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

[redacted]

PETITIONER,

Vs.

FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES
CIRCUIT: 07 Putnam
UNIT: 88314

RESPONDENT.
_____/

APPEAL NO. 11F-01496

CASE NO. 1330070453

FILED
May 27, 2011
OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN AND FAMILIES

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on April 13, 2011 at 10:56 a.m.

APPEARANCES

For the Petitioner: [redacted] husband to the petitioner. The petitioner was present as an observer and did not testify.

For the Respondent: Christi Bellamy, Supervisor for the Institutional Care Program (ICP) Medicaid Unit.

PRELIMINARY STATEMENT

Evidence was received and entered as the Respondent's Composite Exhibit 1, Respondent's Composite Exhibit 2, and Respondent's Composite Exhibit 3. Page 65 of the Respondent's Composite Exhibit 2 was removed due to that page not relating to the petitioner.

STATEMENT OF ISSUE

The petitioner is appealing the Department's action of February 18, 2011, to deny Institutional Care Program (ICP) Medicaid benefits for the months of October 2010, November 2010, December 2010, and January 2011, because she did not meet the disability criteria.

FINDINGS OF FACT

1. The petitioner was admitted into [redacted] Hospital at the [redacted] on September 10, 2010. On October 14, 2010, the required level of care was determined and completed. The level of care was skilled and the placement recommendation was "Temporary Nursing Facility". The level of care effective date was October 2010. The petitioner was admitted into the nursing home on October 14, 2010.

2. On September 21, 2010, the petitioner was examined by Dr. [redacted] who documented in the progress notes that the petitioner, "..appears to be suffering from hypoglycemic encephalopathy…." On September 22, 2010, Dr. [redacted] examined the petitioner and notated in the consultation notes that, "The patient was discussed in detail…At this time we think the patient has a good prognosis of recovery, but again she has a very bad test signal on the bilateral hippocampal areas of the MRI. We think the patient might end up with permanent loss of her memory." Dr. [redacted] notated further that, "The MRI shows extensive abnormality of the hippocampal formation bilaterally. This is consistent with the history of hypoglycemic insult and portends grave concern for residual impairment of short-term memory functions. Neuropsychological

assessment may be helpful as the patient convalesces." On October 14, 2010, the petitioner's discharging physician, Dr. [redacted] diagnosed her with hypoglemic encephalopathy. The secondary diagnoses of the petitioner were "chronic pancreatitis, history of choledocholithiasis, portal hypertension, chronic gastritis, diabetes mellitus, hypertension, and alcoholism" (Respondent's Composite Exhibit 2).

3. On December 2, 2010, the petitioner's speech therapist included notes in the treatment plan that states, "Pt. continues to make progress, recall of longer info and comprehension continues to (increase)…."

4. The petitioner applied for ICP Medicaid benefits on November 19, 2010. The petitioner also requested retroactive ICP Medicaid benefits for the month of October 2010. On January 19, 2011, the respondent forwarded the case for a determination of disability by the Department's District Medical Review Team (DMRT) as she is under age 65..

5. The DMRT denied the petitioner's request for a finding of disability, with a reason code of "N35", meaning that the petitioner's impairment was not expected to be disabling for 12 full months. The reviewing nurse, Kim Andrade, provided an explanation of the DMRT's decision (Respondent's Exhibit 3), which states: "This case was evaluated under neurological impairments 11.18, 11.02, 11.03, and 11.04. The guidelines indicate that to be eligible, the impairment would last greater than six months…There are physical therapy reports for November and December 2010, which indicate the patient is progressing…There are no documents here that provide the

patient's current medical and neurological condition….I do not see evidence in these documents indicating that the impairment is likely to persist six months or greater."

6. The petitioner's husband disagrees with the Department's conclusion that the petitioner's condition would not last longer than six months. The petitioner's husband asserts that the petitioner has neurological impairments, suffers from diabetes, is incapable of holding a job, and that he has to assist her with daily activities. The petitioner's husband testified that he had to close his business because the petitioner could not be left alone for long periods of time. The petitioner's husband asserts that the petitioner's condition may improve but not to the point where she is able to function as she did before. The respondent testified that the petitioner's application for ICP Medicaid benefits was denied because her medical condition was progressing while in the nursing home, according to the medical records. The Department contends that in order for ICP Medicaid to be approved, the petitioner would have to be determined to be disabled. It is the Department's contention that the DMRT's decision to deny the ICP Medicaid benefits was based on the SSA disability guidelines and the medical conditions listed on the pages included in the Respondent's Exhibit 3. The Department asserts that the petitioner would need to apply for SSI-Related Medicaid benefits, and re-apply for Supplement Security Income (SSI) and Social Security Disability benefits for her ongoing medical conditions.

CONCLUSIONS OF LAW

7. The Florida Administrative Code, Section 65A-1.710 et seq., sets forth the rules of eligibility for Elderly and Disabled Individuals Who Have Income of Less Than the Federal Poverty Level. For an individual less than 65 years of age to receive benefits, he or she must meet the disability criteria of Title XVI of the Social Security Act appearing in 20 C.F.R. § 416.905. The regulations state, in part:

> The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy...

