



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. HMA 12271-17

Z.P.,

Petitioner,

v.

MIDDLESEX COUNTY BOARD OF

SOCIAL SERVICES,

Respondent.

Lauren S. Marinaro, Esq., for petitioner (Fink, Rosner and Ershow-Levenberg, LLC, attorneys)

Eric M. Aronowitz, Esq., for respondent

Record Closed: January 3, 2018

Decided: January 24, 2018

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Petitioner, Z.P., appeals the tolling of a Medicaid transfer penalty by respondent, Middlesex County Board of Social Services (Board), resulting from petitioner's transfers of assets at less than fair market value during the sixty-month look-back period, pursuant to N.J.A.C. 10:71-4.10(a).

PROCEDURAL HISTORY

By Notice dated July 31, 2017, petitioner was advised by respondent Board that petitioner would not be financially eligible for Medicaid during seven separate one-month periods during the previously established 374-days transfer penalty, and that the transfer penalty would not run during those months of financial ineligibility. On August 2, 2017, petitioner appealed the tolling of the transfer penalty during those months of ineligibility. The Division of Medical Assistance and Health Services (DMAHS) transmitted the matter to the Office of Administrative Law (OAL), where it was filed on August 23, 2017. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was held on September 29, 2017, wherein the parties requested that the record remain open for the submission of post-hearing briefs, and that this matter be decided as a summary decision. Briefs were received on November 14, 2017. The record remained open for a post-hearing telephone conference. A telephone conference was held on January 3, 2018, and the record closed on that date.

FACTUAL DISCUSSION

Respondent has stipulated that the facts as set forth in petitioner's letter brief of October 25, 2017, are the undisputed **FACTS** of this case:

1. Petitioner, Z.P., a resident of Aristacare at Cedar Oaks in South Plainfield, New Jersey, was clinically eligible for Medicaid Long Term Services and Supports as of December 1, 2016.
2. Petitioner, Z.P., was resource eligible for Medicaid Long Term Services and Supports as of December 1, 2016.
3. Petitioner, Z.P., was income eligible for Medicaid Long Term Services and Supports as of December 1, 2016.

4. Petitioner, Z.P., made transfers for less than fair market value within five years of December 1, 2016, resulting in a 374-day transfer penalty period.
5. Petitioner, Z.P., is seeking a continuous 374-day transfer penalty period commencing as of December 1, 2016.

The parties have additionally raised no objection to the finding by respondent Board that petitioner's income exceeded the income limits for the months of November 2016, February 2017, April 2017, June 2017, September 2017, November 2017, and February 2018, and accordingly it is found as **FACT** that petitioner's income exceeded the allowable income limits for those seven months.¹

LEGAL ANALYSIS

- I. The first issue is whether a summary decision is appropriate in the within matter.

A motion for summary decision may be granted if the papers and discovery that have been filed, as well as any affidavits that may have been filed with the application, show that there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party in order to prevail must demonstrate by affidavit that there is a genuine issue of fact that can only be determined in an evidentiary proceeding. Ibid. These provisions mirror the summary-judgment language of R. 4:46-2(c) of the New Jersey Court Rules. The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

¹ For months with thirty days, the allowable monthly income was \$9,668.70, and for February (with only 28 days) the limit was \$9,024.12. Therefore, petitioner's income of \$9,701.76 for November 2016 exceeded the income limit of \$9,668.70. Her incomes of \$9,704.76 for February 2017 and February 2018 exceeded the limits of \$9,024.12. Her income of \$9,704.76 in April, June, September and November 2017 exceeded the limits of \$9,668.70.

As stated above, both parties agreed to submit this matter by way of petitioner's summary decision motion, both have agreed that this matter is appropriate for summary decision, both parties are in agreement as to the facts in the case, and the documents submitted present no genuine issue of material fact. Accordingly, a summary decision is appropriate in the within matter.

- II. The second issue is whether the Board properly tolled petitioner's transfer penalty for the months when petitioner's income exceeded the Medicaid maximum income eligibility limits.

Medicaid is a joint federal and state program established by Title XIX of the Social Security Act. 42 U.S.C.A. § 1396 et seq. The purpose of Medicaid is "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. Div. of Med. Assistance and Health Serv., 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)). Participation by a state in Medicaid is optional, and those that elect to participate must comply with the requirements imposed by federal law. Harris v. McRae, 448 U.S. 297, 301, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).

New Jersey participates in the Medicaid program through the enactment of the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1.2 to 19.1, and the regulations promulgated thereto (Title 10 of the New Jersey Administrative Code).

To ensure that a Medicaid applicant does not transfer assets for less than fair market value in order to be financially eligible for Medicaid, the regulations contain a "look-back" period. N.J.A.C. 10:71-4.10(a) and (j) state, in pertinent part (emphasis added):

N.J.A.C. 10:71-4.10(a) (Look-back period):

The provisions of this section shall apply, effective June 18, 2001, only to persons who are receiving an institutional level of services, including individuals who are receiving services under a 42 U.S.C. § 1915(c) home and community care waiver under Medicaid, or who are seeking that level of service, and who have transferred assets on or after August 11, 1993. An individual shall be ineligible for institutional level services through the Medicaid program if he or she (or his or her spouse) has disposed of assets at less than fair market value at any time during or after the 60-month period immediately before . . .

