BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH[1]

In the Matter of	)	
	)	
X. Q.	)	OAH No. 22-0509-MDE
	)	

DECISION

I. Introduction

X. Q. is admitted to a long-term care facility. His wife, holding his power of attorney, applied for Medicaid benefits in February 2022. The Division of Public Assistance calculated the amount he was required to contribute toward his cost of care at the facility as $1,750 per month. However, based on additional later-supplied information, the Division reduced his cost of care to $0.00 and retroactively applied the determination to May 2022, the month after the documentation supporting the reduction was received.

Mr. Q. appealed, contending that the zero cost of care determination should apply retroactively to all months following his February application, including March and April 2022. His hearing request was referred to the Office of Administrative Hearings and a hearing was held on July 15, 2022. Mr. Q. was represented by Eva Khadjinova with Alaska Legal Services Corporation. The Division was represented by Jessica Hartley. Based on the evidence in the record and presented at hearing, the Division's decision limiting the start of Mr. Q.'s retroactive cost of care to May 2022, as opposed to March 2022, is REVERSED.

II. Facts

The relevant facts in this case are not in dispute. Mr. Q. is 88 years old, suffers from substantial disabilities, and requires a nursing home level of care. He began staying at the Residence A skilled nursing home in City A, Alaska, in July 2021. On February 7, 2022, through his wife T. Q., holding his power of attorney, he applied for Medicaid benefits under the nursing home and Home and Community Based Medicaid Waiver programs. Mrs. Q. does not live in a long-term care facility and is not receiving Medicaid services.[2]

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[1] On July 1, 2022, pursuant to Executive Order 121, the Department of Health and Social Services was restructured into two separate Departments. The case caption in this matter is modified to reflect that it is being heard on referral from the Commissioner of the Department of Health.

[2] Exs. 2, 3-3.4, 9-9.1; T. Q. Testimony.

The Division pended Mr. Q.'s application on February 23, 2022, awaiting additional information, including verification of Mrs. Q.'s gross monthly income from Social Security and her State of Alaska retirement. The verification documentation was due March 7, 2022.[3]

Although there was some initial confusion regarding when the requested information was provided to the Division, it has since been confirmed that it was timely received on March 4, 2022.[4] The Division approved Mr. Q.'s long-term care Medicaid benefits starting in February 2022 but assessed his monthly cost of care at $1,750.[5] It also determined that his Medicare Part B Buy-in was effective on November 1, 2021.[6]

On March 31, 2022, the Division notified Mr. Q. that it was unable to confirm any deductions regarding his cost of care because the documents he previously submitted, including bank records and tax forms, were not allowed forms of verification of his wife's gross income.[7] Following this notice, Mr. Q. promptly supplied the additional documentation on April 15, 2022.[8]

On May 2, 2022, Mr. Q. was notified that his cost of care would be adjusted to zero, beginning in June, 2022, based on Mrs. Q. being entitled to a spousal allowance.[9] On May 11, 2022, the Division sent another notice, indicating that Mr. Q.'s cost of care amount would be assessed as zero beginning in May 2022.[10] It is unclear why the cost of care applicability was changed as between the Division's notices on May 2 and May 11, 2022 from June 2022 to May 2022.[11] The May 11, 2022, notice indicates that it is because of a reported change on April 18, 2022.[12] This may be a reference to the additional documentation provided on April 15, 2022.

Following May 11, 2022, the Division maintained that Mr. Q. had no cost of care obligation beginning in May 2022.[13] However, he is obligated for a cost of care liability of $1,750 per month for both March and April 2022.[14]

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3 Exs. 9-9.1, 10-10.2.
4 Ex. 14-14.62, 15; Claimant's Pre-Hearing Brief (July 8, 2022), Ex. B; Jessica Hartley Testimony.
5 Ex. 17-17.2.
6 Ex. 18.
7 Ex. 17.2.
8 Claimant's Pre-Hearing Brief (July 8, 2022), Ex. F.
9 Ex. 22.
10 Ex. 23.
11 *Compare* Ex. 22 *with* Ex. 23.
12 Ex. 23.
13 Jessica Hartley Testimony; Division Position Statement (June 13, 2022).
14 Ex. 17.1.

Mr. Q. appealed the Division's determination limiting the beginning of his retroactive cost of care to May 2022, as opposed to March 2022.[15] Although Mr. Q. has also submitted other Fair Hearing requests in this case as to other issues, those requests involve matters that now appear to have either been resolved or are no longer in dispute.[16]

III. Discussion

Under the applicable rules, the Division is required to determine whether a Medicaid recipient is obligated to pay a portion of his or her long-term care services.[17] A person with a cost of care obligation is expected to pay that amount to the Medicaid provider.[18] Medicaid financial eligibility is based on the countable assets of applicants and their community spouses (someone who does not live in a long-term care facility and who is not receiving Medicaid home and community-based waiver services).[19] All countable resources of an applicant and his or her community spouse, are "pooled together" when determining financial eligibility.[20] However, a regulation regarding "[a]llocation of resources to prevent spousal impoverishment" sets out a mechanism where the resource or income allocated or transferred to the community spouse is not counted when determining whether the applicant meets the financial eligibility criteria.[21]

At the hearing, both parties confirmed that based on the income verification documentation provided by both Mr. and Mrs. Q., there is no dispute that Mr. Q. is entitled to a cost of care assessment of zero. The only question is whether that cost of care determination should begin in May 2022, the month after the requested documentation was provided, or March 2022, the month after Mr. Q.'s application was submitted and the documentation establishes he was eligible for a zero cost of care determination.[22]

