



considered by the Department as a "non-covered medical expense", the costs of which should be deducted from her applied income in determining her financial eligibility for Medicaid.

The issue raised by this case is nearly identical to that dealt with by the board in Fair Hearing No. 6245, decided in December, 1984. In that case, a four-to-two majority of the board rejected the recommendation of its hearing officer that medically-necessary "personal care" provided by a "community care home"<sup>2</sup> was a "non-covered medical service" that, according to federal statute, states were required to include as a deduction from applied income.

Instead, the board agreed with the Department in that case that community care home services were "personal" rather than "medical" or "remedial", and, thus, were not required to be included as a deduction from applied income. The hearing officer's recommendation and the board's decision in Fair Hearing No. 6245 are reproduced below.

\ The Department informed the hearing officer that sometime after the board's decision in Fair Hearing No. 6245 the petitioner in that case joined in a class action suit in Federal District Court challenging the policy the board had affirmed. The parties to the instant fair hearing originally agreed to continue this matter until that aforementioned lawsuit was resolved. However, when the

Department informed the petitioner and the hearing officer that settlement of that suit was not imminent, the petitioner requested that the board consider her appeal on its own merits. The board concludes that the petitioner herein is entitled to consideration of her appeal in a timely manner regardless of the status of a lawsuit to which she is not a named party. Except for certain admissions of the Department (see infra), the board is unaware of the specifics of the lawsuit, and it does not figure in this order.<sup>3</sup>

As noted above, the instant case is nearly identical to Fair Hearing No. 6245. However, sometime after the board's decision in Fair Hearing No. 6245, the Department substantially amended the regulation in question, Medicaid Manual (M.M.) § M 432. (See pages 4 - 5 of the Recommendation and page 4 of the Board's Order in Fair Hearing No. 6245, supra, for the text of § M 432 as it appeared at that time.) In its amended form § M 432 adds to the exemplary list of non-covered medical services (for which deductions from applied income are allowed) the following two items: "Level III care provided in a hospital setting" and "Personal care services provided in the home, as described below . . . Personal care services include, but are not limited to, services such as physical assistance with routine bodily functions, preparation of a special diet, assistance with consumption of food, ambulation,

personal hygiene, medication, and general supervision of physical and/or mental well-being where a physician states such total care is required due to a specific diagnosis. .  
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There can be no dispute that the services needed by the petitioner herein (as well as by the petitioner in Fair Hearing No. 6245) are precisely those now listed under "personal care" in 9 M 432 as amended. The only difference is that the petitioner receives these services in a Level III facility, rather than "in the home" or "in a hospital setting". In light of the above amendments to 9 M 432, the Department can no longer take the position (that it did in Fair Hearing No. 6245) that the services provided by the home are not "medical" or "remedial", and, thus, not covered by their nature under the statute and regulations. If, in fact, it is possible to quantify and place a monetary value on "personal services" provided by a Level III facility, it is arbitrary and contrary to federal law and its own regulations<sup>4</sup> for the Department to continue to disallow Level III residents a deduction from their applied income to reflect their cost in obtaining these services. In view of the amendments to 9 M 432 (supra), the board's reasoning in Fair Hearing No. 6245 simply no longer applies. However, the hearing officer's rationale in his recommendation in that case is now even more compelling.

The petitioner in this case maintains that the

Department can, indeed, quantify and place a reasonably accurate value on the "personal services" she receives at her Level III facility. The Department admits that it has already developed (but not implemented, pending resolution of the aforementioned lawsuit) procedures to determine these costs.

ORDER

The Department's decision is reversed. The matter is remanded to the Department to determine the cost of the personal services provided by the petitioner's Level III facility and to allow the petitioner a deduction from her applied income to reflect these costs.

FOOTNOTES

<sup>1</sup>"Applied income" is the amount of money an over-income but otherwise-eligible individual must incur in each six-month period of eligibility before Medicaid coverage "kicks in" for the remainder of that six-month period. See Medicaid Manual §§ M 400 et. seq.

<sup>2</sup>The petitioner in Fair Hearing No. 6245 resided in a Level IV home, which, by law (unlike a Level III home), is not required to provide "nursing overview". However, like the petitioner herein, she alleged she, in fact, received and paid for (as part of her monthly fee to the home) certain "personal services" that were medical in nature.

<sup>3</sup>See Department's Memorandum, October 28, 1991.

<sup>4</sup>Section M 432 provides that deductions for medical services "includes but is not limited to" the listed services. The regulation itself does not specifically exclude "personal services" provided in and by a community care home.

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