State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. HMA 12343-07

K.R.,

Petitioner,

v.

SOMERSET COUNTY BOARD OF SOCIAL SERVICES,

Respondent.

Lawrence A. Friedman, Esq., appearing on behalf of petitioner

Frederick H. Allen III, Esq. (Maura, Savo, Camerino & Grant, attorneys), and **Susan Soliwoda**, Supervisor, Medicaid Unit, appearing pursuant to N.J.A.C. 1:10-5.4(a)(3), for respondent

Record Closed: July 24, 2008 Decided: August 25, 2008

BEFORE **LAURA SANDERS**, CHIEF ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent Somerset County Board of Social Services (the Board) by notice dated November 13, 2007, denied Medicaid Only coverage to petitioner K.R. on grounds his resources exceed the regulatory limits. K.R. argues that the resources cited by the Board belong to his brother. Additionally, K.R. argues that even if the

resources are attributable to him under the Medicaid regulations, he owes more than those resources to his brother under employment and use-and-occupancy agreements signed in 2005.

K.R. timely requested a fair hearing, and the Division of Medical Assistance and Health Services transmitted the matter to the Office of Administrative Law (OAL) as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was filed on December 7, 2007, and heard on February 19, 2008.

Since in the Board's view, one bank account alone was sufficient to disqualify K.R., the Board had not yet considered other information in K.R.'s application that also might affect eligibility. As what K.R. sought through the appeal process was a final determination on eligibility, the Board agreed to evaluate the rest of the application such that a final determination on eligibility could be reached.

The record was reopened on March 14, 2008, to allow submission of additional evidence and to allow the Board to complete its decision-making. By letter dated June 6, 2008, the Board advised that it had determined the first date of eligibility to be January 1, 2008 (R-7). The Board also imposed a penalty period due to a transfer of resources, the period to run from January 1, 2008, through December 28, 2008. The record closed on July 24, 2008.

FACTUAL DISCUSSION

K.R., through his brother, A.R., his attorney-in-fact, applied for Medicaid Only coverage on December 1, 2006, shortly after his November 23, 2005, admission to the McCarrick Care Center, a certified nursing home. Susan Soliwoda, Medicaid Unit supervisor, testified that the Board denied K.R.'s application based on the existence of a Bank of America account, with a balance of $82,469.62 as of October 3, 2007 (the BOA account). There is no dispute that the bank records reflect the ownership of the account to be "K.R. or A.R." (R-2). The tax identification number is K.R.'s Social Security number. There is also no dispute that on December 3, 2007, A.R. withdrew the balance

of $81,725.16 from the account, leaving no funds (R-8h). It is this withdrawal that the Board contends was a transfer of funds from K.R. to A.R. subject to penalty.

A.R. testified on behalf of his brother. He stated that his brother was diagnosed with Parkinson's disease in the mid-1980s and has always had much less income than has A.R. The brothers lived together for some years. For the last ten years, K.R.'s income has consisted of Social Security and pension monies totaling $16,500 per year. In February 2005 K.R. had surgery to alleviate his symptoms. Unfortunately, the surgery worsened his situation, and after a stay in a rehabilitation center between February and November 2005, he entered McCarrick. Through a certification, A.R. stated that the uninsured costs of the rehabilitation center were paid by K.R. through his IRAs and his pension and Social Security income (P-E). Between June and December 2005, K.R. closed out twelve IRAs totaling $39,436. Additionally, a certificate of deposit valued at $33,898 was liquidated.

A.R. testified that he paid all expenses of his brother not covered by his brother's income. He also has been transporting his brother to his many medical appointments. A.R. submitted a certification stating that he had paid $109,002 to the McCarrick Care Center between December 2005 and February 2007.

A.R. testified that in 2002, he himself required surgery, which carried substantial risk of death. He was advised to make arrangements for his brother before the surgery, so that if he did die, there would be some financial breathing room for his brother while the estate was settled. He therefore withdrew funds from his own account at the TrustCompany Bank and deposited $75,000 in the BOA account (P-A, withdrawal slip from TrustCompany Bank and transaction receipt from Fleet Bank, now BOA). Since his own condition remained fragile after the surgery, he left the funds in place. Through a certification, A.R. stated that he used K.R.'s Social Security number on the account because H&R Block advised him he would save money on taxes if he did so (P-J).

