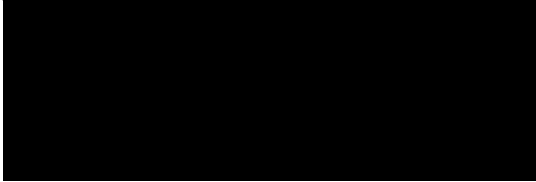


STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

FILED

APR 30 2015

OFFICE OF APPEAL HEARINGS
DEPT OF CHILDREN & FAMILIES



APPEAL NO. 15F-01271

PETITIONER,

Vs.

CASE NO.



FLORIDA DEPT OF
CHILDREN AND FAMILIES
CIRCUIT: 09 Orange
UNIT: 88999

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing telephonically in the above-referenced matter on March 12, 2015 at 2:15 p.m.

APPEARANCES

For the petitioner: _____ PAC case manager.

For the respondent: Lilian Herrera, ACCESS supervisor

STATEMENT OF ISSUE

At issue is the respondent's action to deny petitioner's applications dated November 18, 2014 and December 29, 2014 for Medicaid Waiver – Home and Community Based Services (HCBS) Waiver benefits due to being over the income limit.

PRELIMINARY STATEMENT

At the outset of the hearing, the petitioner's representative explained that on December 23, 2014, the respondent notified the petitioner that his application for HCBS Waiver benefits dated November 18, 2014 was denied.

On January 29, 2015, the respondent notified the petitioner that his application dated December 29, 2014 for HCBS Waiver was denied due to being over the income limit. The petitioner's representative timely requested a hearing. Petitioner had requested a hearing to challenge the respondent's action in denying both applications for HCBS Waiver.

[REDACTED] PAC case manager observed, and serving as a translator was Evelyn Martinez, Language Line Solutions.

Petitioner submitted one exhibit, which was accepted into evidence, and marked Petitioner Exhibit "1". Evidence was received from the respondent and marked as Respondent Exhibit "1". The record was held open until close of business on April 1, 2015 for submission of additional evidence from the respondent. Additional evidence was received on March 24, 2015, and marked as Respondent Exhibit "2". The record closed on April 1, 2015.

FINDINGS OF FACT

1. Prior to the action under appeal, petitioner (52) was receiving HCBS Waiver benefits. The petitioner re-applied for the HCBS Waiver on November 18, 2014 and December 29, 2014.
2. The petitioner reported on his November 18, 2014 application employment with [REDACTED]. The income budget

was based on paystubs provided by the respondent for [REDACTED] dated November 14, 2014 for \$647.79 and November 28, 2014 for \$501.44. Petitioner's second employment is with [REDACTED] and the following paystubs were provided; dated November 7, 2014, for \$552.00 and November 21, 2014, for \$432.00. With a conversion factor of 2.15, the household total gross income was calculated as \$2,293.22.

3. The petitioner's representative explained the application submitted on November 18, 2014, was denied and all the information was provided timely.

4. The respondent clarified the reason on the denial for the application dated November 18, 2014 was due to being over income. On December 5, 2014, the respondent mailed the petitioner a pending notice, informing the income exceeded the income standard and he needed to establish a Qualified Income Trust to become eligible.

5. Respondent asserted that in order for petitioner to be eligible for HCBS Waiver, his monthly income cannot exceed the \$2,199.00 monthly income limit for an individual. Since petitioner's monthly income exceeds the income limit, he is required to establish and fund a Qualified Income Trust in order for him to be eligible for HCBS Waiver. Petitioner did not respond to the pending letter issued on December 5, 2014.

6. On December 23, 2014, the respondent notified the petitioner that his application dated November 18, 2014 was denied due to his household income being over the income limit.

7. The petitioner reported on his December 29, 2014 application both employments. Petitioner submitted paystubs for [REDACTED] dated January 9, 2015 for \$644.99 and January 23, 2015 for \$656.04. Petitioner reported earnings at [REDACTED]

averaging \$450.00 biweekly. The respondent budget the earnings from the petitioner's income with a conversion factor of 2.15. The Department determined the petitioner's household total gross income to be \$2,214.53. It was determined that the petitioner exceeds the income standard and therefore was not eligible for HCBS benefits.

8. The respondent denied the petitioner's December 29, 2014 application based on the petitioner's income. The petitioner did not provide verification that an Income Trust was established or that there was any change in the petitioner's monthly income.

9. On January 29, 2015, the respondent mailed the petitioner a Notice of Case Action informing him that his application from December 29, 2014 was denied due to exceeding the income limit. However, no pending notice was issued to the petitioner to informing him of the need to establish a Qualified Income Trust.

