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

R.M.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
v.	:	FINAL AGENCY DECISION
	:	
DIVISION OF MEDICAL ASSISTANCE	:	OAL DKT. NO. HMA 05059-2023
	:	
AND HEALTH SERVICES AND	:	ON REMAND FROM HMA 10205-2019
	:	
HUDSON COUNTY DEPARTMENT	:	ON REMAND FROM HMA 09313-2018
	:	
OF FAMILY SERVICES,	:	
	:	
RESPONDENTS.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is May 9, 2024, in accordance with an Order of Extension.

The issue in this matter arises regarding Petitioner’s request for a caregiver exemption so as to remove the penalty due to the December 2016 transfer of Petitioner’s home valued at \$398,117.99 to Petitioner’s son, E.M. Petitioner had applied for benefits in November 2016 having been hospitalized in July 2016, and was soon thereafter placed

in an institution. Hudson County found petitioner was otherwise eligible as of January 1, 2017, and imposed a penalty through April 12, 2020. Petitioner appealed Hudson County's determination and the matter was transmitted to the Office of Administrative Law on July 29, 2018. On April 23, 2019, the Administrative Law Judge (ALJ) issued an Initial Decision granting the Petitioner's motion for summary decision and reversing Hudson County's decision denying the caregiver exception. On July 18, 2019, the Division of Medicaid Assistance and Health Services (DMAHS) issued an Order of Remand reversing the Initial Decision and Remanding the matter for further findings including additional medical records and evidence to corroborate the living situation between Petitioner and Petitioner's son for the period beginning July 2014 through July 2016. On January 17, 2023, the ALJ issued an Initial Decision again reversing Hudson County's denial of the caregiver exemption. On April 14, 2023, DMAHS issued a Final Agency Decision once again reversing the Initial Decision and finding that Hudson County appropriately denied Petitioner's request for the caregiver exemption because Petitioner failed to establish that Petitioner's residence was in fact also Petitioner's son's residence for the two years immediately preceding institutionalization. Petitioner then filed a Notice of Appeal with the Superior Court Appellate Division, appealing the April 14, 2023 Final Agency Decision. Additionally, on May 16, 2023, Petitioner filed a request for reconsideration to DMAHS. On June 5, 2023, DMAHS issued a Final Agency Decision on Reconsideration reopening and remanding the matter back to the OAL to address issues with exhibits that were not included in the OAL file related to E.M.'s proof of residency.

On February 7, 2024, the ALJ issued an Initial Decision once again reversing Hudson County's denial of the caregiver exemption.

In determining Medicaid eligibility for someone seeking institutionalized benefits, counties must review five years of financial history. 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). “A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period.” E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). “[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification.” Ibid. Congress’s imposition of a penalty for the disposal of assets for less than fair market value during or after the look-back period is “intended to maximize the resources for Medicaid for those truly in need.” Ibid.

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. 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. See 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 to a parent while “residing in such [parent’s] home” that prevented institutionalization for at least two years, the transfer is exempt from penalty. 42 U.S.C. § 1396p(c)(2)(A)(iv). 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).

In reviewing the caregiver exemption, the Appellate Division noted that the “receipt of Medicaid benefits is not automatic. Understanding the State's need to conserve limited financial resources to assure monies are paid to those who meet the circumscribed eligibility requirements, we will not merely assume the criteria as satisfied. Rather, proof must be forthcoming specifically establishing each requirement of the exception to obtain its application.” M.K. v. DMAHS and Burlington County Board of Social Services, Docket No. A-0790-14T3, decided May 13, 2016, slip op. at 17. In another Appellate Division case, A.M. v. Monmouth Co. Board of Social Services, 466 N.J. Super. 557 (App. Div. 2021), the court held that it was acceptable for the child caregiver to be employed outside of the home and still qualify for the child caregiver exemption. Additionally, the court went on to say that the child caregiver is not required to fund all of the care provided to the parent. It is acceptable for the child caregiver to arrange for aides to assist the parent while the child is at work, and for the parent to incur the expense. Ibid. at 570.

