



State of New Jersey

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Commissioner

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Director

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

L.M.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE

& HEALTH SERVICES &

CAMDEN COUNTY BOARD OF

SOCIAL SERVICES,

RESPONDENTS.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 17143-2016

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. Petitioner and Respondent filed Motions for Summary Decision, which was granted in favor of Respondent. Neither party filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision is July 24, 2018, in accordance with an Order of Extension.

Petitioner, through her Designated Authorized Representative (DAR) Future Care Consultants, LLC (Future Care), applied for Medicaid in February 2016. Camden County

determined that Petitioner was eligible as of November 1, 2015 but was subject to a penalty of 417 days based on a transfer penalty of \$138,533.58. Camden County also denied the request to waive the penalty pursuant to N.J.A.C. 10:71-4.10q(1). Future Care requested a fair hearing on the penalty as well as the denial of the waiver. Petitioner died in December 2016.

Prior to a hearing on the substantive issue, John Pendergast, Esq. entered an appearance on behalf of Future Care and on February 10, 2017, Ada Gallicchio, another attorney from Mr. Pendergast's law firm, SB2, Inc., moved on behalf of Alaris Health nursing home to have the matter placed on the inactive list so that Alaris Health could pursue a lawsuit against Petitioner's husband and children.¹ Camden County opposed the motion. Ms. Gallicchio's reply on behalf of Petitioner states Petitioner is "in serious and immediate peril of being discharged for non-payment." Petitioner had died two months prior so she was no longer in peril of discharge. The ALJ denied the request and the hearing proceeded.

However, when Future Care, represented by Ms. Gallicchio, filed a complaint in the Superior Court of New Jersey against Petitioner's husband, who had signed the DAR form, the ALJ found that there was a conflict of interest regarding the Rules of Professional Conduct 1.7 concerning SB2's representation of Petitioner and its action against the individual who had executed the DAR. ID at 3. As a result, SB2 was disqualified from representing Petitioner and another attorney, Richard Kozel, was substituted.

However, the issue of representation and standing was again raised and the ALJ sought a response from Petitioner's surviving spouse to determine if her estate has authorized Future Care to continue the appeal. At that point, counsel for Petitioner's husband and children advised that Petitioner's husband had died in June 2017 and that his

¹ According to the complaint filed in Superior Court, there appears to be little daylight between Future Care Consultants and Alaris Health as Future Care seeks compensatory damages for a breach of a contract between Alaris Health and Petitioner's husband that caused damages to Alaris Health. R-F.

daughter was proceeding as executrix in the Superior Court action filed by Future Care. However, counsel advised he was not representing the husband's estate or the children in the Medicaid appeal and would forward the communication to the executrix.

Subsequently, Mr. Kozel moved to amend the petitioner in this matter to be Petitioner's estate by its DAR, Future Care, and to proceed in a summary manner.² In attempting to rely on federal Medicare regulations on authorization, Future Care fails to acknowledge that those regulations concern appeals for denied claims of services, not determinations of eligibility. 42 CFR 405.910(a). In response, Camden County cross-moved arguing that there was no genuine issue of material fact as opposing counsel had included a copy of Camden County's statement of facts in Petitioner's motion for summary decision. The Initial Decision denied Future Care's motion finding that it was not authorized to proceed on the estate's behalf. Camden County's cross-motion was granted.

I ADOPT the findings of the Initial Decision with regard to the standing issue as well as the imposition of a transfer penalty. To expand on the standing issue, federal rules, which provides "[t]he agency [DMAHS] must permit applicants and beneficiaries to designate an individual or organization to act responsibly on their behalf in assisting with the individual's application and renewal of eligibility and other ongoing communications with the agency." 42 C.F.R. § 435.923(a)(1) (Emphasis added). 42 C.F.R. § 435.923(c) mandates that Medicaid applicants or beneficiaries be able to terminate or modify the appointment of a DAR at any time. That subsection expressly provides that the DAR appointment "is valid until . . . there is a change in the legal authority upon which the individual or organization's authority was based." 42 C.F.R. § 435.923(c). Here Petitioner and her husband are deceased. The legal authority to designated Future Care ended with

² The record has a DAR in favor of Future Care purportedly signed by Petitioner's daughter in November 2017. The copy of the document is so poor the signatures are completely illegible. There is no authorization from Petitioner's estate in the record.

their deaths. As noted by the ALJ, absent substitution by Petitioner's executrix, Future Care is not authorized and "has no standing to pursue the appeal on behalf of the decedent." ID at 8. No exceptions were filed to this conclusion.

Turning to the transfer penalty, the Initial Decision found that the transfer penalty was properly imposed and denial of the undue hardship waiver was properly granted. Absent a letter from SB2, no explanation was offered regarding the transfer of \$138,533.58 of Petitioner's assets. ID at 10. That letter alleged without proof that the funds "has been unlawfully converted" by Petitioner's husband and children without her consent.

However, N.J.A.C. 10:71-4.10q(1) provides that undue hardship exists when:

- i. The application of the transfer of assets provisions would deprive the applicant/beneficiary of medical care such that his or her health or his or her life would be endangered. Undue hardship may also exist when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life; **and**
- ii. The applicant/beneficiary can irrefutably demonstrate the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred.

(Emphasis added).

Both prongs must be satisfied in order for a waiver of the penalty. See R.P. v. DMAHS and Bergen County Board of Social Services, 2013 N.J. Super. Unpub. LEXIS 2547, (App. Div. Oct. 22, 2013). Camden County's October 27, 2016 notice and brief argues that Petitioner failed to meet either of the prongs. R-D. Petitioner did not document that either prong existed except through positing that she could be discharged in the future. The lawsuit that was filed after Petitioner's death was done on Future Care's behalf, not Petitioner's estate. The lawsuit argued a breach of contract between Alaris Health and Petitioner's husband

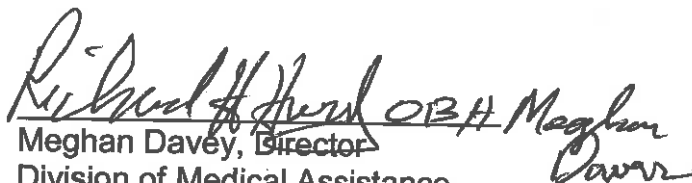
and seeks "to compensate Alaris Health for the residence and services rendered to" Petitioner. R-F. It does not to seek recover the transferred assets.

Thus, for the reasons set forth in the Initial Decision and those stated above, I hereby ADOPT the Initial Decision's findings regarding the standing issue as well as upholding the transfer penalty and denial of the request for an undue hardship waiver.

THEREFORE, it is on this ^{20th} day of JULY 2018,

ORDERED:

That the Initial Decision is hereby ADOPTED.


Meghan Davey, Director
Division of Medical Assistance
and Health Services