



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. HMA 14391-23

AGENCY DKT. NO. N/A

E.A.,

Petitioner,

v.

**ATLANTIC COUNTY DEPARTMENT OF
FAMILY AND COMMUNITY DEVELOPMENT**

Respondent.

Ernest A. Aponte, Esq. for petitioner

Alysia Remaley, Esq., Assistant County Counsel (Atlantic County Department of
Law)

Record Closed: February 9, 2024

Decided: February 27, 2024

BEFORE **ELAINE B. FRICK**, ALJ:

STATEMENT OF THE CASE

Respondent, Atlantic County Board of Social Services (the Agency), found petitioner ineligible for Medicaid for being over the resource limit for eligibility. Petitioner appealed, contending that funds in his bank account were designated for burial/funeral

expenses pursuant to N.J.A.C. 10:71-4.4 and should have been excluded from his resources for eligibility determination.

PROCEDURAL HISTORY

The Agency determined petitioner was ineligible for Medicaid and provided letter notification to petitioner on December 13, 2023. Petitioner requested a fair hearing. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on December 28, 2023, to be heard as a contested case. N.J.S.A. 52:14B-1 to 14B-15; N.J.S.A. 52:14F-1 to 14F-13. A telephonic hearing was conducted on February 9, 2024, and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

The parties stipulated that the facts are uncontroverted and that the issue presented is legal only, pertaining to the application and interpretation of the relevant regulation. Thus, the following information was derived from the arguments presented by the parties' attorneys and the documentary evidence entered. I **FIND** as **FACTS**:

Petitioner applied for Medicaid on November 3, 2023. (R-1 at 2–10.) He reported having a bank account. (R-1 at 5.)

A request for information letter was issued from the Agency to petitioner, dated November 17, 2023, in response to petitioner's application. (R-1 at 14–17.) The Agency requested bank account statements for the five-year lookback period, to be submitted to the Agency by December 1, 2023. (R-1 at 14–15.)

The requested bank statements were submitted and received by the Agency on November 30, 2023. Petitioner's bank account statement for the date ending October 31, 2023, identified a balance of \$2,506.83. (R-1 at 19–20.) Petitioner's monthly social security deposit of \$1,187 was made on November 3, 2023, according to the bank's summary statement of the account. (R-1 at 18.) The summary statement indicated that the current ledger balance of the account as of November 26, 2024, was \$3,311.06. (R-

1 at 18.) The memo ledger balance on the summary statement was \$3,291.06. (R-1 at 18.)

On December 13, 2023, the Agency issued a notification letter, advising petitioner that he was determined to be ineligible for NJ FamilyCare benefits because his total countable resources were \$3,311.06 from his bank account, which exceeded the maximum allowable resource amount of \$2,000. (R-1 at 11–13.) The \$3,311.06 appears on the bank summary statement as the “current ledger balance,” presumably as of November 26, 2023, the latest date that appears on the printout summary statement obtained by petitioner and received by the Agency on November 30, 2023. (R-1 at 18.)

Petitioner had responded to the request for information letter, with petitioner’s counsel writing responses on the letter, indicating the value of the account was \$3,291.06 and “*Total savings for funeral expenses.” (P-1, Exhibit 2.) Petitioner thereafter received the Agency’s determination letter of December 13, 2023, which found petitioner ineligible for having total countable resources of \$3,311.06, which was over the program’s resource limit of \$2,000. (R-1, 11–13.) Petitioner requested a fair hearing, and counsel provided a letter response to the Agency, dated December 18, 2023, contending that, as per N.J.A.C. 10:71-4.4, petitioner’s bank account was an excludable resource since the funds in the account were noted to be used for funeral expenses. (P-1, Exhibit 4; P-1, Exhibit 2.)

Included with counsel’s letter of December 18, 2023, to the Agency was an affidavit executed by E.A. on December 19, 2023, attesting that the funds in his bank account, which had a value of \$3,291.06, were set aside for his funeral expenses. (P-1, Exhibit 5.) Petitioner contends that the affidavit was presented within thirty days of the denial letter of December 13, 2023, and satisfies the regulation’s requirement to provide an attestation that he intends to use the funds in his account for his burial and documentary evidence that the funds have been designated as set aside for burial.

Petitioner asserted that in January 2024, approximately \$800 to \$900 was spent to obtain a burial plot, although the documentation has not yet been forwarded to the Agency. Additional funds were used to put a deposit down with a funeral home for

petitioner's anticipated funeral expenses. Counsel acknowledged that such documentation confirming the deposit has not yet been provided to the Agency.