Although Bank of America was asked to confirm the account status, a bank official replied by letter dated February 11, 2008, that due to the age of the account and

the numerous changes to the bank through mergers and acquisitions, the bank was unable to locate an account agreement (P-D).

Leaving aside the ownership of the account, A.R. contends that his brother is in debt to him for amounts well above the $81,725.16 that A.R. withdrew from the account. In support of this claim, he offered an employment agreement and a use-and-occupancy agreement from June 2005. The employment agreement obligates A.R. to provide auto transportation, undertake cooking and housekeeping duties, and generally serve as K.R.'s business agent at a cost of $25 per hour and $.25 per mile, the compensation deferrable to a future point. For 2006, A.R. maintained a handwritten schedule of dates, destinations, miles, and hours spent on transportation to physicians and hospitals. He testified that in 2006 he spent approximately 850 hours, paid $200 in parking and taxi fares, and drove 1,520 miles, at a total cost of $21,830. He did not present a similar schedule for 2005; however, he testified that he had maintained a calendar for physical therapy appointments plus travel and that he had spent 780 hours and driven 4,712 miles. He said he did not select the $25-per-hour figure; it was provided to him by the lawyer who drew up the agreement.

The Use and Occupancy Agreement (P-C) obligated K.R. to pay the carrying charges for the Somerset, N.J., house the brothers occupied. A.R. said he had made all of the mortgage payments on the house, although his brother had shared the house with him for many years. No particular sum was cited in the agreement, nor was one offered in testimony. Both agreements were signed while K.R. was in a rehabilitation center following the unsuccessful surgery and prior to the determination later that year to admit him to a nursing home.

With regard to the services and use-and-occupancy agreements, the County contends that the absence of proof that any monies ever were paid is itself evidence that the agreements reflect a purely fictional arrangement.

Based upon A.R.'s credible testimony, along with the withdrawal slip from TrustCompany Bank, and the deposit receipt from Fleet Bank, I **FIND as FACT** that

A.R. deposited $75,000 in the BOA account. Lacking any evidence to suggest that any other contributions occurred, I **FIND** that all the funds on deposit in December 2007 came from A.R.

I further **FIND** that the original deposit agreement is no longer accessible, due to the age of the account and mergers in the banking industry. However, based upon A.R.'s credible testimony, the other financial information available, and the absence of evidence to the contrary, I **FIND** that his intent in creating the account was to provide for his brother in the event of his death, and that the fund was never intended to become a gift available to his brother while A.R. lived. While the County contends that A.R.'s decision to put K.R.'s Social Security number on the account altered the ownership of the account, I found credible A.R.'s statement that his intent was to reduce taxes, not to make a current gift of the money to his brother.

With regard to the Use and Occupancy Agreement, I **FIND** that the amounts potentially due are so lacking in evidentiary support that no amount of monies can be attributed to the agreement.

With regard to the Services Agreement, I found credible A.R.'s testimony regarding the need to transport his brother to various physicians (thereby avoiding use of an ambulance). I also found credible his statement that he was taught how to conduct his brother's therapy, so that the physical therapy could continue once his brother's allocation of approved medical plan physical therapy visits had been exceeded. His schedule of mileage is sufficiently detailed to also have credibility with regard to A.R.'s having actually expended those resources on his brother's behalf. Although the $25-per-hour fee is not supported well enough to establish whether it was reasonable or not, I **FIND as FACT** that A.R. incurred mileage of 4,712 in 2005 and 1,520 in 2006, that the rate of $.25 per mile was more than reasonable, and that he expended $200 in taxi and parking fees associated with K.R.'s medical appointments.

LEGAL ANALYSIS

The County contends that K.R. had full control over the BOA account and transferred assets to his brother, invoking the penalty period. Under N.J.A.C. 10:71-4.7, a person seeking Medicaid eligibility for institutionalized care is subject to a penalty period if that person has transferred resources including future rights to a resource within thirty months preceding the date of application or entry into institutional care. Here, K.R. entered nursing-home care on November 23, 2006, and applied for Medicaid on December 1, 2006. The penalty period is the lesser of thirty months or the number of months resulting from dividing the uncompensated value of the transferred resource by the statewide monthly average lowest semi-private room rate for Medicaid certified nursing facilities as calculated annually. N.J.A.C. 10:71-4.7(b)(4). The County calculated the penalty of 358 days by dividing $81,725.16 by a daily rate of $228.23. K.R. argues that no penalty is applicable because the account was not within his control, and therefore not a countable resource to him.

