



State of New Jersey

DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

PO Box 712

TRENTON, NJ 08625-0712

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

CAROLE JOHNSON
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

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

V.C.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE

AND HEALTH SERVICES AND

CUMBERLAND COUNTY BOARD OF

SOCIAL SERVICES,

RESPONDENTS.

ADMINISTRATIVE ACTION

ORDER OF REMAND

OAL DKT. NO. HMA 6143-2019

As Assistant Commissioner 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 in this matter is October 7, 2019 in accordance with an Order of Extension.

The matter arises regarding Petitioner's request for a caregiver exemption so as to

remove the penalty due to the January 1, 2019 transfer of her home valued at \$160,299 to her daughter. There is another penalty for \$3,267.72 in unaccounted proceeds of a life insurance policy that was upheld in the Initial Decision.

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 lookback 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).

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 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 federal statute calls for an explicit exemption from the transfer rules and is meant to compensate the child for caring for the parent. The New Jersey regulations regarding this transfer exemption are based on the federal statute. Compare 42 U.S.C. § 1396p(c)(2)(A)(iv) and N.J.A.C. 10:71-4.10(d). The statute provides that if the “equity interest in a home” is transferred by title to a son or daughter who provided such care that prevented institutionalization for at least two years, the transfer is exempt from penalty. 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). As Petitioner had applied for benefits on December 10, 2018 after being hospitalized and discharged to a nursing home, it is her burden to prove that she is entitled to the exemption due to the care provided by her daughter from December 2016 through December 2018.

The Initial Decision found that Petitioner had proven she was entitled to the exemption by finding that her daughter provided supervision of “medication administration, supervision of her finances and ensuring” someone was watching her. ID at 13. However, I do not find that these tasks are described with enough specificity to rise to the level of needing nursing home level of care and beyond normal activities. As described at N.J.A.C. 8:85-2.1;

1. Individuals requiring NF services may have unstable medical, emotional/behavioral and psychosocial conditions that require ongoing nursing assessment, intervention and/or referrals to other disciplines for evaluation and appropriate treatment. Typically, adult NF residents have severely impaired cognitive and related problems with memory deficits and problem solving. These deficits severely compromise personal safety and, therefore, require a structured therapeutic environment. NF residents are dependent in several activities of daily living (bathing, dressing, toilet use, transfer, locomotion, bed mobility, and eating).

Assistance with finances is a normal support function that children often do for their aging parents. Mere companionship is not care that would prevent someone from being institutionalized and assistance with medicine can be as passive as organizing a pill box. The support required to meet the caregiver exemptions must exceed normal supports and be such that it permitted Petitioner to avoid institutionalization for the full two years. To that end, I hereby REVERSE the Initial Decision and REMAND the matter to OAL for further findings consisted with the discussion below.

There is no doubt that Petitioner needed assistance. Petitioner's daughter had moved in with her and her step-father in 2014 following a divorce. ID at 2. In 2016, her step-father committed suicide. Petitioner's daughter testified that her step-father had taken care of Petitioner and she had assisted. With his untimely death, the daughter was left to care for Petitioner. The medical documentation shows Petitioner has a diagnosis of dementia and had violent episodes.¹ However, the record is silent on exactly what specialized care Petitioner needed to permit her to remain at home and that she needed the care during the entire two years prior to institutionalization. The hospital records show acute episodes that may have required specialized care beyond normal support activities but there is insufficient evidence to show ongoing difficulties with her activities of daily living (ADLs) for the entire 24 months.

On remand, Petitioner's daughter should specify the care and tasks she performed as well as the hours required. There is no narrative as to the extent of care she, herself, provided during the time period in question. Additionally, the issue of the payment for caregivers must be expanded on remand. Petitioner paid \$32,574, or the value of the life insurance proceeds, to various individuals from 2016 to 2018. R-1 at pages 40-48 and ID at 4. There is no evidence in the record as to the hours the caregivers worked, the rate

¹ Despite a long standing dementia diagnosis, Petitioner had capacity to execute a Power of Attorney in December 2016 and the deed in January 2019 after she entered the nursing facility. She also was deemed by hospital staff to be able to execute a plan of care in March 2017 and signed checks as late as July 2017.

paid or the tasks they performed that kept Petitioner out of the nursing home. Petitioner also continued to pay caregivers while she was in the hospital and at the nursing home. Such payment could be a transfer for less than fair market value as her medical needs were being met in those institutions.

Petitioner's daughter's claim that she paid \$14,000 out of pocket for Petitioner's care is misleading as this amount includes payment of regular household expenses not related to the issue of the caregiver exemption. ID at 4. The fact that Petitioner's daughter paid for Petitioner's cigarettes, life insurance or utilities is not germane to this case regarding the caregiving that kept her out of a nursing home. P-1. Moreover, as the daughter was residing in the house, she should be responsible in part for utilities, garbage removal and plumbing expenses for the household. While it is insufficient that the record contains no checks as evidence of the amount she alleges to have paid individuals, even using her own figures, Petitioner's daughter only paid \$5,069 to caregivers during that period from her business account. R-1 pages 49-53. This vast disparity shows that it was Petitioner's assets that provided the care that kept her out of a nursing home.

There should also be an explanation about the daughter's statements during the discharge in March of 2017 when she "continuously refused to take [Petitioner] home." The notes indicated that the daughter states she had no help at home at that time and in the discharge summary in September 2018. The discharge notes also indicate Petitioner was admitted a nursing facility after the March 2017 stay and an indication there was rehab placement in September 2018. P-4. The medical records should be clarified as to the statements made and any discharge placement or services.

Petitioner should also provide information about her condition from March 2017 through March 2018 as there were no significant medical encounters for those twelve months. Petitioner was seen twice by her primary physician in June and August for edema and gout respectively. P-4. ID at 7. There are no medical records from the March

discharge until June 2017 despite appointment notes that Petitioner was seen on March 20 and May 15, 2017. Those missing documents should be explained on remand. While her condition may have deteriorated by the time of the March 2018 home visit, the lack of any medical encounter should be explained.

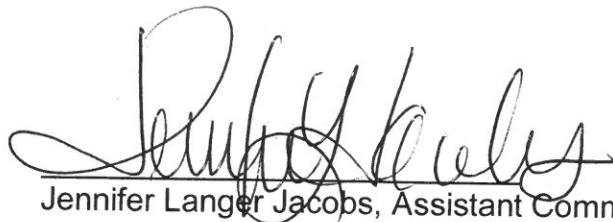
Based on the record before me and for the reasons enumerated above, I hereby REVERSE the Initial Decision as the record does not support the findings and REMAND the matter to OAL for further development of the record.

THEREFORE, it is on this ^{3rd} day of OCTOBER 2019,

ORDERED:

That the Initial Decision is hereby REVERSED; and

That the matter is REMANDED to OAL for further testimony and findings as set forth above.



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