In the present matter, Petitioner's son, R.M., allegedly resided with Petitioner since 2004 and stated that he moved in to assist his elderly parents. ID3¹ at 7. In December 2016, Petitioner transferred Petitioner's home to R.M. ID3 at 5. Hudson County assessed a transfer penalty for \$398,117.99 for the transfer of the home at less than fair market value. Ibid. Petitioner, however, argues that the transfer of the home to E.M. should be exempt from the imposition of a penalty on Petitioner's receipt of Medicaid benefits as a result of E.M. being Petitioner's caregiver for the two-year period prior to Petitioner being admitted into the nursing facility, pursuant to N.J.A.C. 10:71-4.10(d).

Petitioner appealed the transfer penalty in relation to the transfer of Petitioner's home. On or about September 26, 2018, the parties filed a Stipulation of Undisputed Material Facts and on October 30, 2018, Petitioner filed a Motion for Summary Decision. ID1 at 2. The parties stipulated to Petitioner's medical records and medical reports, contained in four binders identified as joint exhibit J-1. ID1 at 4. Hudson County had also stipulated to the medical condition of Petitioner for the two years preceding Petitioner's admission to the facility, but it did not stipulate that the care E.M. provided to petitioner far exceeded normal personal support activities that are essential to the health and safety of Petitioner. ID1 at 3. Hudson County argued that Petitioner's medical condition had so deteriorated that E.M. could not possibly have taken care of his mother because he did not hold the necessary skilled nursing level of care needed to take care of Petitioner. Ibid.

The April 23, 2019 Initial Decision found that as a result of the party's stipulation to Petitioner's medical and physical condition, as contained in the Binders and the Stipulation, the requirements of Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540

¹ ID1 refers to the Initial Decision dated April 23, 2019; ID2 refers to the Initial Decision dated January 17, 2023; ID3 refers to the Initial Decision dated February 7, 2024.

(1995), that no genuine material issue of fact existed concerning the requirements of N.J.A.C. 10: 71-4.10(d)i that “The individual’s physical or mental condition shall have been such as to require special attention and care”, was satisfied. ID1 at 7. Therefore, the ALJ concluded that Hudson County’s decision to decline Petitioner her request for a child caregiver exemption due to Petitioner’s failure to provide medical records for September 2014 to July 2016 was without merit, as the same was contained in the four Binders. ID1 at 8. The Initial Decision also stated that Hudson County’s reasoning for denying Petitioner’s request for a caregiver exemption because E.M. did not provide the required level of care was illogical and contrary to the records Hudson County had stipulated in evidence. ID1 at 10. The ALJ ordered that Petitioner’s Motion for Summary Decision be granted and that Hudson County’s decision denying the caregiver exemption be reversed. ID1 at 12.

On July 18, 2019, DMAHS issued an Order of Remand, reversing the Initial Decision and remanding the matter back to OAL for further testimony and findings. OR at 9. The Acting Director of DMAHS’s review of the record did not comport with the finding that there were no issues of material fact. OR at 3. The Acting Director stated that while the file contained voluminous medical records spanning four large binders, two of the binders contain Petitioner’s medical records after Petitioner entered the hospital and was discharged to the nursing home. OR at 4. Those binders are not germane to the findings of Petitioner’s need for care for the two-year period immediately preceding Petitioner’s institutionalization and the extent to which they were relied on was problematic. Ibid. The Order of Remand also stated that the certification of Petitioner’s son was broad in its description of the care he provided Petitioner and limited on the time frame so as to support a finding that Petitioner met the caregiver exemption. OR at 7. There was no narrative as to the extent of care he provided during the time period in question nor how

he arranged his work schedule from May 2014 to provide the 24/7 skilled nursing level of care Petitioner needed to survive. Ibid. The Acting Director also found that the Initial Decision mischaracterized Hudson County's position regarding the medical records from September 2014 through July 2016. OR at 8. It was not that the records were not presented; it was that the records did not indicate the caregiver exemption was warranted. Ibid. The Order of Remand listed several topics that needed to be specifically addressed at the OAL, including:

- The record did not contain the curriculum vitae of the expert Dr. Brown, which should be provided
- The expert report's list of records reviewed by Dr. Brown did not align with the list of exhibits in the Initial Decision, and therefore all documents relied on in the Brown Report needed to be produced
- As there was no narrative as to the extent of care E.M. provided, a clearer statement of the care provided from July 2014 through July 2016 was needed
- Because of some ambiguity as to where exactly E.M. stayed in the two family house, E.M. needed to more clearly describe the living arrangement
OR at 4-7.

As a result of the remand, on January 13, 2020, the OAL held a hearing and Dr. Brown and E.M. testified on behalf of Petitioner. On February 4, 2020, the parties returned and Dr. Scarpa testified on behalf of Petitioner. ID2 at 3.

Dr. Brown testified that during the period of May 2014 through July 2016, based on his review of the medical records, that he could say to a very high degree of medical certainty that Petitioner would have been unable to complete the ADLs required to maintain independence in the community, that she lacked the mental and physical capacity to accomplish her ADLs, and that ADLs such as dressing, toileting, bathing, and feeding would require a person to have 24 hour supervision and require institutionalization if not for the presence of somebody that could take the place of the institution. ID2 at 7. Dr. Brown also testified that he reviewed a letter from Dr. Yousry which stated that Petitioner "had severe anxiety and dementia which was progressive over that time and

that she suffered from arthritis in her knees, back, neck and shoulders, which prohibited activities such as showering, using the bathroom, walking, standing or climbing without her son's support." ID2 at 8. On cross-examination, Dr. Brown testified that there were no formal functional assessments performed by any of Petitioner's treating physicians, but it was his opinion that all of her treating physicians "gave impressions or reflections" of her functional, physical and mental status, specifically that she had ADL deficits "that were severe enough that she could not have possibly maintained herself in the community independent of her son's care." ID2 at 9. In response to questions by the ALJ, Dr. Brown confirmed that his medical opinion was based upon his review of all of the medical records provided, along with any medical reports, and that it was his opinion that the care of Petitioner by her son, during the period of May 2014 through September 2016, permitted Petitioner to reside at her home rather than an institution. ID2 at 10.

E.M. testified that he had lived at the property since 2005 and that the family lived on both the first floor as well as in the basement in a two-family house and that he lived with Petitioner and took care of her 24/7 after reducing his workload in 2008. ID2 at 11. E.M. stated that he began wiping her behind, brushing her teeth, "that sort of thing" beginning in 2012, and around 2013/2014 Petitioner became very hearing deprived in both ears and also had vision problems. Ibid. E.M. testified that he was in charge of all of Petitioner's needs related to food, clothing, bills, entertainment, cleaning her, bringing her to medical appointments, and managing her medications. ID2 at 11-12.

Dr. Scarpa testified that Petitioner's health had a gradual deterioration, not only physically, but also mentally, over a five, six, or seven-year period from prior to 2014. ID2 at 12. He stated that her muscles had completely atrophied to the point where it was virtually impossible for her to do anything. Ibid. Petitioner lost function in her hands, so that she couldn't wash or dress herself or prepare her own foods because it was a

physical impossibility. ID2 at 12-13. Dr. Scarpa also stated that she couldn't stand, get off of a toilet, or clean herself because her quadriceps and girdle muscles were not strong enough to keep her in balance. ID2 at 13. Dr. Scarpa testified that with a reasonable degree of medical certainty, he found that Petitioner lacked the physical and mental capacity to take care of ADLs from 2014 to 2016, and most likely from before 2014 and that had E.M. not assisted, Petitioner would have required nursing home placement. Ibid.

