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**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of:)
)
 [REDACTED],) OHA Case No. 10-FH-370
)
 Claimant.) DPA Case No. [REDACTED]
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

An application for Medicaid Home and Community-Based Waiver Services (“Choice Waiver” services) was completed and signed on behalf of Ms. [REDACTED] (Claimant) on September 14, 2010 (Exs. 2.0 – 2.7). The Claimant’s application was received by the State of Alaska Department of Health and Social Services, Division of Public Assistance (Division or DPA) on September 15, 2010 (Ex. 5.0).

On November 5, 2010 the Division mailed a notice to the Claimant stating that it had approved her application, but that it was imposing an asset transfer penalty and that the Claimant would be ineligible for Medicaid benefits during the penalty period (Ex. 5.0).¹ The Claimant’s son requested a fair hearing to contest imposition of the asset transfer penalty on November 4, 2010 (Ex. 4.2). This Office has jurisdiction to resolve this dispute pursuant to 7 AAC 49.010.

The Claimant’s hearing was held on November 24, 2010 before Hearing Examiner Jay Durych. The Claimant was represented by her son and power-of-attorney holder [REDACTED], who participated in the hearing by telephone and testified on his mother’s behalf. Public Assistance Analyst [REDACTED] attended the hearing in person and represented and testified on behalf of the Division. The witnesses’ testimonies were received and all exhibits submitted were admitted into evidence.²

¹ The notice sent to the Claimant also stated the start date (November 1, 2010) and the end date (December 13, 2010) of the penalty period (Ex. 5.0). However, neither the length of the penalty period nor its start date are at issue in this case.

² There were additional proceedings following the hearing of November 24, 2010. However, no additional material evidence or arguments were presented in those proceedings. Accordingly, it is not necessary to discuss those proceedings in this decision.

ISSUE

Was the Division correct when, on November 5, 2010, it imposed an asset transfer penalty³ on the Claimant, based on the assertion that she did not benefit from or receive anything of value, in exchange for certain environmental modifications or remodeling expenses which were paid for (or reimbursed from) her bank account?

FINDINGS OF FACT

The following facts were established by a preponderance of the evidence:

1. The Claimant is an elderly woman who was 87 years old at the time her application was submitted in this case (Ex. 2.0; ██████ testimony). The Claimant had been living independently in Ohio prior to coming to Alaska (Ex. 3.0; ██████ testimony). However, on January 1, 2010 the Claimant suffered a severe stroke (██████ testimony). It was initially not known whether the Claimant would survive. *Id.* However, during the period January – May 2010 the Claimant recovered to the extent that it appeared she would not need to remain in a nursing home and that she would be able to take care of herself with a minimum of assistance (██████ testimony).
2. Because the Claimant and her son believed at this time that the Claimant would be able to care for herself in large part, they decided that the Claimant would move to Alaska and live with her son in his home (██████ testimony). Accordingly, in May 2010 the Claimant moved to Anchorage. *Id.* The Claimant lived with her son in his home from approximately May 1, 2010 – September 1, 2010. *Id.*
3. After the Claimant arrived in Anchorage it became evident that the Claimant would be more comfortable if she could have a little more space and privacy than was initially possible in her son's home (██████ testimony). Accordingly, prior to August 10, 2010 the Claimant's son hired a contractor to make certain modifications to his home, (including converting the garage into an additional bedroom), so that the home would be safer and more comfortable for his mother (██████ testimony). The remodeling work began on or about August 10, 2010. *Id.*
4. The remodeling work was performed, and the related expenses were incurred, at the request of the Claimant (██████ testimony). It had been agreed that the remodeling work would be paid for from the Claimant's funds. *Id.* The Claimant's son incurred the remodeling expenses, and the remodeling work was begun, while the Claimant was living in her son's home. *Id.*
5. On or about September 1, 2010, before the improvements could be completed, the Claimant suffered another serious stroke (██████ testimony). For several days her doctors thought that the Claimant's death was imminent. *Id.* However, by approximately September 13, 2010 the Claimant recovered sufficiently to allow her to be placed in an assisted living facility (Exs. 1, 2.4, 3.0, ██████ testimony).

³ The notice sent to the Claimant also stated the start date (November 1, 2010) and the end date (December 13, 2010) of the penalty period (Ex. 5.0). However, neither the length of the penalty period nor its start date are at issue in this case.

