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

E.K.

PETITIONER,

ADMINISTRATIVE ACTION

v.

FINAL AGENCY DECISION

ATLANTIC COUNTY BOARD OF
SOCIAL SERVICES,

OAL DKT. NO. HMA 06226-18

RESPONDENT.

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 in evidence, Respondent's Exceptions to the Initial Decision and Petitioner's reply to those Exceptions. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is July 5, 2019 in accordance with an Order of Extension. The Initial Decision in this matter was received on April 5, 2019.

This matter arises from Petitioner's February 14, 2017 application for Medicaid benefits. On November 16, 2017, the Atlantic County Board of Social Services (ACBSS) notified Petitioner that she was eligible for Medicaid but imposed a 548 day penalty due to transfers totaling \$232,660.58. On April 19, 2018, after receiving

sufficient proofs from Petitioner, ACBSS reduced the transfer penalty to 232 days due to transfers totaling \$98,475.78. ACBSS grouped the penalized transfers into five categories: (1) "Meadowview Hours (payments made to Petitioner's caregiver, Jones, while she resided in the nursing facility); (2) "Night Hours" (overpayments to Jones for caregiving services provided at night); (3) "Day Hours" (overpayments to aides for caregiving services provided during the day); (4) "Gifts/Misc." and (5) "Apartment Cleaning Hours" (overpayments for the cleaning of Petitioner's residence). The Petitioner asserted that the transfers in question were for fair market value. The ALJ found that Petitioner successfully rebutted the presumption that some of the transfers were made to establish Medicaid eligibility in accordance with N.J.A.C. 10:71-4.10(j) and reduced the transfer penalty to \$7,675. For the reasons that follow, I hereby REVERSE in part and ADOPT 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). Petitioner bears the burden of proof to demonstrate that she received fair market value for the assets transferred or that the assets were transferred exclusively for a purpose other than to qualify for medical assistance. N.J.A.C. 10:71-4.10(j). Here, Petitioner was unable to rebut the presumption that the transfers for less than fair market value were made to establish Medicaid eligibility.

Petitioner's February 14, 2017 application was her third application for Medicaid benefits. The Petitioner filed her first application on October 28, 2015 after being

admitted as a resident at Meadowview Nursing and Rehabilitation Center (Meadowview).

The federal government has directed that the lookback date is 60 months prior to the baseline date. For an institutionalized individual such as Petitioner, the baseline date is the first date as of which the individual is institutionalized and applied for medical assistance under the state plan. Centers for Medicare and Medicaid Services, State Medicaid Manual §3258.4(C). Accordingly, I FIND that ACBSS calculated the five year lookback period from Petitioner's first Medicaid application and reviewed transfers beginning in October 2010.

The first category of transfers, "Meadowview Hours," were assessed for payments made to Petitioner's caregiver, Jones, who provided services while Petitioner was a resident at Meadowview. ACBSS determined the payments were impermissible transfers because Petitioner was already paying fair market value for twenty-four-hour care at the facility. Aside from the fact that there is no caregiver agreement in place to set forth the terms of service and compensation, the type of work described by Iudica, such as cleaning and laundry, was duplicative of those services provided by the facility. Courts have held that "the services provided by caregivers that are duplicative of services afforded petitioners by the nursing facilities in which they reside are non-compensable for the purpose of calculating the relevant periods during which petitioners are ineligible for medical assistance benefits." Matter of Barbato v. New York State Dep't of Health, 65 A.D. 3d. 821, 823-24 (2009) citing Estate of Barnett v Department of Health & Human Servs., 2006 Me. Super. LEXIS 116, 2006 WL 1668138 [2006]. Compensation to a private aide for services included in the cost of Petitioner's stay at Meadowview cannot be considered fair market value. In essence, this means either

she did not receive fair market value for the services provided by her caregiver, or she did not receive fair market value for the services provided by the facility. I FIND that ACBSS correctly determined the services provided by Jones while Petitioner was in Meadowview were duplicative and not for fair market value. To determine otherwise would permit Medicaid applicants to distribute their money to family and friends in order to prematurely qualify for Medicaid benefits.

