State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

A.H.,
Petitioner,
v.
BERGEN COUNTY BOARD OF SOCIAL SERVICES,
Respondent.

OAL DKT. NO. HMA 09215-19
AGENCY DKT. NO. N/A

A.H.,
Petitioner,
v.
BERGEN COUNTY BOARD OF SOCIAL SERVICES,
Respondent.

OAL DKT. NO. HMA 14916-19
AGENCY DKT. NO. N/A

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

Sang Yi, Human Services Specialist 4, for respondent, pursuant to N.J.A.C. 1:1-5.4(a)(3)

Record Closed: March 6, 2020 Decided: April 29, 2020

BEFORE **EVELYN J. MAROSE**, ALJ (Ret., on recall):

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner A.H. appealed the issuance of a transfer-of-resource penalty by respondent Bergen County Board of Social Services (CWA). The matter was transmitted to the Office of Administrative Law (OAL) on July 9, 2019. Petitioner also appealed the denial of a caregiver exemption by the CWA. This matter was transmitted to the OAL on October 22, 2019. Both matters were assigned to the undersigned, and were consolidated with the consent of the parties on November 14, 2019. The matters were heard on January 13, 2020. The record closed on March 6, 2020, upon receipt of a transcript of the hearing.

FACTUAL DISCUSSION AND FINDINGS

The parties submitted agreed-upon "Stipulated Facts." Pursuant to that submission, I **FIND** the following relevant facts:

1. An institutional Medicaid application was filed by A.H.'s daughter, J.H., on behalf of A.H. on May 6, 2019.

2. A.H. was ninety-two years of age when she was admitted to a long-term nursing facility on January 4, 2019.

3. A.H. died on August 26, 2019. (P-13.)

4. A.H. owned a house at 123 First Street, Town, New Jersey ("123 First Street").[1]

5. A.H. transferred ownership of 123 First Street to J.H. for $1.00 on February 27, 2019.

[1] A fictitious address for confidentiality.

6. J.H. resided with A.H. for more than two years preceding the transfer of ownership of 123 First Street.

7. The appraisal value of the house was $392,000.

8. The appraisal amount was considered in connection with the transfer of property for $1.00. A penalty of thirty-seven months, four days, was applied since the property was transferred for less than fair market value.

9. A.H. was financially and clinically eligible for Medicaid as of May 1, 2019.

10. Based upon the applied penalty, the CWA determined that A.H. would not be eligible for Medicaid benefits from May 1, 2019, through June 4, 2022.

11. A caregiver exemption was requested.

12. Additional information/documentation was forwarded to the CWA in connection with the request for a caregiver exemption, including documentation regarding A.H.'s treatment by medical providers and various affidavits/certifications.

13. A caregiver exemption was denied on September 20, 2019. (J-2.)

A.H. died on August 26, 2019. Thus, at issue in this appeal is J.H.'s assertion that she is entitled to a caregiver exemption, that no penalty period should have been issued, and that A.H. should be eligible for Medicaid benefits from May 1, 2019, when she was financially and medically qualified, until August 26, 2019, when she died. In support of her qualification for a caregiver exemption, J.H. submitted medical documentation and affidavits/certifications, testified, and called members of her family to testify as to the care that J.H gave A.H. and as to A.H.'s medical condition in the two years prior to her admission into the long-term-care facility.

Testimonial Evidence

Sang Yi

Mr. Yi, on behalf of the Bergen County Board of Social Services, testified and provided documentation that A.H. was admitted to a long-term-care nursing facility on January 4, 2019. The residence in which A.H. resided with her daughter for more than two years prior to January 4, 2019, was transferred by J.H., as attorney-in-fact for A.H., to J.H., on February 7, 2019. (P-2.) The home, which was appraised for $392,000, was transferred for one dollar. (P-1.) A.H. was found to be eligible for Medicaid as of May 1, 2019. Based upon the transfer of her home to J.H., the CWA issued a penalty of thirty-seven months and four days.

Thereafter, J.H. requested a caretaker exemption and forwarded medical documents and affidavits in support of her request. Mr. Yi testified that it was his decision to deny J.H.'s request for a caretaker exemption. He stated that after reviewing the application, it was determined that J.H. had been working a full-time job and a few hours of a part-time job during the two years prior to A.H.'s admission to the nursing facility.[2] During that period, A.H.'s medical condition was such that A.H. was able to stay home alone or attend a local senior center while J.H. was at work. On September 20, 2019, the CWA forwarded a "Notice of Your Medicaid Eligibility Status" to A.H. and J.H. that indicated that the denial was required in accordance with N.J.A.C. 10:71-4.10, which provides that to qualify for a caretaker exemption an individual's physical or mental condition needs to be such as to require special attention and care. (R-9.)

[2] Mr. Yi acknowledged that he read some, but not all, of the medical records provided.

J.H.

In addition to testifying, J.H. identified her affidavit dated August 1, 2019, wherein she also detailed the care that she provided to A.H. during and prior to A.H.'s institutionalization in January 2019. (P-27.) Among other things:

1. J.H. performed household chores including shopping, cooking, cleaning, household maintenance, yard work, and snow shoveling.

2. J.H. transported A.H. to medical appointments, to the bank, to church, to the hairdresser, and to social events.

3. On a daily basis, J.H. assisted A.H. in bathing, dressing, toileting, and with dental care. She also helped A.H. with incontinence garments and monitored her health condition, including, among other things, checking A.H.'s legs for swelling.