6. An application for Choice Waiver services was completed and signed on behalf of the Claimant on September 14, 2010 (Exs. 2.0 – 2.7). The Claimant’s application was received by the Division on September 15, 2010 (Ex. 5.0).

7. Prior to filing her application, the Claimant had money in a bank account (Exs. 3.0, 3.1). On or about October 7, 2010 the Claimant’s son withdrew \$21,000.00 from this account and transferred the money to his bank account (Exs. 3.0, 3.2, 3.5, [REDACTED]). The Claimant’s son transferred the funds to reimburse himself for monies he had previously paid to a contractor for the housing modifications made for the benefit of his mother. *Id.*

8. On October 22, 2010 the Claimant and her son attended a DPA eligibility interview at which the Claimant’s medical condition, the original plan to have the Claimant live with her son, the remodeling work, and payment for that remodeling work, were discussed (Ex. 3.0; [REDACTED] testimony).

9. On November 4, 2010 the Division determined that the Claimant was eligible for the Medicaid Choice Waiver program, but that an asset transfer penalty, beginning on November 1, 2010 and ending on December 13, 2010, should be imposed because of the Claimant’s son’s use of the Claimant’s funds to pay for the modifications to his home (Exs. 4.0, 5.0).

10. On November 5, 2010 the Division mailed a notice to the Claimant stating that it had approved her application, but that it was imposing an asset transfer penalty, and that the Claimant would be ineligible for Medicaid benefits during the penalty period (November 1, 2010 through December 13, 2010) (Ex. 5.0). That notice stated in relevant part as follows [some original formatting modified for brevity]:

Your application for Medicaid benefits received on September 15, 2010 is approved. You are eligible for regular Medicaid benefits beginning December 2010.

However, you are not eligible for Medicaid long term care services or Home and Community-Based Waiver Services because you transferred the following assets for less than their value: Asset: Cash; Date of Transfer: October 7, 2010; Value: \$21,000.00.

Based on the above transfers you are not eligible for Medicaid long term care [services] or Home and Community-Based Waiver Services until you serve a transfer of asset penalty period. We have determined that your transfer of asset penalty period begins 11-1-10 and ends 12-13-10.

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves the Claimant’s initial application for Medicaid benefits. The party seeking a change in the status quo or existing state of affairs normally bears the burden of proof. *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). Accordingly, the Claimant bears the burden of proof in this case.

The regulations applicable to this case do not specify any particular standard of proof. Therefore, the “preponderance of the evidence” standard is the standard of proof applicable to this case.⁴ This standard is met when the evidence, taken as a whole, shows that the facts sought to be proved are more probable than not or more likely than not.⁵

II. The Medicaid Program – In General.

Medicaid was established by Title XIX of the Social Security Act in 1965 to provide medical assistance to certain low-income needy individuals and families. 42 USC § 1396 et. seq. In Alaska, the Department of Health and Social Services administers the Medicaid program in accordance with applicable federal and state statutes and regulations.

Because Medicaid is a federal program, many of its requirements are contained in the Code of Federal Regulations (CFRs) at Title 42, Part 435 and Title 45, Part 233. The Medicaid program’s general eligibility requirements are set forth at 42 CFR Sections 435.2 – 435.1102.

The State of Alaska’s statutes implementing the federal Medicaid program are set forth at A.S. 47.07.010 – A.S.47.07.900. The State of Alaska’s regulations implementing the Medicaid program are set forth in the Alaska Administrative Code at Title 7, Chapter 43 and Chapter 100 *et. seq.*

III. Relevant Medicaid and Adult Public Assistance Regulations Concerning Asset Transfers.

Alaska Medicaid Regulation 7 AAC 100.400 makes a number of Adult Public Assistance (APA) regulations applicable to Medicaid eligibility determinations involving certain Medicaid eligibility categories. The APA regulations which are relevant to this case and which are made applicable by 7 AAC 100.400 are 7 AAC 40.260 (concerning resources); 7 AAC 40.270 (concerning resource limits); and 7 AAC 40.280 (concerning resource exclusions).

