



guardianship of the Office of the Public Guardian (OPG) had applied for Medicaid in October 2020 seeking retroactive benefits beginning July 2020.

In this matter, Petitioner was hospitalized at University Hospital in November 2019. ID at 3. In August 2020, the hospital filed a complaint seeking a judgment that Petitioner was incompetent and sought to have the OPG appointed. P-1 at Exhibit B. On September 3, 2020, the judgment was entered and the OPG was appointed. After entering a nursing home later that month, the OPG filed a Medicaid application with Cumberland County on October 30, 2020 and sought retroactive coverage for the prior three months.

On November 25, 2020, Cumberland County issued a request for more information. A search through the Asset Verification System (AVS) disclosed that Petitioner had a bank account at Wells Fargo. This was disclosed to OPG in February 2021 which included a request for bank statements from the account. R-1 at 45.

On March 1, 2021, the OPG requested information from Wells Fargo regarding the bank account as well as any safety deposit boxes. It was discovered that Petitioner's bank account held \$7,003.11 and that he had a safety deposit box holding \$4,848 in cash. The bank account was closed and a check for the balance was issued on March 23, 2021. On April 21, 2021, the cash in the safety deposit box was retrieved and deposited into Petitioner's OPG account on May 10, 2021. ID at 5. The funds were spent down during May 2021 and Cumberland County found Petitioner's assets, excluding the cash in the safety deposit box exceeded the \$2,000 limit until June 1, 2021. R-1 at 2.

Petitioner is seeking an earlier date of Medicaid eligibility and claims that the Wells Fargo account was inaccessible. The Initial Decision determined that the account was inaccessible and does not count towards the resources standard. I disagree.

A "resource" is defined as "any real or personal property which is owned by the applicant . . . and which could be converted to cash to be used for his/her support and maintenance." See 20 C.F.R. § 416.1201(a) and N.J.A.C. 10:71-4.1(b). If the individual has the right, authority or power to liquidate the property, it is considered a resource. Ibid. A resource is "countable" for purposes of eligibility determinations if it is "available to the applicant/beneficiary or any person acting on his or her behalf." N.J.A.C. 10:71-4.1(c)(3) (emphasis added). Inaccessibility is not established by an applicant's disability but is instead established where the beneficiary cannot exercise control over or tap into the resource due to external factors. N.J.A.C. 10:71-4.4(b)(6)(i). Put simply, the inaccessibility rule is inapplicable to situations such as this because there was no legal impediment to Petitioner's resources.

In *Chalmers v. Shalala*, 23 F.3d 752, 755 (3d Cir. 1994), the Third Circuit considered a similar argument in the context of Supplemental Security Income, for which property is considered a resource "[i]f the individual has the right, authority or power to liquidate the property or his or her share of the property." 20 C.F.R. § 416.1201(a)(1). The court held that though the applicant's schizophrenic mental state precluded her from having actual power or physical ability to liquidate her property interest, the property was a resource for purposes of obtaining Supplemental Security Income (SSI) benefits. Ibid.

The Court recognized that 20 C.F.R. § 416.1201(a), which counts property as a resource if the individual has the right, authority, or "power" to liquidate property, would

be interpreted to mean “legal right” even though the applicant lacked the physical or mental capacity to make necessary decisions regarding the transaction. Ibid.

