



**STATE OF TENNESSEE
DEPARTMENT OF HUMAN SERVICES**

DIVISION OF APPEALS AND HEARINGS
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BILL HASLAM
GOVERNOR

RAQUEL HATTER, MSW, Ed.D.
COMMISSIONER

ORDER OF REMAND

Kenneth Greenhouse, APPELLANT

Docket: MA 101201821

Case: 0068088020

VS

TENNESSEE DEPARTMENT OF HUMAN SERVICES

The Hearing Record and Petition of Appeal of the Initial Order were reviewed on the 25th day of July, 2011, by the Assistant Commissioner, Division of Appeals and Hearings, who is the Hearing Authority for the Commissioner of the Department of Human Services ("the Department"). The issue of the appeal is whether the Department denied the Appellant's application for nursing home Medicaid coverage in accordance with applicable law and regulation.

A hearing was scheduled for the 10th day of February, 2011, before Lakesha Threats, Hearing Officer. The Hearing Officer entered an Initial Order on February 23, 2011, finding that the appeal was abandoned because the Appellant did not appear at the scheduled hearing. A Petition for Reconsideration of the Initial Order was filed with the Hearing Officer on March 1, 2011. Said petition was granted by the Hearing Officer by Order of March 21, 2011. An Order of Continuance was entered on March 24, 2011, rescheduling the hearing to April 27, 2011. A request for continuance was granted to the Department and a second Order of Continuance was entered on May 4, 2011, rescheduling the hearing to May 18, 2011. A hearing was conducted on the 18th day of May, 2011, before Lakesha Threats, Hearing Officer. The Hearing Officer entered an Initial Order on May 31, 2011, upholding the Department's action denying the Appellant's application for nursing home Medicaid coverage due to excess resources. A Petition of Appeal of the Initial Order was timely filed by the Appellant on June 14, 2011. A Notice of receipt of the Petition of Appeal of the Initial Order was mailed on June 17, 2011, giving the parties until 4:30 P.M. on June 27, 2011, to submit written briefs relevant to the issue/s raised in the Petition of Appeal of the Initial Order.

The Appellant's attorney, David McGuffey (hereafter, "the Appellant"), on behalf of the Appellant argues in the Petition of Appeal of the Initial Order that the Hearing Officer erred in finding that the Appellant was not eligible for Medicaid coverage as a resident of a Tennessee nursing home facility. First the RPAIO - 101201821

Appellant argues that the Department used the wrong "snap-shot" date when completing the Appellant's resource assessment asserting that the resources should have been assessed as of May 2010 when the Appellant first entered a Georgia nursing home. The Appellant and his family consisting of his wife, Susan Greenhouse, and his two (2) minor children were resident's of Marietta, Georgia and when the Appellant could no longer be cared for at home, he entered a nursing home in Macon, Georgia. The Appellant was transferred to Standifer Place, a Chattanooga, TN nursing home on September 1, 2010, after being discharged from the Georgia facility because they could not care for him as a ventilator patient. The Appellant filed his application for TennCare Medicaid coverage on August 20, 2010, and the resource assessment was completed and signed by the Appellant's wife on September 2, 2010. Federal and State regulations provide that the value of the assets owned by the institutionalized spouse ("IS") and/or community spouse ("CS") will be calculated as of the beginning of the first continuous period of institutionalization; however, the regulations also state that the assessment will be conducted by the State at the request of the IS or CS and upon receipt of relevant documentation of resources. (42 U.S.C.A. §1396r-5(c)(1) and Tenn. Comp. R. & Regs §1240-3-3-.03(9)). The Department initiated the resource assessment upon the Appellant's filing of an application for TennCare Medicaid coverage and upon receiving documentation from the CS. I do not find error in the timing of the Department's resource assessment.