7 AAC 40.260, titled “Resources,” provides in relevant part as follows:

- (a) In this chapter, "resources" means any real or personal property that an applicant . . . owns and can convert to cash to be used for his or her support and maintenance.
- (b) Any cash or other property received from the sale, exchange, or other disposition of a resource retains the character of a resource.

⁴ A party in an administrative proceeding can assume that preponderance of the evidence is the applicable standard of proof unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986).

⁵ *Black’s Law Dictionary* at 1064 (West Publishing, 5th Edition, 1979); *see also Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495-496 (Alaska 2003) (“Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the triers of fact that the asserted facts are probably true”).

7 AAC 40.270, titled “Resource Limits,” provides in relevant part that “(a) To be eligible for assistance, an applicant . . . must have non-excludable resources which do not exceed . . . (1) \$2,000 for an individual”

7 AAC 100.502(a) provides that, in order to be financially eligible for Medicaid under 7 AAC 100.002(d)(4) (while living in a medical institution), or under 7 AAC 100.002(d)(8) (while receiving home and community-based waiver services), an applicant or recipient may not be subject to or within a transfer-of-asset penalty period under 7 AAC 100.510(d) - (e).

7 AAC 100.510 (effective July 20, 2007) provides in relevant part as follows:

(b) To establish Medicaid eligibility for an individual described in (a) of this section, the department will determine whether the applicant transferred an asset for less than fair market value during the look-back period described in (c) of this section. If the department determines that during the look-back period the applicant transferred an asset for less than fair market value, the department will determine if the applicant is subject to a transfer-of-asset penalty under (d) or (e) of this section.

* * * * *

(k) *The following asset transfers do not result in a transfer-of-asset penalty . . . (3) the transfer of an asset in which an individual attempted to dispose of the asset at fair market value, but actually disposed of the property at less than fair market value (4) a transfer made exclusively for a purpose other than to qualify for Medicaid or remain eligible for Medicaid* [Emphasis added].

* * * * *

(q) The penalty for transferring an asset for less than fair market value is ineligibility for long-term care services for the duration of the penalty period determined under this section.

* * * * *

(r) If an applicant or recipient disposes of an asset for less than fair market value, the department will reduce its determination of uncompensated value under (d) and (e) of this section if the applicant or recipient provides evidence satisfactory to the department that . . . (2) . . . *other circumstances beyond the control of the applicant or recipient prevented the applicant or recipient from receiving fair market value in compensation.* [Emphasis added].

7 AAC 100.519(12) defines “transfer” as “to change ownership or title, in whole or in part, from the transferor to the transferee, including any action eliminating or reducing control of an asset.”

ANALYSIS

I. Introduction; Contentions of the Parties; Definition of Issue.

There are no significant factual issues in dispute in this case. The only real issue is what the relevant regulations require when those regulations are applied to the undisputed facts of the case. These are purely legal issues.

In defining the precise issue to be determined, it is helpful to first note those matters which are *not* at issue. It is not disputed that there was a transfer of assets (money withdrawn from the Claimant's bank account by her son). The amount of the transfer (\$21,000.00) is not disputed. That the transfer was intentional is not disputed. That the transfer was made for a purpose other than to qualify for Medicaid is not disputed. That the transfer occurred during the penalty look-back period (i.e. within the 36 months preceding the date of application) is not disputed. That the Claimant did not receive a corresponding benefit equal to the cost of the improvements made to the Claimant's son's home (\$21,000.00) was not disputed. That the occurrence of the Claimant's stroke was completely unpredictable was not disputed. Finally, the fact that the *only reason* the Claimant was *not* able to receive a benefit equal to the money paid for the improvements, *was due to her stroke*, was not disputed.

The Division's position is essentially that, although the Claimant's deteriorating medical condition, (which forced her out of her son's home and into an Assisted Living Facility), was clearly not intended or planned, the Claimant was nevertheless unable to live in and/or benefit from the modifications made to her son's home. For this reason, the Division asserts, the Claimant never received any value, in the form of either assets or services, in exchange for the money paid for the remodeling work.⁶ Accordingly, the Division argues, the Claimant disposed of property (in this case money or cash) at less than fair market value.

The Claimant responds that the money at issue was paid for bona-fide building modifications which were intended to benefit the Claimant, and that, but for the timing of the Claimant's September 2010 stroke, she would in fact have benefitted from the modifications, and that the benefit to her would have equaled the price paid for the remodeling work. Accordingly, the Claimant argues, there should be an exception where, as here, the Claimant's inability to receive a benefit equal to the amount of assets transferred, (i.e. the amount of money paid for the remodeling work), was completely unintentional and the result of pure happenstance.

