



# State of New Jersey

DEPARTMENT OF HUMAN SERVICES  
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES  
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JENNIFER LANGER JACOBS  
*Assistant Commissioner*

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

D.Z.

PETITIONER,

v.

OCEAN COUNTY BOARD OF  
SOCIAL SERVICES,

RESPONDENT.

**ADMINISTRATIVE ACTION**

**AMENDED FINAL AGENCY DECISION**

**OAL DKT. NO. HMA 08418-17**

As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the documents in evidence and the exceptions to the Initial Decision. Procedurally, the time period for the Agency Head to file an Amended Final Agency Decision in this matter is December 19, 2019 in accordance with the Appellate Division's November 19, 2019 Order. Initially, the time period for the Agency Head to file a Final Agency Decision in this matter was August 9, 2018 in accordance with an Order of Extension. The Initial Decision was received on May 11, 2018.

This matter arises from Petitioner's November 14, 2016 application for Medicaid benefits. On April 13, 2017, the Ocean County Board of Social Services (OCBSS)

determined that Petitioner has transferred \$210,579.16 for less than fair market value. On May 25, 2017, OCBSS imposed a 633 day penalty whereby Medicaid services were not covered from August 1, 2016 to April 25, 2018. The Petitioner asserted that the majority of the transfers in question, checks made payable to cash, were for the purpose of paying her caregivers. The ALJ found that Petitioner successfully rebutted the presumption that the transfers were made to establish Medicaid eligibility in accordance with N.J.A.C. 10:71-4.10(j) and ordered OCBSS' decision to impose a transfer penalty be reversed with regard to the payment of Petitioner's caregivers. For the reasons that follow, I hereby ADOPT in part and REVERSE in part the Initial Decision.

In determining Medicaid eligibility for someone seeking institutionalized benefits, the counties must review five years of financial history. During that time period, a resource cannot be transferred or disposed of for less than fair market value. 42 U.S.C.A. § 1396p(c)(1); see also N.J.A.C. 10:71-4.10(a). If such a transfer occurs, the applicant will be subject to a period of Medicaid ineligibility to be imposed once the person is otherwise eligible for Medicaid benefits. Ibid.; N.J.S.A. 30:4D-3(i)(15)(b). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." Ibid. Congress's imposition of a penalty for the disposal of assets for less than fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid.

Petitioner "may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof in rebutting this presumption is on the Petitioner. Ibid. The regulations also provide that "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(i)2. The presence of one or more of the following factors, while not conclusive, may indicate that the

assets were transferred exclusively for some purpose other than establishing Medicaid eligibility for long term care services:

1. The occurrence after transfer of the asset of:
  - i. Traumatic onset of disability;
  - ii. Unexpected loss of other assets which would have precluded Medicaid eligibility; or
  - iii. Unexpected loss of income which would have precluded Medicaid eligibility;
2. Court-ordered transfer (when the court is not acting on behalf of, or at the direction of, the individual or the individual's spouse); or
3. Evidence of good faith effort to transfer the asset at fair market value.

N.J.A.C. 10:71-4.10(k).

The record shows that the first two factors do not apply to Petitioner. With regard to the third factor, Petitioner fails to demonstrate actual or good faith efforts to transfer her assets at fair market value. N.J.A.C.10:71-4.10(j). As Petitioner is claiming that she received fair market value, she bears the burden to establish the types of care or services provided, the type and terms of compensation, the fair market value of the compensation, and that the amount of compensation or the fair market value of the transferred asset is not greater than the prevailing rates for similar care or services in the community. N.J.A.C. 10:71-4.10(b)(6)(ii) and (j). See E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340 (App. Div. 2010).

Petitioner, a 75 year old widow at the time of application, did not testify at the hearing. Testifying on her behalf were her son, R.Z. and daughter-in-law, J.Z.<sup>1</sup> R.Z. testified that Petitioner spent most of her money on home health aides. He stated that three main aides (E.D, L.O. and N.L.) were hired to assist Petitioner with dressing, ambulating, bathing, cooking, cleaning and laundry. They were paid approximately \$13-\$15 per hour and rotated shifts of two and one-half days each, staying overnight to prevent the Petitioner from injuring herself. R.Z. also testified that one of the aides lived with and cared for Petitioner full time. Moreover, J.Z. testified that she quit her job to care for her

<sup>1</sup> R.Z.'s first-hand knowledge of events is limited to the checks his mother wrote to the caregivers. ID at 4. His knowledge of the work actually performed is limited to his communications with his mother's caregivers. ID at 4.

mother-in-law, without compensation, for twelve hours a day, after she fell in 2012. None of the aides were available to testify or provide a certification regarding the terms of their service or compensation.

After hearing the testimony of witnesses, the ALJ found that the Petitioner's family credibly testified to the aides' employment by Petitioner as caregivers and compensation in cash of anywhere from \$13-\$15 per hour. The fact-finder's assessment of the credibility of witnesses is entitled to deference by the reviewing agency head. Clowes v. Terminix, 109 N.J. 577 (1988). However, N.J.A.C. 1:1-15.5(b), the **residuum rule**, requires "some legally competent evidence" to exist "to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." No such evidence was presented in this matter.

