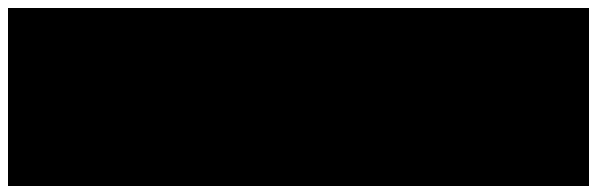


FILED

Feb 29, 2016

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

Office of Appeal Hearings
Dept. of Children and Families



APPEAL NO. 15F-08379

PETITIONER,

Vs.



FLORIDA DEPARTMENT
OF CHILDREN AND FAMILIES
CIRCUIT: 01 Escambia
UNIT: 88113

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing telephonically in the above-referenced matter on December 10, 2015 at 1:36 p.m.

APPEARANCES

For the Petitioner:



petitioner's son



petitioner's daughter

For the Respondent:

Julie Mount, ACCESS Supervisor
Christine Frier,

Northwest Region ACCESS Program Office

STATEMENT OF ISSUE

Petitioner is appealing the Department's action of September 17, 2015 denying the petitioner's application for Institutional Care Program (ICP) Medicaid. The petitioner carries the burden of proof by the preponderance of evidence.

PRELIMINARY STATEMENT

Raymond Muraida, hearing officer, appeared as an observer with no objections from either party.

The petitioner submitted evidence prior to the hearing, which was entered as Petitioner Exhibit 1. The Department submitted evidence prior to hearing, which was entered as Respondent Exhibit 1.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The petitioner submitted an application for Institutional Care Program (ICP) Medicaid on August 17, 2015.
2. The petitioner separated from his wife in 1991.
3. [REDACTED] entered an Order Enforcing Agreement of Separation and for Separate Maintenance on January 30, 2009. In the Order, the petitioner is required to pay his estranged wife \$1,702.00 per month as Separate Maintenance beginning February 1, 2009 as well as pay for her health and life insurance policies in existence as of November 1, 2008. In addition, the petitioner was prohibited from "any conduct calculate and/or designed to harass, threaten, intimidate, or otherwise interfere with" estranged wife's peace and dignity.
4. A Qualifying Income Trust (QIT) was set up on the petitioner's behalf on September 28, 2015. This was submitted to the Department on September 30, 2015.
5. The petitioner believes due to the court order of separate maintenance that he should be considered an impoverished spouse.

6. The petitioner does not believe the Department has considered the court ordered separation of income correctly.

7. The petitioner believes the income and assets of the spouse should not be considered, as the petitioner and his spouse have remained separated since 1991.

8. The petitioner maintains he did not separate from his wife with the intent of becoming eligible for benefits as it occurred long before the petitioner applied for assistance with the Department.

9. The Department explained the policy requires the income and assets of a legally married couple are included in eligibility determination. In addition, the petitioner's income must be counted unless irrevocably assigned at the source. The Department does not view the court order of income to the spouse as irrevocably reassigned at the source as when the spouse dies, the income would revert to the petitioner.

10. The petitioner believes there is a Mississippi case (Goodwin) which should be considered in this case as the estranged spouse resides in Mississippi.

11. The Department explained Federal rules and regulations supersedes another state's ruling in a matter. The Department does not recognize the Mississippi ruling as law in the state of Florida.

12. The Department explained the assets of the spouse must be verified in order to determine eligibility. Federal law allows the Department to exclude those assets only if the spouse's assets make the petitioner ineligible.

13. The petitioner questioned if the state was compelling the petitioner to become divorced in order to become eligible for Medicaid.

14. The Department does not view a legal separation, no matter the length of time separated, the same as divorced.

15. The petitioner provided a statement from the petitioner's estranged wife informing she does not maintain health insurance on the petitioner. She further declares in the statement "she refuses to make her income and/or resources available for the cost of any necessary medical care for the Applicant." (Petitioner Exhibit 1, page 7)

16. The Department advised the court ordered spousal support is not a division of an asset, but a division of income.

17. The petitioner believes when the federal government, payee of the petitioner's pension, followed the court ordered support to redirect the prescribed amount to the spouse; the Department should also honor the Mississippi ruling.

18. The petitioner maintains if the spouse is already refusing to make any of her income or assets available to the spouse; the Department should accept it and move forward.

19. The petitioner maintains because his spouse refuses to provide for his care or any additional information regarding her income or assets, it is placing an undue hardship on the petitioner for obtaining Medicaid eligibility.

CONCLUSIONS OF LAW

20. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Section 409.285, Florida Statutes. This order is the final administrative decision of the Department of Children and Families under Section 409.285, Florida Statutes.

21. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code R. 65-2.056.

22. Fla Admin. Code R. 65A-1.710 "SSI-Related Medicaid Coverage Groups" states in relevant part:

The Department covers all mandatory coverage groups and the following optional coverage groups:

...

(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 435.236. Institutional benefits include institutional provider payment or payment of Medicare coinsurance for skilled nursing facility care.

23. The ICP Medicaid Program covers the institutional provider payment for skilled nursing home care. The petitioner applied for this coverage on August 17, 2015.

24. Federal Medicaid Regulations at 20 C.F.R § 416.1201 "Resources; general" states in relevant part:

(a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

25. Fla. Admin. Code R. 65A-1.712 "SSI-Related Medicaid Resource Eligibility Criteria" states in relevant part:

(1) Resource Limits. If an individual's total resources are equal to or below the prescribed resource limits at any time during the month the individual is eligible on the factor of resources for that month.

26. The above controlling authority sets forth the requirement that resources (assets) be equal to or below the resource limit at some point during each month, that ICP Medicaid eligibility is sought.

27. Fla. Admin. Code R. 65A-1.716 Income and Resource Criteria states:

(5) SSI-Related Program Standards.

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

1. \$2000 per individual.
2. \$3000 per eligible couple or eligible individual with an ineligible spouse who are living together.

28. The applicable resource limit for petitioner under the ICP program is \$2000.

29. Fla. Admin. Code R. 65A-1.303 “Assets” states in relevant part:

(1) Specific policies concerning assets vary by program and are found in federal statutes and regulations and Florida Statutes.

(2) Any individual who has the legal ability to dispose of an interest in an asset owns the asset.

(3) Once the individual’s ownership interest of an asset(s) is established, the availability of that asset must be determined. Asset(s) determined not to be available are not considered in determining eligibility. Assets are considered available to an individual when the individual has unrestricted access to it. Accessibility depends on the legal structure of the account or property. An asset is countable, if the asset is available to a representative possessing the legal ability to make the asset available for another’s support or maintenance, even though the representative chooses not to do so. Assets not available due to legal restrictions are not considered in determining total available assets unless the legal restrictions were caused or requested by the individual or another acting at their request or on their behalf.

30. The above authority identifies that an individual’s ownership interest in an asset must be established before the availability of the asset can be determined.

31. 42 U.S.C. § 1396r-5 (c)(2) “Attribution of resources at time of initial eligibility determination” states in relevant part:

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property—

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

(C) the State determines that denial of eligibility would work an undue hardship.

32. The Department's Program Policy Manual, CFOP 165-22, passage 1640.0314.01 "Assets Available to Spouse (MSSI)" states in relevant part:

The following policy applies to ICP, ICP-MEDS, and ICP-Hospice individuals admitted to institutions on or after September 30, 1989. This includes SSI recipients applying for institutional services. (If the individual was institutionalized prior to September 30, 1989, refer to Chapter 2200).

Although the assets of a Medicaid recipient's spouse may not have been considered available to the individual in the community (e.g., when the couple is separated), when the individual applies for institutional services, the assets of both spouses must be considered in determining the individual's eligibility for institutional services.

The portion of a couple's assets available to the institutional spouse is the amount remaining after the community spouse's asset allowance is subtracted from the couple's total included assets. If this figure is over the program's allowable asset limit, the individual is ineligible until the assets are reduced to within the program's standard.

If after declaring and verifying his assets, the community spouse refuses to make them available to the individual, the institutionalized spouse may assign his rights of support to the state and obtain institutional care benefits (refer to passages 1640.0314.03 and 1640.0314.04 for policy). Community spouses who refuse to make their assets available to the institutionalized spouse are not entitled to a community spouse income allowance.

If the couple has been separated for a long time and the community spouse cannot be located, there is no "community spouse" and the

applicant must be considered an individual when applying income and asset standards.

If either spouse can verify that the community spouse asset allowance determined by the agency is inadequate to generate income to raise the community spouse's income to the minimum monthly maintenance needs allowance, the asset allowance may be revised through the fair hearing process. (emphasis added)

33. The findings show the petitioner and his wife separated in September 1991. The findings also show the petitioner or his representatives know where or how to contact his spouse. The above controlling authority states if the community spouse cannot be located, there is no "community spouse". In this case, the spouse is located. The undersigned concludes although the community spouse provided a statement explaining she will not supply her income or assets to assist with the care of the petitioner, the controlling authorities require that her assets be declared in order to determine the petitioner's eligibility for ICP Medicaid.