4. Although A.H. usually slept through the night, J.H. assisted A.H. if she needed "to go to the bathroom during the night," if she had difficulty breathing, or if she awoke disoriented.

5. J.H. filled A.H.'s prescriptions and made sure that A.H. took all of her medicines correctly. In addition, J.H. massaged A.H.'s muscles, applied medicinal creams, and assisted A.H. when nebulizer treatments were necessary.

6. J.H. prepared and posted cues to assist A.H. with daily activities. For example, she posted a note on the microwave indicating the "start" button.

7. J.H. acknowledged that she worked Monday through Friday from 8:30 a.m. to 3:30 p.m. and had an additional "side job" for three to five hours per week. She noted that her job was just eight miles from their house, that she monitored A.H.

during her workday via a "nanny camera," and that one of J.H.'s sisters, who lived "just down the street" from A.H. and J.H., could "check in" on A.H. if needed.

8. J.H. was able to leave her job or take time off, if necessary, to care for A.H. She identified a timesheet from her employer which indicated that J.H. took approximately 14.5 days off from work during the two-year period prior to A.H. entering the nursing facility, and 4.5 days off from work for their household issues. (Calculated for the two years prior to A.H.'s admission, from data on P-25.)

9. Some weekdays while J.H. worked, A.H. remained on the second floor of their residence, in the "spare bedroom," where she had access to a bathroom and where J.H. would set out books, magazines, mail, tissues, the television remote, and a cordless telephone. A few days a week, A.H. went to a senior center. A.H. was transported to the senior center by either J.H. or one of her siblings, and usually was picked up by J.H. J.H. paid a nominal fee for A.H.'s attendance at the center.

10. Prior to leaving for work, J.H. would prepare A.H.'s breakfast and place it in the "spare bedroom" upstairs where A.H. usually spent her day while J.H. was working, if she did not go to the senior center. J.H. also left a morning drink and lunch tray for A.H. to enjoy during the day, prior to J.H. returning from work.

11. When J.H. returned from work, she would prepare and serve A.H. supper. An hour or two after supper, J.H. would give A.H. an evening snack and drink.

12. Several of J.H.'s siblings and/or their spouses "pitched in" to care for A.H. as needed, for example, to transport A.H. to doctor appointments. However, J.H. explained that she was the primary caretaker and coordinated the assistance provided by her siblings and/or their spouses. The sibling who assisted J.H. the most was G.F., who only lived down the street from A.H. and with whom J.H. was in constant contact regarding A.H.

13. When, on occasion, A.H. would stay with one of J.H.'s siblings for a day, a weekend, or several days, J.H. would provide detailed notes and supplies so that they could duplicate the care that J.H. provided to A.H.

14. J.H. coordinated all of A.H.'s medical care, including hospitalizations, rehabilitation stays, and medical appointments. She made health-care decisions for A.H. and interacted with A.H.'s medical-care providers. She obtained, purchased, and dispensed A.H.'s medicines.

15. J.H. also assisted A.H. financially with her personal and medical costs.

16. J.H. opined that, "There was not a single day, during the five years before A.H.'s nursing facility admission that J.H. was not performing many tasks to assist her mother with her activities of daily living and that there was not a single day that she could have lived on her own without assistance."

17. J.H. said that A.H. had many medical issues, including congestive heart disease, atrial fibrillation, high blood pressure, pulmonary arterial hypertension, chronic obstructive pulmonary disease (COPD), post-stroke 2014 speech aphasia, skin cancer, and osteopenia. She also suffered from bronchitis, pneumonia, and a hip fracture during the two years prior to her admission to the long-term nursing facility.

18. A.H. was in several health-care facilities after December 4, 2018, when she broke her hip. A.H. was initially treated in Hackensack University Medical Center, then transferred to Kessler for rehabilitation. On December 31, 2018, A.H. was brought back to Hackensack University Medical Center, after falling at Kessler.

19. On January 4, 2019, A.H. was admitted to a long-term nursing facility, where she remained until she passed away.

20. On February 27, 2019, approximately a month and a half after A.H. was admitted to the nursing facility, J.H., as attorney-in-fact for A.H., transferred ownership of the residence owned by A.H. to herself for the sum of one dollar.

21. In connection with her application for a caregiver exemption, J.H. contacted her siblings and requested that they provide her with affidavits, as soon as possible, as requested by her lawyer. J.H. requested that the siblings include what they saw J.H. do for A.H., what the sibling did for A.H., and things that needed to be done for A.H. She also detailed for the siblings some things that they should include in their affidavits. (See Exhibits A through E, attached to the written summation of A.H.'s counsel.)

22. In connection with her application for a caregiver exemption, J.H. also requested medical records that she provided to counsel after receipt, at times without reviewing the records herself before providing them to counsel. Portions of those records were offered as Exhibit P-39 and Exhibits P-31 through P-38.

23. J.H. also requested affidavits from A.H.'s medical caregivers, which J.H. usually drafted and the caregiver would review before execution.

P.B.

