

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 17,865
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Prevention, Assistance, Transition, and Health Access (PATH) with regard to the onset date of her Medicaid eligibility.

FINDINGS OF FACT

1. The petitioner is an elderly woman who is assisted with her affairs by her son, a business manager who lives in Connecticut, and her daughter, a nurse, who lives nearby and holds a power of attorney to make health care decisions for her. In 1992, her son became trustee of an account originally set up by his father specifying the petitioner as a beneficiary and which was funded with \$50,000. The account was set up to automatically pay the petitioner \$300 per month. Approximately six years ago, the petitioner placed her residence in the name of herself and her son so it would go directly to him if she died.

2. On March 16, 2001, the petitioner left her home and was admitted to a long term nursing facility. She is not expected to return to her home to live. When her Medicare

benefits were about to run out, the facility contacted PATH to initiate a Medicaid application for her. The petitioner filed a written application on June 29, 2001 at which time an interview was conducted with the petitioner's son and daughter.

3. At the interview the petitioner's children reported that her assets were the house and several bank accounts, one of which contained at least \$5,000. The children also reported the "trust account" set up in 1992 and that the petitioner received monthly income from this account. No information was presented with regard to the exact amounts in any of these accounts. The specialist told the petitioner's children that they had to provide verification of the amounts in these accounts. She also told them that they would have to spend down to \$2,000 any amounts available in the bank accounts before their mother could be financially eligible for Medicaid. The petitioner's son stated that he understood this concept. The specialist told them not to spend any money from the "trust account" until she saw the trust terms and determined whether it was a countable resource. She explained that PATH would not reimburse the family for any amounts that they spent before the eligibility determination. The specialist suspected at that time that the corpus of the trust

might be an excludible resource with only the annuity counted as income. The petitioner's children had no idea at the time of application what kind of a "trust" it might be. The house was apparently excluded as an asset since it is jointly owned by the son.

4. Some verification was received within the next thirty days but several pieces were not forthcoming even after sixty days. Some of the slowness came from the fact that the petitioner's daughter was trying to obtain verification with little success. The specialist sent a written notice to the petitioner on September 4, 2001 specifically itemizing the verification still needed (some six items) and asking for receipt in ten days. At this point, the petitioner's son took over providing the verifications and was able to provide more information although, as he acknowledged, it still came in slowly. At least one bank verification was never received. The \$5,000 in one of the bank accounts was cashed out and paid to the nursing home on September 27, 2001. The only verification which the petitioner's son could provide on the "trust account" was the original document setting up the account in 1992 and showing the value to be \$50,000. It appears that some time later he was actually able to obtain a bank statement that was six months old showing \$37,000 in the

account. By the time that arrived, however, PATH had already reviewed the document and determined that it was an ordinary bank trust account and made a decision that all of the money (\$50,000) was available to the petitioner.

5. On November 19, 2002, PATH sent a notice to the petitioner saying that she was not eligible for Medicaid because she had more than \$2,000 in resources. The letter specifically referred to the \$50,000 in the trust account. The petitioner was advised that she might be eligible if she spent the excess money on "certain things like medical expenses" and that she should keep track of these expenditures. She was also specifically advised that she could reapply when her resources reached the \$2,000 level and that she could contact her worker for more information. The petitioner was referred to the back of the letter for important information which included her right to appeal the denial within ninety days.

6. The petitioner did not appeal that decision. Records subsequently submitted show that at the time of the application in July of 2001, the petitioner had about \$34,000 in the account. At the time of the denial decision in November of 2001, the petitioner had about \$25,0000 left.

7. The petitioner's son contacted the PATH worker in response to this decision on November 26, 2001 and she explained the necessity of spending-down his mother's current assets for her health care. Since the petitioner's son agreed that the amount in the "trust" account was well in excess of \$2,000, she told him "not to worry" that the amount on the notice did not reflect the actual current amount. She told him it would be revised when he filed a new application to show the actual amount available to her at that time.

8. The petitioner's son testified that he told the worker during their phone conversation on November 26, 2001 that he would be in Vermont in February and would review the situation with her again. The specialist does not recall that statement. The specialist wrote the petitioner's son a note following their phone discussion saying that the most current statement she had received from the "trust" was one from March 2001 showing that she had \$37,197 in the account. Although she acknowledged that it might be less now, she explained that it was still more than the \$2,000 resource level and since the petitioner still had possession of the money, the denial had to occur. She explained further that the petitioner only had to spenddown money she actually had (as opposed to the amount on the notice) and reiterated that when the petitioner

reapplied they would make sure that they had the exact amount. She appended a list of accounts that would still have to be verified when the petitioner re-applied so that her son could go about obtaining them. She advised him to talk with an attorney if he disagreed with the classification of the entire amount of the trust as a resource.

