
In the Matter of the Appeal of
[REDACTED]

from a determination by the Albany County
Department of Social Services

:
:
: **DECISION**
: **AFTER**
: **FAIR**
: **HEARING**
:
:

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on September 17, 2015, in Albany County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[REDACTED]

For the Social Services Agency

Lorraine Richards, Fair Hearing Representative

ISSUE

Was the Agency correct in changing the types of prescribed over the counter medicines the Appellant can use towards his spenddown?

FINDINGS OF FACT

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant had been in receipt of Medical Assistance with a spenddown.
2. By notice dated August 19, 2015 the Agency determined to change the prescribed over the counter medicines allowed towards the Appellant's spenddown.
3. On August 26, 2015, the Appellant requested this fair hearing.

APPLICABLE LAW-MEDICAID SPENDDOWN

Administrative Directive 87 ADM-4 provides detailed instructions regarding the appropriate application of medical bills to offset excess income so that an individual can become eligible for Medical Assistance. This offsetting process is called "spenddown". Said Directive further provides that whenever a spenddown is indicated, the Agency is required to include a copy of the letter "Explanation of the Excess Income Program" along with the Notice to the recipient whenever an acceptance, intended change, denial, or discontinuance indicates a spenddown liability situation. Administrative Directive 87 ADM-4 provides that some over-the-counter drugs and medical supplies such as bandages and dressings may be applied to offset determined excess income if they have been ordered by a doctor or are medically necessary. Bills for cosmetics and other non-medical items may not be so applied.

The Medicaid Reference Guide (MRG) provides in the chapter on Income, pages 295-298, as follows:

Description: Excess income or "spenddown" is available net income in excess of an individual's Medicaid level or standard. When determining Medicaid eligibility for A/Rs who are SSI-related, ADC-related, under age 21 or pregnant, any available monthly income in excess of the Medically Needy Level or Medicaid Standard whichever is higher is considered available to meet the cost of medical care and services.

Policy: When the available income of the A/R is greater than the Medically Needy Level or Medicaid Standard whichever is higher, the excess is considered available to meet the cost of medical care and services. In order to become eligible for Medicaid, ADC-related, SSI-related, under age 21 or pregnant A/R(s) may:

- pay or incur medical expenses equal to or greater than their excess income; or
- pay the amount of the excess income directly to a local district; or
- use a combination of paid or incurred medical bills and pay directly to the local district.

A/Rs who meet their excess income must spend down to the appropriate Medically Needy Income Level or Medicaid Standard whichever is higher. A/Rs are not permitted in any instance to spend down income to the Federal Poverty Levels. This includes applicants applying for coverage under the Medicaid Buy-In Program for Working People with Disabilities (MBI-WPD).

The use of medical expenses to offset excess income is known as "spenddown". The direct payment of excess income to the local district is known as "Pay-In".

A/Rs who can participate in the Excess Income Program include:

Individuals who are in a federally participating category (SSI-related, ADC-related or a child under the age of 21) and SSI-related are who also eligible under the appropriate Medicaid Resource Level.

NOTE: SSI-related individuals eligible to participate in the Excess Income Program who also have excess resources may spend down their excess resources. Bills must be applied to excess resources first. Any remaining bills or portions of bills may then be used to reduce excess income.

Excess Income or Spenddown is met by:

Showing the LDSS either a paid bill or an incurred bill.

Types of bills that can be used to meet the Excess/ Spenddown:

Medicare and other health insurance deductibles or other coinsurance charges;

Necessary medical and remedial services that are recognized under State law but are not covered by Medicaid, e.g. chiropractic care; and

Necessary medical and remedial services that are covered under the Medicaid Program.

Such expenses include:

Medical Expenses

Medical Transportation

Prescription Drugs

Surgical Supplies/Medical Equipment/Prosthetic Devices

Non-Participating Provider Services (Once Medicaid coverage is authorized, the recipient MUST receive services from Medicaid providers in order for the Medicaid payment to be made. Credit or refunds will NOT be provided for covered services rendered to the recipient by non-participating providers.)

