

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

MONICA WEIGER,

Petitioner,

v.

GEORGIA DEPARTMENT OF HUMAN
RESOURCES,

Respondent.

Docket No.:

OSAH-DFCS-NH-0927999-44-Gatto

Agency Reference No.: 217175516



INITIAL DECISION

COUNSEL: Victoria L. Collier, for Petitioner.

Gwendolyn George, *Pro se*, for Respondent.

GATTO, Judge.

I. INTRODUCTION

This matter comes before the Court from an appeal of Monica Weiger ("Petitioner") under the Official Code of Georgia Annotated ("O.C.G.A.") § 49-4-13 from the decision of the Georgia Department of Community Health ("Respondent"), acting through the Georgia Department of Human Resources' DeKalb County Department of Family and Children Services ("DFCS") to deny Petitioner's Medicaid eligibility and nursing home vendor payments to be made on behalf of Petitioner for the months of October 2008 and ongoing through the Petitioner's date of death. The Court has jurisdiction to hear this matter pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." For the reasons indicated below, the decision of the Respondent is **REVERSED**.

II. FINDINGS OF FACT

Petitioner was a resident of Northeast Atlanta Health and Rehabilitation Center, a skilled nursing facility in Fulton County, Georgia, when she applied for nursing home Medicaid

assistance on November 4, 2008. Petitioner is the surviving spouse of a veteran who served at least 90 days on active duty, one day of which was during a wartime period. She was in need of regular aid and attendance by another individual to assist her with her activities of daily living; she was living in a nursing home, and met the asset and income limitations such that she was eligible for Improved Pension with Aid and Attendance from the VA.¹ Petitioner was denied nursing home Medicaid benefits due to excess income. The gross monthly income cap is \$2,022.

Petitioner's 2009 gross monthly income included Social Security in the amount of \$1,344.00, a retirement benefit of \$47.15, and VA pension of \$1,056.00. Evidence from the Georgia Department of Veterans Services verified that Petitioner's December 1, 2008 VA pension apportioned as \$395 for Aid and Attendance and \$661 for Unreimbursed Medical Expenses ("UME"). Consistent with the evidence from the Georgia Department of Veteran Services, a VA Form 970 verified that Petitioner's VA income beginning in December 2008 and forward was apportioned as \$395 as aid and attendance and \$661 per month as UME/CME. A VA Form 970 dated May 15, 2009 also verified that Petitioner's 2008 monthly income from the VA was apportioned as \$373 aid and attendance and \$625 UME/CME for November 2008.

Two other VA Forms showed the annual UME/CME amounts to be \$24,245.00, which was stipulated by all parties as correct. In the year 2008, Petitioner had annual medical expenses of \$24,245.00. In 2009, annual medical expenses were projected to be approximately \$17,000 (assuming Medicaid eligibility, the medical expenses would be the amount of the Petitioner's monthly income minus VA benefits).

The Respondent calculated the 2009 VA pension with aid and attendance as follows: the monthly gross amount of \$1,056.00 was bifurcated as widow's "pension" of \$669.00 and the aid

¹ It was stipulated that all service requirements and income and asset requirements had been met and that the Petitioner was awarded widow's death pension with aid and attendance by the VA.

and attendance benefit of \$387.00. The Respondent properly excluded the aid and attendance portion of the pension but did not exclude the widow's "pension" from countable income. The Respondent admitted that if the VA pension with aid and attendance was not considered as income for determining Medicaid eligibility, Petitioner would have been approved for nursing home Medicaid benefits.

CONCLUSIONS OF LAW

Surviving spouses of veterans of a period of war are entitled to a monthly pension if certain service requirements and income and asset requirements have been met. *See* 38 USCS § 1541. "The rates of compensation, dependency and indemnity compensation for surviving spouses and children, and section 306 and old-law disability and death pension, are published in tabular form in appendix B of the Veterans Benefits Administration Manual M21-1 and are to be given the same force and effect as if published in the regulations (title 38, Code of Federal Regulations). The maximum annual rates of improved pension payable under Pub. L. 95-588 (92 Stat. 2497) are set forth in §§ 3.23 and 3.24." 38 C.F.R. § 3.21.² "Payments of any kind from any source shall be counted as income during the 12-month annualization period in which received unless specifically excluded under § 3.272." 38 C.F.R. § 3.271(a). Thus, if Petitioner's income from other sources (i.e. Social Security and pension) meets or exceeds the maximum annual pension rate, she would not be eligible for death pension unless the income is specifically excluded.

Appendix B of the Veterans Benefits Administration Manual M21-1 indicates that in 2008, the widow's pension was a maximum amount of \$624 per month (maximum annual rate of \$7,498 divided by 12), and in 2009 the widow's pension was a maximum amount of \$661 per

² The Veterans Benefits Administration Manual M21-1 can be found on the Internet at: http://www.warms.vba.va.gov/M21_1.html.

month (maximum annual rate of \$7,933 divided by 12). In 2008, the aid and attendance supplemental income was \$374 per month (annual base pension plus \$4,487 divided by 12), and in 2009 the aid and attendance supplemental income was \$395 per month (annual base pension plus \$4,748 divided by 12). The pension with aid and attendance combined for 2008 equaled \$998 per month; and in 2009 equaled \$1,056 per month, each being effective December 1 of the prior year.

