

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 17,681
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of Prevention, Assistance, Transition, and Health Access (PATH) computing his patient share allowance for long term care Medicaid. The issue is whether the petitioner should be allowed as a deduction from income the amount the petitioner pays in alimony each month to his ex-wife. In lieu of an oral hearing the parties have stipulated to the following facts.

FINDINGS OF FACT

1. [Name] is the petitioner in this appeal of a patient share determination by the Department of PATH dated March 15, 2002, which set his patient share at \$1,874.43 per month and did not deduct the amount the petitioner pays in alimony each month.

2. The petitioner is eighty-four and is a resident of Haven Health Center (formerly Roncalli) Nursing Home in St. Albans, Vermont.

3. The petitioner has been found eligible by the Department of PATH for long-term care Medicaid.

4. The petitioner's income consists of a monthly Social Security retirement benefit of \$1,145 (before \$54 deduction for Medicare premium) and a monthly pension from his former employer, Long Island Lighting Company, of \$853.97, for a total of \$1,998.97 per month. (This total amount is slightly different than the amount listed on PATH's March 15 patient share notice, but PATH has been informed of the discrepancy and has adjusted its calculations accordingly.)

5. The petitioner was divorced from his ex-wife [name] on February 4, 1982 by judgment of the Supreme Court of New York, Suffolk County.

6. The petitioner was ordered by the divorce court to pay \$50 per week "as and for support and maintenance to the defendant until the earliest happening of one of the following events:

- a. the death of either of the parties hereto;
- b. the remarriage of the wife regardless of whether such remarriage shall thereafter be terminated by divorce, annulment or otherwise;
- c. the establishment by the wife of a relationship tantamount to that contemplated by Section 248 of the Domestic Relations Law. . ."

7. The petitioner has paid alimony to his ex-wife on a monthly basis since the February 4, 1982 divorce judgment.

8. To the knowledge of petitioner and the court which ordered the alimony, none of the events which would terminate the order of alimony payments has yet occurred.

9. The petitioner's ex-wife, [name], has income below the federal poverty level for a household of one, even with the receipt of alimony from the petitioner.

10. In its patient share determination of March 15, 2002, the Department of PATH did not deduct petitioner's alimony payments from the amount of his income which must be paid directly to the nursing home as petitioner's patient share. The only amounts deducted from petitioner's income by the Department in its determination of his patient share are his personal needs allowance of \$47.66 per month and his Medicare Part B premium of \$54.00 per month.

11. The petitioner's court-ordered alimony payments and his current patient share are greater than his total income.

ORDER

The Department's decision is affirmed.

REASONS

Medicaid Manual § M413 includes the following provisions:

Applied income Determination

The long-term care resident's applied income is the amount of monthly income remaining after allowable deductions (see below) are made. . . .

The allowable deductions, in the order listed below, are:

A deduction for Personal Needs Allowance (PNA) or Community Needs Allowance (CAN) (see procedures manual); plus

A deduction, where applicable, for expenses of maintaining a home; (see Home Upkeep Deduction); and

A deduction, where applicable, for the maintenance needs of a spouse and/or other family members living in the community (see Allocations to Family Members).

No other deductions appear in the regulations. Ex-spouses are not included in the definition of "Other Family Members" in Section M413.22. There is no dispute that the petitioner has received all the other deductions to which he is entitled under the regulations.

The petitioner in this matter argues that "fairness and public policy" dictate that alimony payments to ex-spouses must also be included as an allowable deduction from income in determining a long-term care resident's patient share.

However, even if the Board agreed with this¹ there would be no sustainable legal basis to overrule the clear language of the

¹ Alimony is usually based, in large part, on the financial means of the paying spouse. In this case, the petitioner simply no longer has the financial ability to continue paying alimony. Although this may be unfortunate when, as appears to be the case here, the receiving spouse is

above regulation. It certainly cannot be concluded that the failure of the regulation to include alimony payments to ex-spouses as allowable deductions is so irrational or unfair that the Board, as a matter of law, must add something to its plain language that is simply not there. See State v. O'Neill, 165 Vt. 270, 275-277 (1996).

Fair Hearing No. 11,744, cited by the petitioner, concerned whether the cash surrender value of an insurance policy held by a long-term care resident under court order for the benefit of his ex-wife could be considered as an available resource under the Department's regulations. In this case, however, there is no question that the petitioner's income is available to him. Unlike in Fair Hearing No. 11,744, it cannot be concluded that an individual in the petitioner's circumstances would be in "clear violation" of a court order if his admission into long-term care forced him to stop making alimony payments to his ex-wife.²

Inasmuch as the Department's decision in this matter is clearly in accord with the above regulation, the Board is

herself impoverished, it cannot be concluded that "public policy" demands that ex-spouses must continue to be supported under these circumstances.
² If either the petitioner or his ex-wife truly believes that it would, either or both of them are free to seek a declaratory ruling in court.

bound by law to affirm. 3 V.S.A. 3091(d), Fair Hearing Rule
No. 17.

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