This Initial Decision concluded that petitioner had proven by a preponderance of the evidence that Petitioner was incapable of performing ADLs without the assistance of E.M. because Petitioner's dementia and cognitive impairment, her incontinence and other marked and severe functional and mental limitations and her multiple, serious, chronic medical conditions, were irrefutable, and contributed to the required level of care provided to Petitioner by E.M. ID2 at 19-20. The AJL once again ordered that Hudson County's decision denying the caregiver exemption and assessing a penalty be reversed. ID2 at 20.

On April 14, 2023, DMAHS issued a Final Agency Decision reversing the Initial Decision. FAD at 5. The Final Agency Decision stated:

E.M. may have cared for his mother during those years when she was living in her own home, just as in M.K. However, Petitioner has failed to establish, even upon remand, that his mother's residence was in fact his own residence for the two years immediately preceding institutionalization. It is Petitioner's burden to prove that she has met each of the eligibility requirements and is entitled to the caregiver exemption. Straightforward documentation of E.M.'s residency is not part of the record, and therefore, Petitioner has not met her burden.
FAD at 5.

Petitioner then filed a Notice of Appeal with the Superior Court Appellate Division, appealing the April 14, 2023, Final Agency Decision. Additionally, on May 16, 2023, Petitioner filed a request for reconsideration to DMAHS. On June 5, 2023, DMAHS issued

a Final Agency Decision on Reconsideration reopening and remanding the matter back to the OAL, for the following reasons:

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed Petitioner's May 15, 2023 correspondence wherein she petitions DMAHS to reconsider the Final Agency Decision (FAD) in this matter, dated April 14, 2023.

Petitioner asserts that contrary to the findings in the FAD, the record did contain evidence that Petitioner's son lived with her from July 2014 through July 2016. Specifically, the second page of Petitioner's May 15, 2023 request notes that "the ALJ had before him the complete Medicaid application that was submitted for R.M. and which was delivered by the Hudson County Department of Family Services."

The third page of Petitioner's May 15, 2023 request notes that "the Medicaid application in this matter specifically contained the following documentation and proof of residency of E.M. with his mother, R.M. at her home..." The request went on to list items such as an affidavit, copies of personal income tax returns, copies of drivers licenses spanning several years, and a letter from Hudson County to DMAHS confirming receipt of supporting documentation. Upon review, none of these items were located in the record, nor did they appear in the itemized list of Exhibits at the end of the Initial Decision. However, if they were, in fact, part of the record, they should have been considered as part of the Final Agency Decision.

Therefore, in order to settle the record, I am re-opening and remanding the matter to OAL for the purpose of producing the reference exhibits for inclusion in the OAL case file. See N.J.A.C. 1:1-18.1 and N.J.R. 2:5-5(B).

Upon production of the missing exhibits, the matter, with the complete case file, should be returned to the agency to render a Final Agency Decision.

THEREFORE, it is on this 5th day of June 2023,

ORDERED:

That the Initial Decision is hereby **REMANDED** solely to settle the record and provide the missing exhibits that were entered into evidence below for the inclusion in the OAL case record.

Back at the OAL, the ALJ held hearings on September 6, 2023 and October 26, 2023. ID3 at 5. During these hearings, E.M. and Jacqueline Scalone, former paralegal

at Petitioner's attorney's office, testified for Petitioner, and Michael McDonogh and Arelis Rodriguez, employees at Hudson County, testified for Hudson County. ID3 at 5-6.

E.M. testified that he assisted Jacqueline Scalone with Petitioner's application for Medicaid benefits and that he was communicating with Ms. Scalone in response to Hudson County's request for documents throughout the application process. ID3 at 7. E.M. confirmed that the application submitted also included his tax returns, four driver's licenses covering the period of 2007 through 2018, and personal bank records, all of which listed his address as the same as Petitioner. ID3 at 8. E.M. further testified that when preparing Petitioner's Medicaid application and submitting the documentation to Hudson County, he never received any communications or questions from Hudson County concerning his residency. Ibid.

