

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing Nos. J-02/19-121
) & J-12/19-853
Appeal of)
)

INTRODUCTION

Petitioner appeals a penalty period in connection with her start date for long-term care Medicaid coverage, as determined by the Department of Vermont Health Access ("Department"). Petitioner was represented by an authorized representative (her sister) during this proceeding. The following is based upon a February 9, 2020 (in-person) merits hearing, documents submitted therein, and arguments of the parties. Consideration of this matter was delayed for several months by agreement of the parties (due to the Covid-19 pandemic). The primary issue is whether petitioner should be penalized under the rules for making certain asset transfers.

FINDINGS OF FACT

1. Petitioner was admitted into a long-term care nursing facility on November 2, 2017. She eventually submitted an application for long-term care Medicaid coverage on December 28, 2018, when (apparently) her private resources

to pay for care had been expended. From the record, it appears that petitioner had submitted a previous application in November 2018 which was denied for lack of meeting Medicaid's clinical eligibility threshold. Petitioner's clinical eligibility is not at issue in this appeal and the main dispute between the parties commences with her December 28, 2018 application.

2. Along with petitioner's application, her authorized representative provided information about petitioner's ownership of a "timeshare" at a resort in New Hampshire valued at around \$5,000 (by estimate of the timeshare company - the parties agree this valuation by the company was actually \$4,900). This information included:

- A short note written to the timeshare company by petitioner's authorized representative inquiring as to whether the company would be willing to take back ownership of the timeshare, because petitioner was in a nursing home and could not afford the timeshare fees (also referencing that petitioner had applied for Medicaid);
- A letter to the Medicaid program describing her efforts to get the timeshare company to take the

timeshare back and to ascertain the outstanding fees owed against the value of the timeshare, concluding that "I don't know what to do from here"; and

- invoices from the timeshare company showing petitioner's outstanding fee balances at certain points in time.

3. The long-term Medicaid worker assigned to process petitioner's application then conducted a phone interview with her authorized representative, noting that she (the representative" had "explained to the [timeshare company] that [petitioner] did not have the funds to pay on it anymore, and was wondering what they were going to do." The worker's notes further indicated that "if [the] resale value is correct then I would deduct outstanding balance of what [petitioner] owes on it to get [the] value."

4. On January 16, 2019, the Department sent a "Verification Reminder" form to petitioner asking for a statement of the value of the timeshare, proof of how much petitioner was in arrears on the timeshare, and proof that the timeshare company had started the process to obtain the arrearage.

5. Petitioner's authorized representative and the Medicaid worker had several conversations about the timeshare during this time. The authorized representative indicated that she "was trying to figure out what to do" because she did not have legal authority to sell the timeshare and was awaiting a decision on petitioner's request for the company to take back ownership of the timeshare. The record also reflects that petitioner's authorized representative was advised in January 2019 by the worker that if the company agreed to take the timeshare back, "there would be a penalty period" based on the value of the timeshare minus the fees owed.

6. Petitioner's authorized representative subsequently wrote a letter to the Department's Medicaid worker in response to the verification request, providing that:

- The timeshare records showed that it had an equity value of \$4,900;
- Attaching statements showing the outstanding fees on the timeshare of \$1,204.64; and
- That a timeshare company representative had reported that the arrearage had been sent to a collection agency, which returned it to the company

"saying there was no money for the bill," and so there were no legal proceedings or collection efforts against petitioner at that time.

7. The letter from petitioner's authorized representative included a copy of a letter from petitioner to the timeshare company dated January 22, 2019, stating that "I am in a nursing home and only have Social Security for income. I am unable to pay my outstanding debt. I am releasing the timeshare back to the company. You sent the account to a collection agency and they returned it to you [because] I have no money. Please present this to your board so they will transfer ownership."

8. The Department subsequently issued a decision dated February 6, 2019, denying petitioner's eligibility for being over the Medicaid resource limit of \$2,000, principally due to the value of the timeshare - calculated by the Department as \$3,695.36 (or the sum of \$4,900 minus \$1,204.64). At that point, petitioner had not heard from the timeshare company nor had the timeshare been marketed for sale by petitioner.

9. Petitioner appealed this decision, which is the subject of Fair Hearing No. J-02/19-121. Petitioner also submitted another application for long-term care Medicaid on February 13, 2019. This application included the timeshare

as an owned resource, with a value of \$4,900. The appeal in Fair Hearing No. J-02/19-121 was effectively stayed pending consideration of petitioner's February 13, 2019 application.

