

**GEORGIA DEPARTMENT OF COMMUNITY HEALTH
OFFICE OF THE COMMISSIONER
AGENCY APPEAL REVIEW**

Irene S. Bossen
Petitioner,
v.

*
* OSAH-DFCS-NH-0922489-60-Malihi
*
* Agency Reference No.: 222344516

**Department of Human Resources,
Division of Family and Children
Services**
Respondent.

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**NOTICE OF FINAL DECISION
AFFIRMING INITIAL DECISION
RIGHT OF APPEAL**

PLEASE READ CAREFULLY:

Enclosed is the Final Administrative Decision of the Commissioner of the Georgia Department of Community Health (DCH) pursuant to the authority granted in O.C.G.A. § 49-4-153 (b)(1). The Commissioner, pursuant to the authority conferred on her and through the undersigned as her designated representative, has **AFFIRMED** the Initial Decision of the Administrative Law Judge as indicated in the attached Final Administrative Decision.

If you desire to contest this Final Decision, you may do so only by filing a timely petition for judicial review in accordance with the provisions of O.C.G.A. § 49-4-153 and O.C.G.A. § 50-13-19. When a decision becomes a Final Decision, a petition for judicial review must be filed in the Superior Court of Fulton County or the county of residence of the appealing party within thirty (30) days of service of the Department's Final Decision. If the appealing party is a corporation, the action may be brought in the Superior Court of Fulton County or the superior court of the county where the party maintains its principal place of doing business in this state. A copy of such a petition shall be served upon the Commissioner and all parties of record. Additional requirements related to the filing of such a petition are found in the two statutes referenced above. You are directed to review and comply with each and every requirement found therein.

This Notice and enclosed copy of the Final Administrative Decision is hereby:
Issued and mailed with adequate USPS postage properly affixed or hand delivered.

This June 25, 2009, by



Richard L. Greene
Agency Review Officer
Georgia Department of Community Health
Designated Representative of
Commissioner Rhonda M. Medows, M.D.

cc: Honorable Michael Malihi, Administrative Law Judge, OSAH
Mr. John Rasheed, Clerk, OSAH

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**FINAL ADMINISTRATIVE DECISION
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. INTRODUCTION

1. The Commissioner of the Department of Community Health (“DCH”) has designated the undersigned as the Commissioner’s representative to review the Petitioner’s “Request for Agency Review of Initial Decision” issued by the Office of State Administrative Hearings (“OSAH”) Administrative Law Judge (“ALJ”) Michael Malihi on April 29, 2009. The Petitioner, Irene S. Bossen, had appealed the decision of the Respondent to impose a five-month transfer of assets penalty. An OSAH hearing was conducted on April 2, 2009, and the record remained open until April 28, 2009 to permit either party to submit additional information and arguments. The ALJ affirmed the Respondent’s decision. Apparently through a scrivener’s error, the Decision issued by the ALJ was inadvertently titled “Final Decision” when it should have been titled “Initial Decision”.

2. The Petitioner’s Request for Agency Review dated May 26, 2009 and received by the Department of Community Health on May 29, 2009, was timely requested. The entire record has been reviewed and all issues have been considered by the undersigned Agency Appeals Reviewer. The record reviewed included, but was not limited to, Petitioner’s Request for Agency Review (which included the equivalent of a brief supporting the Petitioner’s view), the Petitioner’s Brief in Support of Validity of Care Management Agreement for Medicaid Eligibility Purposes filed with OSAH on April 22, 2009, a recording of the April 2, 2009 hearing, all other documents and exhibits submitted by both parties, the ALJ’s Decision, as well as the relevant state and federal statutes, cases, rules, regulations, guidelines and policy manuals. The review of the recorded testimony given during the approximately one-hour hearing was very valuable in understanding the ALJ’s Decision. As is always the case, not every fact relied upon by an ALJ in reaching a decision is required to be listed in the formal Findings of Fact and Conclusions of Law. Based upon the entire record and in accord with *Greene v. DCH*, 293 Ga. App. 201, the undersigned, on behalf of the Commissioner, AFFIRMS the ALJ’s Initial Decision.