Petitioner contends that he was in full compliance with the regulation regarding excludable resources, having advised the Agency in response to the request for information letter that his bank account value was "*Total savings for funeral expenses," and thereafter he provided an affidavit attesting that the funds in his bank account were for his funeral expenses. (P-1, Exhibit 4, attachment A; P-1, Exhibit 5.)

The Agency contends that petitioner's bank account is not a separate account with funds set aside for burial/funeral expenses. It asserts that E.A.'s Social Security payments are deposited into the account on a monthly basis, and it is the account that E.A. utilizes to pay his regular expenses. Even though petitioner has asserted that he intends to use the funds to pay for a burial plot and funeral expenses, the funds he claims are in the account to be used for burial expenses have been comingled with his regular monthly operating funds. Hence, the \$3,311.06 identified in his account as the ledger balance, apparently as of November 26, 2023, exceeds the permitted \$2,000 per month maximum in resources to be eligible for Medicaid. The Agency cannot take into consideration any expenditures for burial expenses that have been made since the application was submitted to alter its determination on the November 3, 2023, application. The Agency asserts that petitioner needs to reapply and submit a new application for its consideration.

LEGAL ANALYSIS AND CONCLUSIONS

The Medicaid program is a cooperative federal-state venture established under Title XIX of the Social Security Act. 42 U.S.C. § 1396, et. seq. It "is designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services." L.M. v. Division of Medical Assistance & Health Services, 140 N.J. 480, 484 (1995) (citations omitted).

Eligibility for Medicaid is governed by regulations adopted in accordance with the authority granted to the Division of Medical Assistance and Health Services (DMAHS)

and the Commissioner of the Department of Human Services. N.J.S.A. 30:4D-7. The DMAHS and Commissioner are required to establish a policy and procedures for the Medicaid application process and shall supervise the operation of, and compliance with, the policy and procedures. N.J.A.C. 10:71-2.2(b). The local County Welfare Agency (CWA) is charged with the responsibility to evaluate a Medicaid applicant's eligibility. N.J.A.C. 10:71-2.2(c); N.J.A.C. 10:71-3.15. DMAHS is required to manage the State's Medicaid program in a fiscally responsible manner, considering the public's interest in "increasing social demands for limited public resources." Dougherty v. Dept. of Human Services, Div. of Medical Assistance & Health Services, 91 N.J. 1, 10 (1982).

In order for a Medicaid applicant to be deemed financially eligible for long-term care, they have to be found to be both resource and income eligible. If an individual has countable resources in excess of \$2,000, they are not eligible. N.J.A.C. 10:71-4.5. "Resource eligibility is determined as of the first moment of the first day of each month." N.J.A.C. 10:71-4.1(e).

Certain assets are to be excluded from an applicant's total sum of resources for purposes of calculating resource eligibility for Medicaid. N.J.A.C. 10:71-4.4. The regulation, entitled "Excludable resources," specifies:

(a) A resource which is classified as excludable shall not be considered either in the deeming of resources or in the determination of eligibility for participation in the Medicaid Only Program.

(b) The following resources shall be classified as excludable:

.....

9. Burial spaces intended for the use of the individual, his or her spouse, or any other member of his or her immediate family and funds which are set aside for the burial expenses of the individual or spouse, subject to the limits specified below.

i. The following definitions apply in regard to burial spaces or funds:

(1) Burial spaces are conventional grave sites, crypts, mausoleums, urns, or other repositories which are customarily and traditionally used for the remains of deceased persons.

(2) Funds set aside for burial include revocable burial contracts, burial trusts, and any separately identifiable assets which are clearly designated as set aside for the expenses connected with an individual's burial, cremation or other funeral arrangements.

....

ii. The exclusion from resources of funds set aside for burial applies only when counting any portion of the funds toward the resource limit would cause ineligibility due to excess resources.

(1) If the individual or couple would otherwise be ineligible and could be eligible with the application of this exclusion and the individual or couple alleges that funds are set aside for the burial of the eligible individual or his or her spouse, an affidavit indicating such must be obtained.

(A) The amount of funds that may be excluded shall be determined and may not exceed the maximum limit of \$1,500 each for the individual and his or her spouse. The maximum limit for each individual is reduced by an amount equal to the amount of funds held in an irrevocable burial trust, an irrevocable burial contract, or other irrevocable arrangement which is available to meet that individual's burial expenses. Each individual's maximum limit is further reduced by the face value of any insurance policy on that individual's life owned by him or her or his or her

spouse if the cash surrender value of the policy was excluded in determining the resources of the individual.

(B) In order for burial funds to be excluded, the funds must be separately identifiable (that is, not comingled with other funds or assets which are not set aside for burial). Additionally, the funds must be already designated as set aside for burial. If the funds are not so designated, the funds may be excluded if the individual attests in writing, that he or she intends to use the funds for his or her burial and agrees to submit within 30 days, documentary evidence that the funds have been designated as set aside for burial.