The second category of transfers, "Night Hours," was assessed for overpayments made to Jones for night hours she worked as an aide for Petitioner from January 2012 through October 2015, while Petitioner resided at home. From January 2012 through October 2015, Petitioner paid Jones \$15 per hour for nighttime services in 2012. Beginning in September 2013, Petitioner increased her pay to \$16 per hour. Jones held a Long Term Care Facility Nurse Aide license which expired in September 2012. From November 2015 to November 2017, she held a Homemaker-Home Health Aide (HHA) license. It is Petitioner's burden to demonstrate that she received fair market value for the assets transferred. N.J.A.C.10:71-4.10(j). Iudica testified that he called several home care service companies in the area who quoted hourly rates of \$18-\$20. (ID at 12). Iudica also acknowledged that the hourly rate charged by these companies takes into consideration business operation and overhead expenses that are not incurred by an independent caregiver. (ID at 13). Iudica did not testify to the companies' hourly rates for overnight hours and did not testify with any specificity what services Jones provided, on a regular basis, during the overnight hours. Only that he knew of occasions when Petitioner would be "up and down" all night. (ID at 14).

Moreover, Petitioner presented no evidence that the rates were based on "the prevailing rate of similar care and services in the community." N.J.A.C. 10:71-

4.10(b)(6)(ii). Jones did not testify, and Petitioner provided no evidence of the services performed by Jones overnight or that the rates were similar to those in the community.¹

Although not their burden, ACBSS presented rate information from the Griswold Home Care Agency (Griswold) which they relied upon to determine the fair market value of the services provided to Petitioner. Griswold, which serves Atlantic and Cape May counties, charges a rate of \$12 per hour (plus a \$6 per hour office fee) for NJ certified caregiver services and \$125 per day for live-in services. Although unclear, it appears that at some point Jones was a live-in caregiver. The Initial Decision notes that when Bayada Nurses Home Care Specialists (Bayada) began providing day time care services, Jones became “full-time.” (ID at 12). She would “train” and “oversee” the Bayada staff during the day and then stay to monitor Petitioner at night. (ID at 12-13). Certainly, it is not unreasonable to assume that Jones could not work all day and all night, but that she must have slept at some point. Griswold accounts for this time in its \$125 per day rate for live-in aides. Accordingly, I FIND that ACBSS appropriately determined the rate for Jones’ services to be \$10 per hour for night services.

The third category, “Day Hours,” consists of transfers calculated as overpayment for aides who provided day time caregiver services to Petitioner while she resided in her apartment. As previously stated, Petitioner has not met her burden to show 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). Conversely, the agency relied on the rates of a local caregiving service company to determine the fair market value of the services to be \$12 per hour. I

¹ Petitioner presented invoices from Nurse Partners LLC in King of Prussia and Pottstown Pennsylvania. According to Nurse Partners’ website, they service Philadelphia, Montgomery, Chester and Delaware counties. There is no indication that they service the county in which Petitioner resided.

FIND that ACBSS correctly determined the fair market value for day time caregiving services to be \$12 per hour.

The fourth category of transfers, "Gifts/Misc," consists of \$18,458.73 in transfers made during the lookback period. These transfers were in the form of checks written to various individuals for a minimum of \$100. Some contained no notation in the memo of the check. Some were labeled as gifts, which by definition are not for fair market value. Others were written to individuals as "cash for me," and others contained the notation "for assistance." Three checks, written to a M.K., totaled \$1200 and contained the memo "paying cost of many favors" and "cash for me." Not all individuals to whom checks were written could be identified and not all transfers could be explained. In fact, Mr. Ludica candidly testified that he did not know all of the individuals to whom Petitioner, herself, wrote checks (ID 19-20). Moreover, some of these checks were written to her own children, who did not to testify in this matter. (ID at 34). With such little information, no one could presume that Petitioner received fair market value for any of the "assistance" presumably rendered or any benefit at all from the transfers. Even with regard to the notation "cash for me," there is no way to quantify what amount, if any, Petitioner received from those checks. I FIND that those checks described above were properly included in the transfer penalty.

Some of the checks were written to individuals identified by Petitioner as her caregivers, Lali, Jones, Grasty and Slaughter. Although these individuals may have performed services for Petitioner, documentation is still needed to support the transfers to these individuals. With regard to the checks written for Lali, no times sheets were presented to support the work performed or the checks written for services. I FIND that these amounts were properly included in the transfer penalty amount. Similarly, the disputed checks in this category written to Jones were not supported by timesheets.

They were written for gifts, cash and assistance. As previously stated, there is no evidence to support that Petitioner received any part of the checks written to cash, and there is no explanation for why Petitioner would need to additionally compensate Jones for assistance. Furthermore, check 7903 is not supported by the corresponding timesheet. Check 7903 is written in the amount of \$2,826.88 and includes \$201.88 reimbursement for shopping expenses. The amount for services performed is \$2,625.00. The timesheet indicates that Jones worked 59.5 hours that week. Yet, the calculations on the time sheet show that she was paid for 127 hours at a rate of \$15 per hour that week. No explanation is given for the additional hours. I FIND that ACBSS properly included the additional hours as part of the transfer penalty.