II. BACKGROUND and FINDINGS OF FACT

3. The Petitioner was admitted to a nursing home in October, 2008 following an approximately one-month stay in a hospital. Petitioner, who already was afflicted with Alzheimer's disease, had a stroke that required the hospitalization. Petitioner initially was send to the nursing facility for rehabilitation services. Medicare paid for the Petitioner's hospitalization and approximately one hundred days of nursing home care for rehabilitation (part of October, 2008 through part of January 2009). In December of 2008 it became clear that Petitioner would not recover sufficiently to return to her apartment and would require a nursing home level of care. Staff at the nursing home advised Petitioner's son was advised to get his Mother qualified for Medicaid. He has both financial and medical power of attorney rights from the Petitioner. Petitioner's son sought legal assistance and was advised, in part, to enter into a Lifetime Care Management Agreement ("Agreement") with Ms. Catherine Hailey ("sitter") that was executed on December 31, 2009. Petitioner did not apply for Medicaid until January 5, 2009. (Testimony of Gregg Bossen and statements made by Petitioner's counsel during the course of the hearing).

4. Prior to the stroke, Petitioner had lived in an apartment she rented. The Alzheimer's had necessitated the hiring of a sitter to assist Petitioner. Ms. Catherine Hailey ("sitter") was hired in February, 2008 to provide those services. As Petitioner's condition deteriorated, Ms. Hailey and one of her three teenage children moved into the apartment with Petitioner. Petitioner has not returned to her apartment since the stroke; however, Ms. Hailey and at least one of her three teenage children continue to reside in the apartment. (Testimony of Gregg Bossen and Catherine Hailey).

5. Petitioner's arguments that the ALJ's decision is wrong for various reasons, including that failing to authorize any personal care contract without applying a transfer of assets penalty is a misreading of the decision. The ALJ decision is that the particular contract in this case, combined with the facts of this case, properly authorized Respondent to determine that Petitioner was ineligible for nursing home Medicaid benefits during the period of the transfer of assets penalty. In this case, the contract was (1) not a fair market transfer, (2) valuable consideration was not given under such contractual terms and (3) that the assets were transferred exclusively for the purpose of qualifying for nursing home Medicaid benefits. (See Petitioner's Request for Review of Initial Decision; ALJ's Decision; testimony of Ms. Caryn Smith (DFCS caseworker), Gregg Bossen and Catherine Hailey; and a review of the entire record, especially the recording of the hearing).

6. ALJ Malihi asked a question of Petitioner's counsel during the conclusion of the hearing that is relevant to the Conclusions of Law reached in his decision. The question, paraphrased, was: Could a Medicaid recipient use their own funds to seek extra care by hiring a physician to work full time for the recipient at \$300,000.00 per year for 10 years by entering into a fully funded lifetime care contract [prior to applying for Medicaid];

then qualify for Medicaid and receive Medicaid benefits without a transfer of assets penalty?

7. Ms. Hailey stated she expected the funds from the "Lifetime" contract to run out in 12 to 18 months. The contract is based upon a life expectancy of ten years for the Petitioner. Yet, if Ms. Hailey's rate of expenditures continues at the current rate, the funds would be exhausted by October or November of 2009. At that time, Ms. Hailey would have no income other than child support and would not be able to continue providing care to the Petitioner without some further subsistence. She could no even financially sustain the costs of travel from the apartment to the nursing home for the next ten years with the remaining funds from the contract. (Testimony of Gregg Bossen and Catherine Hailey).

8. DFCS was concerned whether the services were actually being provided as required by the terms of the contract. There was unchallenged testimony of at least three falls by the Petitioner while in the nursing home during January, February and March, 2009. These falls took place at different times of the day ranging from mealtime to bedtime without any evidence of the presence of Ms. Hailey. The Petitioner's explanation as to how such falls might occur was not the issue. (Testimony of Ms. Smith, Gregg Bossen and Catherine Hailey).