[N.J.A.C. 10:71-4.4.]

The Agency cited R.L. v. DMAHS, Monmouth County Board of Social Services, HMA 04625-2023, final Agency decision, October 23, 2023, to support its position that a burial policy that was revocable was not excludable from resources. The decision in the Monmouth County matter indicates that an irrevocable burial policy was placed with a chapel's elder trust account, rather than the funds being placed as an irrevocable trust with the State of New Jersey. "Since the State's designation to the policy is revocable the policy would not qualify as an exception to the transfer penalty rules." Id. at 4.

The Agency also cites to the final agency decision in the matter of R.D. v. DMAHS, Hudson County Board of Social Services, HMA 09480-2014, decided November 26, 2014, to indicate that if funds are set aside for burial, they are to be used only for that and no other purpose. The final decision in the Hudson County case dealt with the issue of a cash-value life insurance policy petitioner possessed and had assigned to a funeral home, with the State of New Jersey identified as the beneficiary. The BSS in that matter found that petitioner was over-resourced due to the cash value of the policy being over \$7,000. Petitioner believed the proper procedures were taken to assign the policy for funeral

expenses to the funeral home and to name the State as beneficiary. N.J.S.A. 2A:102-24 mandates that prepaid funeral agreements shall include a statement that New Jersey law requires the agreement to be irrevocable for applicants or recipients of Medicaid and for the State of New Jersey to be named as the beneficiary to receive any excess funds after funds are used for the funeral services. Since the petitioner's agreement with the funeral home did not contain the mandated language, petitioner failed to demonstrate that the assignment of the policy had been irrevocable. Thus, the cash value of the policy was available to petitioner, and the cash value in excess of \$1,500 was countable for the purpose of determining Medicaid eligibility. Id. The final Agency decision affirmed the action taken by the Hudson County BSS in finding petitioner to be over-resourced for Medicaid eligibility.

The language of these cited final decisions underscores the scrutiny and minutia to detail that must be demonstrated when attempting to exclude burial or funeral funds as excludable resources. The key is the status of the availability of the funds to petitioner, having a separate account or segregated funds, and if the proper procedures have been followed and conditions adhered to under the regulations.

The regulation in question, N.J.A.C. 10:71-4.4(b)(9), permits a burial plot to be an excludable resource, subject to the limitations specified therein. A burial plot that is excludable can be a conventional grave site. Petitioner admittedly had not yet purchased or possessed a burial plot as of the date of his application on November 3, 2023. The regulation does indicate that funds set aside for burial would be an excludable resource, defining "funds set aside for burial" to include specific trusts or "any separately identifiable assets which are clearly designated as set aside for the expenses connected with an individual's burial, cremation or other funeral arrangements." N.J.A.C. 10:71-4.4(b)(9)(i)(2). Petitioner did not have a separately identifiable asset "clearly designated" as set aside for his burial expenses at the time of his application. There is a handwritten notation by counsel in response to the request for information letter that petitioner's bank account would have the total funds used for funeral expenses.

The regulation specifies that "the exclusion from resources of funds set aside for burial applies only when counting any portion of the funds toward the resource limit would

cause ineligibility due to excess resources.” N.J.A.C. 10:71-4.4(b)(9)(ii). The amount of funds that may be excluded cannot exceed the maximum allowable amount of \$1,500 for an individual. N.J.A.C. 10:71-4.4(b)(9)(ii)(1)(A). If an applicant would otherwise be ineligible and could be eligible with the application of this exclusion and the individual applicant alleges that funds are set aside for their burial, as petitioner contends here, then “an affidavit indicating such must be obtained.” N.J.A.C. 10:71-4.4(b)(9)(ii)(1). The regulation further requires that the funds “must be separately identifiable (that is, not comingled with other funds or assets which are not set aside for burial). Additionally, the funds must be already designated as set aside for burial.” N.J.A.C. 10:71-4.4(b)(9)(ii)(1)(B). The Agency asserts that petitioner’s attempt to identify his bank account to be used for funeral expenses does not satisfy this requirement of the regulation since petitioner’s bank account is used to deposit his social security proceeds and to pay daily living expenses. The Agency contends that petitioner is unable to designate the portion of his bank account that exceeds the \$2,000 resource limit since the funds are clearly comingled and were not separately set aside.