P.B., A.H.'s daughter and J.H.'s sister, testified as to the medical condition of A.H., the care that A.H. needed, the care that J.H. provided, and the care that P.B. provided. Among other things:

1. P.B. stated that she lives about an hour from where her mother resided with J.H.

2. She described A.H. as needing daily assistance. While A.H. was able to walk indoors without a cane or walker, she was not steady on her feet. A.H. relied upon "things close by" to steady herself. In open spaces, she was wobbly. A.H. had a cane, but she had to be reminded how to use it. Steps and door jambs were an issue. She benefited from an arm assist.

3. While A.H. was able to assist in dressing, she needed help in selecting what clothing was appropriate, and to put on such things as her shoes and socks. Though A.H. would take a soapy washcloth and rub it on body parts she could reach, she needed assistance getting in and out of the tub and with properly cleaning her whole body. A.H. also needed assistance getting in and out of a car or to climb steps.

4. Since A.H. was essentially incontinent and wore "diapers," she needed assistance with toileting.

5. P.B. opined that A.H. could not have lived in her home without the care provided by J.H., sometimes with the assistance of G.F., another sister. She said A.H. was just not strong enough and not aware enough. P.B. opined that if J.H. had not been living with A.H., someone else would have needed to stay with A.H.

6. When J.H. was not at work, she was at home with A.H.—feeding A.H., cleaning A.H., or addressing A.H.'s medical needs.

7. P.B. was able to help A.H. every other Wednesday in the fall of 2018, in connection with her need for wound care. P.B. would take the afternoon off work and drive down to A.H.'s home. A.H. was usually eating or finishing the lunch that J.H. had left for A.H. before she went to work. P.B. would then take A.H. to Clara Maass Medical Center for her wound care. After wound care, P.B. would stay with A.H. for about an hour, while she "settled in." On those days, P.B. was with A.H. from approximately noon to four p.m.

8. P.B. also remembers taking A.H. to the doctor on one occasion, when for some reason J.H. or G.F. was not available. However, J.H. was A.H.'s primary caretaker, who coordinated her medical care.

9. P.B. would care for A.H. in her home every summer for about ten days to give J.H. a break.

10. P.B. was never paid for any of the care that she provided to A.H.

B.L.

B.L., A.H.'s daughter and J.H.'s sister, testified as to the medical condition of A.H., the care that A.H. needed, the care that J.H. provided, and the care that B.L. provided. She also identified her affidavit, dated August 1, 2019. (P-26.) Among other things:

1. B.L. confirmed that J.H. lived with their mother all of J.H.'s life, including for the last two years prior to A.H.'s entry into the long-term nursing facility.

2. She opined that A.H., as far back as 2012, was dependent on "other people," and that A.H. would not have been able to continue to reside in her home without the care and love of J.H.

3. B.L. saw A.H. frequently, at least once if not twice a week. At times, B.L. would stay with her mother so that J.H. could run errands or go grocery shopping. If B.L. needed to "do anything for A.H." while she was visiting, J.H. would advise B.L. what had to be done and would confirm with B.L. that it was done when she returned.

4. When A.H. would visit B.L. in B.L.'s home, either B.L. would pick A.H. up or J.H. would drop her off. In either case, A.H. needed assistance getting into the car

and out of the car. B.L., and/or B.L.'s husband, and/or B.L.'s son would provide that assistance.

5. B.L. described A.H. as so frail that she could not prepare her own meals or "cut up" her own food. She could not bathe or shower herself. A.H. needed help walking, getting "in and out" of a chair and bed, climbing stairs, getting dressed and undressed, and toileting. She also noted that sometimes, after her stroke in 2014, A.H. got confused or had difficulty "finding a word" when she played board games with her family. B.L. further noted that A.H. had difficulty breathing and suffered from a heart condition and arthritis.

6. B.L. stated that J.H. cared for all of A.H.'s needs. B.L. had personal knowledge that J.H. would prepare A.H.'s meals, serve the meals to A.H., and ensure that she ate. J.H. obtained A.H.'s prescriptions and monitored A.H.'s medications. J.H. took A.H. to her doctor's appointments, for her medical tests, and to family/social events. J.H. also cleaned their house, did the laundry, did the gardening, and took care of snow removal.

7. B.L. stated that if J.H. needed her to assist in the care of their mother, B.L. would assist without any payment because that is "what you do for family."

W.L.

W.L. is B.L.'s husband, the son-in-law of A.H. and the brother-in-law of J.H. W.L. testified as to the medical condition of A.H., the care that A.H. needed, the care that J.H. provided, and the care that W.L. provided. He also identified his affidavit, dated August 1, 2019. (P-19.) Among other things:

1. W.L. stated that for the four years prior to A.H. entering the nursing facility, A.H. suffered medical and physical limitations. A.H. suffered a stroke, had difficulty

breathing, and had a heart condition. Her memory was "impaired", and she got confused.

2. A.H. needed help walking. She could not walk up or down stairs without assistance or use the bathroom alone. She could not shower or bathe herself, could not prepare her own meals, and needed assistance cutting up her food.

3. W.L. stated that he saw A.H. frequently and observed J.H. caring for A.H. Like his wife, he said that J.H. maintained A.H.'s home and cared for all of A.H.'s needs, including, but not limited to, preparing her meals and taking care of her daily hygiene, her medications, and her medical care.

4. Like his wife, W.L. expressed a willingness to help J.H. care for A.H. W.L. stated that he did so willingly and without financial compensation, out of love for his mother-in-law and sister-in-law. He noted that the care that he provided was always after consultation with J.H. as to what A.H. needed, since J.H. was A.H.'s primary caretaker.