9. After a detailed review of the record in this matter, including, but was not limited to, Petitioner's Request for Agency Review (which included the equivalent of a brief supporting the Petitioner's view), the Petitioner's Brief in Support of Validity of Care Management Agreement for Medicaid Eligibility Purposes filed with OSAH on April 22, 2009, the recording of the hearing, all other documents and exhibits submitted by both parties, the ALJ's Decision, as well as the relevant state and federal statutes, cases, rules, regulations, guidelines and policy manuals, the undersigned hereby incorporates herein and adopts the "Introduction" and the "Findings of Fact" as set forth in the Decision, issued by ALJ Malihi on April 29, 2009. The Petitioner takes issue with the mathematical computation portion of ALJ Malihi's Finding of Fact 3 (second paragraph). If the Petitioner's calculation is correct, then the error is nothing more than a scriber's error because if the sum as determined by the Petitioner (\$1.15 per hour for 20,000 hours versus \$.87 per hour by the ALJ) were applied, the outcome of the decision would not change. The portions of Finding of Fact 3 (second paragraph) that the "contract has no termination, enforcement or cancellation clause"; the fact that "Ms. Hailey has already spent 30% of the full amount of the contract" in just the first three months of a contract that is a "Lifetime" contract; and that Ms. Hailey testified that she expects the contract "she signed would be renegotiated once she spends all of the \$23,000.00" are the critical findings of that paragraph.

III. CONCLUSIONS OF LAW

10. The contract was neither a "Lifetime" contract nor a contract for a set number of years. Ms. Hailey, who signed the contract as the caregiver, testified that her understanding of portions of the contract was different from the terms of the Agreement.

The length of the contract is so vague as to render it void or voidable; thus there was a transfer of assets subject to penalty.

11. After a detailed review of the record in this matter, including, but was not limited to, Petitioner's Request for Agency Review (which included the equivalent of a brief supporting the Petitioner's view), the Petitioner's Brief in Support of Validity of Care Management Agreement for Medicaid Eligibility Purposes filed with OSAH on April 22, 2009, the recording of the hearing, all other documents and exhibits submitted by both parties, the ALJ's Decision, as well as the relevant state and federal statutes, cases, rules, regulations, guidelines and policy manuals, the undersigned hereby incorporates herein and adopts the "Conclusions of Law" and "Conclusion" as set forth in the Initial Decision issued by ALJ Malihi on April 29, 2009.

IV. DECISION

Based on the foregoing, the Initial Decision of the Administrative Law Judge is hereby AFFIRMED. The Petitioner's Appeal through a Request for Agency Review is DENIED.

SO ORDERED, this 25th day of June, 2009.



Richard L. Greene
Agency Review Officer
Georgia Department of Community Health
Designated Representative of
Commissioner Rhonda M. Medows, M.D.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing Final Administrative Decision, Notice of Final Decision and Right of Appeal on all parties by depositing a copy of same in the United States Postal Service mail, First Class and/or Certified postage properly affixed to the addresses of the parties or by hand delivery if so noted, each as shown below:

FOR PETITIONER: (USPS mail First Class and Certified)


Ms. Irene S. Bossen
C/O Mr. Gregg Bossen
1904 Monroe Drive, Suite 260
Atlanta, GA 30324

Ms. Irene S. Bossen
C/O Ruthann P. Lacey, Esquire
Ruthann P. Lacey, P.C.
3541-E Habersham at Northlake
Tucker, GA 30084

FOR RESPONDENT: (Hand delivery)

Ms. Lynnette Rhodes, Esquire
Legal Services Unit
2 Peachtree Street, 40th Floor
Atlanta, GA 30303

June 25 2009
Date


Richard L. Greene