE** that he has successfully rebutted the necessary presumption for the application of the caregiver's exception.

I **CONCLUDE** that the petitioner's son provided her with all the activities of daily living. This included bathing, grooming, toileting, helping her in and out of bed, provided all her meals, taking her to all her doctor's visits and took care of the home. I **CONCLUDE** that J.F. was indeed providing the petitioner with nursing home level of care from June 2012, to June 2015, when he could no longer care for her in the home.

I **CONCLUDE** that the caregiver's exemption set forth in N.J.A.C. 10:71-4.10(d) should be granted.

ORDER

Based upon the foregoing, I **ORDER** that the denial of the caregiver's exemption is hereby **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, 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.



February 22, 2018 _____

DATE

SARAH G. CROWLEY ALJ

Date Received at Agency:

February 22, 2018 (emailed)

Mailed to Parties:

February 22, 2018 (emailed)

/mel

APPENDIX

List of Witnesses

For Petitioner:

J.F., petitioner's son
Dr. James Bonner

For Respondent:

Catherine Kadar, Fair Hearing Liaison

List of Exhibits

For Petitioner:

- P-1 Medicaid Determination
- P-2A April 8, 2016 Email
- P-2B Certification of Tabitha White
- P-3 Marcella Center Admission Face Sheet
- P-4 Pre-Admission Screening
- P-5 Federal Court Order
- P-6 T.F.'s Medical Records, Dr. Nabila for February 20, 2012, September 29, 2014 and September 26, 2014
- P-7 T.F.'s Medical Record, Dr. Singh for October 4, 2013
- P-8 T.F.'s Medical Records, Dr. Singh for August 8, 2013
- P-9 T.F.'s Medical Records, Dr. Atlas for April 13, 2013
- P-10 T.F.'s Medical Records, Dr. Budak for September 21, 2014
- P-11 T.F.'s Medical Records, Dr. Budak for January 8, 2015