

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

[REDACTED]

APPEAL NO. 11F-00619

PETITIONER,

Vs.

CASE NO. 1331818982

FLORIDA DEPT OF CHILDREN AND FAMILIES
CIRCUIT: 05 Sumter
UNIT: 88006

RESPONDENT.

FILED
May 6, 2011
OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN AND FAMILIES

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FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above matter on March 11, 2011.

APPEARANCES

For the Petitioner: [REDACTED], employee with [REDACTED] Services, Inc.

For the Respondent: Kane Lamberty, senior human services program specialist with the respondent ACCESS program.

ISSUE

At issue is the respondent's action of December 8, 2010 denying Institutional Care Program and Medicaid (ICP) benefits for the months of July 2010 through November 2010 based on excess counted assets. Later, on February 17, 2011, the

respondent approved ICP benefits for the month of November 2010. The petitioner continues to seek ICP approval for the months of July 2010 through October 2010.

PRELIMINARY STATEMENT

By notice dated December 8, 2010, the petitioner was informed that she was approved for ICP eligibility for the months of December 2010 and ongoing. By later notice dated February 17, 2011, the petitioner was informed that she was approved for ICP benefits for the month of November 2010. In dispute is the effective month that ICP eligibility should begin after \$32,000 of a total \$52,000 in improperly transferred assets was returned with the last payment in July 2010. The petitioner believes that a prior imposed asset transfer penalty should end, and eligibility based on assets should be effective in July 2010. The respondent believes an asset transfer penalty, together with a retroactive countable asset determination, does not permit the petitioner to be eligible for ICP benefits until November 2010. On January 16, 2011, the petitioner timely requested a hearing to appeal the ICP denial decision for the months of July 2010 through October 2010.

The hearing was first scheduled by telephone for March 4, 2011. The petitioner requested an in person hearing and the hearing was rescheduled to March 11, 2011, at 1:30 p.m. All the parties appeared in person for the hearing convened in Wildwood, Florida. The petitioner did not appear for the hearing. [REDACTED] represented the petitioner and testified. [REDACTED], also an employee with [REDACTED], appeared as a witness for the petitioner. Edith Ward, economic self-sufficiency specialist II, appeared as a witness for the respondent. Terry Carpenter, economic self-sufficiency specialist I, also appeared as a witness for the respondent.

The hearing record was held open for an additional 14 day period, until March 25, 2011, to allow for the submission of any additional written arguments. On March 25, 2011, written legal arguments with cited authorities were received from the petitioner. This composite documentation is labeled the Petitioner Exhibit 7.

FINDINGS OF FACT

1. On August 21, 2009, the petitioner was initially admitted to the [REDACTED] nursing facility. The petitioner remained a resident of this nursing facility as of the hearing date. On January 27, 2010, the petitioner gave \$52,000 in liquid assets to her son [REDACTED] as a gift.

2. On February 18, 2010, the respondent received an application for ICP benefits in the petitioner's behalf. In this application, the petitioner acknowledged that the \$52,000 given her son on January 27, 2010 was a gift. This gift could result in an ineligibility penalty period based on an improper transfer of assets. The respondent allowed the petitioner a time period to rebut the presumption of the transferred asset, but the petitioner did not do so. On May 10, 2010, the respondent imposed a transfer of asset penalty of 10.4 months beginning February 1, 2010 through December 12, 2010.

3. On November 9, 2010, the respondent was notified that some of the transferred assets had been returned to the petitioner. On December 1, 2010, the respondent received documentation from the petitioner that \$32,000 of the total \$52,000 transferred amount had been returned in increments over the period of February 2010 to July 2010, as follows:

- \$18,000 was returned on February 8, 2010.

- \$3,315.17 was returned on March 17, 2010.
- \$5,684.83 was returned on May 24, 2010.
- \$5,000 was returned on July 29, 2010

4. Each of the above returned amounts was used by the petitioner in that same month to pay her outstanding debt to the nursing facility. Since the petitioner had less than \$2,000 in funds available at the end of July 2010, she believes that she then met the asset limit, and the transfer penalty should end beginning in July 2010. The respondent believes that each of the above returned amounts must be considered an available asset retroactive to the date of the improper asset transfer on January 27, 2010. Thus, the respondent believes the petitioner was ineligible for ICP based on excess countable assets for the months of February 2010 through June 2010.