The checks written to Susan Slaughter are not substantiated by the time sheets presented. First, there are no time sheets for checks 7310 and 7314. Second, the amount in check 6598 does not match the hours logged on the corresponding time sheet. Third, check 6587 notes a "two hour minimum charge" without explanation. Finally, Slaughter's relationship to Petitioner is defined as "friend and caregiver...who brought lunch and dinner" to Petitioner. The time sheets do not provide any additional information with regard to caregiving services. In fact, they merely list the meals brought to Petitioner. There is no indication that Petitioner prepared these meals for Petitioner, or that she even shopped for them. Furthermore, the receipts provided do not correspond with the meals listed. If we assume that Slaughter occasionally shopped for Petitioner and brought her some meals, it is still Petitioner's burden to show that she paid fair market value for those services. There is nothing in the record to support a finding that the \$20 per hour Petitioner paid for Slaughter's services was fair market value. I FIND that Petitioner has not met her burden and that the payments to Slaughter were properly included in the transfer penalty.

A few of the checks written to Grasty were supported by timesheets presented at the hearing. I FIND that the transfer penalty should be reduced by those amounts that are supported by the hours logged on the timesheets, but that, for the reasons stated above, the rate of compensation should be \$12 per hour rather than \$15. As a result, I FIND that the transfer penalty should be reduced by \$1,032.²

Two checks were written to individuals identified by Petitioner as her accountant and attorney. No bills or invoices were provided to support these transfers. I FIND that both were properly included in the transfer penalty.

The fifth category of transfers, "Apartment Cleaning," was assessed for the work of two individuals who were paid to clean out Petitioner's apartment after she moved to Meadowview. Petitioner paid the two aides the same rate she paid them for providing caregiving services. She presented no evidence that the fair market value rate for cleaning her apartment was equivalent to the rate for caregiving services. Again, I FIND that Petitioner failed to meet her burden to show that these individuals should have received \$12-\$16 per hour for cleaning the apartment.

As previously stated, Petitioner bears the burden of proof to demonstrate that she received fair market value for the assets transferred or that the assets were transferred exclusively for a purpose other than to qualify for medical assistance. N.J.A.C.10:71-4.10(j). For the reasons set forth above, the Petitioner has not shown that she has received fair market value for the transferred assets. Moreover, Petitioner has not established that she transferred these assets for a purpose other than to qualify for medical assistance. However, equally as indicative, is that this was Petitioner's third

² Checks 7514, 7288, 7278, 7285 are supported by time sheets. Check 7501 is partially supported by a time sheet for 23 hours at a rate of \$12 per hour for a total of \$282. The balance of the check is unsupported and should remain part of the penalty amount.

Medicaid application, and that after her first Medicaid application in October 2015, Petitioner chose to pay Jones to stay with her while she resided at Meadowview. Nevertheless, this was Petitioner's burden to overcome and she failed to do so.

THEREFORE, it is on this 13th day of JUNE 2019,

ORDERED:

That the Initial Decision is hereby ADOPTED with regard to ACBSS' calculation of the lookback period; and


That the Initial Decision is hereby REVERSED with regard to the calculation of the hourly rates paid to the daytime and nighttime caregivers and that ACBSS' calculation at a reduced rate is affirmed and properly included in the transfer penalty assessed against Petitioner; and

That the Initial Decision is hereby REVERSED with regard to the determination that the Meadowview hours were paid at a fair market rate and not done in contemplation of Medicaid. ACBSS' calculations are affirmed and properly included in the transfer penalty; and

That the Initial Decision is hereby REVERSED with regard to the determination that Petitioner received fair market value for apartment cleaning services and that ACBSS' calculation at a reduced rate is affirmed and properly included in the transfer penalty; and

That the Initial Decision is hereby ADOPTED with regard to checks in the Gifts/Misc. category that were written to individuals unknown to Mr. Iudica and to Kristin Lis. The Initial Decision is hereby REVERSED with regard to the rest of the checks in this category with the exception of those checks written to Chikenah Grasty which are

supported by timesheets but which hours should be reduced to the \$12 per hour rate, reducing the transfer penalty to \$1,032 for a total transfer penalty of \$97,443.78.

A handwritten signature in black ink, appearing to read "Carol Grant". The signature is written in a cursive style with a long, sweeping line extending from the end of the name towards the upper right.

Carol Grant, Acting Director
Division of Medical Assistance
and Health Services