



State of New Jersey

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

CHRIS CHRISTIE
Governor

P.O. Box 712
Trenton, NJ 08625-0712

ELIZABETH CONNOLLY
Acting Commissioner

KIM GUADAGNO
Lt. Governor

MEGHAN DAVEY
Director

**STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES**

L.K.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE

AND HEALTH SERVICES AND

BERGEN COUNTY BOARD OF

SOCIAL SERVICES,

RESPONDENTS.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 151270-2016

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the OAL case file and the documents filed below. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision (FAD) in this matter is March 3, 2017 in accordance with an Order of Extension.

Petitioner applied for Medicaid benefits in January 2016. By letter dated March 1, 2016 Bergen County found Petitioner eligible as of January 1, 2016. At the time Petitioner owned her home in joint tenancy with her son and daughter-in-law.

Petitioner sought to transfer her remaining ownership to her son and requested that Bergen County grant an exemption to the transfer penalty for a caregiver child. Bergen County did not approve the exemption. Nevertheless, she transferred her ownership in the house to her son by deed dated June 17, 2016. At a fair hearing under OAL Dkt. HMA 5437-201, the Initial Decision found that Petitioner's June 2016 transfer of her home met the caregiver exemption.

The prior FAD reversed that determination stating that:

In finding that Petitioner met her burden, the Initial Decision relied on a letter from her physician as well as testimony from Petitioner's son and daughter-in-law. ID at 3. Petitioner's doctor described her as suffering from non-insulin dependent diabetes, "hypertension, severe bilateral osteoarthritis in lower extremities, anxiety/depression, insomnia and intertrochanteric fracture of the right leg since 08/25/2015." R-1 at 20. [Footnote omitted]. Other than the August 2015 date of Petitioner's hip fracture, there is no timeline for onset of these conditions. Nor is there any explanation how Petitioner's medical conditions affected Petitioner to such a degree that she needed special attention and care from her son.

...

The record does not show what diagnoses caused Petitioner to need special support and care and how the son provided that specialized support. As Petitioner was institutionalized in September 2015, Petitioner must have had the diagnosis and been receiving such care from September 2013 so as to prevent institutionalization.

In the remand voluminous medical records from Petitioner's 2015 hospitalization and subsequent admission to the nursing home were produced as well as lab reports through September 2013. Based on the record before me and as explained below, there is no basis to demonstrate that Petitioner's diagnoses rose to the level that she would have needed nursing home level of care from September 2013 through September 2015. Remarkably, despite the dates specified in the remand, Petitioner's proofs completely omit this time period.

The purpose of the caregiver exemption is to compensate a son or daughter who has provided care to such an extent that the applicant remained in the community and

not receiving institutionalized based services from Medicaid for at least two years. By way of background, when an individual is seeking benefits which require meeting an institutional level of care, any transfers of resources are scrutinized. N.J.A.C. 10:71-4.10. Under the regulations, “[i]f an individual . . . (including any person acting with power of attorney or as a guardian for such individual) has sold, given away, or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period” a transfer penalty of ineligibility is assessed. N.J.A.C. 10:71-4.10 (c). Individuals who transfer or dispose of resources for less than fair market value during or after the start of the sixty-month look-back period before the individual becomes institutionalized or applies for Medicaid as an institutionalized individual, are penalized for making the transfer. 42 U.S.C.A. § 1396p(c)(1); N.J.A.C. 10:71-4.10(m)(1). Such individuals are treated as though they still have the resources they transferred and are personally paying for their medical care as a private patient, rather than receiving services paid for by public funds. In other words, the transfer penalty is meant to penalize individuals by denying them Medicaid benefits during that period when they should have been using the transferred resources for their medical care. See W.T. v. Div. of Med. Assistance & Health Servs., 391 N.J. Super. 25, 37 (App. Div. 2007).¹

Limited exemptions to the transfer penalty rules exist. For example, the caregiver exemption provides that an individual will not be subject to a penalty when the individual transfers the “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

¹ Here Petitioner was not penalized at the time she applied as she had not transferred her home. The transfer occurred in June 2016, six months after she was found eligible.

when "title to the home" is transferred to a son or daughter under certain circumstances. N.J.A.C. 10:71-4.10(d). The son or daughter must have "resid[ed] in the individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual" and "provided care to such individual which permitted the individual to reside at home rather than in an institution or facility." N.J.A.C. 10:71-4.10(d)(4) (emphasis added). This exemption mirrors the federal Medicaid statute. 42 U.S.C.A. § 1396p(c)(2)(A)(iv). The care provided must exceed normal personal support activities and Petitioner's physical or mental condition must be such as to "require special attention and care." N.J.A.C. 10:71-4.10(d). It is Petitioner's burden to prove that she is entitled to the exemption.

