

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. V-09/17-488
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Appeal of)
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INTRODUCTION

The petitioner appeals a decision by the Department of Vermont Health Access computing his patient share for Long-Term Care Medicaid. The issue is how garnishment deductions from the petitioner's monthly Social Security checks should be treated when computing petitioner's countable income for Long-Term Care Medicaid.

The parties have stipulated to the facts and briefed the legal issues. The following findings of fact are based on the parties' written submissions.

FINDINGS OF FACT

1. The petitioner is seventy-two years old and a resident of a Vermont nursing home. The petitioner was found eligible for Long-Term Care Medicaid in March 2016.

2. On August 24, 2017, the Department sent the petitioner a Notice of Decision that his patient share amount (i.e., the amount from his monthly Social Security check,

after all other allowable deductions, that he must pay to the nursing home) is \$970.34. Medicaid pays the balance of his monthly nursing home fee directly to the home.

3. The petitioner's income consists solely of a monthly Social Security benefit totaling \$2,546. His check is paid to his and his wife's son as his representative payee.

4. The petitioner also has an unrelated court-appointed guardian. Although the petitioner is being represented by an attorney in this appeal, there is no claim or indication that his guardian has either authorized, is participating in, or is cognizant of this appeal.

5. The only monthly deductions that the Department has allowed from the petitioner's income in its calculation of his patient share are a standard personal needs allowance of \$47.66, his Medicare Part B premium of \$112, and a "spousal support" allowance of \$1,416 for his wife, who lives in the community.

6. The issue in this case arises from the fact that there are two separate garnishments in the same amount being taken from the petitioner's Social Security check each month. One is to the U.S. treasury (presumably for back taxes owed) in the amount of \$365.10, the other to the Veterans

Administration (for reasons not clear¹), also for \$365.10, for a total garnishment of \$730.20. Thus, the amount of the Social Security check actually paid each month to the petitioner's representative payee (via direct deposit) is \$1,815.80.

7. In light of the above, the petitioner's payee says he is faced with the monthly choice of paying a reduced amount for his mother's spousal allowance or reducing the petitioner's patient share payment to the nursing home (or, presumably, he could reduce both payments).

8. The petitioner alleges that his payee has been paying the petitioner's patient share amount to the nursing home in full each month (\$970.34), leaving only \$845.46 to be paid in some combination toward the petitioner's personal needs (\$47.66) and his wife's spousal support (\$1,416).

9. The petitioner alleges that the family does not have a good relationship with the nursing home, and that they are "not able to take cooperative action" in dealing with the federal agencies involved to try to remove or reduce the garnishments presently in effect. However, other than some

¹The petitioner alleges only that such liens are "usually . . . associated with non-covered medical care such as prescription drugs", but he admits he does not know if these liens could be removed, or, if not, whether the garnishment amount can be identified as a non-covered medical expense that could also be deductible for purposes of Medicaid.

unspecified "concerns" of the family, the petitioner makes no claim or showing that the nursing home has, or legally could (see *infra*), take any adverse action against him if the petitioner's payee chooses to pay the petitioner's personal needs and his wife's spousal allowances in full each month, and pay only the amount remaining from his Social Security check to the nursing home.

10. There is no claim or showing that the petitioner's guardian has placed any undue pressure or limitations on the representative payee's discretion regarding who or how much is paid each month from the petitioner's Social Security check.

11. The petitioner alleges that his family has tried and failed to get further information from IRS and the VA regarding the history of the garnishments and the circumstances, if any, under which they might be modified or eliminated. However, there is no claim or showing that the family's difficulties have been based on anything other than his wife's allegedly-limited wherewithal to pursue such actions on her own, rather than on any actual or legally-definitive "decision" on this issue from any of the agencies involved.