10. Documents submitted at hearing show that, just following this application, petitioner's timeshare was advertised for sale in a local (NH) paper. Copies of the two-line advertisement in the classified section were provided to the Department on February 15, 2019 and February 22, 2019. There were no other substantive efforts by petitioner (or her representative) to market the property during the short period it was advertised (and before the timeshare company took possession of it, as specified below).

11. The Department's records around this time also show conversations between the Department's Medicaid worker and staff at the nursing home as well as petitioner's authorized representative regarding what efforts would be considered sufficient to establish that petitioner was "actively" marketing the timeshare for sale.

12. Shortly after this, on February 26, 2019, petitioner's authorized representative sent the Department a copy of a February 21, 2019 letter from the timeshare company titled "Notice of Cancellation of Vacation Ownership" and effectively taking ownership of the timeshare on the grounds

that petitioner was in default on the contractual obligation to pay annual maintenance fees.

13. The Department continued processing petitioner's February 13, 2019 application, sending petitioner a verification request dated March 8, 2019 to provide copies of certain bank statements from specific periods, due to potential discrepancies that the Department had identified in other bank statements provided by the petitioner. The Department also sent petitioner a notice of a "Potential Transfer Penalty for Long-Term Care Medicaid" dated March 12, 2019, listing the timeshare with an "uncompensated value" of \$3,695.36.

14. Petitioner supplied the additional bank statements to the Department. Two of the transactions shown by the documentation are in dispute here - one was a cash withdrawal from one of petitioner's bank accounts on March 3, 2017 for \$8,000 and the second was a cash deposit into another account on the same date, March 3, 2017, for \$3,000.¹

15. The Department subsequently requested additional verification from petitioner, by notice dated March 22, 2019,

¹ It should be noted, although no longer an issue of dispute, that the parties worked out a significant issue regarding payments petitioner received, or was entitled to receive, for the sale of certain properties. While it is not necessary to go into detail about this issue, these issues were of significant focus of the parties while this appeal was pending.

as to (among other things) the source of the \$3,000 deposit and for what the \$8,000 withdrawal was used.

16. Petitioner's authorized representative responded on April 1, 2019 that she did not know the specific source of the \$3,000 deposit or what the \$8,000 was spent on but speculated that the \$3,000 may have come out of the \$8,000 withdrawal, because they were made on the same date.

17. The Department sent another verification request to petitioner on April 8, 2019, again requesting information regarding (among other things) the \$3,000 deposit on March 3, 2017.

18. On April 29, 2019, the Department sent a notice of a "Potential Transfer Penalty for Long-Term Care Medicaid" which included, among other transfers that have since been resolved, the \$8,000 withdrawal on March 3, 2017.

19. Petitioner's authorized representative subsequently provided a statement from petitioner dated May 2, 2019, in reference to the March 3, 2017 \$8,000 withdrawal, providing "I did not give the money away - I don't know what happened to it."

20. The Department issued a decision on May 10, 2019, that petitioner had made uncompensated transfers (including the March 3, 2017 withdrawal) amounting to \$61,255.32 and

equating to a "penalty period" of 189 days, running from February 1, 2019 to August 8, 2019 (this decision has since been superseded).

21. The process that followed this decision is not entirely clear from the record, except to the extent that the parties continued attempts to resolve the penalty period issue. The Department ultimately made two subsequent decisions with respect to the length of the penalty period. On November 8, 2019, the Department determined that petitioner was financially eligible for long-term care Medicaid as of July 14, 2019. This decision led to the appeal docketed as Fair Hearing No. J-12/19-853. However, the parties continued to negotiate a resolution after this appeal was filed, leading to a second decision by the Department dated February 7, 2020, setting the length of the penalty period as 26 days, and running from February 1, 2019 to February 26, 2019 (which was a further reduction in the length of the penalty period). This decision was based upon petitioner's transfer of the timeshare and the \$8,000 withdrawal and \$3,000 deposit made on March 3, 2017. The Department construed \$5,000 of the \$8,000 withdrawal to be subject to the transfer penalty (i.e. \$8,000 minus the \$3,000

deposit the same day) plus the value of the timeshare (\$4,900) minus the fees petitioner owed (\$1,204.64) on it.

22. Thus, the remaining issues at hearing and in dispute here is whether these transactions should result in the penalty period applied by the Department.

23. Petitioner did not appear at the hearing but was represented by counsel and presented testimony from her sister who also served as her authorized representative. The Department presented testimony from the long-term care Medicaid worker who processed petitioner's appeal. Numerous exhibits were admitted into evidence by stipulation, primarily comprised of the Department's file. The following specific factual conclusions are drawn from the testimony and exhibits entered into evidence (in addition to the findings above) regarding the disputed bank transactions on March 3, 2017 and the resulting \$5,000 transfer penalty:

- Petitioner lived alone before her admission into the nursing home. She did not have any known close relationships with anyone or particularly close relationships with siblings or other family members.