Here, there is no caregiver agreement in place setting forth the expectations of care and compensation for any of the home health aides. There is also no evidence in the record to show that Petitioner's caretakers were certified home health aides (CNA), thus warranting a rate of \$13-\$15 per hour. In support of her position, Petitioner's family presented copies of the checks that were written to pay for the caregiving services. The checks themselves are made out to cash, with the name of a caregiver in the memo line, and were endorsed by the person referenced in the check's memo. However, a closer look at the checks written do not show a consistent pattern of payment as alleged by Petitioner. For example, Petitioner provided checks for E.D. beginning in December 2013.<sup>2</sup> The first check to E.D. was written on December 27, 2013 in the amount of \$294.00. E.D. did not receive another check until August 2, 2014 in the amount of \$400.00. Thereafter, the checks ranged in amount from \$71.00 to \$731.00.<sup>3</sup> There are also times when Petitioner issued multiple checks to E.D. on the same day.<sup>4</sup> Furthermore, there is no explanation for

<sup>2</sup> For purposes of this example, we refer to the year December 2013 to December 2014.

<sup>3</sup> The check for \$731 did not include a reference to a store accounting for purchases made in addition to compensation.

<sup>4</sup> On October 5, 2014, E.D. was given checks for \$360 and \$161. On October 2, 2014, she was given two checks for \$360. On November 24, 2014, she received checks for \$390 and \$195. On November 30, 2014, she received checks for \$390, \$316, and \$360. On December 9, 2014, she received checks for \$109, \$360, and \$125.

the lack of coverage of services where Petitioner claims to need 24 hour care, nor is there an explanation for what appears to be an overlap in payment of services provided, specifically in October, November and December 2014.<sup>5</sup> I note also, that while Petitioner asserted that N.L. provided twenty-four hour care and lived in Petitioner's home checks were still being issued to L.O. for Petitioner's care.

It is also unclear when and for how long J.Z. cared for Petitioner from 6am to 6pm, or why aides were being paid to care for Petitioner for two and a half day shifts when J.Z. was caring for her twelve hours each day. It is also unclear when Petitioner was hospitalized and for how long, and whether the aides were still paid when they visited Petitioner in the hospital. Finally, it is unclear exactly what, if any, services the aides provided to Petitioner during the overnight hours.

The ALJ is correct that as the years go by the payments become more frequent, but the rate of pay for the services performed is still unclear. For example, E.D. was paid on five consecutive days in April 2015. She was paid on April 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, and 17<sup>th</sup>. She received compensation each day as follows: \$415, \$364, \$360, \$315, and on the 17<sup>th</sup> she received two checks in the amounts of \$345 and \$380. On April 17<sup>th</sup>, Petitioner also wrote out a check to L.O. in the amount of \$390. If E.D. was working 24 hours each day, why would her rate change each day, and why would L.O.'s services be necessary?

The Initial Decision's conclusion that the assets transferred to three individuals who allegedly performed caregiving services for Petitioner was solely or exclusively for some other purpose than Medicaid is based on the presumption that Petitioner wanted to remain in her home.<sup>6</sup> Petitioner's desire to remain at home is not in and of itself "a purpose other than to qualify for medical assistance." N.J.A.C. 10:71-4.10(e). Indications that assets were transferred for some other purpose are highlighted in N.J.A.C. 10:71- 4.10(k). The ALJ does not find that there was a traumatic or unexpected occurrence after the transfer was

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<sup>5</sup> There also appears to be an overlap in payments for the other alleged caretakers, who filled in when E.D., L.O. and N.L. were unavailable, in the months of March, April, May and June 2014.

<sup>6</sup> Petitioner could have chosen to remain in her home and receive Managed Long Term Services and Supports (MLTSS).

made or that a court ordered the transfer. N.J.A.C. 10:71-4.10(k)1,2. Moreover, the ALJ makes no finding that Petitioner paid fair market value for the services provided to her. N.J.A.C. 10:71-4.10(k)3. She finds only that Petitioner paid for care provided to her. ID at 17-18. The evidence in the record does not support a finding of fair market value or even a good faith attempt to pay fair market value. Instead, the record shows that there was no caregiving agreement in place, no clear rate of pay, no consistent pattern of payment and no worker, not one of the six, to corroborate Petitioner's son's testimony.

Petitioner's explanations inadequately support the type of services provided or the rate of pay for those services. Petitioner has not been able to rebut the presumption that these transfers for less than fair market value were to qualify for Medicaid. And, because Petitioner has provided inadequate support to rebut the presumption, Petitioner cannot show that the transfers were not made in order to qualify for Medicaid.

THEREFORE, it is on this 18<sup>th</sup> day of DECEMBER 2019,

ORDERED:

The Initial Decision is hereby ADOPTED in that OCBSS should deduct from the transfer penalty those amounts paid to Lakewood Township, LVE and Sears; and

That the Initial Decision is hereby REVERSED with regard to the amounts paid to E.D., L.O. and N.L. These amounts shall remain included in the transfer penalty. The above referenced payments to Lakewood Township, LVE and Sears are the only amounts to be deducted from the penalty.



Jennifer Langer Jacobs, Assistant Commissioner  
Division of Medical Assistance  
and Health Services