12. The petitioner also makes no claim or showing that the nursing home, especially if it was in its interest to do so, could not or would not "assist" the family, or take legal action on its own, in trying to reduce or remove the present garnishments from the petitioner's Social Security check.²

13. Finally, it is unstated (and, frankly, mysterious) why the petitioner's attorney in *this* matter cannot undertake such action in his or his wife's behalf. Other than a vague representation that the appointment of the petitioner's guardian appears to have been "initiated" by the nursing home, there is no claim or indication that the guardian cannot (or will not) effectively act or approve actions in the petitioner's behalf (or that she could not be removed if she refuses to do so or can be shown to have a conflict of interest).

ORDER

The Department's decision is affirmed.

²Assuming the family will be cooperative, if the nursing home does not or refuses to offer such assistance, the petitioner can certainly raise this as a defense (i.e., failure to mitigate damages) in any legal action by the home based on nonpayment. (This could include the petitioner's right to review of such action by DAIL and the Human Services Board. See Vermont Department of Disabilities, Aging and Independent Living Licensing and Operating Rules for Nursing Homes, Rule 2.8; and 3 V.S.A. 3091.)

REASONS

The long-term care Medicaid regulations at HBBE § 24.03 provide: "To determine the maximum patient share, the individual's *gross income* less allowable deductions as specified in § 24.04 is considered." (Emphasis added.) HBBE § 2404(b) lists the allowable deductions from gross income as follows:

- (1) A personal needs allowance or community maintenance allowance;
- (2) Home upkeep expenses, if applicable;
- (3) Allocations to a community spouse or maintenance needs of family members living in the community, if applicable; and
- (4) Reasonable medical expenses incurred, if applicable.

In the petitioner's case, he was granted the personal needs allowance (\$47.66), an allocation to his community spouse (\$1,416), and a medical expense deduction for his Medicare Part B payment (\$112). He does not appear to take any issue with either the applicability or the amounts of the deductions allowed by the Department in determining his patient share.

Based on what the petitioner has and has not alleged, his grievance *against the Department* appears vague, if not contrived. Based on the petitioner's representations, it is

difficult to discern any legal, financial, or ethical basis for the purported decision of petitioner's payee to reduce the amount of money he turns over to the petitioner's wife (the payee's mother) each month as her spousal share in order to fully pay the petitioner's nursing home costs.

Nonetheless, the petitioner's argument appears to be that maintaining a community spouse's patient share must "supersede" any of the other income provisions under the regulations, and that the Department must "help" (without further specification or elaboration) the petitioner's wife obtain her full spousal assistance share each month.

It is not at all clear whether the petitioner is arguing that such "help" might include either decreasing the countable amount of his unearned income or increasing his patient share allowance. If so, either way, the effect of such a result would be to have Medicaid *reimburse* him for the amounts that are deducted from his Social Security check to cover his debts to other federal agencies, so that he (or his payee) wouldn't even have to consider running a monthly deficit in his payments to the nursing home. He has cited no regulation or case law that would support such a result.

The Board has repeatedly held that Medicaid is not responsible to pay or compensate for a long-term-care

recipient's legal obligations unless clearly required to do so by the regulations. See, e.g., Fair Hearing No. B-04/09-223. This is especially so when, as here, a recipient who receives Social Security has not demonstrated that it is beyond his capacity to reduce or eliminate the garnishments taken out by Social Security each month. See Fair Hearing Nos. T-09/15-1047 and R-04/09-227. Although none of the above-cited cases involved a nursing home resident with a community spouse, the basis of those decisions (i.e., the use of gross income to determine patient share) is nonetheless apt.

In this case, it is assumed, albeit not clear, that the garnishments from the petitioner's Social Security check predated his entering the nursing home. If so, he can argue to Social Security, IRS, and/or the VA that his circumstances have drastically changed, in that his income is now insufficient to fully pay both the full patient share toward his ongoing medical expenses and the amount necessary for his wife's support in the community. However, this begs the same question previously identified by the Board in the cited cases (*supra*): *the petitioner's ability and responsibility to try to reduce or eliminate the reductions to his income.* As noted above, the petitioner has not demonstrated that he

either has diligently pursued or lacks the wherewithal to pursue this avenue of relief for himself.

Inasmuch as the Department has correctly applied the applicable regulations in determining the amount of patient share, its decision must be affirmed. 33 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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