- By the time of the hearing and for a substantial period spanning the long-term Medicaid application process, petitioner suffered from dementia.
- Prior to her admission into the nursing home in November 2017, petitioner struggled in managing her own affairs. She was often behind in her bills, wrote checks that would bounce, and experienced challenges in living on the income she received through social security retirement. Petitioner attempted to run a homecare business at some point of time but there is no evidence that this was a significant source of income (if any).
- Petitioner was credibly described as someone who did not give gifts or money to anyone, but instead was more likely to ask for loans from family members (which she did not repay). She often used cash to make purchases and liked to spend her available money on things like dining out, books, and other personal items.
- It is reasonable to conclude that petitioner's inability to specifically recall what she did with the \$8,000 (or \$5,000 net, after subtraction of the

\$3,000 deposit) she withdrew from an account on March 3, 2017, was a function of her dementia in combination with her poor money management.

- Around the time of the disputed bank transactions, petitioner had significant credit card debts and in conjunction with the sale of her home in mid-2017, "cut up" her credit cards.
- The preponderance of evidence establishes that petitioner did not "give away" any of the \$5,000 (net) in cash withdrawn on March 3, 2017. Rather, it is more likely than not that she used the cash to pay household expenses, purchase food, dine out, or purchase other things or necessities (for example, petitioner was buying her own adult diapers at that time) for a period of time.

24. The following specific factual conclusions are drawn from the testimony and exhibits entered into evidence (in addition to the findings above) regarding the transfer of ownership of petitioner's timeshare:

- The only known value of the timeshare was \$4,900. This was from the representation of the petitioner, albeit as determined by the timeshare company and

apparently based upon the initial purchase price of \$4,900. However, there was no persuasive evidence submitted to change that valuation, only speculative testimony that the timeshare was tethered to the "worst week of the year" (the last week of March) for the resort and that timeshares in general are difficult to sell. However, given that the valuation was supplied by the petitioner and based on the initial purchase price, without any further evidence to depart from this valuation, it was reasonable for the Department to rely upon the valuation.

- There was no apparent dispute regarding the amount of the fees subtracted from the value of the timeshare; rather, the dispute is whether the transfer should be subject to the transfer penalty under the rules.
- There is evidence that one of the reasons petitioner offered to give up ownership of the timeshare was that she could no longer afford the fees. At the same time, the only known value of the timeshare exceeded the fees owed at the time of

the transfer. In addition, petitioner had been informed that no collection efforts had been undertaken, and likely would not be undertaken, against her for the outstanding fees.

- Petitioner's attempt to convey the timeshare back to the company was also intertwined with petitioner's Medicaid application. The timeshare was conveyed shortly after petitioner had been determined over-resource for Medicaid eligibility. Communications between the Medicaid worker, petitioner's authorized representative, and the nursing home plainly show that "what to do" about the timeshare was a recurring topic of discussion in relation to petitioner's Medicaid eligibility. Nothing in the record establishes that petitioner was compelled to sell the timeshare, the company was not pursuing collection efforts, and she was also clearly informed of the option to market the timeshare to exclude it as a resource (a process which she had only just started before the company took it back).

25. On the whole, there is no convincing evidence that petitioner transferred the timeshare for purposes completely independent and exclusive from becoming eligible for long-term care Medicaid.²

ORDER

The Department's application of a penalty period based on petitioner's transfer of the timeshare is affirmed; the Department's application of a penalty period for the \$5,000 (net) bank withdrawal on March 3, 2017 is reversed.

REASONS

Review of the Department's determination is de novo. The Department has the burden of proof at hearing if terminating or reducing existing benefits; otherwise the petitioner bears the burden. See Fair Hearing Rule 1000.3.0.4.

Transfer of the timeshare

There is no reasonable dispute that petitioner's timeshare was a resource and that it was generally subject to long-term Medicaid financial eligibility rules. See Health

² It is noted that the timeshare company "cancelled" petitioner's timeshare ownership. Under these circumstances, there is no material difference between this action and an affirmative transfer of the timeshare, especially given that it was precipitated by petitioner's offer to give the timeshare back to the company voluntarily.

Benefits Eligibility and Enrollment ("HBEE") Rules § 29.07(b)(1). It must also be concluded that the cancellation of petitioner's ownership here met the definition of a "transfer" under the rules. See HBEE Rules § 25.02(a). While at hearing petitioner attempted to undercut the value and marketability of the timeshare, the factual record establishes that the Department's reliance on a value of \$4,900 was reasonable. There is no dispute regarding the Department's subtraction of fees owed against that value to determine the amount of the transfer penalty, \$3,695.36, equaling the uncompensated value of the transfer. See HBEE §§ 25.03(a)(1) and 25.04, *generally*.

