

The matter arises regarding the imposition of a transfer penalty under the Medicaid application filed in 2020. Petitioner was found eligible for benefits as of May 1, 2020 but was subject to a transfer penalty for 110 days. ID at 1. The penalty was appealed in June 2020 by Petitioner's Designated Authorized Representative (DAR) who is an employee of the nursing home where she resides. Petitioner passed away in October 2020. ID at 2.

The Initial Decision dismisses the case, finding the DAR lacks standing to proceed. Initially there is a brief discussion of the underlying issue of the transfer penalty. Applicants who transfer or dispose of resources for less than fair market value during or after the start of the 60-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). Transfers within the look-back period are presumed to be an attempt by applicants to obtain earlier Medicaid eligibility than they are entitled to. N.J.A.C. 10:71-4.10(j). 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).

An individual can seek relief from the transfer penalty by requesting an undue hardship waiver. An undue hardship waiver may be granted if both of the following requirements are satisfied:

- i. The application of the transfer of assets provisions would deprive the applicant/beneficiary of medical care such that his or her health or his or her life would be endangered. Undue hardship may also exist when application of the transfer of assets provisions would

deprive the individual of food, clothing, shelter, or other necessities of life; and

- ii. The applicant/beneficiary can irrefutably demonstrate the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred.

[N.J.A.C. 10:71-4.10(q)(1).]

Petitioner's DAR did not seek to challenge the imposition of a penalty due to the transfer of \$38,956.27. Rather, an exemption to waive the penalty was sought. Both prongs must be satisfied in order for a waiver of the penalty. See R.P. v. DMAHS and Bergen County Board of Social Services, 2013 N.J. Super. Unpub. LEXIS 2547, (App. Div. Oct. 22, 2013). The DAR did not document that either prong existed. Petitioner was not "deprived of food clothing, shelter or other necessities of life" and there was no evidence that she had exhausted remedies. The DAR presented a lawsuit filed in February 2021 by the nursing home seeking to recover over \$90,000 from Petitioner's relatives. This lawsuit was done on nursing facilities behalf to recover arrears nearly three times higher than the penalty calculated by Ocean County. P-1 at 5. This action did not seek to recover Petitioner's assets as required by the regulation but rather to reimburse the nursing facility.

However, the more critical issue of standing overrides any discussion of the penalty. The ALJ noted that Petitioner had executed the DAR in March 2020. R-5(b). Upon Petitioner's death, that authorization ceased. L.M. v. Division of Med. Assistance & Health Servs., Dkt. No. A-6014-17T1, 2020 N.J. Super. Unpub. LEXIS 791 (App. Div.

April 30, 2020) and M.F. v. Div. of Med. Assistance & Health Servs., No. A-2254-17T2, 2019 N.J. Super. Unpub. LEXIS 733 (Super. Ct. App. Div. Apr. 1, 2019). See also E.D. v. DMAHS, HMA 05284-18, Final Decision, (September 4, 2018) and G.C. v. DMAHS, HMA 03582-19, Order on Remand, (October 24, 2019). There is no authority to permit a DAR to continue after death. The appointment of a DAR is meant to be voluntary and revocable. 42 C.F.R. § 435.923; E.B. v. Division of Med. Assistance & Health Servs., 431 N.J. Super. 183 (App. Div. 2013). Upon the death of the applicant, a key boundary placed upon such an appointment vanishes — the legal authority underlying the appointment changes, and the individual can no longer revoke the appointment. 42 C.F.R. § 435.923.

The DAR designation is analogous to a limited Power of Attorney for the purposes of pursuing a Medicaid application or appeal. The attorney-in-fact is no longer permitted to act on the principal's behalf once he receives notification of the principal's death. See N.J.S.A. 46:2B-8.5. Additionally, the designation form that Petitioner signed provides that it is revocable at any time, similar to the revocability of a power of attorney. See N.J.S.A. 46:2B-8.10. This federally mandated revocability provision is rendered meaningless if the designation survives the applicant's death.

I FIND that the DAR designation ended upon Petitioner's death and nothing in the record shows that the nursing facility employee received a new authorization from Petitioner's estate to continue the appeal. Thus, I FIND that the Initial Decision correctly dismisses the appeal.

THEREFORE, it is on this ^{1st} day of JUNE 2021,

ORDERED:

That the Initial Decision is hereby ADOPTED.



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