9. The petitioner's son claims that he took the worker's statement "not to worry" and her failure to remark about his plan to return in February as a sign that there was no urgency in filing a new application. There is no evidence, however, that the worker's remark "not to worry" was intended with regard to anything other than the assessment of the actual amount in the trust that was subject to spend-down. There is no evidence that the worker understood any remarks the petitioner's son may have made to indicate that he did not understand that his mother's date of eligibility was dependent upon the spend-down of the excess resource and re-application. On the contrary, the handwritten letter she sent to him after the conversation was an attempt to reinforce their conversation and makes it clear that spend-down and reapplication were essential to re-establishing eligibility.

10. In December, the petitioner spoke with an attorney in Connecticut who said he did not know Vermont law but

advised him to cash out the trust. The petitioner did nothing to cash it out or spend-down the money for almost two months. On January 22, 2002, the petitioner's son withdrew \$22,000 from the account to pay the nursing facility.

11. On February 12, 2002, the petitioner reapplied for Medicaid. This time, the petitioner's son supplied extensive verification of the amounts in all of the petitioner's accounts and verification of what the money had been used for although supplying the verification took about two months. He made arrangements to meet again with the PATH worker in April when he would return to Vermont. He also used \$1,500 to buy a burial contract in April of 2002. The petitioner was notified on May 6, 2002 that she had been found eligible for Medicaid and that the eligibility would be retroactive to November 1, 2001, three months before the date of her application.

12. The petitioner was also notified that she would be expected to pay a patient share for each month back to November 1, 2001. The amounts were calculated by adding together all of her income (which fluctuated between \$1,206 and \$1,506 depending on the month) and deducting a personal needs allowance of \$47.66, and medical allowances for her health insurance and Medicare premiums. The petitioner's son states that the wrong income was used for her Social Security

and pension amounts. Evidence in the file indicates that PATH may have indeed used the wrong Social Security figure for at least November of last year when her gross benefit was \$961.10, not \$986, the figure used by PATH. No evidence was offered verifying the gross Social Security income for the subsequent months. The petitioner also feels his mother should have received a home upkeep deduction to care for her home.

13. The petitioner appealed the May 6 eligibility notice on July 1, 2002. He claims that there was unnecessary delay in deciding the first eligibility claim because no one could establish if the "trust" was countable or not. He also believes he should have been told by the worker following the first denial that he needed to act quickly to re-establish eligibility and that he should have been advised not to let the matter languish until February of 2002. In general, he feels he should have been advised that he had to eliminate the "trust" as quickly as possible in order to establish his mother's resource eligibility.

ORDER

The decision of PATH regarding the onset date is affirmed. The decision regarding the patient share amount is

reversed and remanded for recalculation based on correct Social Security amounts for the time at issue.

REASONS

The Medicaid regulations adopted by the Department of PATH provide that an elderly or disabled individual can only be eligible if he or she has "countable resources" which do "not exceed the applicable Resource Maximum." Medicaid Manual (M)230. The current Resource Maximum is \$2,000 for a single person household. Procedures Manual (P) 2420C (1). "Resources" are defined as cash, liquid assets or any real or personal property that an individual owns and could convert to cash to be used for his/her support and maintenance. If an individual has the right, authority or power to liquidate the property or his/her share of it, it is considered a resource. If a property cannot be liquidated, it is not counted as a resource of the individual. M230.

Questions often arise as to whether money held in trust, as an annuity or in joint ownership is actually available for the support and maintenance of the Medicaid applicant and there are numerous rules dealing with these questions. See M201 et seq. If PATH determines that resources are countable and they are in excess of the \$2,000 maximum, the individual

"may qualify for Medicaid coverage by using (spending down) the excess amount." M400.

Individuals who want Medicaid are required to file an application for current assistance and a separate application for retroactive assistance which is available "for up to three calendar months prior to the month of application, provided that all eligibility criteria were met during the retroactive period to be granted." M112. Applicants are required to provide written verification to PATH of a number of items including their resources. M126. PATH takes the position that it will not reimburse applicants for out-of-pocket expenditures to their medical providers which occur while the application is pending. M152. PATH is required to make a decision within ninety days after the application date and a denial may take place if the "applicant fails to give necessary information or proofs asked for or takes longer than expected without explaining the delay." M121 and M122. If a denial takes place, the applicant is entitled to a written notice stating the reasons therefor and the right to appeal within ninety days. M141 and 142.

In this case, the petitioner initially sought retroactive coverage prior to her June 2001 application. At the time of her application she had at least \$5,000 in assets which were

clearly available to her and an unspecified but large amount in a non-descript "trust". Her representatives were told that she could not be eligible for Medicaid until she had under \$2,000 in resources and that she should spend down those assets which were clearly hers. She was asked to verify the amounts in the various accounts and to provide information on the terms of the "trust" account. Her representatives were warned not to spend money in any questionable accounts until they were ruled upon because the money would not be reimbursed if the accounts were later exempted. These explanations and requests were all in accord with the regulations cited above.

