

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF HUMAN SERVICES
APPEALS OFFICE
600 New London Avenue
Cranston, Rhode Island 02920
(401) 462-2132/Fax# (401) 462-0458
TDD# (401) 462-3363

Docket # 13-1837
Hearing Date: January 30, 2014

Date: May 27, 2014



ADMINISTRATIVE HEARING DECISION

The Administrative Hearing that you requested has been decided. During the course of the proceeding, the following issue(s) and agency policy reference(s) were the matters before the hearing:

THE DHS POLICY MANUAL: MEDICAL ASSISTANCE
SECTIONS: 0354.05, 0376.25.05, 0380.40.05, 0380.40.15, 0380.45.10, 0382.05, 0382.15.35

The facts of your case, the agency policy, and the complete administrative decision made in this matter follow. Your rights to judicial review of this decision are found on the last page of this decision.

Copies of this decision have been sent to the following: you, and agency representatives: Laurie O'Neil, Ted Dobek, Thomas Conlon, and the Policy Unit.

Present at the hearing were: your attorney, and Laurie O'Neil (agency representative).

ISSUE: Do the appellant's resources exceed the agency's resource limit for the Medical Assistance/Long Term Care Program (MA/LTC)?

DHS POLICIES:

Please see the attached **APPENDIX** for pertinent excerpts from the Rhode Island Department of Human Services Policy Manual.

DISCUSSION OF THE EVIDENCE:

The agency representative testified:

- The agency representative stated that the agency notified the appellant by notice dated October 1, 2013, (copy submitted), that his application filed for the month of June 2013 for MA/LTC was denied due to excess resources in the amount of \$142,968.92.
- The agency representative submitted a copy of an agency MA-4, Notice of Resource Attribution, dated October 1, 2013 indicating the resource attribution of \$142,968.92 attributed to the appellant as of June 1, 2013.
- The agency determined that as of first of the month the appellant entered the nursing facility, January 1, 2013, the total joint resources held by the appellant and his spouse was \$271,205.65. The community spouse share of the resources was determined to be \$115,920.00 which is the maximum share allowed to a community spouse.
- The agency determined that as of the first of the month of application, June 1, 2013, the total joint resources held by the appellant and his spouse was \$262,888.92. The resources attributed to the appellant were therefore \$142,968.92. ($\$262,888.92 - \$115,920.00 = \$146,968.92 - \$4000.00 = \$142,968.92$).
- The agency determined the value of the appellant's resources from the bank statements submitted from Citizens, Bank of America, Washington Trust, Greenwood Credit Union, and a Merrill Lynch account.
- The agency representative stated that the annuity should not be allowed to be submitted at this time because the appellant had plenty of chances to submit the annuity contract. To purchase an annuity after the fact should not be allowed as no one else is allowed to do it.

The appellant's representative testified:

- He has to submit a June 28, 2013 cover letter that was submitted with the appellant's application. The letter discusses the facts that it is his understanding that according to a conference that attorney Lawrence had with a member of the agency legal staff, that it would be permissible to submit the June 2013 application.
- He stated that the understanding at that time was that once the agency determined the attribution of resources the appellant would be allowed to annuitize the appellant's excess resource amount.
- The understanding was that the appellant would be eligible in the month that the excess resources were annuitized. He stated that there was no response from the agency about eligibility once the excess resource was annuitized.

- He stated that the agency representative's statement that the initial application was denied due to a lack of documentation is not accurate. He has documentation indicating several requests for information from the agency that document at least 6 responses. At this time it is unclear to him how the agency made the determination.
- He has to submit today a binder documenting all of the correspondence with the agency that shows the responsiveness and cooperation on behalf of the appellant in their efforts to complete the application.
- The main point he wants to make is that pursuant to a conference with the agency's legal counsel it was understood that the appellant could submit the application, get a calculation of the overage of resources and then annuitize that amount and be determined eligible based on the annuitization. The overage that would be annuitized is the \$142,968.00 amount.
- He stated that when it was determined that the application process would not be as expedient as hoped for due to the required documentation, on July 23, 2013 his office advised the appellant's spouse to take \$115,320.64 and invest that amount into a compliant annuity. Additionally the appellant's spouse was advised to make a payment to the nursing home for the appellant's outstanding expenses up until the month of June 2013 and that payment was for \$32,920.00.
- The payment to the nursing facility combined with the annuity establishes eligibility in June of 2013. He stated that he was never advised that a new application would need to be submitted. The annuity contract has not been submitted to the agency to date.
- He stated that there was never any correspondence from the agency that indicated a new application would need to be submitted subsequent to the June 2013 application in order to have the annuity contract reviewed.
- He stated that as the eligibility plan was submitted to the agency at the time of the application it is procedurally fair for the June 2013 application to remain in effect. His understanding was that the appellant's application could be reviewed on an ongoing basis.

