



State of New Jersey

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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

F.G.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE

AND HEALTH SERVICES AND

MERCER COUNTY BOARD OF

SOCIAL SERVICES,

RESPONDENTS.

ADMINISTRATIVE ACTION

ORDER OF REMAND

OAL DKT. NO. HMA 15346-2016

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the OAL case file and the documents filed below. Respondent filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is March 9, 2017 in accordance with an Order of Extension.

The matter arises regarding Petitioner's request for a caregiver exemption so as to remove any penalty due to the future transfer of her home to her daughter. The record does not contain any deed transferring the home to her daughter. Petitioner also owns another property that is an available asset. R-1 at 4. The record does not contain information about the impact of that second property on Petitioner's application. Petitioner applied for Medicaid on November 24, 2015. At the time she had been in a nursing home since August 2015.

The Initial Decision found that Petitioner's future transfer of the home would meet the caregiver exemption so that there would be no penalty period. Based on the record before me, I hereby REVERSE the Initial Decision as the record does not support the findings and REMAND the matter to OAL for further development of the record.

By way of background, when an individual is seeking benefits which require meeting an institutional level of care, any transfers of resources are scrutinized. N.J.A.C. 10:71-4.10. 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). Individuals who transfer or dispose of resources for less than fair market value during or after the start of the sixty-month look-back period before the individual becomes institutionalized or applies for Medicaid as an institutionalized individual, are penalized for making the transfer. 42 U.S.C.A. § 1396p(c)(1); N.J.A.C. 10:71-4.10(m)(1). Such individuals are treated as though they still have the resources they transferred and are personally paying for their medical care as a private patient, rather than receiving services paid for by public funds. In other words, the transfer

penalty is meant to penalize individuals by denying them Medicaid benefits during that period when they should have been using the transferred resources for their medical care. See W.T. v. Div. of Med. Assistance & Health Servs., 391 N.J. Super. 25, 37 (App. Div. 2007).

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) (emphasis added). 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. Compare 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 that prevented institutionalization for at least two years, the transfer is exempt from penalty. 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). It is Petitioner's burden to prove that she is entitled to the exemption.

The facts surrounding Petitioner's level of care from August 2013 to August 2015 were based on statements provided to Mercer County in the course of the application and testimony at the hearing. Based on the discrepancies in the record as amplified below, I FIND a lack of competent evidence to support the findings that Petitioner needed nursing home level of care during the two years prior August 2015 and that Petitioner's daughter provided specialized care to permit her to remain at home.

The Initial Decision states that Petitioner became increasingly dependent "over the two-and-a-half to three years before" entering the nursing home. ID at 2. However, the account of the testimony fails to give time frames except for two periods of rehabilitation at the SMART program at Hamilton Grove. This occurred in February 2015 and, upon her release in April 2015, "a home health aide supplied care two days a week." ID at 2. Petitioner was "readmitted to the hospital in August 2015." ID at 2. There is no indication of when Petitioner was first admitted to the hospital so as to characterize the August admission as a "readmission". The summary of her doctor's testimony and his letter dated April 2016 do not mention either admission. P-3. Moreover, her doctor did not give any time frame for any of her diagnoses. For example in his April 2016 letter, he generally states Petitioner "would not been [sic] able to live safely at home on her own without a caregiver." P-3. There is no disease, affliction or condition mentioned in his letter. At the hearing in November 2016, he testified that she suffered from diabetes, "very severe arthritis, weakness in the thoracic area, and significant pain in the knee and hip joints." ID at 3. Additionally, he testified Petitioner had been "in a declining mental state for some time" and had uncontrollable trembling in

her hands. ID at 4. None of this was mentioned in his April 2016 letter nor was a date given for the onset of these conditions.

I FIND that the testimony and the documents are inconsistent and fail to address Petitioner's medical condition and her activities of daily living (ADL) needs during the two years required for a caregiver exemption. As noted by Respondent in exceptions, Petitioner spent upwards of six hours home alone without any need for assistance. Indeed, the testimony, absent any time frame, waived from Petitioner being unable to "ambulate well" and a significant risk for falls according to her doctor to her daughter's recounting that she "was mobile enough at that time to be able to get milk from the refrigerator for her cereal or get sandwich items for lunch." Compare ID at 4 and P-2. Her daughter's original statement averred that Petitioner "could also get to the bathroom with the use of her walker . . . [and with a raised seat] was able to use it on her own." P-2. But the Initial Decision states that Petitioner could not "transfer to a commode without assistance." P-7.

Recently the Appellate Division reviewed the caregiver exemption and 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 M.K., the court had "no doubt [the daughter] extended love and care to her mother that added to M.K.'s comfort, welfare and happiness during those years when she was living in her own home, despite significant medical challenges". M.K., Slip op.

at 17. However, during the two years prior to entering a nursing home, M.K. moved in with her son for a period of five months. The court found that as ""Medicaid is an intensely regulated program' H.K., supra, 184 N.J. at 380, and its requirements are strictly enforced;" a five month break in "the mandated two-year time period for care" meant that the caregiver exemption had not been met. M.K., Slip op. at 15.

In another case, the Appellate Division also determined that an individual, receiving caregiving services paid for by Medicaid, cannot transfer her home to her daughter under the exemption. "Although appellant cared for her mother during the relevant time period, the key factor that permitted G.B. to remain in her home until 2009 was the Medicaid assistance she received through the services provided by the [Medicaid program]." Estate of G.B. (deceased) by M.B.-M., as Executor v. DMAHS and Somerset County Board of Social Services, Docket No. A-5086-12T1, decided September 15, 2015, slip op. at 8. In that case, G.B. received 30 hours of caregiving services a week under a Medicaid waiver program that permitted her to remain at home. Id. at 7. Despite the finding by the ALJ that the daughter "tended her mother in decline for many years, and assisted her mother in avoiding institutionalization," the Appellate Division upheld the Final Agency Decision that overturned that finding and held that G.B. was not entitled to a caregiver exemption. Id. at 5

The record here shows that Petitioner received a home health aide care during the two years in question. Petitioner was receiving home health aide services two days a week beginning in April 2015 when she was "released home" from Hamilton Grove. That service would have been provided under a plan of care that would specify the tasks to be provided as well as the discharge plan that would include "methods for including the patient and/or the patient's family in planning and implementing the

discharge plan." See N.J.A.C. 8:42-6.2. This initial plan of care as well as the discharge plan would shed light on the professional assessment of Petitioner's deficiencies in her ADLs and any discharge plans might address how her needs would be met at home. As such, the record should be clarified with competent evidence to determine if it was the care provided through the home health agency that was the key factor that permitted her to remain out of a nursing home.

Thus, I FIND that the record does not support the finding that Petitioner met the caregiver exemption and hereby REMAND the matter to OAL for further findings regarding Petitioner's diagnosis, her plan of care and the amount and type of services provided by outside agencies.

THEREFORE, it is on this ^{2nd} day of MARCH 2017,

ORDERED:

~~That the Initial Decision is hereby REVERSED in that the record does not~~
support the finding that the caregiver exemption was met; and

That the matter is REMANDED to the Office of Administrative Law for clarification regarding the contradictions in the testimony, further evidence regarding Petitioner's condition relative to dates from August 2013 through August 2015 and examples of Petitioner's plan of care for home health services.


Meghan Davey, Director
Division of Medical Assistance
and Health Services