

RE: PERNIE J DUPREE, Petitioner

Docket No.: OSAH-DFCS-ABDA-1430837-146-Langston

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- DEPARTMENT OF COMMUNITY HEALTH
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ATLANTA GA 30303 (DECISION ONLY)

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

PERNIE DUPREE,)	
)	Docket No.
Petitioner,)	OSAH-DFCS-ABDA-1430837-146- Langston
v.)	
)	Agency Reference No. 414220512
DEPARTMENT OF HUMAN)	
RESOURCES, DIVISION OF FAMILY)	
AND CHILDREN SERVICES,)	
)	
Respondent.)	



MAY 10 2014

Virginia Ramsey
Virginia Ramsey, Legal Assistant

INITIAL DECISION

I. Introduction

A hearing was held in this case on March 12, 2014 concerning whether or not the Respondent may consider assets owned by the Community Spouse in determining the Institutionalized Spouse's continuing eligibility for Medicaid assistance. For the reasons set forth in this Decision, I REVERSE the Respondent's position.

Findings of Fact

-1-

Petitioner was admitted to Parkside at Hutchison, a nursing home, on September 11, 2009. At the time of her admission, she was married to her husband.

-2-

Petitioner applied for Medicaid on November 1, 2010. Medicaid was denied and a request for a fair hearing was filed. Following a decision by an Administrative Law Judge on June 30, 2010, Petitioner was approved for Medicaid. On February 1, 2011, Medicaid issued a notice finding "Based on our records we have determined that you are eligible." That notice further indicated that eligibility began in November 2010 and that it "will continue ... unless there is a change in your situation." (Emphasis added).

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Petitioner was approved for Medicaid as an Institutionalized Spouse. Petitioner's husband, the Community Spouse, was entitled to a Community Spouse Resource Allowance (CSRA). The eligibility determination presumes that countable assets in excess of the CSRA were disposed of prior to November, 2010.

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Medicaid eligibility is reviewed each year.¹ At the first annual review, eligibility was administratively denied by notice dated February 29, 2012. The notice stated that eligibility was terminated due to failure to provide documentation. Petitioner filed a new application on May 25, 2012 in reliance on Section 2060-2 of the ABD Manual.² Later, after submission of the requested information, eligibility was denied upon the grounds that Petitioner was allegedly over resourced. (Notice dated November 22, 2013.) A timely appeal was filed on December 11, 2013.

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Petitioner did not acquire any new assets following her application for Medicaid. The assets reviewed during the first annual review were those set aside for the Community Spouse. The only asset Petitioner owned was the account where her Social Security check was deposited and ~~those~~ funds were paid to the nursing home as her patient liability amount.

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The Department's standard practice is to consider assets owned by the Community Spouse in determining the Institutionalized Spouse's continuing eligibility.³

-7-

Petitioner was discharged from the nursing home on July 19, 2013. Initially, she was hospitalized. Thereafter, she has lived with her daughter until the date of her death in February, 2014. She was continuously institutionalized from September 11, 2009 through July 19, 2013 and did not resume living with her husband.

Conclusions of Law

1. This case turns on a single question of law. Does *deeming* continue after Medicaid eligibility is established? In other words, can the Department continue to count the Community Spouse's resources when determining the Institutionalized Spouse's Medicaid eligibility after Medicaid is initially approved?⁴ If the Department can count the Community Spouse's resources, then Petitioner was over resourced. On the other hand, if the Community Spouse's resource cannot be deemed to the Institutionalized Spouse after Medicaid eligibility is established, then Petitioner's Medicaid eligibility was improperly terminated and it must be reinstated from the date it was terminated through the date of her death.

¹ ABD Manual § 2706.

² "An application was previously correctly denied due to failure to provide required verification. A/R wants to reapply in a subsequent month. Although the application date of the first application is protected, have the A/R sign another application for the subsequent month(s) unless there is good cause for not initially providing the verification." (Emphasis added). As noted above, the first application was filed on November 1, 2010. See also ABD Manual § 2053-1 through 2053-2, providing that eligibility can be considered for all months where eligibility was denied on procedural grounds. Technically, even if the ABD Manual did not protect the original month of application, 42 U.S.C. § 1396a(a)(34) would nonetheless fold an application in May 2012 back into February.

³ The interpretation of a statute by an administrative agency, which has the duty of enforcing or administering it, is to be given great weight and deference. Hospital Authority of Gwinnett County v. State Health Agency, 211 Ga. App. 407, 408 (1993); Kelly v. Lloyd's of London, 255 Ga. 291, 293 (1985); Reheis v. L.E.A.F., Inc., 216 Ga. App. 699, 702 (1995); Georgia Real Estate Commission v. Peavy, 229 Ga. App. 201, 203 (1997); and Commissioner of Insurance v. Stryker, 218 Ga. App. 716, 718 (1995).

⁴ The terms Institutionalized Spouse and Community Spouse are defined in 42 U.S.C. § 1396r-5(h).

