

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

FILED

AUG 21 2009

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-03514

PETITIONER,

Vs.

CASE NO. 1281010065

FLORIDA DEPARTMENT OF
CHILDREN AND FAMILIES
CIRCUIT: 18 Brevard
UNIT: ICP

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing convened before the undersigned hearing officer on July 16, 2009, at 10:52 a.m. The petitioner was not present. She was represented by _____, a designated representative appointed by the petitioner's guardian, RF. Bobbie Van Cott, ACCESS supervisor, represented the Department. The petitioner and the respondent were present in Cocoa, Florida, and the hearing officer appeared by telephone from another location.

ISSUE

At issue is the action taken by the Department to deny Institutional Care Program (ICP) Medicaid from May 2008 through March 2009 based on the contention that the value of her assets exceeded the program's eligibility limit. The petitioner holds the burden of proof in this matter.

FINDINGS OF FACT

1. On February 4, 2008, the petitioner was discharged from the hospital to a skilled nursing facility. On March 5, 2008, an application requesting ICP Medicaid was submitted to the Department on the petitioner's behalf. The application was submitted by a designated representative from the nursing facility in which the petitioner resides. This individual is no longer employed there. Two additional applications were submitted: May 2, 2008 and July 18, 2008. The Department requested proof of the petitioner's assets. All of these applications were denied for failure to provide the documents the Department requested in order to be able to determine eligibility for ICP Medicaid. Notices of Case Action were sent to the petitioner's representative after each application was denied.
2. On October 31, 2008, RF's attorney filed a Petition for Appointment of Plenary Guardian (Incapacity-person and property) and a Petitioner to Determine Incapacity on the petitioner's behalf in the county probate court. On February 6, 2009, RF was appointed as the plenary guardian of the petitioner (Respondent's Exhibit 4).
3. On March 19, 2009, an application requesting ICP Medicaid was submitted to the Department on the petitioner's behalf by her guardian. Retroactive ICP benefits beginning May 2008 were requested at that time.
4. The petitioner receives Social Security income, a Canadian pension, and a pension from the United Kingdom. The nursing facility was able to redirect some of her income for February, March, and April 2008, so the petitioner gained ICP Medicaid eligibility for those months.

5. The petitioner had a bank account at SunTrust Bank. The account number ended in [redacted] with a joint account holder, TL. He (TL) did not use any of the petitioner's funds or access any funds on her behalf. The adult protective investigator in charge of an elderly abuse case did not freeze the petitioner's account, and the facility was not allowed to have any contact with TL. The balance on this account in May 2008 was \$2578.26; \$2704.93 in June 2008; \$3040.15 in July 2008 and \$3380.42 from August 2008 through February 2009 (Respondent's Exhibits 8, 9, 10, 11).

6. In March 2009, the SunTrust account [redacted] was closed and a guardianship account was setup at the same bank by RF. The account number ends in [redacted] (Respondent's Exhibit 10). In March 2009, the balance on the account was \$3356.17. On April 9, 2009, a check for \$2199.28 was written from the guardianship account to pay for the petitioner's care. The balance on that account was reduced to \$856.89 (Respondent's Exhibit 9).

7. ICP eligibility was granted effective April 2009 when the petitioner's assets were below the Program's \$2000 asset limit. Notice was sent on May 13, 2009 to inform the designated representative that the March 19, 2009 application was approved effective April 1, 2009, but denied May 2008 through March 2009 because the petitioner's countable assets exceeded the program limits (Respondent's Exhibit 1).

8. The petitioner's representative believes that the petitioner is and was incapacitated both mentally and physically and could not have accessed her bank account prior to acquiring a guardian. She explained that she has no form of identification, could not find her birth certificate, and even if she could get to the bank, she could not get any money from the account because she had no checks. The

petitioner has senile dementia. Her representative believes there was no one to help her with her financial matters prior to the appointment of a plenary guardian. She stipulated that the money just sat in the bank for several months and the amount was in excess of the Department's asset limit for ICP Medicaid, and that her guardian did not liquidate the money in the account fast enough for ICP eligibility for February and March 2009. She asserts that the petitioner is eligible for ICP Medicaid based on assets, because accessing those assets to get her below the asset limit was out of her control.

9. The Department sought guidance from its district program office about the availability of the money in the SunTrust account. The specialist determined that the funds in the SunTrust account were available to the petitioner as there were no restrictions placed on the account.

