

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



APPEAL NO. 11F-06449

PETITIONER,

Vs.

FLORIDA DEPARTMENT OF
CHILDREN AND FAMILIES (DCF)
CIRCUIT: 18 Seminole
UNIT: ICP

CASE NO. 1318225965

RESPONDENT.

FILED
Nov 30, 2011
OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN AND FAMILIES

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on September 21, 2011 at 10:00 a.m. in [REDACTED], Florida.

APPEARANCES

For the Petitioner: [REDACTED] Esq.

For the Respondent: [REDACTED], Esq.

STATEMENT OF ISSUE

At issue was whether the respondent correctly determined an ineligibility period based on the uncompensated value of a transferred asset.

PRELIMINARY STATEMENT

The petitioner sought Institutional Care Program (ICP) eligibility but was denied on July 15, 2011. The respondent said there was an ineligibility period from May 1,

2011 to November 30, 2011. The respondent based this determination on value of transferred asset without receipt of adequate compensation.

The petitioner timely appealed. She objected to DCF use of a \$5,000 divisor as the means to determining an eligibility period.

Petitioner's Exhibits 1 - 7 were accepted along with Respondent's Exhibits 1 – 3. These included excerpts from federal and state regulatory guidelines as well as the denial notice. The parties also submitted prehearing and post hearing motions and responses, as well as a Joint Stipulation of Facts.

FINDINGS OF FACT

1. The petitioner applied for ICP assistance on May 27, 2011.
2. The respondent denied the application on July 15, 2011 (see Respondent's Exhibit 4).
3. The petitioner had recently transferred an asset of \$39,150 without receiving compensation. This is undisputed.
4. The respondent determined the ineligibility period as May 1, 2011 through November 30, 2011.
5. The respondent made this determination by dividing \$39,150 with a \$5,000 monthly amount. A period of seven full months of ineligibility was assigned.

CONCLUSIONS OF LAW

6. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Fla. Stat § 409.285. The hearing was a de novo proceeding pursuant to Fla. Admin. Code

§ 65-2.056. This order is the final administrative decision of the Department of Children and Families under § 409.285, Fla. Stat.

7. In accordance with Fla. Admin. Code § 65-2.060 (1), the burden of proof was assigned to the petitioner as an applicant for assistance.

8. Fla. Admin. Code 65A-1.712 addresses "SSI-Related Medicaid Resource Eligibility Criteria" in relevant part, saying:

(3) Transfer of Resources and Income. According to 42 U.S.C. § 1396p(c) (2006), incorporated by reference, if an individual, the spouse, or their legal representative, disposes of resources or income for less than fair market value on or after the look back date, the department must presume that the disposal of resources or income was to become Medicaid eligible and impose a period of ineligibility for nursing facility care services, institutional hospice or HCBS waiver services. The Department will mail a notice to individuals who report a transfer for less than fair market value (Form CF-ES 2264, 02/2007, Notice of Determination of Assets (Or Income) Transfer, incorporated herein by reference), advising of the opportunity to rebut the presumption and of the opportunity to request and support a claim of undue hardship per subparagraph (c)5. below. If the Department determines the individual is eligible for Medicaid on all other factors of eligibility except the transfer, the individual will be approved for general Medicaid services (not long-term care services) and advised of their penalty period (Form 2358, 02/2007, Medicaid Transfer Disposition Notice, incorporated herein by reference). Transfers of resources or income made prior to (first day of month following effective date) are subject to a 36 month look back period, except in the case of a trust treated as a transfer in which case the look back period is 60 months. Transfers of resources or income made on or after (first day of month following effective date) are subject to a 60 month look back period.

(a) The Department follows the policy for transfer of assets mandated by 42 U.S.C. §§ 1396p (2006) and 1396r-5 (2006), incorporated by reference. Transfer policies apply to the transfer of income and resources.

...

(g) ... For transfers made on or after November 1, 2007, periods of ineligibility begin with the later of the following dates: (1) the day the individual is eligible for medical assistance under the state plan and would otherwise be receiving institutional level care based on an approved application for such care but for the application of the penalty period; or (2) the first day of the month in which the individual transfers the asset; or (3) the first day following the end of an existing penalty period. The

department shall not round down, or otherwise disregard, any fractional period of ineligibility of the penalty period but will calculate the period down to the day. There is no limit on the period of ineligibility. Once the penalty period is imposed, it will continue although the individual may no longer meet all factors of eligibility and may no longer qualify for Medicaid long-term care benefits.

1. Monthly periods of ineligibility due to transferred resources or income are determined by dividing the total cumulative uncompensated value of all transferred resources or income computed in accordance with paragraph 65A-1.712(3)(f), F.A.C., by the average monthly private pay nursing facility rate at the time of application as determined by the Department (refer to paragraph 65A-1.716(5)(d), F.A.C.).

This rule refers to 65A-1.716 “Income and Resource Criteria” which informs in relevant part that the “(d) Average monthly private pay nursing facility rate: \$5,000.” This is the figure used by the respondent in this case and argued as the only divisor now permitted.

9. The petitioner would prefer a higher divisor because that would decrease the ineligibility period. He asserted that would be permissible under federal authority 42 U.S.C. 1396p(c)(1)(E)(i)(II) which says the Department’s divisor would be “the average monthly cost to a private patient of nursing facility services in the State (or at the option of the state, in the community in which the individual is institutionalized) at the time of application.” He also notes that, on occasion, the state opts to use more generous (otherwise described as applicant-favorable) financial figures. He particularly noted Rule 65A-1.716 (c) 4. This addresses “Spousal Impoverishment Standards” (not at issue here as this is not a spousal impoverishment situation), but he noted that such Rule refers to “Food Assistance Program Standard Utility Allowance: \$198.” The standard utility allowance (SUA) standard usually increases annually, and DCF generally allows the higher SUA to be used in spousal impoverishment budgets. This is favorable to spouses in the community. However, the spousal impoverishment SUA

factor is not in use here. The \$198 figure was used for purpose of analogy in the petitioner's argument.

10. The respondent argued that the applicable Rule is clear, firm, and controlling as it directs \$5,000 for the divisor. She further noted that this appeal hearing forum is not a proper forum by which to change the divisor amount which is expressly set at the Florida Administrative Code. She suggested a rule challenge forum in the Division of Administrative Hearings (DOAH) would be the appropriate place to make this argument and effect the desired change. The petitioner argued that the hearing officer could use the divisor described in the federal authority as cited and without a state rule change proceeding. The petitioner also argued that a more appropriate divisor would be a figure noted by the Agency for Health Care Administration (AHCA) as \$229.59 per day (\$6,862 per month). That was issued in an AHCA report titled "Florida Nursing Home Estimated Average Private Pay Rate – 2011" (submitted in Petitioner's Exhibit 5). Use of that figure would reduce the months of ineligibility.

11. The undersigned has carefully considered the facts, motions and arguments. The applicable rules and authorities have also been studied. In final analysis, the \$5,000 divisor figure is set in Rule. It is the standard currently used by DCF throughout the state for these cases. The petitioner's point of view and arguments are reasonable but not controlling. At this time and in this tribunal, it is not permissible to use a figure higher than the \$5,000 set by Rule 65A-1.716 (d) as a divisor to determine ineligibility period. Thus, it is concluded that the period of ineligibility set by the respondent as May 1 through November 30, 2011 was correct. The respondent's denial for that period was justified.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is denied and the respondent'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 _____ day of _____, 2011,
in Tallahassee, Florida.

J W Alper
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