An individual who has transferred assets for less than fair market value within the look-back period will be assessed a penalty, that being a period of ineligibility, beginning with the month of that transfer. N.J.A.C. 10:71-4.10(b)9(iv.).

Respondent Board has argued that because there were seven months in which petitioner's monthly income exceeded the monthly allowable income limits, the transfer penalty should be tolled for those months.

Petitioner has argued that the Deficit Reduction Act of 2005, 42 U.S.C. § 1396p(c)(1)(A) ("DRA") prohibits tolling of the transfer penalty "for any reason." Respondent correctly pointed out that the language "for any reason" does not appear in the statute itself, nor in the "Section 6011 and 6016 New Medicaid Transfer of Asset Rules under the Deficit Reduction Act of 2005" ("DRA Communication") relied upon by petitioner in its October 25, 2017, brief.

However, the DRA Communication does state, "The penalty period will continue to run for the number of months determined . . .", and, "Once the penalty period is imposed, it will not be tolled (i.e., will not be interrupted or temporarily suspended), but will continue to run even if the individual subsequently stops receiving institutional level care." It appears from the plain language of the DRA Communication that the tolling of transfer penalties is not permitted.

Respondent has provided evidence that there may be at least one state, Michigan, which allows the tolling of transfer penalties. Therefore, respondent argued,

the DRA and DRA Communication did not serve as blanket prohibitions of tolling. However, respondent has provided no statutory support, nor any New Jersey Medicaid communications, which specifically permits the tolling of transfer penalties in New Jersey.

Respondent instead relied on a legislative intent argument in support of its tolling of petitioner's transfer penalty. The New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 et seq., sets forth as its purpose that it is the intent of the New Jersey legislature that Medicaid benefits be "last resource benefits." Respondent interpreted this to mean that when an individual has the financial resources to pay, he or she should pay for care rather than the government or taxpayers; therefore, those months when petitioner's income exceeded income limits represented time periods when petitioner had the financial wherewithal to pay for her own care, and therefore the transfer penalty period should not run during those time periods.

Petitioner has responded by claiming that respondent's promulgation of a new policy, based on Michigan's allowance of tolling transfer penalties, equates to illegal rulemaking, and would violate the New Jersey Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. Additionally, petitioner has submitted an Affidavit from a Michigan elder law attorney, stating that Michigan does NOT allow the tolling of "divestment" periods once that period has started to run.

Whether or not Michigan allows the tolling of penalty periods, there is no basis in New Jersey law for the tolling of transfer penalty periods once they have started to run. N.J.S.A. 10:71-1 et seq. is the controlling statute for Medicaid Only cases in New Jersey; it does not specifically permit the tolling of transfer penalty periods.

III. The third issue regards the effect that not "tolling" the penalty period would have on petitioner's eligibility.

N.J.S.A. 10:71-1 et seq. sets forth guidelines for Medicaid eligibility. There are citizenship requirements, residency requirements, institutional eligibility requirements as

well as financial eligibility requirements which must be met before Medicaid benefits are available to an applicant. If an applicant does not comply with these eligibility requirements, participation in a Medicaid program may be terminated or an application for Medicaid may be denied. N.J.S.A. 10:71-3.1(a).

It is undisputed that during the seven months in question the petitioner's income exceeded the established maximum income limits. Accordingly, once the first month of ineligibility occurred, the Board had the right to terminate petitioner's Medicaid.² While this issue is not subject to this appeal, when petitioner exceeded the income limits in November 2016, the respondent Board could have terminated her Medicaid benefits. Petitioner then could have reapplied the next time she became financially eligible for Medicaid.

CONCLUSION

Applying the law to the facts, I **CONCLUDE** that the Middlesex County Board of Social Services improperly tolled the transfer penalty during the months of petitioner's ineligibility. The Board should determine whether petitioner remains eligible for on-going benefits.

ORDER

It is hereby **ORDERED** that the decision of the Middlesex County Board of Social Services tolling petitioner's transfer penalty during the months of petitioner's financial ineligibility is hereby **REVERSED**. The Board shall determine whether petitioner is financially eligible for continuing benefits.

² It therefore appears as if the Board was attempting to toll petitioner's Medicaid during those months of ineligibility as a way of addressing the ineligibility without actually terminating petitioner's file. It is acknowledged that there could be an administrative nightmare created if an agency is forced to terminate a Medicaid file every time there is a month of ineligibility, and then have to process a new application submitted by an applicant every time their income falls within the statutory parameters. In the within matter, this could result in up to seven separate terminations and seven reapplications. Petitioner was offered the "tolling" solution by respondent in order to preclude petitioner Z.P. from having to submit a new application every time she again became financially eligible, and to address the transfer penalty in the most expeditious manner. However, petitioner rejected this solution by filing the within appeal.

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.

January 24, 2018

DATE



JEFFREY N. RABIN, ALJ

Date Received at Agency:

January 26, 2018

Date Mailed to Parties:

JNR/cb

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

BRIEFS

For petitioner:

Letter Brief, dated October 25, 2017

Letter Brief, dated November 30, 2017

For respondent:

Letter Brief, dated November 9, 2017