The Petitioner's annual income from Social Security and pension for 2008 was \$15,817.80, which exceeds the maximum annual pension rate of \$7,498. The Petitioner's annual income from Social Security and pension for 2009 was expected to be \$16,692, which would have exceeded the maximum annual pension rate of \$7,933. Thus, the Petitioner would not have been eligible for improved death pension unless her countable income was otherwise specifically excluded.

Exclusions from income are detailed in 38 C.F.R. § 3.272. Specifically, pursuant to 38 C.F.R. § 3.272(g)(2), with regard to a surviving spouse, UME "will be excluded when all of the following requirements are met:

- (i) They were or will be paid by a surviving spouse for medical expenses of the spouse, veteran's children, parents and other relatives for whom there is a moral or legal obligation of support;
- (ii) They were or will be incurred on behalf of a person who is a member or a constructive member of the spouse's household; and
- (iii) They were or will be in excess of 5 percent of the applicable maximum annual pension rate or rates for the spouse (including increased pension for family members but excluding increased pension because of need for aid and attendance or being housebound) as in effect during the 12-month annualization period in which the medical expenses were paid.

See also 38 U.S.C. 501.

Petitioner's medical expenses were paid by her and all future medical expenses were going to be paid by her as well. Thus, C.F.R. § 3.272(g)(2)(i) was met. C.F.R. § 3.272(g)(2)(ii) is not relevant as it pertains to medical expenses of other family members. C.F.R. § 3.272(g)(2)(iii) was met as well given that Petitioner's annual medical expenses of \$24,245.00 were in excess of the 5 percent maximum annual pension rate threshold (\$490 for 2008 and \$520 for 2009) for Unusual Medical Expense. After reducing the actual medical expenses of \$24,245.00 by the 5 percent threshold, the total annual Unusual Medical Expense would be \$23,755.00 for 2008 and \$23,725.00 for 2009. These amounts are applied as exclusions from annual income (reducing Petitioner's countable income for VA purposes), resulting in Petitioner receiving the maximum VA pension benefit provided by law, which is \$624 per month in 2008 and \$661 per month in 2009. Petitioner also received the supplemental income of Aid and Attendance because of her need for another person to assist her with her activities of daily living, thus increasing her monthly income from the VA to \$998 in 2008 and \$1,056 in 2009. The statutory cap reflects the actual amount Petitioner received from the VA.

Pursuant to Georgia's Medicaid Manual § 2418-1, VA pension is a benefit paid to an aged, blind or disabled veteran or dependant who are in need.³ VA Aid and Attendance is a payment made to veterans and certain dependents for medical or remedial care in their own home or a nursing home. *Id.* Unusual Medical Expense is a reimbursement paid to some veterans for high medical costs. *Id.* Continuing Medical Expenses ("CME") are a monthly prospective payment for out-of-pocket medical expenses for veterans and their spouse who are in a personal care home or nursing home. *Id.* The Manual defines Unusual Medical Expense as "a

³ Georgia's Medicaid Manual can be found on the Department of Human Resources Online Directives Information System located on the Internet at: http://www.odis.dhr.state.ga.us/3000_fam/3480_medicaid/MAN3480.doc.

reimbursement paid to some veterans for high medical costs.” *Id.*⁴ The Medicaid Manual defines CME as “a monthly prospective payment for out-of-pocket medical expenses for veterans and their spouses who are in a personal care home or nursing home. It is considered a **reimbursement.**” *Id.* at § 2418-2 (*emphasis added.*)

Without the VA deducting UME and CME from the Petitioner’s income, her income exceeds the maximum annual pension rate and she would not have been eligible for any award from the VA. Thus, the Petitioner only received VA Improved Death Pension with Aid and Attendance to reimburse her for her out-of-pocket UME and CME, while meeting all other statutory requirements for the pension. It is undisputed that Petitioner is a resident of a nursing home and that she has prospective out-of-pocket medical expenses for her ongoing patient liability to the nursing home. Thus, her prospective payments to the nursing home for 2009 are considered CMEs wherein the VA would reimburse Petitioner up to the maximum annual pension rate allowed by law. The Medicaid Manual specifically states that “UME/CME reimbursements and A&A are not considered in determining patient liability and cost share and are never considered as income for determining Medicaid eligibility.” *Id.* at § 2418-2. Therefore, the Court concludes that the entire VA death pension with Aid and Attendance must be excluded as income for determining Medicaid eligibility since Petitioner only received the VA Pension with Aid and Attendance to reimburse her for her out-of-pocket Ume and CME. The Court therefore concludes that Respondent erroneously included the VA pension with Aid and Attendance as income for determining Medicaid eligibility. Accordingly,

IV. DECISION

⁴ The VA defines unusual medical expenses as being excessive, which are medical expenses that exceed 5 percent of the claimant’s reported annual income. It has been established that Petitioner’s medical expenses exceed 5 percent of her annual income, and thus, are unusual medical expenses pursuant to 38 U.S.C. § 3.262(l).

IT IS HEREBY ORDERED THAT Respondent's decision to deny Petitioner's Medicaid eligibility and nursing home vendor payments to be made on behalf of Petitioner for the months of October 2008 and ongoing through the Petitioner's date of death is **REVERSED** and the case is **REMANDED** to DFCS with instructions to exclude Petitioner's VA pension with Aid and Attendance as income for determining Medicaid eligibility and patient liability.

SO ORDERED THIS 27th day of May, 2009.



JOHN B. GATTO, Judge