Petitioner points to the next line of the regulation to overcome the Agency’s contention that the bank account funds cannot be designated as an excludable resource for burial or funeral expenses because they are comingled in the daily living expenses bank account. Petitioner argues that the regulation states, “If the funds are not so designated, [as set aside for burial] the funds may be excluded if the individual attests in writing, that he or she intends to use the funds for his or her burial and agrees to submit within 30 days, documentary evidence that the funds have been designated as set aside for burial.” N.J.A.C. 10:71-4.4(b)(9)(ii)(1)(B). Petitioner contends that he is compliant, having provided the notation on the reply to the request for information, which the Agency received prior to the deadline for the submission of additional information, that his bank account would be used for funeral expenses. After the denial letter of December 13, 2023, was issued, petitioner submitted an affidavit, executed on December 19, 2023, attesting that his bank account funds would be used for funeral expenses. Petitioner believes that since the affidavit was submitted within thirty days of the denial letter, the funds are excludable as resources. A burial plot has since been purchased, sometime in January 2024, and a deposit has been made at a funeral home towards future funeral expenses. Petitioner admittedly has not provided receipts or documentary evidence that

his funds were expended for the burial plot and a deposit at the funeral home.

Petitioner is seeking to exclude \$1,311 from his bank account, which the Agency determined had a value of \$3,311.06, placing him over the \$2,000 maximum allowable resources limit to be eligible for Medicaid. I **CONCLUDE** that the regulation requires that the burial funds intended to be excluded must already have been in a separate account or fund upon application for Medicaid. The regulation specifies that the funds cannot be comingled. I thus **CONCLUDE** that the Agency's determination that petitioner could not deem any portion of the account as burial funds since the funds would be deemed comingled with his bank account used for daily living expenses. I thus **CONCLUDE** that the Agency's determination that petitioner was over the \$2,000 maximum resource amount for eligibility for Medicaid was appropriate.

The regulation does have the provision that if the separate funds have not yet been designated for burial purposes, the applicant can attest that the funds will be used for burial purposes. Even if petitioner's interpretation of the regulation was accepted, that he would be able to designate a portion of his bank account for burial funds, there has not been strict compliance with the regulation. The attestation must provide that the funds will be used for burial expenses and that the applicant must submit, within thirty days of the attestation, documentary evidence that the funds have been designated as set aside for burial. The notation on the request for information letter indicated the funds would be used for funeral expenses. It was not an attestation. Even if accepted as an attestation, petitioner admittedly has not yet provided documentary evidence that the funds have been appropriately set aside for burial or funeral expenses. Reliance on the affidavit executed on December 19, 2023, also would not comply with the regulation. The Agency is not required to take into consideration such information submitted post-denial. A new application must be submitted. I thus **CONCLUDE** the Agency's determination that petitioner was over-resourced and thus ineligible for Medicaid shall be **AFFIRMED**. Petitioner must submit a new application for consideration for Medicaid.

The parties are directed that this Initial Decision is issued after the Order of October 2, 2023, wherein a decision on resource eligibility by an ALJ is "deemed adopted" as the Agency's final decision. If an appeal is sought, it must be done as per the

information below, to the Appellate Division.

ORDER

It is **ORDERED** that the Agency's determination that petitioner was ineligible for Medicaid due to being over the resource limit is **AFFIRMED**.

I **FILE** this initial decision with the **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**. This recommended decision is deemed adopted as the final agency decision under 42 U.S.C. § 1396a(e)(14)(A) and N.J.S.A. 52:14B-10(f). The **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** cannot reject or modify this decision.

If you disagree with this decision, you have the right to seek judicial review under New Jersey Court Rule 2:2-3 by the Appellate Division, Superior Court of New Jersey, Richard J. Hughes Complex, PO Box 006, Trenton, New Jersey 08625. A request for judicial review must be made within 45 days from the date you receive this decision. If you have any questions about an appeal to the Appellate Division, you may call (609) 815-2950.



February 27, 2024 _____

DATE

ELAINE B. FRICK, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

EBF/gd

APPENDIX

Exhibits

For petitioner

P-1 Petitioner's Letter Brief, January 16, 2024, with attachments:

Exhibit 1: November 17, 2023, Request for Information Letter

Exhibit 2: Request for Information Letter with handwritten notation reply to information from petitioner

Exhibit 3: Agency's Determination Letter, December 13, 2023

Exhibit 4: Request for Fair Hearing with Attorney Representation Letter, December 18, 2023, and attachment A: Request for Information Letter with handwritten notation reply information and attachment B: print out copy of N.J.A.C. 10:71-4.4 Excludable Resources

Exhibit 5: Affidavit by E.A., December 19, 2023

For respondent

R-1 Fair Hearing Packet (22 pages)

Cover Page (1)

Application for Medicaid, November 3, 2023 (2-10)

Determination Letter, December 13, 2023 (11-13)

Request for Information Letter, November 17, 2023 (14-17)

Bank Summary Statement, November 26, 2023 (18)

Bank Statement, period ending October 31, 2023 (19-20)

Bank Statement, period ending September 29, 2023 (21-22)