Over-the-counter drugs when ordered by a physician

Medical expenses paid/incurred by a public program, e.g. ADAP and EPIC

Copays

Non-covered services

Medical expenses for an individual for whom the A/R is legally responsible

Medical expenses from a legally responsible relative whose income is available to the

A/R

When the A/R presents a combination of bills, the local district uses its judgment in selecting the most appropriate alternatives in order to satisfy program requirements.

360-7.5 Method of payment for medical care

Department Regulations at 18 NYCRR 360-7.5(a) set forth how the Medical Assistance Program will pay for medical care. Generally the Program will pay for covered services which are necessary in amount, duration and scope to providers who are enrolled in the Medical

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Assistance program, at the Medical Assistance rate or fee which is in effect at the time the services were provided.

APPLICABLE LAW-ADEQUATE NOTICE

In general, a recipient of Public Assistance, Medical Assistance or Services (including child care and supportive services) has a right to a timely and adequate notice when the Agency proposes to discontinue, suspend, reduce or change the manner of payment of such benefits. An adequate, though not timely, notice is required where the Agency has accepted or denied an application for Public Assistance, Medical Assistance or Services; or has increased the Public Assistance grant; or has determined to change the amount of one of the items used in the calculation of a Public Assistance grant or Medical Assistance spenddown; or has determined that an individual is not eligible for an exemption from work requirements. 18 NYCRR 358-3.3(a). In addition, pursuant to 18 NYCRR 358-3.3(d), an adequate, though not timely, notice is required for a Public Assistance or Medical Assistance recipient when, for example, the Agency has factual information confirming the death of the recipient; the Agency has received a clear written statement from the recipient that he or she no longer wishes to receive Public Assistance or Medical Assistance; the Agency has reliable information that the recipient has been admitted to an institution or prison; the recipient's whereabouts are unknown and mail has been returned to the Agency; or the recipient has been accepted for Public Assistance or Medical Assistance in another district.

In general, a SNAP recipient has a right to a timely and adequate adverse action notice when the Agency proposes to take any action to discontinue, suspend or reduce the recipient's SNAP benefits during the certification period. 18 NYCRR 358-2.3; 18 NYCRR 358-3.3(b). An adequate, though not timely, action taken notice is required where the Agency has accepted or denied an application for SNAP benefits; or has increased the SNAP benefits; or has determined to change the amount of one of the items used in the calculation of the SNAP benefits. 18 NYCRR 358-3.3(b). However, pursuant to 18 NYCRR 358-3.3(e), there is no right to an adverse action notice when, for example, the change is the result of a mass change, the Agency determines that all members of the household have died or the household has moved from the district or when the household has failed to reapply at the end of the certification period.

A timely notice means a notice which is mailed at least 10 days before the date upon which the proposed action is to become effective. 18 NYCRR 358-2.23.

An adequate notice is a notice of action, an adverse action notice or an action taken notice which sets forth the action that the Agency proposes to take or is taking, and if a single notice is used for all affected assistance, benefits or services, the effect of such action, if any, on a recipient's other assistance, benefits or services. In addition, the notice must contain:

- o for reductions, the previous and new amounts of assistance or benefits provided;
- o the effective date of the action;

