



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. HMA 01057-19

AGENCY REF. NO. N/A

**M.M.,**

Petitioner,

v.

**OCEAN COUNTY BOARD OF**

**SOCIAL SERVICES,**

Respondent.

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**Darren J. Mills, Esq.** for petitioner (Mills Elder Law, attorneys)

**Ivan Mendosa,** Human Services Specialist 3, for respondent pursuant to  
N.J.A.C. 1:1-5.4(a)3

Record Closed: March 4, 2019

Decided: March 22, 2019

BEFORE **DAVID M. FRITCH, ALJ:**

**STATEMENT OF THE CASE**

The petitioner, M.M., appeals the denial of New Jersey FamilyCare (NJFC) benefits by respondent, Ocean County Board of Social Services (OCBSS) because the petitioner had assets in excess of the maximum allowable to qualify for NJFC benefits.

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## **PROCEDURAL HISTORY**

The petitioner applied for NJFC benefits on October 15, 2018. (R-9.) On December 3, 2018, the petitioner was notified via letter that her NJFC application was being denied. (R-10.) The petitioner timely requested a fair hearing and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on January 18, 2019, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on March 4, 2019, and the record closed.

## **TESTIMONY AND FACTUAL DISCUSSION**

The **FACTS** of this case are not in dispute and, as such, I **FIND** the following:

1. The petitioner has made prior applications for NJFC benefits on June 4, 2018 (R-1), and August 20, 2018. (R-5.)
2. The petitioner's June 4, 2018, NJFC application was denied on June 12, 2018, because the petitioner's monthly income exceeded the private pay rate at the assisted living facility she was residing in. (R-2.)
  - a. Part of the petitioner's income was generated by a fixed benefit annuity issued by the Croatian Fraternal Union of America (CFUA). (R-3.) This annuity (May 2018 annuity) was purchased in May 2018, for \$73,673.11, and provided twelve monthly payments, beginning in June 2018, of \$6,141.93. (Id.)
  - b. The May 2018 annuity was listed on the petitioner's NJFC application as a Qualified Income Trust. (R-1.)
  - c. The remainder of the petitioner's income consisted of a monthly pension she received in the amount of \$1,325.66 per month. (Id.)
3. The May 2018 annuity was issued under contractual terms that the annuity was "irrevocable and immediate," the annuity "may not be surrendered or commuted,"

it "has no cash or loan value," and no changes could be made to either the benefit period or the frequency for payment. (R-3.)

4. The petitioner re-applied for NJFC benefits on August 20, 2018. (R-5.)
  - a. Petitioner's counsel withdrew that application on September 20, 2018, on the grounds that the petitioner was "currently over resourced" as a result of a life insurance policy. (R-7.)
5. The petitioner re-applied for NJFC benefits under the NJFC Aged, Blind, Disabled Programs on October 15, 2018. (R-9.)
  - a. This application reports the petitioner receives monthly income of \$1,325.66 from a pension and \$5,117.85 from an "annuity payment to QIT." (Id.)
  - b. The monthly payment of \$5,117.85 was from an annuity contract the petitioner purchased with CFUA. (R-11.) This annuity (the July 2018 annuity) was purchased on July 27, 2018, for \$61,389.25 and provided twelve monthly payments of \$5,117.85 beginning on August 15, 2018. (Id.)
  - c. The July 2018 annuity was purchased using the remaining funds from the May 2018 annuity. (Id.) The funds were "rerouted" from the May 2018 annuity to fund the July 2018 annuity. (Id.)
  - d. This was done at the petitioner's request because the prior annuity contract "was not issued in accordance to [the petitioner's] spend down plan" and "CFU[A] agreed to surrender this contract on the contingency that a second [annuity] be purchased with a more appropriate term and monthly payout." (Id.)
6. The July 2018 annuity was issued under identical contract terms to the May 2018 annuity. The terms of the July 2018 annuity provided that it was "irrevocable and immediate," "may not be surrendered or commuted," "has no cash or loan value,"

and no changes could be made to either the benefit period or the frequency for payment. (R-11.)

7. Edward Pazo, National President of CFUA, testified that his office was contacted by someone representing the petitioner regarding the May 2018 annuity requesting to restructure it. Although that annuity, by its terms, did not expire until June 2019, CFUA ended the May 2018 annuity and moved the remaining funds into a new annuity in July 2018.
  - a. Pazo explained that his authority to change the terms of the May 2018 annuity are contained in the annuity's application form. The application contains, among its terms, a provision that "only the National President or Secretary/Treasurer of the Croatian Fraternal Union of America may, in writing, make or change a contract or waive any of its rights or requirements." (R-3.) The contract terms for the May 2018 annuity expressly incorporate the application as part of the contract. (Id.)
  - b. Although the cover letter which transmitted the executed annuity contract expressly states that CFUA "will deny any request to change any parties to the contract, including the payee, nor any terms or conditions of the contract, once the contract has been issued" (Id.), Pazo conceded that, despite this, he authorized the changes to the May 2018 annuity on the condition that the funds be rolled into a new annuity contract with CFUA.
  - c. The contract for the July 2018 annuity had an application form identical to the form utilized by the petitioner to purchase the May 2018 annuity. (R-11.) The application to purchase the July 2018 annuity included a provision that "only the National President or Secretary/Treasurer of the Croatian Fraternal Union of America may, in writing, make or change a contract or waive any of its rights or requirements." (Id.) Also like the May 2018 annuity, the contract terms for the July 2018 annuity expressly incorporates the application as part of the annuity contract. (Id.)