5. Twenty thousand dollars (\$20,000) of the total of \$52,000 in improperly transferred assets has not been returned to the petitioner. The respondent divided this \$20,000 amount by a \$5,000 average monthly nursing home payment rate to determine a four month period of ICP ineligibility due to the improper transfer of assets. The respondent begins this penalty period in July 2010 and will continue to the end of October 2010.

6. The respondent determined the petitioner ineligible for ICP benefits due to excess countable assets from February 2010 through June 2010. The respondent imposed the asset transfer penalty for four months from July 2010 through October 2010.

CONCLUSIONS OF LAW

7. The Department of Children and Families, Office of Appeal Hearings, has jurisdiction over the subject matter of this proceeding and the parties, pursuant to § 409.285, Fla. Stat. This order is the final administrative decision of the Department of Children and Families under Fla. Stat. § 409.285.

8. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code § 65-2.056. In accordance with Fla. Admin. Code § 65-2.060(1), the burden of proof was assigned to the petitioner since she asserts the affirmative by seeking a reduction of the duration of the ICP asset transfer penalty period.

9. The United States Code provision at 42 USCS § 1396p(c) describes the following on transfers of assets applicable to the ICP Program:

§ 1396p. Liens, adjustments and recoveries, and transfers of assets
(c) Taking into account certain transfers of assets.

(1) (A) In order to meet the requirements of this subsection for purposes of section 1902(a)(18) [42 USCS § 1396a(a)(18)], the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in subparagraph (D)(ii) In the case of a transfer of asset made on or after the date of the enactment of the Deficit Reduction Act of 2005 [enacted Feb. 8, 2006], the date specified in this subparagraph is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.

10. Application of the above U.S. Code provision shows the transfer of asset penalty would be effective in February 2010, which is the first month after the petitioner would have been otherwise eligible for ICP benefits were it not for the asset transfer on January 27, 2010.

11. The Centers for Medicare and Medicaid Services, State Medicaid Manual, General and Categorical, Eligibility Requirements addresses transfer of assets penalties.

3258.10 Exceptions to Application of Transfer of Assets Penalties.—

There are a number of instances where, even if an asset is transferred for less than fair market value, the penalties discussed above do not apply. These exceptions are:

C. In addition to the above, a penalty for transferring an asset for less than fair market value is not assessed if a satisfactory showing is made to the State that:...

All of the assets transferred for less than fair market value have been returned to the individual; or...

3. All Assets Transferred for Less Than Fair Market Value Are Returned to the Individual.--When all assets transferred are returned to the individual, no penalty for transferring assets can be assessed. In this situation, you must ensure that any benefits due on behalf of the individual are, in fact, paid. When a penalty has been assessed and payment for services denied, a return of the assets requires a retroactive adjustment, including erasure of the penalty, back to the beginning of the penalty period.

However, such an adjustment does not necessarily mean that benefits must be paid on behalf of the individual. Return of the assets in question to the individual leaves the individual with assets which must be counted in determining eligibility during the retroactive period.

Counting those assets as available may result in the individual being ineligible for Medicaid for some or all of the retroactive period, (because of excess income/resources) as well as for a period of time after the assets are returned.

12. The above State Medicaid Manual allows for a potential ICP ineligibility period applied to retroactive months due to excess assets, even when all improperly transferred assets have been returned. The Fla. Admin.

Code Rule 65A-1.716 describes the ICP income and resource (asset) criteria, with the average private pay rate for a nursing facility:

65A-1.716 Income and Resource Criteria.

(5) SSI-Related Program Standards.

(a) SSI (42 U.S.C. §§ 1382 – 1383c) Resource Limits:

1. \$2000 per individual...

(d) Average monthly private pay nursing facility rate: \$5,000...

13. The petitioner transferred assets totaling \$52,000 on January 27, 2010. This resulted in a penalty period of 10.4 months that was assigned to run from February 1, 2010 through December 12, 2010. The penalty period was determined by dividing the \$52,000 by the \$5,000 average monthly private pay nursing facility rate (see Fla. Admin. Code Rule 65A-1.716(5)(d)). The penalty was applied and was to begin in February 2010, the first month of eligibility, if not for the transfer (See 42 USCS § 1396p(c)(1)(D)(ii)).

14. The petitioner reported that \$32,000 of the assets was returned. This was done in multiple payments between the months of February 2010 and July 2010. The last payment made toward returning the assets was \$5,000 on July 29, 2010. This \$5,000 payment was spent by the petitioner in July 2010. The respondent considered the payment of \$5,000 to have been an available asset to the petitioner from the date of the transfer on January 27, 2010 through the month of June 2010. This \$5,000 payment exceeded the Institutional Care Program (ICP) asset limit of \$2,000 for a single individual (See Fla. Admin. Code Rule 65A-1.716(5)(a)(1.)).

