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

D.Z.

PETITIONER,

ADMINISTRATIVE ACTION

v.

FINAL AGENCY DECISION

OCEAN COUNTY BOARD OF
SOCIAL SERVICES,

OAL DKT. NO. HMA 08418-17

RESPONDENT.

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the documents in evidence and the exceptions to the Initial Decision. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is August 9, 2018 in accordance with an Order of Extension. The Initial Decision was received on May 11, 2018.

This matter arises from Petitioner's November 14, 2016 application for Medicaid benefits. On April 13, 2017, the Ocean County Board of Social Services (OCBSS) determined that Petitioner has transferred \$210,579.16 for less than fair market value. On May 25, 2017, OCBSS imposed a 633 day penalty whereby Medicaid services were

not covered from August 1, 2016 to April 25, 2018. The Petitioner asserted that the majority of the transfers in question, checks made payable to cash, were for the purpose of paying her caregivers. The ALJ found that Petitioner successfully rebutted the presumption that the transfers were made to establish Medicaid eligibility in accordance with N.J.A.C. 10:71-4.10(j) and ordered OCBSS' decision to impose a transfer penalty be reversed with regard to the payment of Petitioner's caregivers. For the reasons that follow, I hereby ADOPT in part and REVERSE in part the Initial Decision.

In determining Medicaid eligibility for someone seeking institutionalized benefits, the counties must review five years of financial history. During that time period, a resource cannot be transferred or disposed of for less than fair market value. 42 U.S.C.A. § 1396p(c)(1); see also N.J.A.C. 10:71-4.10(a). If such a transfer occurs, the applicant will be subject to a period of Medicaid ineligibility to be imposed once the person is otherwise eligible for Medicaid benefits. Ibid.; N.J.S.A. 30:4D-3(i)(15)(b). Petitioner bears the burden of proof to demonstrate that she received fair market value for the assets transferred or that the assets were transferred exclusively for a purpose other than to qualify for medical assistance. N.J.A.C. 10:71-4.10(j).

As Petitioner is claiming that she received fair market value, she bears the burden to establish the types of care or services provided, the type and terms of compensation, the fair market value of the compensation, and that the amount of compensation or the fair market value of the transferred asset is not greater than the prevailing rates for similar care or services in the community. N.J.A.C. 10:71-4.10(b)(6)(ii) and (j). See E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340 (App. Div. 2010). Based on the record below, I FIND that she failed to meet this burden.

Petitioner, a 75 year old widow at the time of application, did not testify at the hearing. Testifying on her behalf were her son, R.Z. and daughter-in-law, J.Z. R.Z. testified that Petitioner spent most of her money on home health aides. He stated that three main aides (E.D, L.O. and N.L.) were hired to assist Petitioner with dressing, ambulating, bathing, cooking, cleaning and laundry. They were paid approximately \$13-\$15 per hour and rotated shifts of two and one-half days each, staying overnight to prevent the Petitioner from injuring herself. R.Z. also testified that one of the aides lived with and cared for Petitioner full time. Moreover, J.Z. testified that she quit her job to care for her mother-in-law, without compensation, for twelve hours a day, after she fell in 2012. None of the aides were available to testify or provide a certification regarding the terms of their compensation.

After hearing the testimony of witnesses, the ALJ found that the Petitioner's family credibly testified to the aides' employment by Petitioner as caregivers and compensation in cash of anywhere from \$13-\$15 per hour. The fact-finder's assessment of the credibility of witnesses is entitled to deference by the reviewing agency head. Clowes v. Terminix, 109 N.J. 577 (1988). However, 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." No such evidence was presented in this matter.