FINDINGS OF FACT:

1. The agency determined that the appellant was not eligible for MA/LTC benefits as of June 1, 2013 due to excess countable resources.

2. The agency sent the appellant a notice of denial of MA/LTC benefits, for the month of June 2013 on October 1, 2013.

3. The record of hearing was held open through March 3, 2014 to allow the appellant's representative to submit additional resource evidence.

4. Subsequent to the March 3, 2014 held open period the hearing officer decided to extend the held open period through April 14, 2014 to allow the agency LTC Administrator to review the additional resource evidence submitted by the appellant's representative.

CONCLUSION:

The issue to be decided is whether the appellant's resources exceeded the agency's resource limit for the MA/LTC Program for the application month of June 2013.

There is no dispute as to the fact that the agency determined that as of June 1, 2013 that the assets attributed to the appellant totaled \$142,968.92.

Review of agency policy (0380.40.05) specific to total joint resources determines that the total joint resources of an institutionalized spouse and community spouse are always evaluated as of the first of the month in which a continuous period of institutionalization begins regardless of the actual date on which the evaluation is conducted.

The total joint resources are equal to the combined resources of the couple, regardless of whether they are owned partly or wholly by either spouse.

In this matter the agency has submitted an undisputed "Notice of Resource Attribution" (agency MA-4) indicating that at the time of eligibility determination for Medical Assistance, June 1, 2013, the total joint resource amount was \$262,888.92. The resources attributed to the community spouse were \$115,920.00 (the maximum allowable per agency policy 0380.40.15) and \$142,968.92 attributed to the institutionalized spouse. (The appellant).

The agency notice dated October 1, 2013 states that, "The appellant may be able to establish eligibility on the basis of Resource Reduction if: 1. You have allowable medical bills or other allowable expenses that equal or exceed the amount of your excess resources; and 2. You reduce the amount of the excess resources to the appropriate resource limit by actually paying the allowable expenses or fees; and 3. You submit verification thereof within 30 days of the date of the notice. Both the expenditure of the resource and submission of verification of the expenditure must occur within the 30 day time period."

The appellant's representative testified that the understanding between the appellant and the agency was that once the agency determined the spousal resource attribution the appellant would be allowed to annuitize the excess resources attributed to the appellant. The understanding was that the appellant would be eligible in the month that the excess resources were annuitized.

He submits that on July 23, 2013 the appellant's spouse invested \$115,320.64 into a Medicaid compliant annuity. Additionally the appellant's spouse made a payment to the

nursing facility in the amount of \$32,920.00. He stated that the payment to the nursing facility combined with the annuity cost establishes eligibility in June of 2013.

The appellant's representative submitted an 11 page Memorandum in Support of Request for Medicaid Eligibility on behalf of the appellant during the record held open period which was received March 3, 2014 by this office.

The memorandum indicates that a request for Medical Assistance was submitted by Lawrence & Associates, Inc. (L&A) on June 28, 2013. The cover letter submitted with the application made it clear that the intention was to obtain a determination as to the amount of excess resources for the purpose of purchasing a qualified annuity in order to reduce the appellant's resources and so that he is eligible for Medical Assistance. The cover letter stated, "Mr. and Mrs. Kelly have assets exceeding the exemption amount for Mr. Kelly as applicant, and Mrs. Kelly as community spouse. Mr. Kelly has/will transfer to Mrs. Kelly assets greater than his exemption amount. Mrs. Kelly will annuitize via Medicaid Compliant Annuity all amounts over her community spouse exemption."

The Memorandum documents numerous requests over the course of 4 months from the agency for the resource and income documentation required to complete the application and determine eligibility. The Memorandum states that on July 23, 2013 the appellant's spouse transferred \$115,320.64 to a Nationwide Medicaid Qualified Annuity.