5. W.L. opined that without the care and devotion that J.H. provided, his mother-in-law would not have been able to remain in her home.

M.A.H.

M.A.H. is the daughter of A.H. and the sister of J.H. M.A.H. testified as to the medical condition of A.H., the care that A.H. needed, the care that J.H. provided, and the care that M.A.H. provided. She also identified her affidavit, dated August 1, 2019. (P-18.) Among other things:

1. M.A.H. confirmed that J.H. lived with her mother her whole life, including during the last two years prior to A.H. entering a nursing facility. J.H. assisted A.H. in her activities of daily living.

2. M.A.H. stated that A.H. suffered from COPD, high blood pressure, respiratory issues, dementia, irregular heart, and incontinence.

3. She described A.H. as unable to stand for long periods of time or to walk any distance. A.H. had difficulty climbing stairs, getting in and out of a chair or car, holding any weight with her hands, opening a jar, or pouring a drink into a cup. She was unable to bathe herself, dress herself, or clean her teeth/dentures. A.H. was also unable to shop for, prepare, or serve her own meals.

4. M.A.H. stated that J.H. fully addressed all of her mother's foregoing needs. M.A.H. said J.H. not only served her mother her meals, she also monitored her eating. Without J.H.'s attention, A.H. would forget to eat, or simply fiddle with her food rather than eating it.

5. M.A.H. noted that A.H. loved to play board games, especially Scrabble, and do crossword puzzles. Yet, in her later years, A.H.'s ability to play deteriorated and she needed cueing.

6. M.A.H. said that A.H. came to stay with her, for a few days, twice during 2018 to give J.H. a break. M.A.H. noted that A.H. needed assistance getting in and out of her chair, climbing up and down stairs, bathing, dressing, and with meals.

7. Since 2017, M.A.H. also visited A.H. once a week, usually on Wednesday, for five to six hours, to keep A.H. company. During those visits, she personally observed some of the daily care that J.H. provided to their mother, including providing her with clean clothes, bedding and towels, selecting appropriate clothing for her to wear on those days, stocking healthy nutritional food, preparing well-balanced meals, and monitoring her medications and health care.

8. At times, M.A.H. helped J.H. by taking A.H. to her doctor appointments. On those occasions, J.H. prepared M.A.H. with any necessary information for the visit. M.A.H would then communicate the details of the visit to J.H.

9. M.A.H. had personal knowledge of the competent manner in which J.H. managed A.H.'s medical care and insurance. In particular, she noted how J.H. performed wound care for her mother and provided detailed instructions to M.A.H. regarding when and how to clean A.H.'s wound when A.H. stayed at M.A.H.'s house.

10. M.A.H. stated that the care she provided to her mother was done without any financial renumeration to her.

11. M.A.H. stated that A.H.'s admission to the nursing facility in January 2019 was a decision made by all her siblings in the best interest of A.H. and J.H. She said that A.H.'s inability to walk or climb stairs and her deteriorating mental state meant that A.H. could not be alone at home any longer.

Non-Testimonial Evidence

Hearsay is admissible subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. There must be a residuum of legal and competent evidence in the record to support it. Weston v. State, 60 N.J. 36, 51 (1972). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." N.J.A.C. 1:1-15.5(a).

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the

circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F. 2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

In accordance with the foregoing standards, I give no weight to the affidavit of D.H., dated August 5, 2019 (P-23), and the affidavit of C.H. (P-28), dated August 7, 2019. Neither affiant testified and their credibility could not be assessed. Further, both affiants are family members of A.H. and J.H. and so not uninterested witnesses. D.H. is the son of A.H. and the brother of J.H. C.H. is the wife of D.H. In addition, the circumstances surrounding the creation and production of their affidavits significantly decrease their reliability. Their affidavits were requested by J.H., who wrote D.H. an e-mail on July 22, 2019, requesting that he and his wife submit affidavits in support of her application for a caregiver exemption. The body of the e-mail contained substantive requests for statements in favor of that application. The e-mail states as follows:

> Lawyer wants this ASAP, she bumped it up bc the county said they would accept and review evidence before the hearing instead of waiting till the day of, so she wants to send everything in one packet if possible.
>
> Notice her HIGHLIGHTS for how to edit this. IT HAS TO BE WHAT YOU SAW ME DO FOR MOM, OR THE EVIDENCE OF WHAT I DID FOR HER WHEN YOU WERE IN THE HOUSE (Like groceries stocked in house, etc.) ALSO WHAT YOU DID FOR HER.
>
> IT CAN'T BE THINGS YOU HEARD ME SAY, IT HAS TO BE WHAT YOU SAW Remember, this is about the 2–3 years BEFORE she fell, not after.

> You can state in there that I gave you all the instructions for her care (I can't remember if there were times I asked you to stay with her if I had to go for something) and that you reported back to me regarding her status when I got back.
>
> Also you can talk directly about her cognitive/mental status when she was with you. Memory issues, confusion, etc.
>
> That you may have served her a snack/meal/drink. Also walking with a cane, but that she needed assistance walking in community even with the cane, and that you had to hold her bag, etc. while she walked.
>
> Don't worry about the numbering after EXAMPLES, I guess that's a numbering error where it says 6-16. Just go with it and edit as you would if they were numbered better.
>
> I think I have to send it to her for review first, but the Final should be notarized to witness your signature. Hoping you know someone to do that up there.
>
> THANKS SO MUCH!
>
> J.
>
> [Exhibit C, Written Summation on behalf of A.H., dated February 5, 2019.]