34. The Department's Policy Manual section 1640.0314.03 "Assignment of Support Rights (MSSI)" states

If the community spouse refuses to make available assets attributed to the institutionalized spouse, the institutionalized spouse may assign his rights of support to the state and obtain institutional care benefits. This situation may arise when assets allocated to the individual actually solely belong to the community spouse who, in turn, refuses to make them available to the individual.

The institutionalized spouse may complete CF-ES Form 2504, Assignment of Support Rights, which allows the state to pursue recovery from the community spouse. The original copy of this form is to be sent to Headquarters Program Policy, in Tallahassee, Attention: SSI-Related Medicaid Program staff. This form is not an option that an eligibility specialist suggests to an ineligible couple, but rather a solution to an existing situation which is brought to the eligibility specialist's attention. **When all conditions in passage 1640.0314.04 are met, the allocated assets being withheld by the community spouse will no longer be considered available to the institutionalized spouse.**

If the institutionalized spouse does not assign the rights of support to the state, continue to consider the assets available to the institutionalized individual. (emphasis added)

35. Fla. Admin. Code R 65A-1.712 "SSI-Related Medicaid Resource Eligibility

Criteria" states in relevant part:

(4) Spousal Impoverishment

...

(g) The institutionalized spouse shall not be determined ineligible based on a community spouse's resources if all of the following conditions are found to exist:

1. The institutionalized individual is not eligible for Medicaid Institutional Care Program because of the community spouse's resources and the community spouse refuses to use the resources for the institutionalized spouse; and
2. The institutional spouse assigns to the state any rights to support from the community spouse by submitting the Assignment of Rights to Support, CF-ES 2504, 10/2005, incorporated by reference, signed by the institutionalized spouse or their representative; and
3. The institutionalized spouse would be eligible if only those resources to which they have access were counted; and
4. The institutionalized spouse has no other means to pay for the nursing home care.

36. The Department's Policy Manual section 1640.0314.04 "Undue Hardship

(MSSI) states:

The institutionalized spouse will not be determined ineligible based on a community spouse's assets if all of the following conditions are found to exist:

1. The institutionalized individual is not eligible due to the community spouse's assets and the community spouse refuses to use the assets for the institutionalized spouse; and
2. The Assignment of Support Rights form (CF-ES Form 2504) is signed; and
3. The institutionalized spouse would be eligible if only those assets to which he has access were counted; and
4. The institutionalized spouse has no other means to pay for the nursing home care.

37. The findings show the community spouse's assets have not been verified. The undersigned concludes without verifying the community spouse's assets, the Department cannot determine if the petitioner is ineligible for ICP Medicaid due to her assets. As a result, the undersigned further concludes not ALL of the conditions required for undue hardship as detailed in the above controlling authority are met.

38. In a Department Question and Answer clarification in its Knowledge Bank, ID number 87, the question is asked if the whereabouts of the community spouse (CS) is unknown, is there a length of time they must be separated before we treat them as individuals and not count the assets of the community spouse. The answer from the Headquarters' program is:

As long as a couple are legally married, we must look at the CS' assets in determining the institutionalized spouse's (IS) eligibility for Medicaid. If the whereabouts of the CS are unknown, we can determine the IS as an individual. We recognize that sometimes the CS may be uncooperative and this can be problematic. If the IS is ineligible for ICP solely due to the CS's assets, the IS can sign the Assignment of Support Rights form. Of course, this requires that the CS first disclose their assets to DCF. We would not divert income to a CS if the IS does not want to divert income to them, which would be true in cases of separation.

39. The above further clarifies the ICP requirement of a married couple when the spouse refuses to cooperate and make her assets known for an ICP Medicaid eligibility determination of the spouse in the facility. The findings clearly show the petitioner and his wife are separated but not divorced which requires them to be considered as married according to the above controlling authority. Based on this policy, since the spouse's location is known and she stated she will not cooperate with the eligibility determination, the ICP is denied as eligibility cannot be determined. Therefore, the undersigned concludes that once the spouse refuses to cooperate, the

Department would have been unable to determine eligibility and the Department's denial action was correct.

DECISION

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

NOTICE OF RIGHT TO APPEAL

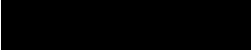
This decision is final and binding on the part of the Department. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Office of Legal Services, Bldg. 2, 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 petitioner is responsible for any financial obligations incurred as the Department has no funds to assist in this review.

DONE and ORDERED this 29 day of February, 2016,

in Tallahassee, Florida.



Melissa Roedel
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
Office: 850-488-1429
Fax: 850-487-0662
Email: Appeal.Hearings@myflfamilies.com

Copies Furnished To:  Petitioner
Office of Economic Self Sufficiency
Donald Eicher III