10. During a supervisory review, the respondent reopened the case. A pending notice was mailed to the petitioner on March 4, 2015 to allow an opportunity for the petitioner to establish a Qualified Income Trust. The notice allowed the petitioner ten days to respond.

CONCLUSIONS OF LAW

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

12. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code § 65-2.056.

13. In accordance with Fla. Admin. Code § 65-2.060 (1), the burden of proof is assigned to the respondent on application November 18, 2014. The burden of proof is assigned to the petitioner for application December 29, 2014.

14. Fla. Admin. Code § 65A-1.713, SSI-Related Medicaid Income Eligibility Criteria, in part states:

(1) Income limits. An individual's income must be within limits established by federal or state law and the Medicaid State Plan. The income limits are as follows:

...

(d) For ICP, gross income cannot exceed 300 percent of the SSI federal benefit rate after consideration of allowable deductions set forth in subsection 65A-1.713(2), F.A.C. Individuals with income over this limit may qualify for institutional care services by establishing an income trust which meets criteria set forth in subsection 65A-1.702(15), F.A.C...

(2) Included and Excluded Income. For all SSI-related coverage groups the department follows the SSI policy specified in 20 C.F.R. 416.1100 (2007) (incorporated by reference) et seq., including exclusionary policies regarding Veterans Administration benefits such as VA Aid and Attendance, unreimbursed Medical Expenses, and reduced VA Improved pensions, to determine what counts as income and what is excluded as income with the following exceptions:

(a) In-kind support and maintenance is not considered in determining income eligibility.

(b) Exclude total of irregular or infrequent earned income if it does not exceed \$30 per calendar quarter.

(c) Exclude total of irregular or infrequent unearned income if it does not exceed \$60 per calendar quarter.

(d) Income placed into a qualified income trust is not considered when determining if an individual meets the income standard for ICP, institutional Hospice program or HCBS.

(e) Interest and dividends on countable assets are excluded, except when determining patient responsibility for ICP, HCBS and other institutional programs ...

(b) For institutional care, hospice, and HCBS waiver programs the department applies the following methodology in determining eligibility:
1. To determine if the individual meets the income eligibility standard the client's total gross income, excluding income placed in qualified income trusts, is counted in the month received. The total gross income must be less than the institutional care income standard for the individual to be eligible for that month.

15. Fla. Admin. Code § 65A-1.713 SSI-Related Medicaid Income Eligibility Criteria in relevant part states:

(4) Income Budgeting Methodologies. To determine eligibility SSI budgeting methodologies are applied except where expressly prohibited by 42 U.S.C. § 1396 (2000 Ed., Sup. IV) (incorporated by reference), or another less restrictive option is elected by the state under 42 U.S.C. § 1396a(r)(2) (2000 Ed., Sup. IV) (incorporated by reference). When averaging income, all income from the most recent consecutive four weeks shall be used if it is representative of future earnings. A longer period of past time may be used if necessary to provide a more accurate indication of anticipated fluctuations in future income.

(a) For MEDS-AD Demonstration Waiver, Protected Medicaid, Medically Needy, Qualified Working Disabled Individual, QMB, SLMB, QI1, and to compute the community spouse income allocation for spouses of ICP individuals, the following less restrictive methodology for determining gross monthly income is followed:

1. When income is received monthly or more often than once per month the monthly income from that source shall be computed by first determining the weekly income amount and then multiplying that amount by 4. A five-week month shall not be treated any differently than a four-week month.

2. When unearned income is received less often than monthly the total amount will be prorated over the period it is intended to cover. If prorating income adversely affects the client it will be counted in the month received and not prorated.

3. When earned income is received less often than monthly, the department counts the total amount in the month received and does not prorate.

(b) For institutional care, hospice, and HCBS waiver programs the department applies the following methodology in determining eligibility:

1. To determine if the individual meets the income eligibility standard the client's total gross income, excluding income placed in qualified income trusts, is counted in the month received. The total gross income must be less than the institutional care income standard for the individual to be eligible for that month.

16. The Department's ACCESS Florida Program, Appendix A-9 sets forth the HCBS income limit for an individual is \$2,199.

17. The above authority explains that in order for petitioner to be eligible for the HCBS Waiver, his gross income cannot exceed 300% of the federal benefit rate. However, if petitioner's income exceeds the limit, he is able to establish and fund an Income Trust to qualify for HCBS Waiver benefits.