The Medicaid resource regulation is as follows:

> When a savings or checking account is held by the eligible individual with other parties, all funds in the account are resources to the individual so long as he or she has unrestricted access to the funds (that is, an "or" account) regardless of their source. When the individual's access to the account is restricted (that is, an "and" account), the CBSS shall consider a pro rata share of the account toward the appropriate resource maximum, unless the client and the other owner demonstrate that actual ownership of the funds is in a different proportion. If it can be demonstrated that the funds are totally inaccessible to the client, such funds shall not be counted toward the resource maximum. Any question concerning access to funds shall be verified through the financial institution holding the account.
>
> [N.J.A.C. 10:71-4.1(d)(2).]

The County argues that the rule mandates the treatment of an "or" account as providing unrestricted access to the funds. Essentially, the County contends, the rule treats any joint account employing the "or" nomenclature as one which, by its nature as a joint account, gives the eligible individual unrestricted access to the funds, no matter who contributed the money to the account. The rule distinguishes accounts using the "and" nomenclature, allowing eligible individuals to demonstrate that funds from an "and" account are totally inaccessible to the client.

Medicaid is a joint federal and state program designed to provide a safety net for payment of medical bills for low-income individuals who are elderly, blind, or disabled. See Atkins v. Rivera, 477 U.S. 154, 156, 106 S. Ct. 2456, 2458, 91 L. Ed. 2d 131, 137 (1986). "Each participating state must adopt a plan that 'includes "reasonable standards . . . for determining eligibility for and the extent of medical assistance . . . [that is] consistent with the objectives" of the Medicaid program.'" Mistrick v. Div. of Med. Assistance & Health Servs., 154 N.J. 158, 166 (1998) (quoting L.M. v. State, Div. of Med. Assistance and Health Servs., 140 N.J. 480, 484 (1995)). In addition, states may elect to provide Medicaid assistance to the medically needy, who have income and resources that are insufficient to pay their medical expenses but are too high to qualify them for Aid to Families with Dependent Children (AFDC) or Supplemental Security Income (SSI), and who otherwise meet the nonfinancial eligibility requirements for those programs. Id. at 167. Additionally, "federal law authorizes, at the option of the states, the provision of benefits to 'any reasonable categories' of applicants who do not otherwise qualify as categorically or medically needy. 42 U.S.C.A. § 1396a(a)(10)(A)(ii)." Ibid. "New Jersey provides benefits to those considered 'optionally categorically needy' under its 'Medicaid Only' program." Ibid.

Where states so elect, the methodology for determining eligibility may be less restrictive but not more restrictive than the methodology used to determine eligibility for SSI applicants. Id. at 168. "A methodology is '"no more restrictive" if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance.' 42 U.S.C.A. § 1396a(r)(2)(B)." Ibid.

The federal regulation governing resources in general is found at 20 C.F.R. § 416.1201(a) (2008). It defines "resources" as

> cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance.
>
> > (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual . . . .

The New Jersey Medicaid rule governing joint accounts first became effective October 1, 1977, at a time when the SSI regulations did not specifically address how to determine the status of joint accounts. In 1989, the U.S. District Court for the Southern District of New York determined that absent such regulations, state law would determine the extent of an SSI applicant's interest in such accounts. McCassell v. Sullivan, 1989 U.S. Dist. LEXIS 14400 (S.D.N.Y. Dec. 1, 1989). Regulations were promulgated concerning treatment of joint accounts effective May 31, 1994.

The regulations governing the resource treatment of funds held in financial institutions are found at 20 C.F.R. § 416.1208 (2008). More specifically, 20 C.F.R. § 416.1208(c)(1) through (3) (2008) creates a rebuttable presumption concerning ownership. The rebuttal process requires an individual to:

> (i) Submit his/her statement, along with corroborating statements from other account holders, regarding who owns the funds in the joint account, why there is a joint account, who has made deposits to and withdrawals from the account, and how withdrawals have been spent;
>
> (ii) Submit account records showing deposits, withdrawals, and interest (if any) in the months for which ownership of funds is at issue; and

> (iii) Correct the account title to show that the individual is no longer a co-owner if the individual owns none of the funds; or, if the individual owns only a portion of the funds, separate the funds owned by the other account holder(s) from his/her own funds and correct the account title on the individual's own funds to show they are solely-owned by the individual.
>
> [20 C.F.R. § 416.1208(c)(4) (2008).]