J.H. also submitted the affidavit of her deceased sister G.F., dated July 26, 2019. (P-20a; P-20b). J.H. hand-delivered a sample affidavit provided by her counsel to G.F. and requested that G.F. make all necessary changes so that it reflected her experience and firsthand knowledge. (See Exhibit E, Written Summation on behalf of A.H., dated February 5, 2019.) I will admit the portions of G.F.'s affidavit that are supported by the hearing testimony of G.F.'s siblings.

G.F. agreed with her siblings that A.H. suffered from numerous medical conditions and that she needed hands-on assistance with many of her basic life activities. G.F. lived "down the street" from A.H and J.H., and saw them several times a week. She characterized J.H. as A.H.'s primary caretaker and detailed many of the activities with which J.H. assisted A.H.

G.F. took A.H. to the senior center twice per week and J.H. usually did the "pick up." Among other things, G.F. would take A.H. to doctors' appointments arranged by J.H. However, it was J.H. who was basically in charge of A.H.'s medical care. G.F. would also take A.H. with her when she was running errands and had A.H. and J.H. come to her house for social events.

G.F. volunteered to help A.H. and J.H. G.F. was not paid for the services she provided to her mother. G.F. opined that A.H. could not have remained in her home without the care that J.H. provided and coordinated. (P-20A.)

No medical caregiver testified in this matter. However, hearsay in the form of medical records and certifications was submitted for consideration.

Little weight was given to the certification of Myoung A. Park, nurse practitioner with United Medical, P.C. Nurse Park certified that A.H. was under her care for CVA, CAD, and pulmonary hypertension before she was admitted to the long-term-care nursing facility. She also certified that actual assistance in meeting A.H.'s medical needs and activities of daily living was provided by her main caregiver. Nurse Park was not subjected to examination as to her personal knowledge of who provided care to A.H. or what care they provided. It also should be noted that, as stated above, the request for this certification was made by J.H. after a penalty period was issued to A.H. and to support her application for a caretaker exemption. (P-24.)

Little weight also was given to the Certification of Child's Status as "Caregiver Child" of Viren Desai, M.D. His affidavit was prepared by J.H. in support of her application for a caregiver exemption. Dr. Desai was not subjected to examination as to the substance of his certification, including as to his personal knowledge of what services were provided to A.H. in her home, who provided those services, and what portion of the week J.H. was working outside the home. Based upon the evidence presented at the hearing, I will admit this certification as confirming the evidence that was presented at the

hearing, that Dr. Desai treated A.H. after 2013 and that Dr. Desai diagnosed A.H. as having pulmonary hypertension and COPD, and a history of pneumonia, stroke, atrial fibrillation, and coronary artery disease. (P-17.)

The certification of Omar Hasan contains numerous statements that merit little to no weight. The certification contains descriptions of the care provided to A.H. by J.H. that were told to Dr. Hasan by J.H. and memorialized in this certification, drafted by J.H. to support her request for a caretaker exemption. I will admit this certification as confirming the evidence that was presented at the hearing. Dr. Hasan saw A.H. several times a year since 2014 for acute cardiac issues and follow-up checkups. He diagnosed her with atrial fibrillation and pulmonary hypertension and confirmed that she had a stroke. As to what he observed and concluded, I will consider his treatment notes. Those notes were taken at or shortly after A.H.'s visits in connection with her treatment and not in connection with this application for a caretaker exemption. As noted above, since Dr. Hasan did not appear at the hearing, he was not subjected to examination as to the substance of his certification, including, as to his personal knowledge regarding what services were provided to A.H. in her home, who provided those services, and what portion of the week J.H. was working outside the home. (P-21.)

Limited weight was given to the certification of C.B. of the senior center that A.H. attended two days per week. A.H.'s attendance at the center is not disputed, nor is A.H.'s transportation to and from the center by J.H. and G.F. This certification does confirm that up to December 4, 2018, A.H. was able to attend the senior center, whose attendees did not have mental and/or physical conditions that required their institutionalization; the senior center offered programs, activities, and opportunities for seniors to socialize. Again, C.B. did not appear at the hearing, and her personal knowledge as to what services were provided to A.H. in her home, who provided those services, and what portion of the week J.H. was working outside the home was not subject to examination, nor was C.B's description of A.H.'s behavior during her attendance at the center. (P-22.)

A.H.'s medical records will be admitted into evidence, with reservation, since testimony at the hearing evidenced that not all of the records received were provided at the hearing. However, the records provided do evidence A.H.'s condition. The records were also made for treatment and not in connection with J.H.'s application for a caretaker exemption. The records were copious and are summarized as follows:

1. Medical records of Omar Hasan, A.H.'s cardiologist, from September 30, 2015, to March 13, 2019, were submitted. Treatment for active pneumonia was noted in July 2017. There was no notation of mental-status issues. During her periodic visit in July 2018, Dr. Hasan made no diagnosis of dementia. In March 2019, Dr. Hasan conducted a follow-up visit with A.H. for the "flu" with COPD. The doctor noted that A.H. suffers from atrial fibrillation, cerebral artery occlusion and cerebral infarction, hyperlipidemia and pulmonary hypertension, essential hypertension, and paroxysmal atrial fibrillation. He did not note incontinence or hallucinations, nor that she needed wound care for her left leg. Dr. Hasan stated that A.H. was not confused, had a calm affect, and had no focal neurological deficit. Dr. Hasan recommended a follow-up in four months. (P-29.)

