

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing Nos. M-03/17-101  
 ) M-03/17-118  
Appeal of )  
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INTRODUCTION

Petitioner appeals a termination of his Medicare Cost-Sharing program eligibility and (separately) a change in his level of VPharm assistance, by the Department of Vermont Health Access ("Department"), from VPharm 1 to VPharm 3. The material facts are undisputed, leaving only the legal issue of petitioner's household composition and size. The following facts are adduced from a hearing held April 3, 2017 and memoranda submitted by the parties, with the record closing as of July 11, 2017.<sup>1</sup>

FINDINGS OF FACT

1. Petitioner is married and the couple's sole source of income, \$1,810 per month, is from petitioner's Social Security retirement income. In October of 2016, petitioner's spouse was lodged in a federal penal institution, for

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<sup>1</sup> This appeal was reassigned to another hearing officer following closure of the record.

unspecified reasons, and has remained lodged there during the entirety of this appeal. There is no indication of when she will or might return home; however, petitioner indicates that he has remained in and maintained their home (with attendant expenses) in anticipation of her return (he also indicates that they continue to file taxes jointly).

2. Petitioner has several significant health issues and was previously eligible for "VPharm 1" benefits, as well as the Medicare Cost-Sharing program as a "QI-1" beneficiary (which pays his Medicare Part B premiums), when considering his income against a household of two. Because his spouse entered a penal institution and has not lived in their home for at least 30 days, the Department reviewed his eligibility as a household of one, resulting in a determination - by notice of decision in February of 2017 - that he is ineligible for the Medicare Cost-Sharing program and eligible for "VPharm 3" benefits (which is a lesser level of assistance than "VPharm 1").

3. There is no dispute regarding the correctness of the Department's decisions regarding application of petitioner's income to the threshold for a household of one. Petitioner's monthly countable income is above the QI-1 threshold of \$1,357, and VPharm 1 and 2 respective thresholds

of \$1,508 and \$1,759, for a household of that size. See Medicaid Procedures P-2420B (Bulletin B17-14, effective 1-1-17). The sole dispute is the Department's categorization of petitioner as a household of one, under the rules.

ORDER

The Department's decisions is affirmed.

REASONS

Review of the Department's determination is de novo. The Department has the burden of establishing the basis for termination or reduction of existing benefits, whereas an applicant appealing an initial denial has the burden of establishing eligibility - both by a preponderance of evidence. See Fair Hearing Rule 1000.3.0(4).

VPharm and the Medicare Cost-Sharing program are governed, respectively, by separate rules. VPharm provides "supplemental pharmaceutical coverage" to Medicare beneficiaries. VPharm Rules, § 5400. As to income eligibility, VPharm rules provide that:

Household income, when calculated in accordance with the rules adopted for the Vermont Health Access Plan (rules 5321 - 5323), must be no greater than 225 percent of the federal poverty level.

VPharm Rules, §5414.

The Vermont Health Access Plan ("VHAP") is a program that existed prior to implementation of the Affordable Care Act and Vermont's related health exchange; it ceased to exist following the implementation of the exchange in 2014. The VHAP rules remain publicly available with a proviso that they were "repealed" as of April 1, 2014 with the exception of Rules 5321-5323, undoubtedly because those are the rules referred to within the VPharm program. Those rules discuss what types of income are counted and disregarded, as well as available deductions from income, and also provide that the definition of the VHAP "group" for purposes of applying the income eligibility standards is ". . . according to the definition included in the Financial Need (rule 5320)." VHAP Rules § 5323.

