STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,896

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Appeal of)

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INTRODUCTION

The petitioner, a nursing home resident, appeals a determination by the Department of Social Welfare finding that he is ineligible for Medicaid due to excess resources. The issue is whether the amount attributed to the petitioner's wife as a community spouse resource must be increased so as to make the resources unavailable to him.

FINDINGS OF FACT

1. Mr. and Mrs. C. are an elderly husband and wife. Mr. C. has lived in a nursing home in southern Vermont since the Fall of 1992, due to the effects of Alzheimer's disease. Mrs. C. lives in a nearby community in the marital home.

2. Mr. and Mrs. C. own assets in the form of savings accounts, stocks and bonds which have a present value of $94,774.70. An inventory of those resources is attached hereto as Exhibit One and incorporated herein by reference. Mr. C.'s income is $453.50., most of which is in the form of Social Security payments. Mrs. C.'s income consists of $149.00 per month in Social Security, $116.00 from interest on savings accounts and $325.67 from dividends and interest on the stocks and bonds, for a total of $590.67 per month.

3. On May 16, 1994, after having paid for nursing care as a private patient for over a year and half, Mr. C. applied for Medicaid benefits. On June 7, 1994, Mr. C. was notified that his application was denied because his assets were $17,671.00 more than Department standards allowed for a two person family ($2,000.00). That figure was reached after a $72,660.00 spousal allowance was subtracted from the couple's joint assets.

4. Mrs. C. presented evidence that her monthly expenses amount to at least $723.77, and may go higher. Copies of her expense sheets are attached hereto as Exhibits Two and Three and are incorporated herein by reference. In addition, she has physician's expenses to pay of unknown amount which are not covered by Medicaid. The vast majority of her expenses could be classified as essential to her survival. (She appears to have about $20.00 per month in discretionary spending.) It is therefore found that the petitioner actually needs at least $723.77 per month for maintenance in the community. Under the Regulations, she is allowed at least $1,200.00 for monthly maintenance.

5. Without the $441.67 monthly income generated from the interest and dividends on her resources, the petitioner would have only $149.00 per month to live on. It must be found, therefore, that the petitioner needs the entirety of the income generated from their joint resources to meet her modest monthly expenses and that the entirety of their resources, or $94,774.70, should be attributed to her, and not just the $72,660.00 standardized figure.

ORDER

The spousal community resource allowance to the petitioner's wife is increased to $94,774.00. The Department's decision to deny Medicaid to the petitioner because of excess resources is reversed.

REASONS

This is a case of first impression before the Board in that the institutionalized spouse's eligibility for Medicaid hinges upon a finding by the Board that the standardized resource amount allowed to the community spouse (and thus not counted as a resource of the institutionalized spouse) is inadequate and should be increased. Under the Medicaid regulations, the resources of both spouses must be lumped together regardless of which spouse actually owns them in order to determine eligibility for long term care. However, a spouse in the community is automatically entitled to have a portion, currently set at $72,660.00, allocated for his or her support and care and not counted in the joint property amount. After eligibility is determined, the Medicaid scheme also allows the institutionalized spouse to pay over amounts of his or her income to the community spouse if it is needed to reach a certain monthly maintenance minimum. If the spouses feel that the resource or monthly income allocation is inadequate, the federal statute sets up a unique process which requires that the fair hearing Board, and not the Department, makes the initial finding as to whether the spousal allocation should be revised and also whether the monthly maintenance amount should be increased. The federal authorizing statute provides as follows:

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of----

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the computation of the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse

resource allowance (as defined in subsection (f)(2) of this section);

such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance

If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance

If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

42 U.S.C. § 1396r-5(e)

The Department of Social Welfare has not promulgated regulations pursuant to this statute, which was originally enacted as part of the Medicare Catastrophic Coverage Act of 1988 and last revised in 1993. The regulations promulgated by the Department specifically discuss the right of an applicant and his community spouse to request a fair hearing where the monthly maintenance amount is at issue (See M413.21), but are not so explicit with regard to the resource allocation, although even the resource regulations refer to the use of "an amount set by fair hearing." (See M270.2(2)). In any event, the Department does not now appear to reject the notion (as they did at the original hearing) that the Board is required to revise both those standards under certain circumstances pursuant to the above statute.[(1)]

The issue squarely before the Board in this case is whether and in what amount the community spouse's resource allocation should be increased. Paragraph (e)(2)(C) of the statute cited above makes it clear that a new amount must be substituted if either spouse establishes that the income generated by the standard spousal allowance is not adequate when added to any other income to raise the community spouse's total monthly income to the minimum monthly needs allowance.

Under the federal statute, the minimum monthly needs allowance is defined and established as follows:

(2)

(d) Protecting income for community spouse

. . .

(2) Community spouse monthly income allowance defined

In this section (except as provided in paragraph (5))[(3)] the "community spouse monthly income allowance" for a community spouse is an amount by which--

(A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance.)

(3) Establishment of minimum monthly maintenance needs

allowance

(A) In general

Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds--

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with sections 9847 and 9902(2) of this title) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent

For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of --

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance

The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500.00 (subject to adjustment under subsections (e) and (g) of this section).[(4)]

(4) Excess shelter allowance defined

In paragraph (3)(A)(ii), the term "excess shelter "allowance" means, for a community spouse, the amount by which the sum of--

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 2014(e) of Title 7) or, if the State does not use such an allowance, the spouse's actual utility expenses,

exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

. . .