In answering that question, regulations provide that the Division may, "*[a]t any time*, make a retroactive adjustment to a recipient's cost-of-care liability to compensate for a previously understated or overstated cost-of-care determination."[23] Further, the Medicaid Eligibility Manual provides that: "[r]etroactive adjustments can be made for an overstated or

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15 Ex. 24-24.1.
16 Claimant's Pre-Hearing Brief (July 8, 2022), Exs. A, H and K.
17 7 AAC 100.550.
18 7 AAC 100.552.
19 7 AAC 100.500 *et. seq.*
20 The Department of Health and Social Services Aged, Disabled and Long Term Care Medicaid Eligibility Manual, § 553 D.
21 7 AAC 100.506(a).
22 Jessica Hartley Testimony.
23 7 AAC 100.570 (emphasis added).

understated cost-of-care (COC) liability *at any time*. There is no time limit to correct a COC error."[24] As noted in an earlier OAH decision:

> making a retroactive adjustment to a previously determined Cost of Care obligation is different than retroactively establishing the obligation in the first place. There is no regulation that specifically states whether the original notice establishing the obligation can be made retroactively. However, 7 AAC 100.554(e) states that there is no Cost of Care obligation in the first month of admission to the long term care facility. This suggests that there is an obligation after the first month. Since there is no regulation specifying that the department must make its determination within 30 days, there will be occasions when the obligation will be set retroactively, and there is implied authority to do that.[25]

At hearing, the Division was questioned concerning its justification for limiting application of Mr. Q.'s retroactive cost of care to the month after the supporting financial documentation was received as opposed to the month after his initial application was submitted. It suggested that the examples cited in the policy manual under Section 570 G all similarly apply retroactive cost of care adjustments back to the month after the event giving rise to the change to the cost of care. As such, it was asserted that the Division has always taken the position that it will retroactively apply the cost of care to the month after the justifying documentation is received.[26]

While that may be the Division's long-standing policy or interpretation, there is no support for that position. What is key is the specific language in the regulation and policy. Here, that language, in both regulation and policy, indicates that cost of care determinations may be made *at any time*.[27]

Again, the Division has relied on the examples in its policy manual as support that it will only adjust the cost of care after supporting documentation is provided.[28] However, a review of those examples show that they are not on point. They all involve situations where there has been a change of circumstances, not a delay in receiving supporting documentation. Unlike the

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[24] The Department of Health and Social Services Aged, Disabled and Long Term Care Medicaid Eligibility Manual, § Section 570 G (emphasis added).

[25] *In re BM,* OAH 12-0245-MDE at 3 (Commissioner of Health and Social Services, 2013), available at https://aws.state.ak.us/OAH/Decision/Display?rec=2120.

[25] AS 47.10.014.

[26] Jessica Hartley Testimony.

[27] 7 AAC 100.570; The Department of Health and Social Services Aged, Disabled and Long Term Care Medicaid Eligibility Manual, § Section 570 G (emphasis added).

[28] Jessica Hartley Testimony; The Department of Health and Social Services Aged, Disabled and Long Term Care Medicaid Eligibility Manual, § Section 570 G.

examples in the policy manual, this case does not involve a situation of a change of circumstance after some event occurred and the applicant then sought a retroactive cost of care determination based on the event. In such a situation, it might be appropriate to limit the retroactive cost of care determination to the month after the documents demonstrating a change in circumstances are received. But those examples do not apply here, where the conditions justifying the zero cost of care determination existed when Mr. Q. submitted his original application.[29]

The time that transpired between when Mr. Q.'s original application was submitted on February 7, 2022, and the last of the financial documentation was received regarding Mrs. Q.'s gross income on April 15, 2022, is typical of the back and forth that occurs when the Division receives and reviews documentation and then requests clarification and follow-up. Here, there was no delay on the part of the applicant and, as the Division has acknowledged, the financial conditions justifying a zero cost of care determination existed as of the time his original Medicaid application was received. Consequently, and based on the clear language in the regulation and policy manual allowing retroactive cost of care adjustments to be made at any time, Mr. Q. is entitled to a retroactive cost of care determination of zero beginning in March 2022.

IV. Conclusion

The Division's decision limiting the start of Mr. Q.'s retroactive cost of care to May 2022, is REVERSED.

DATED this 29th day of July 2022.

SIGNED
Z. Kent Sullivan
Administrative Law Judge

[29] It is noted that, in the past, the Division has "retroactively" adjusted a party's cost of care obligation by calculating the amount of past expenses that a recipient is entitled to by taking that as a deduction from future cost of care obligations for expenses. For instance, this occurred in OAH Case No. 19-0078- MDE. In that case, the recipient provided proof of expenses for January through April, in March and April. In that case, the recipient's January through April expenses were allowed, but the cost of care obligation for January through April was not adjusted. Instead, the January through April expenses were allowed as an additional deduction from the recipient's cost of care obligation beginning in May. Such an approach is not possible in Mr. Q.'s case because his present and immediate future cost of care is zero. As such, it is not possible to give him a credit against a $0 obligation, and the retroactive adjustment is necessary and appropriate.

Adoption

The undersigned, by delegation from the Commissioner of Health, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 9th day of August, 2022.

By: SIGNED
Name: Z. Kent Sullivan
Title: Administrative Law Judge

[This document has been modified to conform to the technical standards for publication. Names have been changed to protect privacy.]