If New Jersey's regulatory scheme with regard to Medicaid-countable resources is limited to an analysis as to whether the prospective Medicaid Only claimant's name is on the account, then the regulation would be far more restrictive than current SSI law, and therefore invalid. However, under the analysis applied by the Federal District Court in McCassell v. Sullivan, supra, 1989 U.S. Dist. LEXIS 14400 at *5-6 (citing Cannuni v. Schweiker, 740 F.2d 260 (3d Cir. 1984) (citing Rosenfeld v. Secretary of Health and Human Servs., 563 F. Supp. 1192 (E.D.N.Y. 1983))), even before the 1994 SSI rule, New Jersey Medicaid's treatment of bank resources would have been subject to state law, i.e., New Jersey's Multiple-party Deposit Account Act (MPDAA), N.J.S.A. 17:16I-1 to -17.

Sections 1 through 9 of the MPDAA govern the ownership and payment of funds held in checking and savings accounts with multiple parties. Under the act, the right of a person to access payment from an account is dependent upon that person's status as a "party" to the account. See N.J.S.A. 17:16I-2(g), (h); N.J.A.C. 3:1-12.4(a)(3). A person becomes party to a joint account simply by being authorized to make withdrawals on the account. N.J.S.A. 17:16I-2(d), (g).

However, status as a party to an account has no bearing on the power of withdrawal accorded to those who are parties. N.J.S.A. 17:16I-3. For joint accounts,

> Unless a contrary intent is manifested by the terms of the contract, or the deposit agreement, or there is other clear and convincing evidence of a different intent at the time the account is created,

> (a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit. In the absence of proof of net contributions, the account belongs in equal shares to all parties having present right of withdrawal.
>
> [N.J.S.A. 17:16I-4.]

Thus, the mere fact that K.R.'s name and Social Security number appear on the BOA account does not give him the legal right under New Jersey's banking laws to withdraw the funds in the BOA account. As the Third Circuit has commented, this provision was enacted "to prevent the mere establishment or use of a joint account from automatically changing the parties' ownership interests in the deposited funds." High v. Balun, 943 F.2d 323, 327 (3d Cir. 1991).

Moreover, New Jersey's Medicaid regulations treat ownership as the threshold inquiry. N.J.A.C. 10:71-4.1(b) defines a "resource" as "any real or personal property which is *owned* by the applicant." Emphasis added. In this case, it has been demonstrated that A.R. deposited the original $75,000 into the account in 2002, with the intent of having it pass to his brother immediately upon his death. There is no evidence that anyone except A.R. ever contributed to the account. The primary evidence as to intent is A.R.'s credible testimony regarding his desire to provide for his brother short-term after his death. Therefore, I **CONCLUDE** that no gift was intended while A.R. lived, that under the MPDAA the power of withdrawal had not passed to K.R., and that K.R. therefore lacked access to the resources at the time of his application for Medicaid because he did not own those resources.

As regards the two agreements, under N.J.A.C. 10:71-4.10(b)(6)(ii):

> In regard to transfers intended to compensate a friend or relative for care or services 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. . . . 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 or the fair market value 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.

Here, since no funds actually changed hands, the services were essentially provided for free. Therefore, K.R. must overcome the presumption that they were intended to be delivered without compensation. The record makes clear that A.R. has been providing financial, transportation, and other support to K.R. for many years, and he is to be strongly commended for his efforts. But while I am convinced that he expended significant time and effort in transporting his brother to his many medical appointments, A.R. can have had no expectation of actual compensation under the contract, since no monies were actually paid under it even before the transfer to the nursing home, and I **CONCLUDE**, therefore, that K.R. has not overcome the presumption.

Finally, I **CONCLUDE** that no penalty was applicable, as the funds were not owned and available to K.R., and therefore Medicaid eligibility was established as of January 1, 2008.

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.

August 25, 2008
DATE

Laura Sanders
LAURA SANDERS, CHIEF ALJ

Date Received at Agency:

Mailed to Parties:

AUG 27 2008
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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