The remaining issue is whether there is "convincing" evidence that petitioner transferred the timeshare "exclusively" for reasons "other than" becoming eligible for long-term care Medicaid:

(c) Transfers for less than fair-market value - in general. A penalty period is not imposed for a transfer for less than fair market value that meets one or more of the following criteria:

. . . .

(4) Transfer of resource for a purpose other than creation or maintenance of eligibility for Medicaid coverage of long-term care services and supports. The transferor has documented to AHS's satisfaction *convincing evidence* that the resources were transferred *exclusively for a purpose* other than

for the individual to become or remain eligible for Medicaid coverage of long-term care services and supports. *A signed statement by the transferor is not, by itself, convincing evidence.* Examples of convincing evidence are documents showing that:

(i) The transfer was not within the transferor's control (e.g., was ordered by a court);

(ii) The transferor could not have anticipated the individual's eligibility for Medicaid coverage of long-term care services and supports on the date of the transfer (e.g., the individual became disabled due to a traumatic accident after the date of transfer); or

(iii) A diagnosis of a previously undetected disabling condition leading to the individual's eligibility for Medicaid coverage of long-term care services and supports was made after the date of the transfer.

HBEE Rules § 25.03 (*italicized emphasis added*).

It must first be observed that petitioner does not meet any of the above-listed factors, albeit non-exhaustive, for determining the above exception. In fact, the timeshare transfer was not out of petitioner's control and she (or her representative) was clearly aware of her application for Medicaid eligibility *at the time of and before* the transfer was made. Given the remaining evidence in the record of how closely related ownership of the timeshare was to petitioner's Medicaid eligibility (or lack thereof), the

evidence is not convincing that the transfer was *exclusively* for a purpose apart from gaining Medicaid eligibility.

As such, the Department's decision applying a penalty to the timeshare transfer (minus fees owed) is consistent with the applicable rules and must be affirmed. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

"Transfer" of petitioner's \$5,000 bank withdrawal

The Medicaid rules contain the following definition regarding transfers (in pertinent part):

(a) Transfer of income or resources. For the purposes of this section, a transfer of income or resources is any action taken by the individual requesting Medicaid coverage of long-term care services and supports, by the spouse of such individual, or by any other person with lawful access to the income or resources of the individual or such individual's spouse that disposes of the income or resources.

HBEE Rules § 25.02.

Transfers for "fair market value" are allowable transfers not subject to the penalty period. This includes purchases of personal services, support and maintenance needs, and other personal items. See HBEE Rules 25.03(a)(5).

The Department's initial request for verification of what the \$5,000 withdrawal was used for was reasonable. At the same time, petitioner's dementia makes it virtually impossible for her to verify this with any specificity.

Petitioner has appealed this determination and presented credible and unrebutted evidence regarding petitioner's money management, personal habits, and overall conduct regarding her purchases and dealings with friends and family. This evidence was credible and persuasive in establishing by a preponderance of evidence (i.e. that it was "more likely than not") that petitioner spent the cash she withdrew on personal items, services, food, and other personal support and maintenance needs over a period of time, within the meaning of HBEE Rule 25.03(a)(5) - meaning that the funds were transferred for "fair market value" - and even more persuasive evidence that the \$5,000 was not "given away" by petitioner in any event.

These circumstances are similar to those addressed by the Board in Fair Hearing No. B-04/19-247, which also involved an applicant with dementia who was unable to personally verify certain banking transactions (in that case, certain bank deposits). Much as in that case, the petitioner here provided persuasive and credible evidence of the likely nature of the transactions and (in this case) use of the funds at issue. While the Department is not resting on the issue of lack of verification or "non-cooperation" here, instead construing the withdrawal against petitioner in its

entirety as a penalty on the grounds of her lack of specific verification, the Board's decision in Fair Hearing No. B-04/19-247 goes into great depth regarding the challenges facing applicants with dementia in terms of verification and the allowances in the rules for alternatives (such as self-attestation or exceptions in special circumstances). See *id.*, citing HBEE Rules § 57.00(d) and § 57.00(c)(5), among other things. The evidence at hearing more than established that such considerations are also triggered here, and certainly in conjunction with petitioner's persuasive evidence that her \$5,000 withdrawal should not be subject to penalty under the rules.

For these reasons, the Department's decision applying a penalty period in relation to her net \$5,000 withdrawal on March 3, 2017 is inconsistent with the applicable rules and must be reversed. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D. This matter must be remanded back to the Department for determination of a new penalty period in accordance with the above.

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