Accordingly, the precise issue to be determined is whether the asset transfer penalty regulation at issue, 7 AAC 100.510, contains an exception which excuses the imposition of an asset transfer penalty when a Claimant's inability to receive benefits equal to the value of the asset transferred is not intentional, is made for purposes *other than* to qualify for Medicaid, and/or is the result of circumstances beyond the Claimant's control. If any such exception exists, then the Claimant must

⁶ It is important to note that the Division *did not* assert that the actual value of the remodeling work / improvements made to the Claimant's son's home was not equal to the \$21,000.00 paid for those improvements. Rather, the Division asserts that an asset transfer penalty must be imposed because the Claimant never received the benefit of those improvements.

prevail. If such an exception does not exist, then the Division's decision was correct and must be upheld.

II. Does 7 AAC 100.510 Contain an Exception to the Asset Transfer Penalty That Applies Here?

Review of the relevant regulation, 7 AAC 100.510, clearly shows that there are three separate exceptions or exemptions from the asset transfer penalty rule which apply in this case. These exceptions apply when the transfer is made for purposes *other than* to qualify for Medicaid, and/or when the Claimant's inability to receive benefits equal to the value of the asset transferred is not intentional and/or is the result of circumstances beyond the Claimant's control.⁷

First, 7 AAC 100.510(k)(4) provides an exception where "a transfer [is] made exclusively for a purpose other than to qualify for Medicaid or remain eligible for Medicaid." In this case the only evidence is that the remodeling work at issue was done to facilitate the Claimant's ability to live at her son's home, and thus to *avoid* having to apply to Medicaid for payment of Assisted Living Facility expenses. In addition, the remodeling work was begun on or about August 10, 2010, approximately three weeks prior to the Claimant's stroke on September 1, 2010, and approximately five weeks prior to the Claimant's submission of her application for Medicaid benefits on September 14, 2010. There is no evidence that, (and the Division never even asserted that), the Claimant paid for the remodeling work at issue in order to financially qualify for Medicaid. It was undisputed that the only reason that the Claimant did not receive the full benefit from the remodeling work that she paid for was that she had a stroke before the remodeling work was completed. Accordingly, 7 AAC 100.510(k)(4) mandates that no asset transfer penalty be imposed.

Second, 7 AAC 100.510(k)(3) provides an exception where "an individual attempted to dispose of the asset at fair market value,⁸ but actually disposed of the property at less than fair market value." In this case there was no evidence that the Claimant was attempting to pay more for the remodeling work at issue than the work was worth; there was no evidence that the Claimant did not intend to "get her money's worth" out of paying for the remodel. Rather, it was only the occurrence of a stroke, something impossible to predict, which resulted in the Claimant not being able to use, and thus not receiving full value for, the improvements. Accordingly, 7 AAC 100.510(k)(3) also requires that no asset transfer penalty be imposed here.

Third, 7 AAC 100.510(r)(2) provides an exception where "other circumstances beyond the control of the applicant or recipient prevented the applicant or recipient from receiving fair market value"⁹

⁷ Again, there is no assertion in this case that the occurrence or timing of the Claimant's stroke was in any way within her control.

⁸ 7 AAC 100.510(k)(3) appears to have been intended to apply primarily to transfers involving non-cash assets, the fair market value of which may be difficult to determine or subject to legitimate dispute. This case, on the other hand, involves cash. There can be no dispute that the "fair market value" of the \$21,000.00 transferred to the Claimant's son was, obviously, \$21,000.00. However, 7 AAC 100.510(k)(3) still applies due to the fact that the Division is asserting that the benefit actually received by the Claimant was less than the \$21,000.00 transferred to her son. Further, the clear intent of 7 AAC 100.510(k)(3) is to provide an exception to the asset transfer penalty when the transfer, regardless of the type of asset involved, was not intended to dispose of the asset at less-than-fair-market value.