8. OCBSS denied the petitioner's October 15, 2018, application for NJFC benefits on December 3, 2018. (R-10.)
  - a. The basis for this denial was OCBSS' finding that the July 2018 annuity did not meet the requirements to be compliant with the requirements of the Deficit Reduction Act of 2005 (DRA).
  - b. The funds deposited in a non-DRA compliant annuity are not eligible to be excluded from consideration as an available resource in determination of the petitioner's resource eligibility for NJFC benefits. Because the remaining funds in the July 2018 annuity, which was purchased for \$61,389.25, greatly exceeded the \$2,000 individual resource maximum set forth in N.J.A.C. 10:71-4.5(c), the petitioner's application was denied.

### LEGAL DISCUSSION

The Medicaid program is a cooperative Federal-State venture established as Title XIX of the Social Security Act. 42 U.S.C. § 1396 et. seq. 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) (citations omitted). Medicaid is intended to be a funding of last resort for those in need. N.J.S.A. 30:4D-2. The petitioner is seeking Medicaid benefits under the NJFC program.

NJFC applicants must comply with certain income and resource standards as a condition of eligibility. N.J.A.C. 10:71-4.1 to 4.11; N.J.A.C. 10:71-5.1 to -5.9. Resources, for determination of NJFC eligibility, are defined as any resources "which could be converted to cash to be used for his or her support and maintenance." N.J.A.C. 10:71-4.1(b). Resources are available to an applicant when those resources are either under their "right, authority or power to liquidate" or where those resources have been "deemed available to the applicant." Id. at (c)(1) and (2). As an individual applying for NJFC benefits, the petitioner is subjected to maximum resource eligibility limits. "Participation in the program shall be denied or terminated if the total value of an individual's resources exceeds \$2,000." N.J.A.C. 10:71-4.5.

OCBSS determined that the remaining funds in the July 2018 annuity which the petitioner acquired for \$61,389.25 far exceeded the permitted resource limit of \$2,000 for eligibility for NJFC benefits. The petitioner contends that the annuity is compliant with the DRA and, as such, these funds are not an available resource to be considered in her resource eligibility for NJFC benefits. The DRA permits resources to be converted into income through the purchase of an annuity contract provided that (1) the State is named as the first remainder beneficiary to the extent that the applicant received Medicaid benefits; (2) the annuity is irrevocable and non-assignable; and (3) the annuity is actuarially sound. 42 U.S.C. §§ 1396p(c)(1)(F) and (G). While the income generated from these qualified annuities is countable as income to the individual applicant, the funds utilized to purchase these qualified annuities are not treated as resources in determining the applicant's eligibility. See CL v. Division of Medical Assistance and Health Services and Monmouth County Board of Social Services, OAL Dkt. No. HMA 10901-2016, Initial Decision (November 25, 2016), adopted, Director (February 13, 2017) <<http://lawlibrary.rutgers.edu/oal/search.html>>. The reason for this exclusion is that the resources which form the principal asset of a qualified annuity are no longer "accessible or available" to the applicant and "should not be considered in determining [the applicant's] eligibility for Medicaid." Id.

The petitioner relies on the terms of the contract for the July 2018 annuity (R-11), which states that the purchased annuity is:

**Irrevocable.** This contract: (1) is irrevocable and immediate; (2) may not be transferred, assigned, surrendered or commuted; and (3) has no cash or loan value. The Annuitant may not be changed. No change may be made: (1) in the Benefit Period; or (2) in the frequency for payment.

Like the May 2018 annuity, which had identical contractual language regarding the contract's irrevocability (see R-3), this provision (along with all the provisions in the contract) is subject to modification via the terms spelled out in the application form which are also incorporated into the contract terms. (Id. noting that the "entire contract"

includes the "attached copy of the application".) That application includes the term that "only the National President or the National Secretary/Treasurer of the Croatian Fraternal Union of America may, in writing, make or change a contract or waive any of its rights or requirements." (*Id.*)

This language, by its terms, calls into question whether the terms of the July 2018 annuity was, in fact, irrevocable. The contractual terms which reserve the exclusive right for specified executives at CFUA to change or "waive any of its rights or requirements" of the annuity contract make the annuity, by its terms, revocable at the discretion of CFUA. (*Id.*) Further, the precedent established in the early termination of the May 2018 annuity and movement of the remaining funds into the July 2018 annuity under modified terms demonstrates that changes can, in practice, be initiated by the holder of a CFUA annuity which modify the terms and conditions of the purchased annuity and funds in these annuities can be redirected at the holder's request. While the contract terms for the May 2018 annuity hold that "[n]o change may be made: (1) in the Benefit Period; or (2) in the frequency for payment," (R-3), CFUA nonetheless responded to a request made by or on behalf of the petitioner when they altered those terms and moved the funds from the May 2018 annuity into the July 2018 annuity with a different benefit period and payment terms—just two months into the annuity's twelve-month term. Further, this change was made without notice to or consent of at least one of the primary beneficiaries of this annuity—the State of New Jersey. (R-3.)