Next the Appellant argues that the Hearing Officer erred in concluding that the investment in the G.G. Sailwind Investment Group, LLC (hereafter, "the LLC") was an accessible resource at the time of the Appellant's application for Medicaid coverage and therefore, was properly counted as a resource. I find merit in the Appellant's argument. The purchase of the LLC is a primary factor in the denial of the Appellant's application for Medicaid so it is useful to understand some of the circumstances surrounding the transaction. The Appellant was fifty-nine (59) years old at the time of the TennCare Medicaid application (the Appellant had previously applied for Medicaid coverage from Georgia) and suffers from Amyotrophic lateral sclerosis ("ALS") or Lou Gehrig's disease. At the time of the transaction, the Appellant required 24-hour care and the Appellant's family was exhausting their financial resources to allow the Appellant to remain at home. On May 6, 2009, the Appellant's wife purchased a 40.54% interest in the LLC for \$60,000.00; the remaining proceeds of an inheritance from her father. All proceeds in the LLC were used to purchase a 1.21% interest in a land redevelopment project in Atlanta, Georgia, doing business as the Davidson's Downtown, LLC. The Appellant testified that she made the long-term investment in hopes of 'stretching' the family's remaining resources. The Managing Member of the LLC, Peter Gleichman, testified by affidavit that the CS is a minority member of the LLC with no voting control. (See Exhibit 8, Affidavit of Peter Gleichman, Managing Member of G.G. Sailwind Investment Group, LLC). Mr. Gleichman also stated that there is no market for resale of the Appellant's interest in the LLC and that there is no mechanism within the operating agreement for the LLC to repurchase the CS's interest. The Department regulations define inaccessible assets as follows:

"The cash value of resources which are not currently accessible to the assistance group or which cannot reasonably be brought to a condition of current availability are exempted. Non-availability of such resources must be determined prior to approval and at each redetermination of eligibility. Also, resources whose cash value is not accessible to the AG are exempt, such as, but not limited to: security deposits on rental property or utilities; property in probate; real property which the AG is making a good faith effort to sell at a reasonable price and which has not been sold; and jointly owned resources determined to be inaccessible."

The Hearing Officer states in Conclusion of Law #3 that the investment in the LLC is not an inaccessible asset under the rules because it was originally a cash asset; however, the rule refers to the liquidity of the asset at the time of application and resource assessment and not the condition or liquidity of the asset at some previous point in time such as when the transaction took place. I find the Hearing Officer did not

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sufficiently articulate the legal basis for finding the asset is accessible under the plain meaning of the rule. Federal regulations define resources as cash or other liquid assets that an individual owns and can be used for her or her spouses support and maintenance. (20 C.F.R. §416.1201(a)). A liquid resource is a property that can be converted to cash within 20 days. (20 C.F.R. §416.1201(b)). If an individual has the "right, authority or power" to liquidate the property it is considered a resource but if the property cannot be liquidated it will not be considered a resource of the individual or spouse. (20 C.F.R. §416.1201(a)(1)). If the investment could not be sold and converted back to cash as indicated by Mr. Gleichman, then the investment would be an inaccessible resource and not countable. The Department's attorney argues in her brief that in accordance with Tenn. Comp. R. & Regs §140-3-3-.03(2)(a)(1)(x) the resource must also be unavailable to the Appellant due to circumstances that are out of her control and that in this case, the resource is not outside the Appellant's control. I disagree. As noted previously, Mr. Gleichman stated that the Appellant is a minority member of the LLC and has no voting control in the LLC; it is not within her power to convert the interest in the LLC to a liquid asset.

Next the Appellant argues that the Hearing Officer erred in finding the investment in the LLC was a transfer for less than fair market value ("FMV") and purchased for the purpose of attaining TennCare Medicaid eligibility. The Appellant also argues that the Hearing Officer erred in failing to impose penalties based on her conclusion that it was a transaction for less than FMV. Although the Department's attorney stated in the hearing that the Department was not arguing that there was a transfer for less than FMV or seeking transfer penalties, the Hearing Officer concluded that because the Appellant's investment was executed within sixty (60) months prior to the application for Medicaid, there is a presumption that the transfer was made for less than FMV. (See Conclusion of Law #4; also See Tenn. Comp. R. & Regs §1240-3-3-.03(e)(1) providing that a transaction occurring within 60 months of a Medicaid application for nursing home coverage may be considered a transfer for less than FMV). This legal presumption based solely on the timing of the transaction is the only evidence I find to support the conclusion that the purchase of the LLC was for less than FMV. To rebut the presumption, the Appellant points to the fact that the LLC (to which the CS purchased a 40% interest) owns a 1.21% interest in the Davison's Downtown LLC renovation project and that documents that were provided to the caseworker and the Department's attorney show that the value of the Davison's building was \$13.9 million as of August 2009, and is projected to increase to \$35.5 million at completion of the project. The Appellant also offered three (3) affidavits for the purpose of establishing the LLC transaction was for FMV and was a good long-term investment; the Hearing Officer excluded two of the affidavits stating they were not necessary to make her decision and upholding the Department's objection that the affidavits of Larry Winter (Certified Public Accountant) and Jeff Riblet (Certified Financial Planner) were redundant and repeated the statements of Mr. Gleichman. According to Department policy, the client can provide documentation from at least two (2) knowledgeable sources familiar with the type of transferred asset to rebut the presumption that a transaction was for less than FMV. (See TennCare Medicaid and TennCare Standard Policy and Procedures Manual, December 2009, pp. 230-31). The affidavits may be redundant as argued by the Department's attorney in the hearing and in her brief but were relevant to rebut the presumption in accordance with Department policy. I agree with the Department's attorney's assertion that the testimony of Mr. Winter and Mr. Riblet lacked proper foundation as expert witnesses but Department policy only requires "knowledgeable sources" to rebut the presumption. The Department's attorney also argued in the hearing and in her brief that the excluded affidavits did not mention the term Fair Market Value but they did contain statements regarding the investment which could be relevant to rebut the presumption.

