



State of New Jersey

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
P.O. Box 712
Trenton, NJ 08625-0712

CHRIS CHRISTIE
Governor

ELIZABETH CONNOLLY
Acting Commissioner

KIM GUADAGNO
Lt. Governor

VALERIE HARR
Director

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

B.S.,
PETITIONER,
v.
ADMINISTRATIVE ACTION
FINAL AGENCY DECISION
OAL DKT. NO. HMA 16561-14
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES AND
MONMOUTH COUNTY BOARD OF
SOCIAL SERVICES,
RESPONDENTS.

As Director of the Division of Medical Assistance and Health Services, I
have reviewed the record in this matter, consisting of the case file, the
documents in evidence, the Initial Decision and Petitioner's exceptions.
Procedurally, the time period for the Agency Head to file a Final Agency Decision

is February 4, 2016, in accordance with an Order of Extension. The Initial Decision in this case was received on November 5, 2015.

At issue is a two hundred and twenty four day penalty imposed due to Petitioner's transfers totaling \$58,618.11. In particular were two very large withdrawals of \$29,955.79 and \$37,085.47. Verifications provided by Petitioner showed that these withdrawals were placed in Petitioner's daughter's account, but did not show that the full amount was used for Petitioner's benefit. Credit was given for \$9,490.43, but the balance of \$58,618.11 remains unaccounted for. Petitioner bears the burden of proof to demonstrate that she received fair market value for the assets transferred. N.J.A.C.10:71-4.10(j). Here, Petitioner failed to rebut the presumption that the transfers were for less than fair market value. Accordingly, the ALJ found that the Monmouth County Board of Social Services properly considered the \$58,618.11 transfer of assets and affirmed the transfer penalty.

With regard to Petitioner's exceptions to the Initial Decision and in particular with Petitioner's exception to the ALJ's finding that she did not present testimonial evidence of the execution of power of attorney or Designated Authorized Representative (DAR) form, I note the following. Petitioner is a 94 year old woman who resides at the Liberty Royal Rehabilitation and Health Center (Liberty Royal) in Tinton Falls, New Jersey. On May 6, 2013, Petitioner executed a power of attorney (POA) naming her daughter, M.D. (P-B). On November 13, 2013, M.D. signed a DAR form on behalf of Petitioner appointing Sam Stern of Future Care as Petitioner's representative. (P-A). On February 4, 2014, Sam Stern filed an application for Medicaid on behalf of Petitioner. (R-1).

Upon receiving the October 27, 2014 notice of transfer penalty, Schutjer Bogar sent Monmouth County a letter requesting a fair hearing in connection with Petitioner's Medicaid eligibility and identifying its client as Liberty Royal. Twenty days later, Sam Stern requested a fair hearing from the Division of Medical Assistance and Health Services, Fair Hearing Unit, and on February 18, 2015, Schutjer Bogar submits an appearance to the OAL without identifying their client. By letter dated March 27, 2015, the firm identified their client B.S. "by and through her authorized representative" Sam Stern of Futurecare.¹ Then, at the hearing, neither Petitioner, Petitioner's authorized representative, Sam Stern, nor Petitioner's POA, M.D., appeared to testify on her behalf. The fact that no one appeared to dispute the transfer penalty other than an attorney from Schutjer Bogar appears to have lead the ALJ to question whether or not an attorney-client relationship exists between the two.

Furthermore, contrary to Petitioner's assertion, the DAR² does not exist to eliminate the need for testimony regarding legal representation of Petitioner or documentary evidence. The POA gives the designated attorney-in-fact, in this case M.D., the ability to appoint a representative and hire counsel. However, the DAR form relied upon by Schutjer Bogar does not inherently grant Sam Stern as the authorized representative a right to hire an attorney on Petitioner's behalf. Only the POA would be authorized to hire legal representation. Here, it seems

¹ By letter dated November 10, 2015, Petitioner's attorney filed exceptions to the Initial Decision claiming to represent Petitioner B.S. with no reference to her authorized representative Sam Stern.

² It is true, as Petitioner asserts in exceptions, that DMAHS accepted the DAR and transmitted the request for fair hearing to the OAL. However, at the time of the request, the DAR identified Sam Stern as the authorized representative, and he was listed as Petitioner's representative on the OAL transmittal.