2. Medical records of Viren Desai, pulmonologist, from August 18, 2016, to June 27, 2019, were submitted. He diagnosed A.H. with chronic obstructive pulmonary disease. He noted that test results did not indicate early signs of chronic kidney disease. There was no indication of dementia or any mental incapacity. (P-30.)

3. Medical records of Myoung Ae Park, APN, and Byong K. Park, M.D., from March 9, 2016, to October 22, 2018, were submitted. The records indicate that A.H. suffered a heart-failure disorder in 2013. A.H. was treated by the group, on numerous occasions, for a leg wound and cellulitis of the lower leg with ulceration and oozing. Several notes concern bouts with pneumonia, shortness of breath, yellow and whitish sputum, and swelling of the leg "on and off." She was treated with albuterol, Mucinex, Symbicort, and Santyl ointment. (P-31.)

4. Medical records of Firstcare Medical Group Lyndhurst, from July 5, 2015, to December 31, 2018, were submitted. During the two years prior to her admission to the long-term-care facility, A.H. was treated for an upper-respiratory infection, for frequent urination, for an open leg wound, and for pneumonia. Her medical caregivers never noted A.H. as appearing confused. To the contrary, A.H. was always reported to be alert, with normal mood, appropriate affect, and grossly oriented to person, place and time, and having her judgement and insight intact. (P-32.)

5. Medical records of Clara Maass Medical Center, for treatment on January 23, 2017, were submitted. A.H. was treated for respiratory complaints including shortness of breath and wheezing. The medical caregiver suspected pneumonia and prescribed methylprednisolone, azithromycin, albuterol, and ceftriaxone. A follow-up was suggested. (P-33.)

6. Medical records of Alaris Rehabilitation, from January 27, 2017, to March 13, 2017, were submitted. A.H. was diagnosed with pneumonia, chronic obstructive pulmonary disease with acute exacerbation, and essential hypertension. She was noted to have short-term incontinence of the bowel and bladder, and generalized muscle weakness with difficulty walking. She was given oxygen therapy, physical therapy, and occupational therapy. A.H. was described as having clear comprehension, clear speech, and no disorganized thinking. She was noted to be able to express her ideas and wants. During that stay, A.H. was noted to be independent in eating and needing setup help only. She was also described as needing only limited assistance with toileting, again needing setup help only. (P-34.)

7. Medical records from Clara Maass, from June 20, 2018, to October 31, 2018, were submitted. A.H. was treated for outpatient wound care in the lower left leg, with a history of left-lower-leg cellulitis. The medical caretakers noted that

A.H.'s daughter stated that A.H.'s cognitive status had changed since June 2018; however, the caretakers described A.H. as alert and oriented during her treatment sessions. (P-35.)

8. Medical records from Hackensack University Medical Center, from December 4, 2018, to December 8, 2018, were submitted. A.H. was admitted through the Emergency Department for a hip fracture and suffering from right elbow pain, after a fall. While the medical caregiver noted that A.H.'s speech was clear and appropriate, the record reflects that J.H. told the hospital staff that A.H. has "good days and bad days" and that she suffers from dementia but had not been officially diagnosed. (P-36.)

9. Medical records from Kessler Institute for Rehabilitation for December 2018 were submitted. A.H. was transferred from Hackensack University Medical Center to Kessler for functional activity training after repair of a hip fracture from a fall in her kitchen. The record indicates that A.H. tripped and fell in the kitchen while walking to open the back door, when the light was switched off. A.H. was noted to be alert and oriented during her three weeks of stay. Kessler did not diagnosis A.H. with dementia, but the medical notes indicate that A.H. was being treated for dementia by Dr. Puja Vora, a neurologist in Hackensack. (P-37.)

10. Medical records from Hackensack University Medical Center, from January 1, 2019, to January 4, 2019, were submitted. A.H. presented with shortness of breath, coughing, and wheezing. She was assessed for viral pneumonia. The record indicated that J.H. told the staff at Hackensack that she believed that A.H.'s mental status had deteriorated after she returned home from Kessler Institute. J.H. said that A.H. no longer remembered events and was becoming increasingly disoriented. (P-37; P-38.)

11. Prescription records from CVS from 2016 to 2019 were submitted. (P-40.)

Based on the credible evidence presented in this matter and my ability to observe the witnesses and assess their credibility, I **FIND** the following:

- While A.H.'s daughter J.H. lived with petitioner for her whole life, including from January 2017 to January 2019, and assumed many household and personal tasks for the benefit of A.H., there is no credible evidence that without J.H.'s care A.H. would have required institutional care prior to January 2019.

- The certifications signed by A.H.'s medical caregivers and drafted by J.H. after J.H. had applied for a caregiver exemption lack legal credibility. Some of the statements contained therein were not based upon the affiants' personal knowledge and some of the statements do not "hang together" with the affiants' own medical documentation, which was created by the medical caregivers in connection with their treatment of A.H.