In addition, If the Appellant can show that the transaction was intended to dispose of assets at FMV or for other valuable consideration and that the assets were transferred exclusively for a purpose other than Medicaid eligibility, then the Appellant will not be ineligible for Medicaid based on the presumption of a transfer for less than FMV. (42 U.S.C.A. §1396p(c)(2)(C)). Upon review of the hearing record, I find no evidence to support a presumption that the transaction was for the purpose of gaining Medicaid eligibility

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in Tennessee; to the contrary I find compelling evidence to support the Appellant's argument that at the time of the transaction, the thought of the Appellant residing in a Tennessee nursing home or needing TennCare Medicaid coverage was not even on the CS's radar. The CS purchased the interest in the LLC in May 2009, a full year before the Appellant entered a nursing home and at a time when the CS was providing care for the Appellant at home. When the Appellant was finally admitted to a nursing home a year later it was to a facility in Georgia, the State where the Appellant and his family resided. The Appellant was not admitted to a Tennessee nursing home until after the Georgia nursing home determined they could not properly care for the Appellant and after the CS failed to find any other nursing home in Georgia that could accept the Appellant as a patient. There is no evidence to support a conclusion that the CS executed a transaction for less than FMV in order to obtain TennCare Medicaid eligibility; the evidence is compelling that at the time of the transaction the CS was not contemplating nursing home care for the Appellant, much less care in a Tennessee nursing home or seeking TennCare Medicaid coverage.

Finally, the Appellant argues that the Hearing Officer erred by not increasing the Standard Maintenance Allowance ("SMA"). I do not find merit in this argument. The State rules provide that the Hearing Officer may allocate additional resources to the CS through the administrative appeals process in order to make up any shortfall between the SMA and the maximum monthly income allowance ("MMLA"). (Tenn. Comp. R. & Regs §1240-3-3-.03(9)(f)). State rules also set the amount of the SMA (\$1,822.00) and the MMLA (\$2,739.00) in accordance with Federal guidelines. ((Tenn. Comp. R. & Regs §1240-3-3-.04(2)(b)(2)). The Appellant's family's household gross monthly income at the time of the TennCare Medicaid application was \$3,160.82 exceeding the MMLA by more than \$460.00 per month. (See Finding of Fact #11, Conclusions of Law #7). An increase in the MMLA is only warranted if there are, "exceptional circumstances resulting in significant financial duress" and not merely a shortfall in meeting ongoing monthly expenses. (42 U.S.C.A. §1396r-5(e)(2)(b)). The Hearing Officer considered the CS's evidence regarding ongoing expenses and I do not find error in the Hearing Officer's conclusion that an increase in the MMLA is not warranted.

Following a thorough review of the Hearing Record, I have determined that the decision of the Hearing Officer was not supported by the testimony and evidence presented. Therefore, the Petition of Appeal of the Initial Order is hereby granted.

This matter is remanded to the Hearing Officer for further consideration consistent with the findings herein.

THIS APPLIES TO: Kenneth Greenhouse

Entered this the 25th day of July, 2011.



Lee Anne Bruce Boone
Assistant Commissioner, Appeals and Hearings

CC: Kenneth Greenhouse, Appellant
David McGuffey Esq., Attorney for Appellant
Denise Romer, Program Coordinator, Cumberland County DHS
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