Although Schutjer Bogar entered an appearance with Monmouth County and the OAL, it did not disclose an attorney-client relationship with Petitioner to the DMAHS Fair Hearing Unit.

odd that an attorney representing Petitioner, retained by her POA, would be required to subpoena the POA to appear at the hearing to testify on her mother's behalf. The POA's testimony would be helpful to clarify representation especially in this case. However, the ALJ saw fit to ascertain the appropriateness of the underlying transfer penalty in this matter and so the issue of representation may be one better addressed in another forum.

Nevertheless, testimony is necessary with regard to the bank records referenced in Petitioner's exceptions. These documents are hearsay evidence. Hearsay is admissible in the Office of Administrative Law but 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. Here, the documents were submitted post hearing and without any witness to establish the documents' authenticity, attest to the purpose of the documented transfers or to be cross examined by Monmouth County. The ALJ was correct to conclude that these hearsay documents were unsupported by the residuum rule and therefore inadmissible.

In exceptions Petitioner argues that she requested an adjournment of the May 15, 2015 hearing date because she needed additional time to obtain the above referenced bank records, and the ALJ unfairly refused the adjournment request and excluded the records from evidence. To that point, Petitioner had more than enough time to procure the evidence necessary to rebut the assessed transfer penalty. Beginning in February 4, 2014, Sam Stern of Future Care, LLC, an experienced Medicaid authorized representative, filed an application on

Petitioner's behalf, and either knew or should have known that Petitioner would have to produce five years of financial information and verifications to dispute any penalty. Moreover, counsel has been handling this matter in some capacity since October 2014. Once at the OAL, this case was noticed for three hearing dates on February 20, 2015³, April 17, 2015 and May 15, 2015⁴. Then, three days before the final hearing date, counsel requested an adjournment because he still did not have the documentation necessary to rebut the imposition of the transfer penalty. The ALJ did not grant the adjournment, but by counsel's own admission left the record open for the submission of additional documentation.⁵

A month later, Petitioner made a partial and unsupported submission of bank records and credit card statements, none of which clarify how the \$58, 618.11 was used for Petitioner's benefit.⁶ Petitioner's exceptions do not assert that additional hearing dates were requested to properly move in the newly obtained documentation, only that Monmouth County be required to consider the bank records. As stated above, without supporting testimony, it is unclear whether the

³ By letter dated, February 18, 2015, Petitioner's counsel requested an adjournment of the February 20, 2015 hearing date in order to communicate with POA, M.D. and potentially subpoena her presence at the hearing. By facsimile dated February 19, 2015, Sam Stern also requested an adjournment of the hearing stating that he needed a new authorization done so that an attorney could represent him at the hearing as his prior attorney was notified that he could not appear on his behalf. The attorneys referenced are not named in the facsimile.

⁴ By letter dated May 11, 2015, Petitioner's counsel requested an adjournment of the May 15, 2015 hearing claiming he filed an Order to Show Cause and Motion to Compel the Production of Documents in the Monmouth County Superior Court, but that the Monmouth County Clerk "refused to accept these filings in violation of Rule 1:5-6."

⁵ By letter dated June 12, 2015, Petitioner's counsel requested that the court leave the record open so that the parties may have an opportunity to review the additional documentation and discuss settlement.

⁶ On June 16, 2015, Petitioner provided documents, presumably those that were the subject of the Order to Show Cause and Motion to Compel Production of Documents previously rejected by the Monmouth County Superior Court Clerk. The documents provided were financial records of M.D. If these are the result of Petitioner's Motion to Compel, it is curious that Petitioner's attorney would have to compel production of documents from the POA who appointed his firm as counsel. If not the result of the Motion to Compel, what obstacles delayed the production of M.D.'s documents for more than a year?

bank records are reflective of funds used for Petitioner's benefit or that they are even responsive to the amount of the transfer penalty.

After reviewing the record, I concur with the ALJ's finding and ADOPT the Initial Decision in its entirety. N.J.A.C. 10:71-4.10 requires a penalty when assets have been transferred during the look back period. Petitioner offered no corroborating evidence to establish that she received fair market value for any of the transfers in question. Petitioner was unable to rebut the presumption that the transfers were for less than fair market value. N.J.A.C.10:71-4.10(j).

THEREFORE, it is on this 1st day of FEBRUARY 2016,

ORDERED:

That the Initial Decision is hereby ADOPTED;



Valerie J. Harr, Director
Division of Medical Assistance
and Health Services