

which Petitioner had been residing since January 3, 2019. Petitioner, himself, authorized Ms. Gutman to act on his behalf as designated authorized representative (DAR) in a form signed on August 19, 2019.

On November 22, 2019, the facility moved to have the Petitioner deemed incompetent. In support of this motion, the facility provided two nearly identical physician's certifications. The earliest date that Petitioner was examined by either physician was October 14, 2019. There is no indication that either physician was Petitioner's treating physician, nor does the certification address when Petitioner began to exhibit symptomatic behavior. The veracity of the certifications are called into question as paragraphs 2, 4, and 5 are identical with the exception of the date of examination, and as paragraph 3 merely rearranges the same words to arrive at the same conclusion. Additionally, no one questioned the Petitioner's competency two months earlier when he signed the DAR permitting the facility to file a Medicaid application on his behalf.

Moreover, while the court issued a date for a hearing and assigned Ben Menashe, Esq. as temporary guardian of Petitioner's estate, there is no evidence in the record that Petitioner was adjudicated incompetent or that a permanent guardian had ever been appointed. In fact, the record shows that on September 18, 2020, Petitioner, not his guardian, signed another DAR, again appointing Ita Gutman, to act on his behalf. Petitioner had either regained competency or was never adjudicated incompetent.

The status of Petitioner's competency and guardianship throughout the application process may affect his access to assets and consequently the calculation of his eligibility date. The July 8, 2020 notice of determination notes an effective date of eligibility based on a spend-down of resources, which was later changed. The DAR disputed the eligibility date and asked for reconsideration claiming that the assets were inaccessible through no fault of Petitioner, due to the temporary and partial guardianship. The record, however, provides little to no information with regard to Petitioner's mental capacity or ability to access his resources at the time of application and warrants further examination.

A “resource” is defined as “any real or personal property which is owned by the applicant . . . and which could be converted to cash to be used for his/her support and maintenance.” See 20 C.F.R. § 416.1201(a) and N.J.A.C. 10:71-4.1(b). If the individual has the right, authority or power to liquidate the property, it is considered a resource. Ibid. A resource is “countable” for purposes of eligibility determinations if it is “available to the applicant/beneficiary or any person acting on his or her behalf.” N.J.A.C. 10:71-4.1(c)(3) (emphasis added). Inaccessibility is not established by an applicant’s disability but is instead established where the beneficiary cannot exercise control over or tap into the resource due to external factors. N.J.A.C. 10:71-4.4(b)(6)(i).

Furthermore, Supplemental Security Income (SSI) guidance states that funds held and managed through a court appointment are available resources.¹ That guidance states that “[i]f State law requires that funds in a conservatorship account be made available for the care and maintenance of an individual, we assume, absent evidence to the contrary, that funds in such an account are available for the individual's support and maintenance and are, therefore, that individual's resource.” POMS SI 01140.215. The SSI guidance declares “the fact that an individual or his or her agent must petition the court for withdrawal of funds does **not** mean that the funds may be assumed to be unavailable for the individual's support and maintenance (and, therefore, not a resource for SSI purposes).” POMS SI 01140.215.

In Chalmers v. Shalala, 23 F. 3d 752 (1994), the Third Circuit found that even though the applicant’s schizophrenic mental state precluded her from having actual power or physical ability to liquidate her property interest, the property was considered a resource for purposes of obtaining Supplemental Security Income (SSI) benefits. Chalmers v. Shalala, 23 F.3d 752, 755 (3d Cir. 1994). The court held that the phrase “right, authority or power” is disjunctive and refusing to interpret the phrase as conjunctive. The court went on to find that the word “power” means not only a “mental or physical ability or aptitude” but also “the legal

¹ New Jersey is an “SSI State” in following the SSI rules with respect to income and resources. See Schweiker v. Gray Panthers, 453, U.S. 34 (1981).

authority” to liquidate resources. Id. at 755. Therefore, if the individual has the legal right to receive the money, any mental or physical disability is immaterial to the eligibility determination. Indeed, as the court noted, since many disabled individuals receive benefits, “such an interpretation would render the provision meaningless.” Id.

The New Jersey Superior Court, Appellate Division has upheld the denial of an application where the applicant argued that her assets were not available through no fault of her own. In S.D. vs. DMAHS and Bergen County Board of Social Services, The court found that the applicant, who had a power of attorney and then a guardian, had “the capacity, through her representatives, to access her resources.” S.D. vs. DMAHS and Bergen County Board of Social Services, No. A-5911-10 (App. Div. February 22, 2013).

I am struggling, based on the record before me, to understand the legal impediment to Petitioner’s resources. By court order, dated November 22, 2020, Petitioner’s temporary guardian had full legal access to his assets. For the purposes of Medicaid eligibility, all of Petitioner’s funds, including those held by or under the control of Petitioner’s guardian, are countable because he had the “right, authority, or power” to liquidate his assets, through his guardian who had authority to act on his behalf. C.F.R. § 416.1201(a) and N.J.A.C. 10:71-4.1(b). I am also struggling to understand why and when UCBSS arrived at a November 19, 2019 eligibility date. There is no evidence in the record establishing that Petitioner met resource eligibility earlier than April 2020. Moreover, I am struggling to see what evidence was presented to establish that Petitioner was, in fact, eligible as of the date of the application, and possibly the three months prior. There is currently no evidence that the Petitioner was incapacitated at the time of application or that he did not have access to his resources. To the contrary, the facility representative believed he held sufficient capacity to designate a facility employee to represent him during the Medicaid application process.

THEREFORE, it is on the 23rd day of MARCH, 2021,

ORDERED:

That the Initial Decision is hereby REVERSED; and

That the matter is REMANDED to the Office of Administrative Law (OAL) for additional evidence and testimony with regard to Petitioner's capacity throughout the Medicaid application process; and

That the matter is REMANDED for additional evidence and testimony with regard to UCBSS' decision to change its original eligibility date from April 2020 to November 2019, including notification of same; and

That the matter is REMANDED for additional evidence and testimony with regard to Petitioner's resource eligibility prior to November 2019 and in connection with his September 2019 Medicaid application.



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