



State of New Jersey

DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

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

G.C.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE :

AND HEALTH SERVICES AND :

PASSAIC COUNTY BOARD OF :

SOCIAL SERVICES, :

RESPONDENTS. :

ADMINISTRATIVE ACTION

ORDER OF REMAND

OAL DKT. NO. HMA 3582-2019

As Assistant Commissioner 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. Neither party filed exceptions in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is October 24, 2019 in accordance with an Order of Extension.

The matter arises regarding Petitioner's application. Petitioner signed an application for Medicaid on August 3, 2018. Petitioner was discharged from the facility on August 25, 2018 and transferred to a hospital where he died on September 7, 2018. ID at 2. For some reason that application was not submitted until August 27, 2018. The submission of the application was done by Shana Akerman, an employee at Future Care Consultants (FCC) which is identified as the fiscal agent for the nursing facility where Petitioner had resided. Petitioner had also signed a Designation of Authorized Representative (DAR) form naming Ms. Akerman as his representative. Additionally, Ms Akerman did not submit a notification that Petitioner had entered the nursing facility in June 2018 but waited until after he was discharged from the facility, contrary to the regulations. See N.J.A.C. 8:85-1.8 and N.J.A.C. 8:85-2.1. Without clinical eligibility, FCC cannot be paid for Petitioner's stay.

The matter was transmitted to OAL with Ms. Akerman as the DAR in March 14, 2019. The transmittal does not reflect that Petitioner had died the prior September. On June 17, 2019, Michael Heinemann, Esq. entered an appearance stating he represented Petitioner. It appears that the OAL sought clarification on the issue of a conflict of interest between Mr. Heinemann representing Petitioner and FCC. Mr. Heinemann withdrew from the case in a July 16, 2019 letter addressed only to the ALJ. The next day Brian Rath, Esq. filed a brief that he represents the deceased Petitioner through his DAR and argued that there was no conflict of interest. However, the issue of the DAR expiring on death was not determined by the two unpublished Appellate Division cases cited by Mr. Rath. Rather both cases turned on the failure to transmit the request for a hearing and the matters were remanded to OAL to address in the first instance if a nursing home in one matter and FCC in the other had standing to request a hearing absent authority from the decedent's estate. See R. 4:34-1(b) which states that when a party to an action dies, the decedent's successors are to be substituted for the deceased party. To date, neither of those remanded cases has made a determination on standing.

Additionally, there is another unreported Appellate Division case decided chronologically in between the cases cited by Mr. Rath. In that case, the Medicaid applicant had also died and the court analogized the DAR with a limited power of attorney which expires on death. See N.J.S.A. 46:2B-8.5(a). M.F. v. Division of Med. Assistance & Health Servs., Dkt No. A-2254-17T2, 2019 N.J. Super. Unpub. LEXIS 733, April 1, 2019.

The federal rules on appointing an authorized representative acknowledge that changes in legal authority will invalidate such appointment. 42 C.F.R. § 435.923(c) states: “[t]he power to act as an authorized representative is valid until the applicant or beneficiary modifies the authorization or notifies the agency that the representative is no longer authorized to act on his or her behalf, or the authorized representative informs the agency that he or she no longer is acting in such capacity, or there is a change in the legal authority upon which the individual or organization's authority was based.” Petitioner's death changes the legal authority upon which FCC's authority is based and raises questions about whether FCC has standing to represent Petitioner much less retain an attorney to represent him, an authority that is not contained in the DAR form.

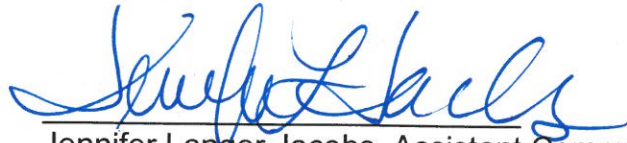
Moreover, by the clear terms of the Federal regulation and the express language of the form, DAR appointments must be voluntary and revocable. Petitioner's death would render Ms. Akerman's appointment irrevocable, a position rejected by the Appellate Division and the federal regulations. See E.B. v. Div. of Med. Assistance & Health Servs., 431 N.J. Super. 183 (App. Div. 2013) and 42 C.F.R. § 435.923(c). The change in legal authority requires that Petitioner's executor or administrator now grant authority to permit Ms. Akerman and FCC to continue representation. See E.B. supra at fn. 16. To this end, I hereby REVERSE the Initial Decision and REMAND the matter to OAL for further findings consistent with the discussion above which must be determined prior to any decision on the denial of benefits.

THEREFORE, it is on this ^{24th} day of OCTOBER 2019,

ORDERED:

That the Initial Decision is hereby REVERSED; and

That the matter is REMANDED to OAL for further findings on standing as set forth above.



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