The Memorandum states that on July 31, 2013, James S. Lawrence, of L&A met with Gail Theriault, Legal Counsel with the Executive Office of Health and Human Services at DHS offices to confirm the use of a Medicaid compliant annuity to create eligibility for an applicant for Long Term Care benefits with a community spouse and non-exempt assets exceeding the community spouse resource allowance, and confirmed that such an application would be reviewed by DHS and the applicant would be advised as to the amount of the required 'spend down' which would need to be annuitized, to become eligible for these benefits."

The Memorandum states that on August 8, 2013, a letter was sent by the DHS caseworker to L&A, which stated that the appellant was denied eligibility for Medical Assistance because, "You did not provide required proof of your situation." The Memorandum indicates that L&A submitted a Request for a Hearing in response to the August 8, 2013 notice. The Memorandum states that subsequent to the August 8, 2013 notice the agency caseworker sent another letter to L&A on September 5, 2013 requesting additional income and resource documentation. The letter indicated that if proof of the requested information was not received by September 15, 2013 your application may be denied or your DHS benefits may be closed.

The Memorandum states that the agency September 15, 2013 agency notice clearly vitiated the Notice of Denial from the agency August 8, 2013 notice. "Thus the application was at that time and remained open pending determination."

The Memorandum states that on October 1, 2013, 96 days after the filing of the application for long term care benefits, the agency caseworker sent a Notice of Denial to L&A, on the basis of excess resources in the amount of 4142,968.92. A Notice of Resource Attribution was sent with the Notice of Denial.

The Memorandum discusses the evaluation of the resources and the determination of the spousal share. The Memorandum indicates that the \$115,920.00 attributed to the community spouse and the \$142,968.92 attributed to the appellant was properly accounted for by the agency caseworker.

The Memorandum states that the appellant has incurred total outstanding costs of \$32,130.00 in nursing home care through June 30, 2013. The appellant's spouse has made payments totaling \$32,130.00 to the nursing facility as of January 2014 effectively reducing the appellant's excess resources to \$110,838.02.

The Memorandum cites agency annuity policy 0382.15.35 which sets forth the certain standards and requirement for an annuity to be determined a non-countable and excluded resource. The annuity purchased by the appellant's spouse on July 20, 2013 for \$115,320.64 is a qualified annuity and is non-countable as an asset because it is: irrevocable and non-assignable; actuarially sound based on the life expectancy of the appellant's spouse; and it names the state as primary beneficiary to the extent of medical assistance paid on behalf of the appellant.

The Memorandum further states that the annuity purchase, together with the payments made to Coventry Skilled Nursing & Rehabilitation Center, effectively and properly reduces the appellant's excess resources to the level required to establish his eligibility for Medical Assistance. It is crucial to the appellant's argument to note that if an application was submitted in August of 2013, the appellant would have been determined eligible for Medical Assistance.

The Memorandum also submits that the appellant was deprived of a timely determination as to eligibility benefits as required by DHS policy 0302.15. The policy requires that a decision on a Medical Assistance application for families, aged and blind individuals be made within 30 days of the receipt of the application, within 90 days for disabled individuals. An eligibility decision must be made within the standards except in unusual circumstances when good cause for delay exists.

The Memorandum submits that the appellant did not receive a timely decision and was never advised in any one of the numerous correspondences and notices from the agency caseworker, until after the expiration date of the decision date, September 25, 2013, as to the amount of the excess assets. This failure to provide a timely decision and failure to timely advise the appellant as to the amount of excess assets (in light of the clearly expressed intent to annuitize the same), substantially prejudiced the appellant.

The Memorandum concludes that the appellant is eligible for Medical Assistance from the first day of the month, in the month which his resources were reduced to qualifying levels, because his application had been submitted and was pending at the time his resources were reduced to an eligible level. Any decision to the contrary would result in a ruling that requires future applicants to submit duplicate applications each month during the period that their initial application remained pending. This would only serve to increase the amount of documentary evidence that a DHS caseworker would be required to review and analyze, in derogation of the goals sought to be accomplished by the DHS Code of Rules. Accordingly, and for the reasons set forth in detail above, it is respectfully submitted that the appellant here is entitled to a determination of eligibility for Medical Assistance beginning July 1, 2013.

This record of hearing was held open through April 14, 2014 to allow the LTC Administrator time to review the annuity contract issued to the appellant's spouse. The Administrator responded to this record by Memorandum dated March 31, 2014. The Memorandum from the Administrator states the following: "I have reviewed the copy of the letter dated March

14, 2014 sent to the applicant "C/o Lawrence and Associates", many pages faxed regarding Contract #03304518, and would offer the following: The contract information indicates that the Date of Issue was July 23, 2013 as does the letter of July 23, 2013 sent to Virginia Kelly.