- The detailed notes of petitioner's visits to her medical caregivers during the two years prior to her entry in the nursing facility do not indicate that petitioner suffered from a physical or mental condition that required special attention or care to reside in her home rather than in an institution or facility. A.H. was never diagnosed as requiring any type of medical equipment such as an IV drip, a ventilator, or oxygen.

- J.H. acknowledged that A.H. was never diagnosed with dementia. J.H. did tell the medical caregivers that in her opinion her mother suffered from dementia, but that assertion was made in December 2018, only one month prior to A.H. being admitted into the long-term-care nursing facility.

- While there is a note in the documentation provided by Kessler, during A.H.'s stay in December 2018, again only one month prior to A.H. being admitted into the long-term-care facility, that indicates that A.H. was being treated for dementia by Dr. Puja Vora, a neurologist in Hackensack, this notation does not

"hang together" with other evidence. None of the witnesses testified that A.H. was being treated for dementia. No medical records or certification was submitted regarding such treatment, and Dr. Vora did not testify in this matter. Further, A.H. was noted to be alert and oriented during her three-week stay at Kessler, and the notes from that facility do not indicate that A.H. was diagnosed with dementia.

- In numerous treatment records made in the two years prior to A.H being admitted into the long-term-care facility, A.H. was described by her treating caregivers as having a calm affect, having judgement and insight intact, being alert and oriented, having clear comprehension and speech, being able to express her ideas and wants, being grossly oriented to place, person and time, and exhibiting no disorganized thinking.

- During the two years prior to A.H. entering the nursing facility, for two days a week while J.H. worked, A.H. attended a senior center, for persons who do not require an institutional level of care. The senior center provides programs to improve the overall quality of life for senior attendees through programs, activities, and socialization. The last day that A.H. attended the senior center was December 4, 2018, again just one month prior to A.H. being admitted into the long-term-care nursing facility.

- During the two years prior to A.H. entering the nursing facility, her primary caregiver, J.H., was able to work a full-time position from 8:30 a.m. to 3:30 p.m. and maintain a part-time job three to five hours per week, without employing a full-time caretaker for A.H. in J.H.'s absence.

- During J.H.'s absences, A.H. read, watched television, and ate the lunch and snacks left for her by J.H. Because she was not bedridden or confined to a wheelchair, she had mobility in the upstairs area of her home while J.H. worked. By J.H.'s own testimony, when she checked on her mom via a "nanny camera,"

at times she could not see her mother. A.H. had moved out of camera range to another area. J.H. would then telephone A.H.'s cordless telephone to check on her.

- There is no doubt that J.H. was the primary caretaker for A.H., without remuneration, and that her siblings and their spouses also provided care for A.H., without remuneration.

- There is also no doubt that J.H. performed numerous tasks for the benefit of A.H. during the last two years before A.H. entered the nursing facility. Among other things, J.H. performed household chores including shopping, cooking, cleaning, yard work, and snow shoveling. She assisted A.H. in bathing, dressing, toileting, and transporting. She cooked their meals and ensured that A.H. ate. She coordinated A.H.'s medical care with doctors and prescriptions. In addition, she coordinated the care provided to A.H. by her siblings.

- A.H.'s other children also provided care to A.H. They "checked on" A.H., visiting her when J.H. was at work; they took A.H. with them when running errands; and they had A.H. overnight at their homes at times, to visit and to give J.H. some vacation time from mom. G.F., who lived close to A.H. and J.H., saw her mom and sister frequently and assisted A.H. on a regular basis. Among other things, she transported A.H. to the senior center two mornings a week.

- J.H. and A.H.'s other children and their spouses made numerous statements in their affidavits to support J.H.'s application for a caregiver exemption. They opined that A.H. would have had to be placed in a long-term-care nursing facility years earlier than January 2019. In assessing the credibility of their statements, it must be noted that, in addition to J.H., who is applying for a caretaker exemption, the affiants were J.H.'s family members, interested witnesses, who made their affidavits in response to an e-mail from J.H., who

even detailed substantive suggestions as to what should be included in the affidavits.

- Further, the assertion that A.H. suffered from mental deficiencies made by the affidavits must be reasonable and proper under the circumstances. For example, two affidavits noted that A.H., who was in her nineties at the time, did not play board games, such as Scrabble, as well as when she was younger. Such an assertion does not support the opinion that A.H. suffered from dementia or another mental deficiency, as would the testimony that A.H. could not identify a board game or understand the concept of playing a board game.

- There did come a time, in January 2019, when A.H. could not walk and her mental state was such that a group decision was made by the siblings that A.H. could not stay home alone any longer. In response to A.H.'s condition, arrangements were not made for J.H. to take a leave of absence from her job or to employ a caretaker to be with A.H. so she was not alone.

- It was decided that it was in the best interest of A.H. and J.H. for A.H. to enter a long-term-care facility.

- There is no credible evidence that prior to January 2019 A.H. needed the level of care that would permit J.H. to be eligible for a caregiver exemption.