As stated in 42 U.S.C. § 1328b(3)(B):

In the case of an irrevocable trust established by an individual, if there are circumstances under which payment from the trust could be made to or for the benefit of the individual (or the individual's spouse), the portion of the corpus from which payment to or for the benefit of the individual (or of the individual's spouse) could be made shall be considered a resource available to the individual.

The open-ended terms of the May 2018 annuity application which permits specific officers of CFUA to change or waive any of the rights or requirements of the annuity were applied at the petitioner's request to modify the terms of her annuity and redirect the funds into a new annuity which better accommodated the income eligibility

requirements in a re-application for NJFC benefits. This demonstrates that these funds were not completely "not accessible" to her as required in order to not be considered an asset in determining NJFC eligibility under N.J.A.C. 10:71-4.4(6). There is no reason to believe that the funds in the July 2018 annuity, which was issued under identical terms to the May 2018 annuity, are any less accessible to or manipulatable by the petitioner.

Under the specified terms of the annuity, there are certainly circumstances "under which" any or all of the funds in the July 2018 annuity could be made available for the benefit of the petitioner provided that the appropriate officer from CFUA agrees to do so. 42 U.S.C. § 1328b(3)(B). Just as CFUA was able to move the funds from the May 2018 annuity into a new annuity at the petitioner's request prior to the expiration of the annuity's terms, that same seemingly unlimited discretion could be used at the petitioner's request to move the funds from the July 2018 annuity into a financial instrument more immediately accessible to the petitioner at any time prior to the annuity's expiration date. Applying the facts to the law, I **CONCLUDE** that the assets in that annuity were properly considered a resource available to the petitioner in determining her eligibility for NJFC benefits. Counting the remaining funds deposited in the July 2018 annuity as an asset, the petitioner clearly exceeded the \$2,000 individual resource maximum set forth in N.J.A.C. 10:71-4.5(c). Accordingly, I **CONCLUDE** that OCBSS properly denied the petitioner's application for NJFC benefits.

### **ORDER**

Based upon the foregoing, the determination of OCBSS to deny the petitioner's October 15, 2018, application for NJFC benefits is hereby **AFFIRMED**.

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, 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.

March 22, 2019  
DATE

  
\_\_\_\_\_  
DAVID M. FRITCH, ALJ

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

/dw

**APPENDIX**

**LIST OF WITNESSES**

**For petitioner:**

Dale M. Krause, CEO of Krause Financial

Edward Pazo, National President, Croatian Fraternal Union of America

**For respondent:**

Ivan Mendosa, Human Services Specialist 3

**LIST OF EXHIBITS**

**For petitioner:**

P-1 CFUA annuity agreement, July 27, 2018

P-2 CFUA annuity payments, July 2018 – February 2019

**For respondent:**

R-1 NJFC application, June 4, 2018

R-2 OCBSS denial letter, June 12, 2018

R-3 CFUA annuity agreement, May 15, 2018

R-4 OCBSS case summary notes, June 8, 2019

R-5 NJFC application, August 20, 2018

R-6 OCBSS denial letter, October 18, 2018

R-7 Letter of withdrawal of NJFC application, September 20, 2018

R-8 OCBSS case summary notes, October 13, 2018

R-9 NJFC application, October 15, 2018

R-10 OCBSS denial letter, December 3, 2018

- R-11 CFUA annuity agreement, July 27, 2018
- R-12 OCBSS case summary notes, November 30, 2018
- R-13 NJFC designation of authorized representative form, April 7, 2018
- R-14 Notice of Hearing, March 4, 2019
- R-15 Miscellaneous documents from OCBSS' file on petitioner's NJFC application



# Croatian Fraternal Union of America

100 DELANEY DRIVE / PITTSBURGH, PENNSYLVANIA 15235-5416

EDWARD W. PAZO

National President

412/843-0380

FAX: 412/823-1594

November 28, 2018

✓

Lovallo, Marie  
C/O John Golombuski  
33 Zachary Way  
Mount Arlington NJ 07856

Dear Mrs. Lovallo :

Please be advised that your single life fixed benefit annuity A 914084 is irrevocable. It may not be transferred, assigned, surrendered or commuted. Furthermore, it has zero cash or loan value. The annuitant may not be changed, the owner may not be changed, and no changes may be made to either the benefit period or the frequency of payments. Finally, please note that the irrevocable beneficiaries may only be changed with the written consent from all currently listed irrevocable beneficiaries, including the State of New Jersey .

Please know that the Croatian Fraternal Union of America will deny any request to change any parties to the contract, including the payee, nor any terms or conditions of the contract, once the contract has been issued.

If I can be of any further assistance in this matter, please feel free to contact me directly.

Sincerely,

CROATIAN FRATERNAL UNION OF AMERICA

*Edward W Pazo*

Edward W. Pazo  
National President