The Court rejected Chalmer’s contention that although she had the legal right to liquidate her interests, her disability left her powerless to do so. Ibid. It found that Chalmers’ argument “misconstrues the meaning of the word ‘power’ as used in the regulations,” and that “power” means not only “a mental or physical ability or aptitude but also legal authority, as the Secretary implicitly uses the word.” Ibid. Moreover, since many individuals receiving SSI benefits are disabled and lack the mental or physical ability to manage their own resources, interpreting the word “power” to mean only “mental or physical ability” would render the eligibility requirement meaningless. Ibid. In *Chalmers v. Shalala*, 23 F. 3d 752 (1994), the Third Circuit found that even though the applicant’s schizophrenic mental state precluded her from having actual power or physical ability to liquidate her property interest, the property was considered a resource for purposes of obtaining Supplemental Security Income (SSI) benefits. *Chalmers v. Shalala*, 23 F.3d 752, 755 (3d Cir. 1994). The court held that the phrase “right, authority or power” is disjunctive and refusing to interpret the phrase as conjunctive. The court went on to find that the word “power” means not only a “mental or physical ability or aptitude” but also “the legal authority” to liquidate resources. *Id.* at 755. Therefore, if the individual has the legal right to receive the money, any mental or physical disability is immaterial to the eligibility determination. Indeed, as the court noted, since many disabled individuals receive benefits, “such an interpretation would render the provision meaningless.” *Id.* See also *L.S. v. Div. of Med. Assistance and Health Servs.*, No. A-0571-04 (App. Div. October 21, 2005).

In support of the appeal in this matter, Petitioner provided four separate certifications prepared for this instant matter. (P-1, P-2, P-3 and P-4). No testimony was provided and accordingly, those four certifications are considered hearsay. While hearsay evidence shall be admissible during contested cases before the OAL some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). The finding of fact cannot be supported by hearsay alone. Rather, it must be supported by a residuum of legal and competent evidence. *Weston v. State*, 60 N.J. 36, 51 (1972).

The reliance of the certification of Tericia Burrus does not acknowledge that the response from SSA on November 12, 2020 instructed the OPG to keep the current account open until the next check was deposited in the OPG account. ID at 4 citing P-4, Exhibit B. Absent testimony, the finding that OPG had no information about assets is belied by the letter from SSA and the certification cannot be used to support this finding.

Here November 2020 letter from Social Security states that Petitioner's benefits will be deposited in a new financial institution selected by the OPG. P-4 at Exhibit B. The SSA cautioned that, since the changed to direct deposit could take one to two months, "[y]ou should keep the old account open until we send a payment to the new account." At minimum, the letter put the OPG on notice that there was another bank account that had been previously receiving Petitioner's SSA benefit. Additionally, the account had received the federal stimulus checks in 2020 and 2021 which, while not countable for Medicaid purposes, were funds available to the OPG for Petitioner's needs. See

Medicaid Communication No. 20-04. Those checks were deposited in the Wells Fargo account both prior to and during the OPG's appointment.

The Initial Decision noted "an argument could be made that OPG should have followed up with SSA to determine where the prior Social Security benefits were being deposited" but concluded that the account was not accessible because it was unknown. ID at 9. There was a telephonic hearing and post-hearing submissions in this matter. The only individual who testified was Omayra Rosa, the CWA Medicaid supervisor. ID at 11. The statements and opinions contained in the certifications from the OPG were not subject to cross-examination. As such there could be no exploration about steps the OPG took in response to the SSA letter about the other bank account as no testimony was offered. Thus, the ultimate finding of fact that the OPG needed assistance to discover the Wells Fargo account cannot stand.

However, upon further review of the case, it appears that Petitioner has been eligible for Medicaid benefits. He had been in receipt of benefits and those benefits have been continued under a Maintenance of Eligibility (MOE) established under the Families First Coronavirus Response Act (FFCRA). FFCRA requires that states provide continuous Medicaid eligibility for those enrolled as of March 18, 2020, through the end of the federal Public Health Emergency (PHE). Petitioner's period of eligibility as of March 2020 is continued up to and including the time frame sought by the OPG. Thus, I hereby REVERSE the Initial Decision and find that while Petitioner's eligibility was determined correctly, the FFCRA requirement covers his benefits during the disputed time frame.

THEREFORE, it is on this 3<sup>rd</sup> day of JUNE 2022,

ORDERED:

That the Initial Decision is hereby REVERSED and MODIFIED as set forth above.



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