Here, there is no caregiver agreement in place setting forth the expectations of care and compensation for any of the home health aides. There is also no evidence in the record to show that Petitioner's caretakers were certified home health aides (CNA), thus warranting a rate of \$13-\$15 per hour. In support of her position, Petitioner's family presented copies of the checks that were written to pay for the caregiving services. The

checks themselves are made out to cash, with the name of a caregiver in the memo line, and were endorsed by the person referenced in the check's memo. However, a closer look at the checks written do not show a consistent pattern of payment as alleged by Petitioner. For example, Petitioner provided checks for E.D. beginning in December 2013.¹ The first check to E.D. was written on December 27, 2013 in the amount of \$294.00. E.D. did not receive another check until August 2, 2014 in the amount of \$400.00. Thereafter, the checks ranged in amount from \$71.00 to \$731.00.² There are also times when Petitioner issued multiple checks to E.D. on the same day.³ Furthermore, there is no explanation for the lack of coverage of services where Petitioner claims to need 24 hour care, nor is there an explanation for what appears to be an overlap in payment of services provided, specifically in October, November and December 2014.⁴ I note also, that while Petitioner asserted that N.L. provided twenty-four hour care and lived in Petitioner's home checks were still being issued to L.O. for Petitioner's care.

It is also unclear when and for how long J.Z. cared for Petitioner from 6am to 6pm, or why aides were being paid to care for Petitioner for two and a half day shifts when J.Z. was caring for her twelve hours each day. It is also unclear when Petitioner was hospitalized and for how long, and whether the aides were still paid when they visited Petitioner in the hospital. Finally, it is unclear exactly what, if any, services the aides provided to Petitioner during the overnight hours.

¹ For purposes of this example, we refer to the year December 2013 to December 2014.

² The check for \$731 did not include a reference to a store accounting for purchases made in addition to compensation.

³ On October 5, 2014 E.D. was given checks for \$360 and \$161. On October 21, 2014, she was given two checks for \$360. On November 24, 2014 she received checks for \$390 and \$195. On November 30, 2014, she received checks for \$390, \$316, \$360. On December 9, 2014, she received checks for \$109, \$360 and \$125.

⁴ There also appears to be an overlap in payments for the other alleged caretakers, who filled in when E.D, L.O. and N.L. were unavailable, in the months of March, April, May and June 2014.

The ALJ is correct that as the years go by the payments become more frequent, but the rate of pay for the services performed is still unclear. For example, E.D. was paid on five consecutive days in April 2015. She was paid on April 13th, 14th, 15th, 16th, and 17th. She received compensation each day as follows: \$415, \$364, \$360, \$315, and on the 17th she received two checks in the amounts of \$345 and \$380. On April 17th, Petitioner also wrote out a check to L.O. in the amount of \$390. If E.D. was working 24 hours each day, why would her rate change each day, and why would L.O.'s services be necessary?

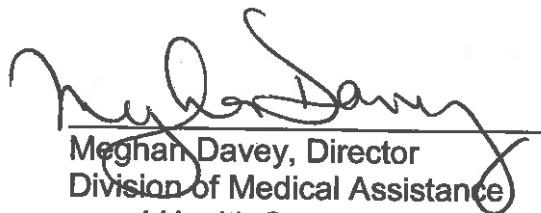
Petitioner bears the burden of proof to demonstrate that she received fair market value for the assets transferred. N.J.A.C.10:71-4.10(j). Petitioner's explanations inadequately support the type of services provided or the rate of pay for those services. Petitioner has not been able to rebut the presumption that these transfers for less than fair market value were to qualify for Medicaid.

THEREFORE, it is on this ^{12th} day of JULY 2018,

ORDERED:

The Initial Decision is hereby ADOPTED in that OCBSS should deduct from the transfer penalty those amounts paid to Lakewood Township, LVE and Sears; and

That the Initial Decision is hereby REVERSED with regard to the amounts paid to E.D., L.O. and N.L. These amounts shall remain included in the transfer penalty. The above referenced payments to Lakewood Township, LVE and Sears are the only amounts to be deducted from the penalty.


Meghan Davey, Director
Division of Medical Assistance
and Health Services