As indicated above, VHAP Rule 5320 was "repealed" when that program ceased to exist. That rule provides, or provided, that the VHAP group includes spouses "if living in the same home." VHAP Rule 5320 (repealed 4/1/14). Both prior to and following the cessation of VHAP, the Department has continued to interpret the VPharm "group" consistent with VHAP Rule 5320, meaning that spouses must live in the same

home to both be counted for purposes of household size as well as total household income.<sup>2</sup>

The Medicare Cost-Sharing program applies the same income and household size methodology applicable to Medicaid for the Aged, Blind and Disabled ("MABD") applicants. See Health Benefits Eligibility and Enrollment ("HBEE") Rules, § 8.06.<sup>3</sup> Under those rules, "the countable income . . . of the financial responsibility group are compared against the income . . . standards applicable to the Medicaid group's size." HBEE § 3.00 (referring to HBEE § 29.04 regarding formation of the Medicaid group).

The rules further provide, in pertinent part, that:

- (1) *When spouses are living together*, both the individual requesting MABD and the individual's spouse are considered members of the individual's Medicaid group, unless one of the exceptions specified in paragraph (d) of this subsection applies...
- (2) Spouses are considered living together in any of the following circumstances:
  - (i) Until the first day of the month following the calendar month of death or separation, when one spouse dies or the couple separates. . .

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<sup>2</sup> It is noted that the Department submitted an affidavit from a health programs specialist confirming this has been the policy interpretation and practice with respect to VPharm determinations.

<sup>3</sup> In contrast with the MABD methodology, "MAGI-based" Medicaid generally utilizes the tax household to determine household size. See HBEE § 28.03(e).

HBEE § 29.04(c) (emphasis added).<sup>4</sup>

With respect to both the VPharm and Medicare Cost-Sharing determinations, the Department's decision is based on the conclusion that petitioner and his spouse are not "living together" or "living in the same home," and therefore he is treated as a household of one instead of two. With respect to VPharm, petitioner argues, as an initial matter, that reliance on VHAP Rule 5320 is inappropriate because it has been repealed. While it is not necessarily inappropriate for the Department to rely on a repealed rule - which remains referenced in another rule that is current and active for a separate program - even assuming that is the case, the principal question remains whether the Department's interpretation of the rules is unreasonable or inconsistent with other rules. Similarly, the Department's decision on petitioner's Medicare Cost-Sharing eligibility is bound by the same question of whether it is consistent with the rules to consider petitioner and his spouse no longer "living together," making him a household of one.<sup>5</sup>

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<sup>4</sup> Several irrelevant provisions of this section of the rules are omitted.

<sup>5</sup> Petitioner's arguments as to the exceptions contained in HBEE § 29.04(d), referenced in § 29.04(c), misconstrues the rules. These are exceptions that would treat a spouse as a household of one when they might normally be considered as "living together." These exceptions do

There is nothing unreasonable about requiring that spouses live in the same home to be considered part of the same household for VPharm eligibility, nor to conclude that under these facts - where petitioner's spouse has lived outside of the home for several months with no indication of when she might return - they are not living in the same home. Moreover, doing so is not inconsistent with any other applicable rules or laws. Likewise, the Department's understanding that, in order to be treated as a household of two, petitioner and his spouse must be actually "living together" is a condition that is plainly spelled out in the language of HBEE 29.04(c)(1) (quoted *supra*). Petitioner's argument that HBEE § 29.04(d) contradicts such is unavailing (see note 5, *supra*). Given the length and nature of her absence, the Department's conclusion that this is not a temporary absence and the couple is not living together, under the rules, is supported by the evidence.<sup>6</sup>

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not come into play if the spouses are not living together in the first instance. See HBEE § 29.04(c).

<sup>6</sup> Nor is this inconsistent with the rules; if anything, it is supported by ancillary rules and guidance. See HBEE § 20.01 ("Individuals or couples meet the living-arrangement requirement for Medicaid eligibility purposes if they live in: (a) their own home. . ."); Social Security Administration ("SSA") Program Operations Manual System ("POMS") SI 00835.001.C.1 ("A resident of an institution is not a member of a household. . ." for purposes of determining living arrangements). The SSA POMS provide guidance as the MABD financial methodologies are based in SSI financial methodologies. See 42 C.F.R. § 435.601.

As such, the Department's decisions are consistent with the rules and must be affirmed. See 33 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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