15. The uncompensated value of the transfer after considering repayments is \$20,000. Based on this dollar amount, the proper penalty period is four months. The issue is when to apply the four month transfer penalty. The original penalty was applied

for the time period of February 2010 through December 12, 2010. The State Medicaid manual provides that when all assets are returned, no penalty will be assessed and clarifies that this does not necessarily mean that the individual will receive benefits. The manual further requires that "return of the assets in question to the individual leaves the individual with assets which must be counted in determining eligibility during the retroactive period. Counting those assets as available may result in the individual being ineligible for Medicaid for some or all of the retroactive period, (because of excess income/resources) as well as for a period of time after the assets are returned."

16. After the transfer, the individual was determined eligible (now meets the resource standard) and would have received benefits except for the application of the penalty. However the returned assets must be evaluated to determine if they could have been used to meet the petitioner's needs including paying for the nursing care. The program has a standard of \$2,000 for countable assets and any month the assets exceed that standard for the entire month the individual is not eligible to receive ICP benefits.

17. The petitioner is not eligible to receive ICP benefits based upon not meeting the resource standard until July 2010. The respondent began applying the newly determined penalty on July 1, 2010, the first month of eligibility, except for the transfer penalty, and continued it for four months through the month of October 2010 (See 42 USCS § 1396p(c)(1)(D)(ii)).

18. Petitioner argued that the Department follows the Supplement Security Income (SSI) rules in determining income and resources for ICP; this is confirmed by

Fla. Administrative Code Rule 65A-1.712. However this rule specifies for transfers of resources the Department follows the Medicaid rules rather than the SSI rules.

19. The petitioner also argued the rules in the SSA's Program Operations Manual (POMS) should apply in determining when the returned asset should count as being an available resource to the petitioner. The petitioner cited the provision that addresses increases in the value of resources, and since the resources were spent in the same month they were returned, such should not have countable value. The return of transferred resources does not meet the definition of an increase in resources. The examples shown in the POMS, are all situations where the individual gains something she never had before, such as an inheritance, not the return of her own resources. The hearing officer cannot conclude that this provision is applicable to the petitioner.

20. The petitioner also argued that in accordance with rule, once the penalty period is imposed, it will continue (See Fla. Admin. Code Rule 65A-1.712(3)(g)). The rule makes reference to the penalty continuing although the individual might no longer qualify for long term Medicaid. An example is that if the petitioner's health improves such that she no longer needed institutional care, the penalty would continue to run and expire without additional months being added for the time she did not require institutional care. In this case, the respondent established a penalty period of February 2010 to December 12, 2010. The respondent is not attempting to extend that penalty and is willing to have that penalty run as originally established.

21. The petitioner has requested the respondent to recompute the penalty period based on a partial return of the transferred assets. The respondent did this and set aside the original penalty period and established a new penalty period of four months to

begin in July 2010. The petitioner is in a position to choose either of these penalty periods and the respondent applied the most favorable period and began benefits November 1, 2010 rather than December 12, 2010.

22. To shorten the penalty period to four months and apply it beginning in February 2010 for the months of February, March, April and May 2010 is inconsistent with the federal law that provides a penalty for an individual who transfers resources that could be used to pay the nursing facility costs and requests to transfer the expense of the nursing faculty care to the taxpayers through the Medicaid program. Using the petitioner's argument an individual could transfer \$40,000 in resources. This would provide an eight month penalty period. If \$20,000 were returned immediately, the individual could use that \$20,000 to pay for four months of nursing facility care. The penalty would be reduced to four months - the same four months the individual was able to pay for with the partial return of the transferred assets. There would be no remaining penalty for the uncompensated value of the remaining \$20,000 of the transfer.

23. To interpret or apply the rule in any manner other than restarting the penalty at the time the individual becomes eligible after counting the returned funds is inconsistent with the law and direction provided by CMS in the State Medicaid Manual. The manual states, "When a penalty has been assessed and payment for services denied, a return of the assets requires a retroactive adjustment, including erasure of the penalty, back to the beginning of the penalty period." Once the penalty has been erased, if appropriate, the respondent may impose a new penalty for the proper time period as required under the authorities.

DECISION

The appeal is DENIED and the respondent action affirmed.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the Department. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The petitioner must also file another copy of the "Notice of Appeal" with the First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The Department has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this _____ day of _____, 2011,
in Tallahassee, Florida.

Jim Travis
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