10. On August 11, 2008, the Department informed the designated representative that \$2500 in funds could be set aside for burial, thereby reducing the petitioner's countable assets by \$2500. To date, the funds have not been set aside and the asset is below the limit for the Program.

CONCLUSIONS OF LAW

Florida Administrative Code 65A-1.712 addresses SSI-Related Medicaid

Resource Eligibility Criteria:

- (1) Resource Limits. If an individual's total resources are equal to or below the prescribed resource limits at any time during the month the individual is eligible on the factor of resources for that month. The resource limit is the SSI limit specified in Rule 65A-1.716, F.A.C....

Florida Administrative Code 65A-1.716 in part states:

- (5) SSI-Related Program Standards.

(a) SSI (42 U.S.C. §§ 1382 – 1383c) Resource Limits: 1. \$2000 per individual.

Until April 2009, there is undisputed testimony that the petitioner had resources in excess of the \$2000 asset limit for ICP.

Fla. Admin. Code 65A-1.303, also addresses **Assets**, as follows:

- (1) Specific policies concerning assets vary by program and are found in program specific rule sections and codes of federal statutes and regulations and Florida Statutes.
- (2) Any individual who has the legal ability to dispose of an interest in an asset owns the asset.
- (3) Once the individuals' ownership interest of an asset(s) is established, the availability of that asset must be determined. Asset(s) determined not to be available are not considered in determining eligibility. Assets are considered available to an individual when the individual has unrestricted access to it. Accessibility depends on the legal structure of the account or property. An asset is countable, if the asset is available to a representative possessing the legal ability to make the asset available for another's support or maintenance, even though the representative chooses not to do so. Assets not available due to legal restrictions are not considered in determining total available assets unless legal restrictions were caused or requested by the individual or another acting on their request or on their behalf.

The Department's Florida Integrated Public Policy Manual 165-22, informs as follows at passage 1640.0316 Legal Restrictions to Availability (MSSI, SFP):

In general, assets are considered available unless the applicant/recipient asserts otherwise. If the individual claims an asset is unavailable due to legal restrictions, the eligibility specialist will request supporting evidence and make an independent assessment of the availability based on the evidence presented. An individual may be restricted by law from disposing of owned assets. If an asset is unavailable due to legal restrictions, it is not considered an includable asset. Additional guidance can be requested from the Region or Circuit Program Office, District Legal Counsel or Headquarters through the Region or Circuit Program Office.

And at passage 1640.0320 Legally Incompetent Individuals (MSSI, SFP) it states:

Under the Florida Guardianship Law, only a guardian of the property is authorized to dispose of assets on behalf of a legally incompetent individual. Until a legal guardian is assigned, real property owned by a legally incompetent individual is not available. Liquid assets (for example, patient fund accounts and checking accounts) are included as available if the individual has free access to the funds. If a legal guardian must petition the court in order to dispose of the individual's property, the asset is still included for the individual. The fact that the guardian must petition the court does not make the property an unavailable asset.

In accord with state and federal regulations, the Department's guidelines at Florida Integrated Public Policy Manual 165-22, inform as follows:

1640.0319 Comatose Individual (MSSI, SFP)

Any asset owned by a comatose individual will be excluded when there is no known legal guardian or other individual who can access the asset.

The petitioner has a diagnosis of dementia. There was no evidence that she was comatose. The above cited passage does not show any exclusion for any other medical condition other than being comatose.

The petitioner's representative argued that the petitioner did not have access to the funds in her account because of circumstances beyond her control until she had a guardian appointed in February 2009. The Department argued that the funds were available to the petitioner because there were no legal restrictions placed on the account. The above cited authority shows that liquid assets are included as available if a person has free access to the funds. Getting to the bank and withdrawing money were physical barriers, not legal restrictions to the money. There was no evidence that there were any legal restrictions on the funds in the bank account.

Based on the evidence of the record and the controlling authorities cited above, the undersigned concludes that the bank account in question was available to the petitioner during the months prior to the appointment of a guardian, and the funds in that account exceeded the Program limit for ICP eligibility. The Department's action to deny ICP benefits from May 2008 through March 2009 was proper.

DECISION

The appeal is denied. The Department's action is affirmed.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the Department. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The Department has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this 21st day of August, 2009,

in Tallahassee, Florida.



Margaret Poplin
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
850-488-1429

FINAL ORDER (Cont.)

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