18. The findings show on December 5, 2014 the respondent mailed the petitioner a pending letter to allow an opportunity to establish and set up a Qualified Income Trust. The petitioner did not respond to the letter. The petitioner re-applied on December 29, 2014, but the petitioner's income exceeded the income standard. During the application period, no pending letter was mailed to the petitioner to allow an opportunity to establish and set up a Qualified Income Trust. On March 4, 2015, the respondent issued a pending letter allowing petitioner the opportunity to establish a Qualified Income Trust.

19. The ACCESS Florida Program Policy Manual, Section 0640.0401 Requests for Additional Information/Time Standards (MSSI, SFP)

If the Department needs additional information or verification from the applicant, provide:

1. a written list of items required in order to complete the application process,
2. the date the items are due in order to process the application timely, and
3. the consequences for not returning additional information by the due date.

The verification/information due date is 10 calendar days after the date of the interview or if there is no interview requirement, 10 days after the date the pending notice is generated.

20. The ACCESS Florida Program Policy Manual, Section 1840.0110 Income Trusts (MSSI, SFP) states:

MEDS-AD, institutionalized Hospice, Home and Community Based Services (HCBS) and PACE. It does not apply to Community Hospice.

To qualify, an individual's gross income cannot exceed 300 percent of the SSI federal benefit rate (refer to Appendix A-9 for the current income standard). If an individual has income above the ICP income limit, they may become eligible for institutional care or HCBS if they set up and fund a qualified income trust. A trust is considered a qualified income trust if:

1. it is established on or after 10/01/93 for the benefit of the individual;
2. it is irrevocable;
3. it is composed only of the individual's income (Social Security, pensions, or other income sources); and
4. the trust stipulates the state will receive the balance in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on their behalf.

The eligibility specialist must forward all income trusts to their Region or Circuit Program Office for review and submission to the Circuit Legal Counsel for a decision on whether the trust meets the criteria to be a qualified income trust. . .

Once the Circuit Legal Counsel returns the income trust transmittal through the Region or Circuit Program Office, the eligibility specialist must promptly process the Medicaid application, making sure proper notification of eligibility and patient responsibility is given...
(emphasis added)

21. The Department denied HCBS Waiver eligibility on both applications as the total income exceeded the income limit. The petitioner did not create a qualified income trust to gain eligibility for either application. However, there was no opportunity or notification for the petitioner to create a qualified income trust for the December 23, 2014 application. On March 4, 2015, the respondent reopened said application and issued a pending notice to allow the petitioner an opportunity to establish a qualified income trust. According to *Forman v Department of Children & Families*, 956 So.2d 477, 478 (Fla.4d DCA 2007):

Where an applicant has in good faith attempted to comply with a welfare regulation and an agency representative has not complied with an obligation to fully inform the applicant of eligibility requirements, Florida

courts have held applicants to be eligible for benefits. See generally Pond v. Dep't of Health & Rehab. Servs., 503 So.2d 1330 (Fla. 1st DCA 1987); Buckley v. Dep't of Health & Rehab. Servs., 516 So.2d 1008, 1009 (Fla. 1st DCA 1987); Gonzalez v. Dep't of Health & Rehab. Servs., 558 So.2d 32 (Fla. 1st DCA 1989).

22. According to the Department's own policy, the Department is inform petitioner of necessary information to obtain eligibility and allow ten calendar days to provide the information. The Department is not deny the application until after the pending period ends. Therefore, this matter is returned back to the Department to inform the petitioner of the eligibility requirements and allow for petitioner to submit the necessary documentation to obtain eligibility to the HCBS Waiver. On record, the respondent reopened the case and a new pending notice was issued on March 4, 2015 with a due date March 14, 2015 giving an opportunity to establish a Qualified Income Trust. This remand does not guarantee benefits.

DECISION

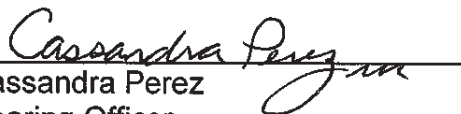
Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is in part denied and in part granted. In regards to the November 18, 2014, application, the appeal is denied. As for the December 23, 2014, application, the appeal is granted and is remanded back to the respondent in accordance with the Conclusions of Law above. Once a determination is complete, petitioner is to be notified of the outcome with a new notice that includes appeal rights.

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, and 1317 Wynnewood 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 petitioner is responsible for any financial obligations incurred as the Department has no funds to assist in this review.

DONE and ORDERED this 30th day of April, 2015,

in Tallahassee, Florida.


Cassandra Perez
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