

Agency Head to file a Final Agency Decision in this matter is November 28, 2014 in accordance with an Order of extension. The Initial Decision in this matter was received on August 29, 2014.

The issue in this case is whether Petitioner rebutted the presumption that the transfer of \$120,268.14 in assets to her children and grandchildren was done solely for a reason other than qualifying for Medicaid. Petitioner was found otherwise eligible July 1, 2013 with retroactive benefits to April 1, 2013 but for a penalty of fifteen months and thirteen days, or until July 14, 2014. Petitioner conceded that \$75,000 of the assessed penalty was a gift to her son, but asserts the balance of \$45,268.14 was transferred for a purpose other than to qualify for Medicaid. In support of her position she claims that a July 2010 surgery which resulted in infection was a traumatic onset of disability pursuant to N.J.A.C. 10:71-10(j).

The Initial Decision found that Petitioner's wife had rebutted the presumption that the transfers were done to qualify for benefits and determined that Petitioner was not subject to a penalty for any transfers made prior to January 1, 2011. For the reasons that follow, I hereby REVERSE the Initial Decision with regard to the transfers to Petitioner's children prior to January 1, 2011. However, I hereby ADOPT the Initial Decision with regard to the transfers to Petitioner's children after January 1, 2011.

Petitioner is a seventy-six year old woman. In 1972, at age thirty-four, Petitioner was diagnosed with a brain tumor for which she underwent several surgeries. After each surgery, Petitioner required hospitalization and

rehabilitation, but she always returned home. In 1984, one of these surgeries left her partially paralyzed, confined to a wheelchair and unable to return to work. At some point thereafter, Petitioner's husband retired in order to care for her fulltime. In 1995, Petitioner and her husband moved into a wheelchair accessible apartment in their daughter Sharon's basement. In July 2010, Petitioner underwent another surgery to place a titanium plate in her skull. The surgery ultimately resulted in an infection and Petitioner's placement in a nursing facility.

Prior to the July 2010 surgery, Petitioner transferred more than \$100,000 to her children and grandchildren. By the time Petitioner applied for Medicaid benefits on July 1, 2013, Petitioner had transferred a total of \$120,268.14 to her children and grandchildren. 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.¹ N.J.A.C. 10:71-4.10 (c). The presumption that the transfer of assets was done to qualify for Medicaid benefits may be rebutted "by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). It is Petitioner's burden to overcome the presumption that the transfer was done – even in part – to establish Medicaid.

¹ Congress understands that applicants and their families contemplate positioning assets to achieve Medicaid benefits long before ever applying. To that end, Congress extended the look back period from three years to five years. Deficit Reduction Act of 2005, P.L. 109-171, § 6011 (Feb. 8, 2006).

N.J.A.C. 10:71-4.7(i) sets forth the procedures for rebutting the presumption. Primarily, the applicant would make a statement concerning the transfer including the stated purpose for transferring the resource. The statement should include "the applicant's means of, or plans for, supporting himself or herself after the transfer." No such statement appears in the record below.

Additionally, an individual can rebut the presumption that a transfer for less than fair market value was made to qualify for Medicaid. A traumatic onset of disability may indicate that the transfer was for some other purpose. N.J.A.C. 10:71-10(j)1.i. Petitioner asserts that the infection she suffered after surgery in July 2010 was a traumatic injury that she did not anticipate precluding her return home.

By Initial Decision dated August 29, 2014, the ALJ found that the July 2010 infection was a traumatic event and any transfers occurring prior to the traumatic event were not done with the intention of qualifying for Medicaid. However, all transfers occurring after the infection were subject to a transfer penalty. As a result, the ALJ reduced the transfer penalty to \$90,217.48.

To reach this conclusion, the ALJ relied on testimony from Petitioner's family regarding her health and whether her need for long term care was unexpected. A finding of fact based on hearsay must be supported by competent evidence. N.J.A.C. 1:1-15.5(b), the **residuum rule**, requires "some legally competent evidence" to exist "to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness."

Petitioner's health has been compromised for the past forty years. She has been confined to a wheelchair for the past thirty years. I note that there was no expert medical testimony about her health from 1984 forward. Additionally, the record is devoid of competent medical evidence of her condition at the time Petitioner gifted the money to her children. In fact, testimony that Petitioner was partially paralyzed and needed the fulltime assistance of her husband, is at odds with the finding that Petitioner did not anticipate the need for medical assistance, either in or outside of the home. Indeed New Jersey's Home and Community Based Waivers permit individuals needing institutional level of care to live at home with supports such as caregivers. 42 U.S.C.A. § 1396n(c). Her age and medical condition cannot be ignored when trying to overcome the presumption that the transfer was done -even in part - for Medicaid purposes. I FIND that the testimony concerning Petitioner's health is hearsay and cannot be used to support the finding that the infection was a traumatic event unanticipated by either Petitioner or her family. ID at 8.

I FIND that the record does not support a finding that Petitioner was healthy and financially secure during the time the transfers were made. It is Petitioner's burden to demonstrate such factors in order to overcome the presumption that the transfers were done to qualify for Medicaid benefits. Here, Petitioner presents no evidence as to how she intended to support herself after she transferred \$120,268.48 within three years. Particularly bothersome is Petitioner's choice to pay for her grandsons' private education. As the ALJ correctly noted, "it is an unauthorized transfer of assets...to spend one's own

funds on the privilege of attending private schools while at the same time seeking taxpayer funding for one's own institutional care needs." ID at 8. As noted above, I FIND that there is not enough evidence to support a finding that Petitioner suffered a traumatic event when the titanium plate in her head became infected. Accordingly, I FIND that all of the tuition payments, totaling \$30,707.48, are unauthorized transfers subject to a penalty.

I FIND that the record does not support a finding that the transfers made to Petitioner's daughter for a hot water heater; a bounced paycheck and an early Christmas present were made for some purpose other than to qualify for Medicaid. These checks, made out to Petitioner's daughter, are unsupported by receipts, invoices or other documentation. Moreover, the sums are round numbers which would not occur if the checks were solely to cover a specific expenditure or paycheck. I FIND that the transfers to Petitioner's daughter, in the amount of \$5,500, are unauthorized transfers subject to a penalty.

With regard to the municipal court payments made by Petitioner on behalf of her son, I FIND that the preponderance of the credible evidence established that Petitioner made these transfers for a reason other than to qualify for Medicaid. Because, these were numerous, small payments made directly to municipal courts I have no reason to suspect that they were made for any reason other than to help her son. I FIND that the payments made to municipal courts in the amount of \$9,061 were not a transfer done in anticipation of qualifying for Medicaid and should not be calculated as part of the transfer penalty assessed against Petitioner.

THEREFORE, it is on this 18th day of NOVEMBER 2014,

ORDERED:

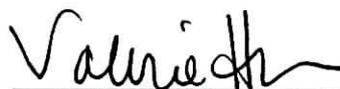
That the Initial Decision is hereby REVERSED with regard to the conclusion that Petitioner suffered a traumatic event. There is no competent medical testimony to support a finding that the infection of a titanium plate in Petitioner's skull was a traumatic and unexpected occurrence; and

That the Initial Decision is hereby REVERSED with regard to the tuition payments made prior to January 2011; and

~~That the Initial Decision is hereby REVERSED with regard to \$5,500 in~~
transfers made to Petitioner's daughter; and

That the Initial Decision is hereby ADOPTED with regard to the \$9,061 in payments made to municipal courts on behalf of Petitioner's son; and

That the matter is returned to Morris County to calculate the penalty in accordance with this decision.



Valerie Harr, Director
Division of Medical Assistance
and Health Services