As I stated in the prior FAD, "Petitioner's representative argued that it was "important to note" that Petitioner had to have her "blood sugar level monitored two to three times per day." I found that this was not "special care" that permitted Petitioner to remain out of a nursing home" and sought more information regarding Petitioner's Medicaid condition. FAD at 5. Nevertheless, the Initial Decision made three specific findings of fact regarding her diagnosis of non-insulin dependent diabetes and found that checking her blood glucose levels was necessary due to "poor eyesight." ID at 4. There is nothing in the record to tie the diagnosis of non-insulin dependent diabetes to the need for nursing home level of care. There is no indication that she suffered from debilitating medical complications from diabetes. Moreover, there is nothing in the record that indicates that Petitioner suffered from "poor eyesight" or any ophthalmologic condition for that matter.²

² In an assessment done at the nursing home on or around September 18, 2015, Petitioner was deemed to have no obvious problems with vision and was not "visually challenged." P-4.

There is no way to align Petitioner's claim that she was totally dependent for help with her ADLs with the complete lack of medical records, appointments or care during the two years prior to institutionalization. Petitioner's production of documents completely omits her medical condition during the relevant time period of September 2013 to September 2015. The medical records provided at P-4 and P-5 are contemporaneous to the fall in August of 2015 that led to the institutionalization and do not address the time period in question. Moreover, both the doctor's handwritten notes and the Lab Corp test reports end September 5, 2013. The next notation in her doctor's handwriting is in relation to her fall in August 2015, leaving the record utterly devoid of anything about Petitioner's medical condition during the two years prior to becoming institutionalized. Rather there is a gaping hole in the medical records from September 2013 through September 2015 and Petitioner has not demonstrated that she had medical conditions that caused her to be in need of nursing home level of care as contemplated by the federal statute.

I FIND that the record does not support the finding that the "additional medical records supplied, in addition to that supplied during the hearing of June 23, 2016, amply demonstrate that Petitioner suffered and continues to suffer, from variety of ailments that prevent her from performing ADLs on her own." ID at 5. The testimony from Petitioner's son and daughter-in-law, who the ALJ "deemed to be extremely credible", about Petitioner's diagnoses does not match up with the medical records. The medical records reflect Petitioner's medical condition as of August and September 2015 which describe her condition after her fall and hip fracture. They do not shed any light on her condition from September 2013 forward. The handwritten doctor notes are illegible and, absent transcription or live testimony, are of no value as to Petitioner's condition. P-3.

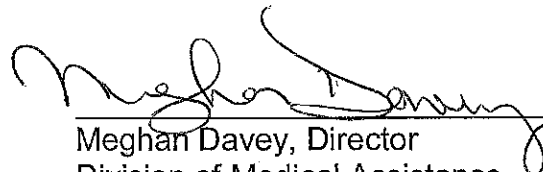
Astonishingly, the dates, which are marginally readable, show a lack of any medical interaction with her primary doctor for over two years. There are no Lab Corp tests or any other record of medical care during the critical time period. The authorization to have Medicare pay for therapeutic shoes due to poor circulation is dated July 1, 2015 – again failing to address the two years prior to entering the nursing home. Without explanation, Petitioner's record on remand has no medical records or encounters for the critical two years prior to becoming institutionalized much less any competent medical evidence that she was in need of nursing home level of care during that same time.

THEREFORE, it is on this ^{25th} day of FEBRUARY 2017,

ORDERED:

That the Initial Decision is hereby REVERSED with regard to caregiver exemption; and

That Petitioner's transfer of her home in June 2016 warrants a transfer penalty.


Meghan Davey, Director
Division of Medical Assistance
and Health Services