8. The above regulation explains that for an individual under 65 years of age to be eligible to receive SSI-Related Medicaid benefits, he or she must meet the disability criteria specified in Title XVI of the Social Security Act. The Social Security Act defines disability as not being able to engage in any substantial activity due to a physical or mental impairment that has lasted or is expected to last for a period of no less than 12 months, or is expected to result in death. The impairment has to be severe enough to prevent the individual from being able to work in previous employment or any other substantial and gainful activity.

9. Fla. Admin. Code 65A-1.710 SSI-Related Medicaid Coverage Groups states in part:

> (2) Institutional Care Program (ICP). A coverage group for institutionalized aged, blind or disabled individuals (or couples) who would be eligible for cash assistance except for their institutional status and income as provided in 42 C.F.R. §§ 435.211 and 435.231….

10. The above authority defines ICP as coverage for an individual who is aged or disabled. Because petitioner is under age 65, the Department had to determine if she met the disability requirement.

11. Fla. Admin. Code 65A-1.711 SSI-Related Medicaid Non-Financial Eligibility Criteria states in part:

> (2) For ICP benefits, an individual must be:
> (a) Living in a licensed nursing facility, or confined to a hospital swing bed or to a hospital-based skilled nursing facility bed, or in an ICF/DD facility that is certified as a Medicaid provider and provides the level of care that the client needs as determined by the Department…and
> (b) Determined to be in medical need of institutional care services according to Rules 59G-4.180 and 59G-4.290, F.A.C., for nursing facility, hospital swing bed placements and placements in a hospital-based skilled nursing facility bed according to Chapter 65B-38, F.A.C., for ICF/DD facilities or according to Rule 59G-4.300, F.A.C.

12. The above authority explains that for an individual to be eligible for ICP Medicaid benefits, he or she must be living in a licensed nursing facility, confined to a hospital bed, or confined to a bed in a hospital-based skilled nursing facility. The facility must provide the level of care needed by the individual and established by the Department. The individual must also be determined to be in medical need of institutional care services according to the guidelines in the Florida Administrative Code.

13. 20 C.F.R § 416.909 How long the impairment must last states in part:

"Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. We call this the duration requirement."

14. 20 C.F.R § 416.920 Evaluation of disability of adults, in general states in part:

> (3) Evidence considered. We consider all evidence in your case record when we make a determination or decision whether you are disabled…
> (4) The five-step sequential evaluation process. The sequential evaluation process is a series of five ‘‘steps’’ that we follow in a set order. If we can find that you are disabled or not disabled at a step, we make our determination or decision and we do not go on to the next step. If we cannot find that you are disabled or not disabled at a step, we go on to the next step.
> (i) At the first step, we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled….
> (ii) At the second step, we consider the medical severity of your impairment(s). If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 416.909, or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled.....

15. The above regulations explain that to be considered to be disabled by the SSA, an individual must have an impairment that has lasted, or be expected to last, at least 12 months if it does not result in death. The disability evaluation consists of five steps which must be followed in sequential order. If an individual cannot be found to be disabled, or is not disabled on one step, the agency moves on to the next step. If the impairment is not severe enough and does not meet the duration period, the individual is determined not disabled.

16. The Department’s Program Policy Manual 165-22, section 1440.1204 Blindness/Disability Determinations (MSSI, SFP), states in part:

> If the individual has not received a disability decision from SSA, a blindness/disability application must be submitted to the Division of Disability Determinations (DDD) for individuals under age 65…
> ……..
> The District Medical Review Team (DMRT) handles all other necessary disability determinations (including ICP, OSS, HCBS, and PACE).

17. The above authority states that if an individual, who is under 65, applies for SSI-Related Medicaid and a disability decision has not been received from SSA, the Department must submit the application to DDD. If the application is for ICP Medicaid benefits, it is submitted to the DMRT. In this instant case, the petitioner's wife applied for ICP Medicaid benefits, therefore her application was submitted to the DMRT and not to DDD.

18. The DMRT completed a disability review on January 19, 2011 of the petitioner's impairments regarding her neurological impairments of major and minor epileptic seizures, central nervous system vascular accident, and cerebral trauma. Based on the medical records presented to the DMRT, the reviewing nurse was unable to establish that the petitioner's impairments would last longer than six months. The evidence presented at the hearing does not establish that the petitioner's condition worsened while being a patient in the nursing home nor that there was a disabling condition that would last 12 months or longer, to meet step two of the disability evaluation as required by the federal regulation.

19. After carefully reviewing the evidence, testimony, and governing authorities, the undersigned concludes that the Department's action to deny the petitioner's ICP Medicaid application is correct.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is denied.

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 appropriate District Court of Appeal. 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.

_____
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Copies Furnished To: [redacted], Petitioner
ACCESS Circuit 7 - Sue Ann Sheedy