LEGAL ANALYSIS AND CONCLUSIONS

Medicaid is a federal-state program to provide "medical assistance to the poor." Estate of DeMartino v. Div. of Med. Assistance & Health Servs., 373 N.J. Super. 210, 217 (App. Div. 2004). Although a state is not required to participate, once a state is accepted into the Medicaid program, it must comply with the Medicaid state and federal regulations. Harris v. McRae, 448 U.S. 297, 301 (1980); 42 U.S.C. § 1396(a), (b). The New Jersey

Division of Medical Assistance and Health Services is the State agency designed to administer the New Jersey Medicaid program. N.J.S.A. 30:4D-5.

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), (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), -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 N.J., Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 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). 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.

An 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 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 which permitted the individual to reside in the home rather than in an institution or facility. N.J.A.C. 10:71-4.10(d)(4).

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 ensuring the safety of the individual. N.J.A.C. 10:71-4.10(d)(4)(i).

In this case, petitioner's daughter lived with A.H. from birth, including from January 4, 2017, to January 4, 2019, when she entered a nursing facility. However, the preponderance of the credible evidence presented does not indicate that A.H.'s physical or mental health was such, until January 2019, to require special care for her to remain at home rather than to be in an institution or facility. The preponderance of the credible evidence provided also does not indicate that J.H. provided, during the two years prior to institutionalization, such level of care to A.H. I **CONCLUDE** that petitioner's daughter is not eligible for a caregiver exemption.

ORDER

I hereby **ORDER** that petitioner's request for a caregiver exemption be **DENIED**, and

I further **ORDER** that the issuance of a transfer penalty period of Medicaid ineligibility from May 1, 2019, to June 4, 2022, be **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,** which 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 the decision within forty-five (45) 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 thirteen 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.

April 29, 2020

DATE

EVELYN J. MAROSE, ALJ (Ret., on recall)

Date Received at Agency: April 29, 2020

Date Mailed to Parties: April 29, 2020

sej

APPENDIX

WITNESSES

For Petitioner:

M.A.H., A.H.'s daughter

B.L., A.H.'s daughter

P.B., A.H.'s daughter

W.L., A.H.'s son-in-law

J.H., A.H.'s daughter

For Respondent:

Sang Yi, CWA supervisor

EXHIBITS

Joint:

J-1 Not admitted into evidence

J-2 Stipulated Facts

For Petitioner:

P-1 Deed Documentation, A.H. to J.H., dated February 27, 2019

P-2 Durable General Power of Attorney, A.H. to J.H.

P-3 Not admitted into evidence

P-4 Not admitted into evidence

P-5 Not admitted into evidence

P-6 Identical to R-8

P-7 Not admitted into evidence

P-8 Not admitted into evidence

P-9a Not admitted into evidence

P-9b Not admitted into evidence

P-10 Not admitted into evidence

P-11 Identical to R-9

P-12 Not admitted into evidence

P-13 Certificate of Death, A.H.

P-14 Not admitted into evidence

P-15 Not admitted into evidence

P-16 Not admitted into evidence

P-17 Certification of Child's Status as "Caregiver Child," by Viren DeSai, M.D.

P-18 Affidavit of M.A.H.

P-19 Affidavit of W.L.

P-20a Affidavit of G.F.

P-20b Certificate of Death of G.F., dated November 25, 2019

P-21 Certification of Dr. Omar Hasan, M.D.

P-22 Affidavit of Cathy Borviello, Adult Day Care director

P-23 Affidavit of D.H.

P-24 Certification, by Myoung A. Park, APN, NP-C

P-25 Employee Attendance Records of J.H., from 2016 to 2019

P-26 Affidavit of B.L.

P-27 Affidavit of J.H.

P-28 Affidavit of C.H.

P-29 Medical Records, Dr. Omar Hasan, M.D. (cardiologist), from September 30, 2015, to March 13, 2019

P-30 Medical Records, Viren Desai, M.D. (pulmonologist), from August 18, 2016, to June 27, 2019

P-31 Medical Records, Myoung Ae Park, nurse practitioner, Byong K. Park, Amandeep Singh, M.D., from March 9, 2016, to October 22, 2018, Internal Medicine Providers

P-32 Medical Records, Firstcare Medical Group Lyndhurst, from July 2015 to December 2018

P-33 Medical Records, Clara Maass Medical Center, dated January 2017

P-34 Medical Records, Alaris Rehabilitation Center, from January 27, 2017, to March 13, 2017

P-35 Medical Records, Clara Maass Medical Center (outpatient), from June 20, 2018, to October 31, 2018

P-36 Medical Records, Hackensack Medical Center, December 4, 2018, to December 8, 2018

P-37 Medical Records, Kessler Institute, December 2018

P-38 Medical Records, Hackensack Medical Center, from January 1, 2019, to January 4, 2019, diagnosing viral pneumonia

P-39 Note of Medical Record Collection, by J.H.

P-40 Prescription Record of A.H., CVS, 2016 to 2019

For Respondent:

R-1 Proposed “Summary of Facts” by CWA

R-2 Realty Transfer Fee, regarding transfer of “123 First Street”

R-3 Deed Transferring “123 First Street” from A.H. to J.H., dated February 27, 2019

R-4 Appraisal Documentation, dated May 21, 2019

R-5 Penalty-Period Calculating Tool

R-6 Medicaid Only Transfer of Resource Notice, dated June 21, 2019

R-7 Pre-Admission Inquiry Screen

R-8 Medicaid Eligibility Notice, dated June 21, 2019

R-9 Medicaid Eligibility Notice, dated September 20, 2019