⁹ 7 AAC 100.510(r)(2), like 7 AAC 100.510(k)(3) (discussed above), appears to have been intended to apply primarily to transfers involving non-cash assets, the fair market value of which may be difficult to determine or subject

in compensation” for the transfer. As noted above, the evidence is uncontroverted that the only reason that the Claimant was unable to live in the remodeled home, and thus receive fair market value in return for her money, was that she suffered a stroke before the remodeling could be completed. The stroke was clearly a “circumstance beyond the control of the applicant.” Accordingly, 7 AAC 100.510(r)(2) constitutes a third independent bar to imposition of an asset transfer penalty in this case.

In summary, three separate exceptions to the asset transfer penalty rule, (7 AAC 100.510), apply on the undisputed facts of this case. Accordingly, the Division erred when, on November 5, 2010, it mailed a notice to the Claimant stating that it was imposing an asset transfer penalty.

CONCLUSIONS OF LAW

1. State Medicaid regulation 7 AAC 100.510 generally requires the imposition of an asset transfer penalty when an applicant or recipient transfers assets without receiving fair market value in return for the transfer. It was not disputed that, in this case, the Claimant did not receive a benefit equal to the fair market value of the assets transferred. However, there are exceptions to the general asset transfer penalty rule stated in 7 AAC 100.510.
2. 7 AAC 100.510(k)(4) provides an exception where a transfer is made exclusively for a purpose other than to qualify for Medicaid. In this case there was no evidence that the Claimant paid for the remodeling work at issue in order to financially qualify for Medicaid. Thus, pursuant to 7 AAC 100.510(k)(4), imposing an asset transfer penalty is not appropriate in this case.
3. Regulation 7 AAC 100.510(k)(3) excuses the failure to receive a benefit corresponding to the value of the assets transferred, where that failure is unintentional or accidental. In this case the only reason that the Claimant was unable to receive a benefit equal to the money paid for the remodeling work was that she suffered a stroke before the remodeling work was completed. Thus, pursuant to 7 AAC 100.510(k)(3), imposing an asset transfer penalty is not appropriate in this case.
4. Regulation 7 AAC 100.510(r)(2) excuses the failure to receive a benefit corresponding to the value of the assets transferred where this is due solely to circumstances beyond the control of the applicant. The only reason that the Claimant was unable to receive a benefit equal to the money paid for the remodeling work was that she suffered a stroke before the remodeling work was completed. This was a completely unforeseeable event beyond her control. Thus, pursuant to 7 AAC 100.510(r)(2), imposing an asset transfer penalty is not appropriate in this case.
5. Accordingly, the three independent exceptions to the asset transfer penalty rule provided by 7 AAC 100.510(k)(4), 7 AAC 100.510(k)(3), and 7 AAC 100.510(r)(2), apply to the undisputed facts of this case.

to legitimate dispute. As noted above, this case involves cash, and there can be no dispute that the “fair market value” of the \$21,000.00 transferred to the Claimant’s son was \$21,000.00. However, 7 AAC 100.510(r)(2) still applies due to the fact that the Division is asserting that the benefit actually received by the Claimant was less than the \$21,000.00 transferred to her son. Further, the clear intent of 7 AAC 100.510(r)(2) is to provide an exception to the asset transfer penalty when the transfer, regardless of the type of asset involved, was not intended to dispose of the asset at less-than-fair-market value.

6. The Division was therefore not correct when, on November 5, 2010, it mailed a notice to the Claimant stating that it was imposing an asset transfer penalty.

DECISION

The Division was not correct when, on November 5, 2010, it mailed a notice to the Claimant stating that it was imposing an asset transfer penalty.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, The Claimant has the right to appeal by requesting a review by the Director. To do this, send a written request directly to:

Director of the Division of Public Assistance
Department of Health and Social Services
PO Box 110640
Juneau, AK 99811-0640

If the Claimant appeals, the request must be sent within 15 days from the date of receipt of this Decision. Filing an appeal with the Director could result in the reversal of this Decision.

Dated this 7th day of April, 2011.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 7th day of April 2011 true and correct copies of the foregoing document were sent to the Claimant via U.S.P.S. Mail, and to the remainder of the service list by secure / encrypted e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested

, DPA Hearing Representative
, DPA Hearing Representative
, Policy & Program Development
, Staff Development & Training
, Administrative Assistant II
, Eligibility Technician I

(signed)

By: _____
J. Albert Levitre, Jr.
Law Office Assistant I