

pay rate for the assisted living facility where she resided. Her income included a Croatian Fraternal Union of America (CFUA) annuity purchased in May 2018 for \$73,673.11. R-3. That annuity paid Petitioner \$6,141.93 a month for 12 months. She also received a monthly pension of \$1,325.66. Petitioner did not appeal the denial of that application.

The August 2018 application was filed but withdrawn by her attorney on September 20, 2018 as she was over resourced.

On October 15, 2018, Petitioner applied once again. The third application identified the pension paying her \$1,325.66 a month. However, the CFUA annuity now paid \$5,117.85 or about \$1,000 less than the annuity submitted with the June application. The annuity now had a purchase date of July 27, 2018 for \$61,389.25 and the payments began on August 15, 2018. R-11.

Ocean County denied the case due to the actions by Petitioner regarding the alleged irrevocable annuity. The identical language in the May and July 2018 annuity contracts states that each contract "(1) is irrevocable and immediate; (2) may not be transferred, assigned, surrendered or commuted; and (3) has no cash or loan value. The Annuitant may not be changed. No change may be made: (1) in the Benefit Period; or (2) in the frequency for payment." R-11. Despite this language Petitioner was able to request that creation cease the terms of the May 2018 annuity after two months and convert to a new annuity.

I agree with and amplify the ALJ's uncontested finding that "[t]here is no reason to believe that the funds in the July 2018 annuity, which was issued under identical terms to the May 2018 annuity, are any less accessible to or manipulatable by the petitioner." ID at 8. The ability of the CFUA to alter the May 2018 contract at Petitioner's request creates a "seemingly unlimited discretion [that] could be used at the petitioner's request to move the funds from the July 2018 annuity into a financial instrument more immediately accessible to the petitioner at any time prior to the annuity's expiration date." Id.

Petitioner presented testimony from Edward Pazo, National President of CFUA and from Dale Krause, whose financial services firm processed both annuity applications. ID at 10. The Initial Decision does not relate the substance of Mr. Krause's testimony. However, Mr. Pazo's testimony was recounted wherein he conceded that "[a]lthough the cover letter which transmitted the executed annuity contract expressly states that CFUA 'will deny any request to change any parties to the contract, including the payee, nor any terms or conditions of the contract, once the contract has been issued' (Id.), . . . he authorized the changes to the May 2018 annuity on the condition that the funds be rolled into a new annuity contract with CFUA." ID at 4. Petitioner provided no explanation why CFUA revoked the May 2018 annuity and move the funds to the July 2018 annuity with different payout amounts and a different term. These actions render the funds accessible or subject to modification at Petitioner's request.

Federal law permits the states to consider annuities as countable resources when it is available. see 42 U.S.C.A. § 1396p(e)(4). A resource is "available" when the person has the right, authority, or power to the resource or the person's share of it. See N.J.A.C. 10:71-4.1(c). Mistrick v. Division of Medical Assistance and Health Services 154 N.J. 158, 176 (1998). The burden of proving unavailability is on the applicant. Ibid. Petitioner has failed to meet that burden as the facts and documents in this case show that the annuity funds can be accessed at Petitioner's request. Thus, I hereby ADOPT the Initial Decision in its entirety.

THEREFORE, it is on this 19th day of JUNE 2019,

ORDERED:

That the Initial Decision is hereby ADOPTED.



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