42 U.S.C. § 1396r-5

This rather lengthy section can be summarized as requiring a case by case determination in which a standardized figure based on poverty indexes is added to an individualized figure based on the community spouse's actual shelter expenses to obtain a figure which is then reduced by the monthly amounts already coming into the household. The Department's regulations, inexplicably, use a slightly different methodology:

Allocation to Community Spouse

A Standard Community Spouse Allocation (see Procedures Manual) may be deducted from a long-term care spouse's income for the needs of a spouse who is living in the community. In no case shall an allocation be made to a community spouse whose countable resources exceed the Community Spouse Resource Allocation Maximum (see Procedures Manual) or a higher amount set by a Fair Hearing or court order in accordance with policy in the Special Requirements for Applicants/Recipients Living in Long-Term Care section. This standard deduction is reduced by the gross income, if any, of the

community spouse. The long-term care spouse is not required to make the full (or any) allocation to his/her spouse.

. . .

A higher amount, up to the Maximum Community Spouse Allocation as specified in Title XIX of the Social Security Act, as amended (unless a higher amount has been set by a Fair Hearing or court order), may be deducted for the needs of a community spouse upon documentation of a greater need. The higher amount is determined by adding a Maintenance Income Standard to any Excess Shelter Allowance (see Procedures). The Excess Shelter Allowance is equal to the amount by which actual shelter expenses exceed the Shelter Standard; the Shelter Standard is equal to 30 percent of the Maintenance Income Standard (which is equal to 150 percent of the federal Poverty Guideline for two). The community spouse, as well as the applicant/recipient, has a right to request a Fair Hearing.

This amount (i.e. the maintenance income standard plus the excess shelter allowance) is reduced by the gross income, if any, of the community spouse.

. . .

M413.21

No explanation was offered by the Department as to where it derives the authority to use its method number one, which is a standardized amount ($1,200.00, see Procedures Manual 2420 D8), since the statute requires that method number two be used in all cases. If the Department's regulation is to make any sense, it would mean interpreting the term "greater need" to mean anyone who would get a higher monthly maintenance figure if method number two were used. In that case, the $1,200.00 standardized figure would merely be a bonus to those who have no excess shelter expenses to add.

In this case, however, it is not necessary for purposes of deciding on the resource allotment, to do an individualized calculation of the petitioner's monthly maintenance allowance. Even the lowest standardized figure of $1,200.00 adopted by the Department is more than $400.00 higher than the petitioner's actual expenses. The gap between the petitioner's $149.00 in Social Security income and the minimum standardized figure is extreme, over $1,000.00. Even with allocation of the entire $94,774.70 to the petitioner's wife, only $441.67 of that income gap is realized. Since the petitioner's wife needs all her current resources to even provide a portion of what she is allowed to retain, it must be concluded that she has established the need for a larger allocation equalling the total amount of assets now possessed jointly by the couple. Therefore, the Board, under the statute, is compelled to allocate that amount to her. As the resources are no longer available to the petitioner, he cannot he denied Medicaid for that reason.

The petitioner's wife asked in the event that her husband was found eligible for Medicaid, that the Board order the Department to transfer further amounts from his income to her to make up the rest of the gap. However, the Board has no authority to make such an order. Under the regulations at M413.21, cited above, the institutionalized spouse may elect to have amounts deducted from his income if they are needed to meet his spouse's minimum monthly needs. At this point, it is up to the Department to

calculate the community spouse's minimum monthly needs as directed by statute and regulation and determine what amount, if any, the petitioner may transfer from his income to her. If the petitioner is dissatisfied with that action, he may then file a fair hearing request.

A final word to the Department on the notice issue is in order. The Department is clearly required by the above regulations (and due process) to notify applicants for Medicaid of their right to request a higher community spouse allowance and/or minimum monthly maintenance amount. This petitioner would not have known of that right had he not consulted a lawyer. This situation needs to be remedied at once. The Board suggests that the Department adopt the following language in its decisional notices for long-term Medicaid eligibility:

An applicant or spouse of an applicant for payment of long-term care under the Medicaid program who is dissatisfied with a determination by the Department of Social Welfare as to:

(1) the maximum amount of the couple's resources which the spouse staying in the community can keep for his or her personal support;

(2) the maximum amount of the couple's income which the spouse staying in the community can keep for his or her personal support; or

(3) the amount of income or resources actually received by either spouse, has right to seek revision of those figures through a fair hearing before the Human Services Board. Requests for hearings can be made in person or in writing through the District Welfare office within 90 days of the date of the decision.

# # #

1. The Department does contend that the petitioners are required to choose only one of these standards for revision due to the use of the word "or" after paragraph (2)(a)(iv) supra. However, that argument is entirely unpersuasive as the clear language of the statute indicates that the purpose of the section is to list and not to restrict the grounds for appeal. Language in the Department's own regulation at M413.21--prohibiting monthly maintenance allocations and revisions "to a community spouse whose countable resources exceed the Community Spouse Resource Allocation Maximum

. . . or a higher amount set by a fair hearing. . ."--indicates that a spouse who has already had a resource revision and does not have resources in excess of the revised amount, can apply for an income maintenance revision as well through the fair hearing process.

2. An analysis of this methodology, though tedious, is unfortunately necessary as the Department has failed to establish this amount in this case.

3. Paragraph 5 requires that monthly maintenance amounts cannot be any less than a Court ordered amount if such a support order exists.

4. Subsection (e) refers to revision of the amount through the fair hearing process. Subsection (g) requires that amounts to be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers for the calendar year involved. According to the Department's

procedures manual that figure is now set at a maximum of $1,815.50.