2. Deeming is a concept within Medicaid law where a non-applicant's income or resources are treated as available to someone else who is applying for Medicaid.⁵ When an individual applies for Medicaid, if he or she is married, all marital assets are initially pooled. From those countable assets within this pool, a resource allowance is set aside for the Community Spouse. 42 U.S.C. § 1396r-5(c). However, deeming does not continue indefinitely.
3. Subsection (c)(4) of Section 1396r-5 provides: "*During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse.*" The Supreme Court of the United States paraphrased subsection (c)(4) in *Wisconsin v. Blumer*, 534 U.S. 473, 483 n.4 (2002), where it said "Once the institutionalized spouse is determined to be eligible, no resources *gained* by the community spouse shall be deemed available to the institutionalized spouse."
4. After the month in which an institutionalized spouse is determined to be eligible for benefits no resources of the community spouse shall be deemed available to the institutionalized spouse. *Hughes v. McCarthy*, 734 F.3d 473, 2013 U.S. App. LEXIS 21701, *5 (6th Cir. 2013), citing *Blumer*, See also *Morenz v. Wilson-Coker*, 415 F.3d 230, at note 1 (2nd Cir. 2005); *Geston v. Olson*, 857 F.Supp. 2d 863, 875 (N. D. 2012).
5. In *Morris v. Oklahoma Dep't of Human Services*, 685 F.3d 925 (10th Cir. 2012), the Court made it clear that § 1396r-5(c)(4) relates to the initial determination of eligibility. There, in the context of addressing how the agency would deal with resources which were "newly received" by the institutionalized spouse, the Court said: "once an agency affirmatively determines that an institutionalized spouse is eligible for benefits, at which point "separate treatment of resources" begins. § 1396r-5(c)(4). "[A]fter the month in which an institutionalized spouse is determined to be eligible for benefits . . . no resource of the community spouse shall be deemed available to the institutionalized spouse." *Id.*
6. In *Houghton v. Sellers*, 382 F.3d 1162 (6th Cir. 2004), the Sixth Circuit specifically addressed the issue of redeterminations. There, the State attempted to re-classify certain assets held by the Community Spouse (in that case, retirement accounts) and then use that re-classification during annual re-determinations. The Court held: "We again begin our analysis with the text of the MCCA. *Barnhart*, 534 U.S. at 450. Section 1396r-5(c)(4) plainly states that, after the initial one-month eligibility period, "no resources of the community spouse shall be deemed available to the institutionalized spouse."
7. The legislative history further states, in H.R. Rep. No. 100-105, 100th Cong., 1st Sess., at 71, reprinted in 1988 U.S.C.C.A.N. 857, 894, that "if while the care of the institutionalized spouse is being paid for by Medicaid, the community spouse's resources grow to exceed the \$48,000 initial limit, *the State would not be authorized to require the community spouse to apply any excess toward the cost of care of the institutionalized spouse*" (emphasis supplied).

⁵ See ABD Manual § 2502.

8. After the month in which an institutionalized spouse is determined eligible for Medicaid, any resources belonging to the community spouse are solely the property of that spouse⁶. That is, the community spouse can do whatever he or she wants to with them.”⁷
9. The Georgia Medicaid Manual indicates that deeming ceases when certain events occur. Specifically, when one spouse (or child) enters LA-D, deeming of income ceases for the LA-D A/R the month of admission. Spousal impoverishment resource rules apply during the month of admission. If the community spouse is an A/R under a non-LA-D COA, deeming of income and resources ceases for the community spouse the month following the month of admission. Georgia Medicaid Manual § 2502-2.
10. Further, a marital relationship ceases the month following the month of separation of spouses,⁸ regardless of whether one or both spouses are Medicaid eligible. The admission of one or both spouses into LA-D is considered separation. Georgia Medicaid Manual § 2501-1.
11. Georgia is an “SSI State,” meaning that Georgia follows the SSI rules in determining Medicaid eligibility. Pursuant to 42 C.F.R. § 416.1163(f)(5), deeming terminated the month following admission to a medical care facility. Further, POMS SI 01320.450, like ABD Manual § 2501, terminated deeming upon separation.
12. Petitioner became eligible for Medicaid beginning November 2010. She remained institutionalized after she was initially found to be eligible. Thus, Section 1396r-5(c)(4) answers the question presented in this case. Deeming terminated as of November 2010 and Petitioner’s eligibility stood on its own. The husband’s community spouse assets could not be used in determining Petitioner’s eligibility after Petitioner was initially approved.⁹

Conclusion

Petitioner’s Medicaid eligibility was improperly terminated. She remained eligible for Medicaid because she did not have resources above the Medicaid limits and 42 U.S.C. § 1396r-5(c)(4) prohibits deeming of the community spouse’s resources following the initial determination of eligibility.

SO ORDERED THIS 10th day of May, 2014



DAVID C. LANGSTON
Administrative Law Judge

⁶ See: Letter from Ronald Preston, HCFA (now CMS) Associate Regional Administrator, to Attorney Brian Barreira, dated April 5, 2000.

⁷ This position is consistent Section 2342-2 of the ADM Manual. No transfer penalty is deemed to the Institutionalized Spouse after eligibility unless the Community Spouse transfers the homeplace of an annuity.

⁸ This is consistent with 42 C.F. R. § 416.1830(a).

⁹ The sole exception to this rule is that a transfer penalty could be applied