Jacqueline Scalone testified that she had been a Medicaid case worker and then a Medicaid Supervisor for approximately thirty-five years before retiring and working for counsel for Petitioner. ID3 at 9. Ms. Scalone stated that she personally put together the Medicaid application along with all exhibits and then hand-delivered the Medicaid application to Hudson County and that it included E.M.'s income tax returns and driver's licenses. ID3 at 10-11.

Michael McDonogh testified that he could not confirm if any documents were missing from the initial application and that he may have requested additional information, but that he ultimately received enough information about the whole case to consider it complete, and then submit to his supervisor Arelis Rodriguez for review. ID3 at 12.

Arelis Rodriguez testified that she was in communication with her field representative from DMAHS about this matter. ID3 at 12. Ms. Rodriguez stated that DMAHS directed her to approve the application with a penalty because DMAHS believed that there was not sufficient proof to approve the caregiver exemption. Ibid. She stated

that the issue was whether there was actual proof of Petitioner's son caring for Petitioner for the two years prior to the Medicaid application being filed. Ibid. On cross-examination, Ms. Rodriguez testified that she did not recall all the details of Petitioner's Medicaid application because the application had been submitted seven years prior. ID3 at 13. Answering a question from the ALJ, Ms. Rodriguez stated that she recalled having E.M.'s Affidavit and that she would have been satisfied with an Affidavit that stated "I have lived with my mother in the same apartment [in] Jersey City, New Jersey for the last 15 years. I am making this affidavit in support of my mother's Medicaid application." Ibid. Ms. Rodriguez confirmed she approved the caregiver exemption for Petitioner after she reviewed all the information and that she had to submit it to her state representative who told her it was insufficient, resulting in her asking for numerous medical records. ID3 at 14. Ms. Rodriguez confirmed that DMAHS's objection was related to the medical services E.M. provided and that DMAHS never questioned E.M.'s residence. Ibid.

The February 7, 2024 Initial Decision concluded that the record as a whole demonstrated by a preponderance of the evidence that Petitioner submitted the "missing exhibits" referenced in the FAD-Reconsideration. ID3 at 18. Additionally, the Initial Decision concluded that the record as a whole, including E.M.'s testimony, affidavit, and the copies of his tax returns and driver's license, which all show E.M. residing with Petitioner for at least two years prior to the submission of Petitioner's November 2016 application, demonstrated that E.M. resided with Petitioner from July 2014 through July 2016. Ibid. Ultimately, the ALJ concluded that Petitioner submitted the necessary documentation required to establish eligibility for Medicaid and qualified for the caregiver exemption and thereby ordered that Hudson County's decision denying Petitioner's request for the caregiver exemption be reversed.

I agree. Petitioner has proven by a preponderance of the evidence that Petitioner

was incapable of performing ADLs because of Petitioner's dementia and cognitive impairment, in addition to her multiple, serious, chronic physical medical conditions. This was clearly documented in the medical reports and highlighted in Dr. Brown's testimony. Additionally, Petitioner has proven that E.M., through E.M.'s testimony and affidavit, had provided a high level of care for Petitioner for at least the two-year period preceding the submission of the Medicaid application. Specifically, that E.M. was in charge of all of Petitioner's needs related to food, clothing, bills, entertainment, cleaning her, bringing her to medical appointments, and managing her medications. Lastly, Petitioner has proven that E.M. resided with Petitioner for at least the two-year period preceding the submission of the Medicaid application. The record establishes that E.M.'s testimony, affidavit, and the copies of his tax returns and driver's license, all show that E.M. resided with Petitioner for that period of time.

Thus, based on the record before me and for the reasons enumerated above, I hereby ADOPT the Initial Decision and FIND that Hudson County's decision of June 12, 2018, denying Petitioner's request for the caregiver exemption is reversed.

THEREFORE, it is on this 6th day of MAY, 2024

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods OBO JLJ

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