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- o the specific reasons for the action;
- o **the specific laws and/or regulations upon which the action is based;**
- o the recipient's right to request an agency conference and fair hearing;
- o the procedure for requesting an agency conference or fair hearing, including an address and telephone number where a request for a fair hearing may be made and the time limits within which the request for a fair hearing must be made;
- o an explanation that a request for a conference is not a request for a fair hearing and that a separate request for a fair hearing must be made;
- o a statement that a request for a conference does not entitle one to aid continuing and that a right to aid continuing only arises pursuant to a request for a fair hearing;
- o the circumstances under which public assistance, medical assistance, SNAP benefits or services will be continued or reinstated until the fair hearing decision is issued;
- o a statement that a fair hearing must be requested separately from a conference;
- o a statement that when only an agency conference is requested and there is no specific request for a fair hearing, there is no right to continued public assistance, medical assistance, SNAP benefits or services;
- o a statement that participation in an agency conference does not affect the right to request a fair hearing;
- o the right of the recipient to review the case record and to obtain copies of documents which the agency will present into evidence at the hearing and other documents necessary for the recipient to prepare for the fair hearing at no cost;
- o an address and telephone number where the recipient can obtain additional information about the recipient's case, how to request a fair hearing, access to the case file, and/or obtaining copies of documents;
- o the right to representation by legal counsel, a relative, friend or other person or to represent oneself, and the right to bring witnesses to the fair hearing and to question witnesses at the hearing;
- o the right to present written and oral evidence at the hearing;
- o the liability, if any, to repay continued or reinstated assistance and benefits, if the recipient loses the fair hearing;

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- o information concerning the availability of community legal services to assist a recipient at the conference and fair hearing; and
- o a copy of the budget or the basis for the computation, in instances where the social services agency's determination is based upon a budget computation.

18 NYCRR 358-2.2

DISCUSSION

The Appellant requested this hearing for review of the Agency's determination to change the prescribed over the counter medicines allowed towards the Appellant's spenddown.

At the hearing, the Agency Representative (AR) stated that the Appellant is receiving Medicaid with a spenddown of \$119.00 per month. The AR explained that the Appellant met his spenddown in July 2015 and at that time was notified that there was going to be a change in what over the counter medical expenses would be allowed in the future. In August 2015 the Appellant submitted receipts for over the counter medicines along with the doctor's prescription for the items. The AR stated that by notice dated August 19, 2015 the Agency notified the Appellant that the Agency would no longer be allowing the use of "[REDACTED]" to be counted towards his spenddown. The AR summarized that cough drops, aspirin products, vitamins and antacids would not be covered despite the fact that the Appellant had a doctor's prescription for these over the counter medicines. The Agency submitted an evidentiary packet into evidence. The packet contained copies of the Appellant's prescriptions for the over the counter items.

In response, the Appellant stated that he requested a hearing because he wanted clarification as to why these items would no longer be counted towards his spenddown. He noted that he had a doctor's prescription for all the medicines in question. In response, the AR indicated that the policy has changed.

Based on the evidence presented at the hearing, the Agency's determination cannot be sustained. As the above applicable law section states, when an Agency determines to discontinue or amend a recipient's Medical Assistance, the recipient has a right to an adequate notice. Among other things the notice must contain the specific laws and/or regulations upon which the action is based. In the instant case, the notice states the Regulation relied on by the Agency is 360-7.5 (a). Yet this Regulation does not detail any changes regarding prescribed over the counter medicines used to meet a spenddown. It is also noted, when questioned at the hearing, the AR was unable to articulate the specifics of this alleged change that the Agency relied on in making its determination.

It is important to note, that the above-applicable law section contains the portion of the Medicaid Reference Guide dealing with spenddowns. It details what types of bills can be used to

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meet the monthly spenddown, and one of the items on the list is, “*over-the-counter drugs when ordered by a physician.*”

The Agency has failed to prove that its determination to change the prescribed over the counter medicines the Appellant may use to meet his spenddown was correct. Accordingly, the Agency is reversed.

DECISION (AND ORDER)

The Agency’s determination to change the types of prescribed over the counter medicines the Appellant can use towards his spenddown was not correct and is reversed.

The Agency is directed to continue allowing the Appellant to use prescribed over the counter medicines to meet his monthly spenddown.

Should the Agency need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant promptly in writing as to what documentation is needed. If such information is requested, the Appellant must provide it to the Agency promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
09/23/2015

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink that reads "Robin Stroup". The signature is written in a cursive, flowing style.

Commissioner's Designee