Furthermore, the contract owner had the right to examine and cancel the contract within 10 days of the date it was received by the owner...

Therefore the funds used to purchase the annuity would be deemed available as of the first moment of the month of July (and likely prior to that date) and would still be countable as of August 1, 2013 due to that right to cancel.

Effective for September 1, 2013 and ongoing the monies used to purchase this "Post-Deficit Reduction Act" would be an allowable transfer for value.

This is all based upon the language contained on page 10 of the fax that I received that reads in part, "Non Assignment Endorsement" "This Contract may not be Transferred, assigned, sold..." Also the State of Rhode Island has been named as Beneficiary.

If the phrasing used "State of Rhode Island Medicaid per application." State of Rhode Island up to the amount provided by the Department for MA for the institutionalized individual's care. In this instance, Stuart A. Kelly.

I would suggest that all parties agree that that is what was intended upon the purchase of such an annuity."

The response from the Administrator indicates that the annuity purchase is an allowable transfer for value. Review of DHS policy 0382.15.35 determines that a specific example is given regarding the terms of an annuity contract as follows:

Annuities 0382.15.35
EXAMPLE 4:

Mrs. Findlay, age 65, prior to February 8, 2006 purchases a \$10,000 annuity on January 1st. Under the terms of the contract, she has the right to cancel and receive the full amount of \$10,000 back within ninety (90) days of the purchase. She applies for MA on February 15th. Because the annuity provides for a \$10,000 cash surrender at the time of MA application, this amount is added to Mrs. Findlay's countable resources. Her MA application is denied.

Based on the policy example the policy application to the annuity purchased by the appellant would be an available resource as indicated within the contract language. The contract states as follows:

"Right to Examine and Cancel:

The contract owner has the right to examine and cancel the contract. The contract owner may return the contract within 10 days of the date it is received by the contract owner to the home office of Nationwide or the agent through whom it was purchased. When Nationwide receives the contract, it will cancel the contract and refund the purchase payment, less premium tax, in full."

Review of DHS policy 0382.05 First Moment of the Month Rule determines that countable resources are determined as of the First Moment of the Month (FOM). The determination is based on the resources the individuals own, their value, and whether or not they are excluded as of the first moment of the month. The FOM rule establishes a point in time at which to value resources; what a person owns in countable resources can change during a month but the change is always effective with the following month's resource determination. If countable resources exceed the limit as of the first moment of a month, the recipient is not eligible for that month..."

In this matter the annuity contract in the amount of \$115,320.64 was purchased July 23, 2013. The FOM policy therefore would require that the \$115,320.64 be counted as an available resource as of July 1, 2013. The FOM policy would also require that the \$115,320.64 be considered a countable resource as of August 1, 2013 due to the purchaser's right to cancel within 10 days of the date it is received.

The appellant's representatives submit that the appellant was deprived of a timely determination as to eligibility for benefits. Review of the record determines that the appellant's application was filed on June 28, 2013. The appellant's spouse purchased an allowable annuity contract on July 23, 2013 using the excess resources attributed to the appellant. The annuity was purchased within 30 days of the application and apparently without input from the agency regarding a determination of the total joint resources and the resulting institutionalized spouse's share.

The appellant's representative submits that the application was submitted with the statement indicating that the appellant's spouse would annuitize the assets greater than the applicant's exemption amount once a determination of that resource calculation was done by DHS. The applicant would then be determined eligible during the month the qualifying annuity purchased.

The appellant's representative did not submit any documentation that there was an understanding between the agency and the appellant's representative either prior to or subsequent to the application that the appellant would be eligible effective the month that his excess resources were annuitized. The record indicates that the excess resources were annuitized by the applicant within 30 days of the application date.

The appellant's representative has provided sufficient documentation to determine that \$32,130.00 in nursing home care expenses were incurred and paid to Coventry Skilled Nursing and Rehabilitation Center. The representatives have also provided sufficient documentation that an allowable annuity contract was purchased in the amount of \$115,320.64 by the appellant's spouse on July 23, 2013. The total documented and allowable expenditures amounts to \$147,450.64 and effectively reduce the appellant's countable resources to the resource eligibility level to establish Medical Assistance eligibility.

The notice under appeal in this matter is the October 1, 2013 agency notice that denied the appellant's June 2013 LTC/Medicaid application.