The petitioner was slow to verify her assets and was reminded in writing in early September of the items still needed by PATH. The petitioner, in fact, never verified some of those assets. When it became clear that the petitioner had more than \$2,000 in countable assets she was sent a denial letter and advised that she could reapply as soon as she spent down the excess amount. She was also advised that she could appeal that denial in ninety days. Again, these procedures were proper under the regulations cited above.

The petitioner never appealed that denial which she must have done by February 17, 2002. As such, the Board has no jurisdiction to determine whether the actions taken by PATH

with regard to the first application should have been affirmed or reversed. See Fair Hearing Rule 1, Fair Hearings No. 10,106, and 12,537.

With regard to the second application, the petitioner received all of the relief to which she could be entitled, namely current coverage under Medicaid and retroactive coverage for the three months preceding the month of application. The only issue remaining with regard to the coverage issue is whether the petitioner was misled by PATH with regard to the necessary timing of the reapplication which the petitioner's son waited to file until February of 2002. If she was misled, PATH could be estopped from claiming that her application was not filed until February.

The four elements of estoppel adopted by the Vermont Supreme Court are: "(1) the party to be estopped must know the facts; (2) the party to be estopped must intend that its conduct shall be acted upon or the acts must be such that the party asserting the estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped. Burlington Fire Fighters' Ass'n. v. City of Burlington, 149

Vt. 293, 299, 543 A2d 686, 690-91 (1988) as cited in Stevens v. Department of Social Welfare, 159 Vt. 408,421 (1992).

There is no question that PATH understands its eligibility requirements and has an obligation to communicate them to applicants. See Id. at 413. The evidence showed that the PATH worker did explain these requirements to the petitioner from at least the first date of her interview with the petitioner's children in June of 2001. The children were told at that time that Medicaid eligibility required spending down all resources to a level of \$2,000. After the petitioner provided the "trust" information to PATH, PATH told her in its written denial decision that the total amount of the "trust" would be considered an asset and that it was disqualifying until the amounts were spent on items such as medical care. This same information was also conveyed to the petitioner in the handwritten note sent by the worker to her son following the denial which again explained the spend-down process, the need to reapply and the verification requirements upon reapplication. There is no question that PATH intends applicants to be guided by and to act upon information such as the above.

PATH did not know, however, that the petitioner was confused about her rights with regard to an onset date for

Medicaid or the necessity of acting promptly with regard to a reapplication. The petitioner never indicated in any way that she did not understand the necessity of spending-down and reapplying as a prerequisite to starting her eligibility period. The only confusion which PATH and the petitioner discussed following the denial was with regard to the amount in the trust that had to be spent-down. It cannot be found, therefore, that PATH knew that the petitioner was confused about the timing of the reapplication and failed to correct the misperception.

It cannot be said either that the petitioner was ignorant of the true facts. Her representatives knew that she had to have less than \$2,000 to become Medicaid eligible. They knew that the "trust" might be considered a total resource to her. They knew that she had to spend-down all resources she owned before she could become eligible. And they knew after November 19, 2001 that the petitioner had to reapply for benefits because PATH had determined that she had excess resources. If she had questions with regard to the effect of the denial of her first application with regard to her onset date of eligibility, she never raised them with PATH.

In spite of the information on eligibility given to her by the PATH worker, the petitioner did not provide information

to PATH for over two months regarding the "trust" nor did she take any steps on her own to determine herself if the "trust" was a resource owned by her until after the denial was sent to her. After the denial and at the suggestion of PATH, the petitioner's son spoke to an attorney who advised him that the money was available to his mother and that it should be spent. Even then, the petitioner did not spend down the money and reapply for almost two months. These facts indicate that the petitioner's children either were or should have been aware that it was to their mother's benefit to spend-down her income and to reapply as soon as possible. Any financial detriment¹ which their mother suffered was not caused by the children's reliance on anything PATH said but rather on their erroneous assumptions and failure to act promptly on advice they had received from both PATH and their attorney. These facts do not support a finding that "estoppel" should occur under the four criteria set out by the court.

Finally, the petitioner has challenged the calculation of the "patient share" amount. Patient share is calculated by adding together all of the gross income received by a Medicaid

¹ The petitioner presumably had some sort of financial detriment from this delay although she did not present evidence of the same at hearing. As she had at least \$42,000 when she entered the nursing home in March and

recipient minus medical bills which must be paid from that income and a small personal needs allowance. M413, 414, and 415. Deductions are not allowed for "home upkeep" unless the recipient is expected to return to the home within six months which is not the situation here. M413.1. Because the evidence indicated that PATH may not have used the correct amount of Social Security income from 2001, the matter is remanded for a recalculation of the patient share.

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the home cost approximately \$6,000 per month, she could have paid for over seven months of her stay before needing Medicaid support.