

[REDACTED]

APPELLANT

v.

MARYLAND DEPARTMENT OF

HEALTH

* BEFORE MICHELLE W. COLE,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MDH-MCP-11B-18-37541

* * * * *

DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSION OF LAW
ORDER

STATEMENT OF THE CASE

On October 2, 2018, the Appellant applied for Medical Assistance (MA) benefits under the Home and Community-Based Waiver Program (HCB Waiver)¹ of the Maryland Department of Health (Department). On October 29, 2018, the Department’s Eligibility Determination Division (EDD) notified the Appellant that it had denied the application because her income exceeded the maximum allowable limit for the HCB Waiver. The Appellant filed an appeal on November 9, 2018. Code of Maryland Regulations (COMAR) 10.01.04.02A.

I held a hearing on February 1, 2019,² at the [REDACTED]

[REDACTED] COMAR 10.01.04.06. [REDACTED] Esquire, represented the Appellant, who was

¹ The “Home and Community-Based Options Waiver . . . authorizes the waiver of certain specified statutory requirements limiting coverage for home and community-based services under the Maryland Medical Assistance Program.” Code of Maryland Regulations (COMAR) 10.09.54.01B(10).

² The Appellant’s request to postpone her first hearing date of January 4, 2019 was granted.

present. COMAR 10.01.04.12(B). The Department was represented by [REDACTED]

Medicaid Program Supervisor, EDD.

At the commencement of the hearing, the Appellant made an oral motion for summary decision in her favor. The Appellant presented one exhibit and the Department presented one exhibit. I admitted both exhibits into evidence on the motion. After hearing arguments by the parties, I denied the motion on the record.

The Administrative Procedure Act, the Procedures for Fair Hearing Appeals under the Maryland State MA Program, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 10.01.04; COMAR 28.02.01.

ISSUE

Did the Department properly determine that the Appellant was ineligible for the HCB Waiver because her available income exceeded the applicable limit for eligibility?

SUMMARY OF THE EVIDENCE

Exhibits

Motion

I admitted the following exhibits on the Appellant's behalf in support of her Motion:

- | | |
|-----------------|--|
| App. Mot. Ex. 1 | Photocopy of Letter from the EDD to the Appellant, October 29, 2018, page 1 of 3 |
| App. Mot. Ex. 2 | Photocopy of Letter from the EDD to the Appellant, October 29, 2018, page 1 of 4 |

I admitted the following exhibit on the Department's behalf on the Appellant's Motion:

- | | |
|------------------|---|
| Dept. Mot. Ex. 1 | 2 Letters from the EDD to the Appellant, October 29, 2018, with attachments |
|------------------|---|

Hearing on the Merits

I admitted the following exhibit on the Department's behalf for the hearing:

Dept. Ex. 1 Summary for Appeal Hearing, dated January 25, 2019 (p. 1), with the following attachments:

- Notice of Hearing, December 31, 2018 (p. 2)
- Letter from the EDD to the Appellant, October 29, 2018, with attachments (pp. 3-6)
- Letter from the EDD to the Appellant, October 29, 2018, with attachments (pp. 7-9)
- Application, received October 2, 2018 (pp. 10-26)
- [REDACTED] Banking Statement, September 14, 2018 (pp. 27-28)
- State Online Query, printed October 5, 2018 (p. 29)
- Narrative, various dates (pp. 30-31)
- Maryland Code and COMAR (pp. 32-42)

I admitted the following exhibits on the Appellant's behalf for the hearing:

App. Ex. 1 Medicaid Home and Community-Based Services Waiver Program Participant Assessment, January 29, 2019

App. Ex. 2 Letter of Medical Necessity, January 22, 2019

App. Ex. 3 Letter from [REDACTED] M.D., July 25, 2016

App. Ex. 4 Letter from [REDACTED] January 16, 2015

App. Ex. 5 Letter from [REDACTED] M.D., June 1, 2015

App. Ex. 6 Letter from [REDACTED] M.D., April 3, 2015

App. Ex. 7 Letter from [REDACTED] M.D., September 23, 2014

App. Ex. 8 Letter from [REDACTED] M.D., November 3, 2014

App. Ex. 9 Letter from [REDACTED] M.D., September 23, 2014

App. Ex. 10 Letter from [REDACTED] M.D., November 4, 2014

App. Ex. 11 Letter from [REDACTED] M.D., November 3, 2014

App. Ex. 12 Letter from [REDACTED] M.D., November 1, 2014

App. Ex. 13 Letter from [REDACTED] M.D. September 16, 2014

App. Ex. 14 Statement of Diagnosis, October 26, 2012

App. Ex. 15 Letter from [REDACTED] M.D., January 30, 2019

App. Ex. 16 Plan of Service Summary, created January 4, 2019

Testimony

Mr. [REDACTED] read the Summary and testified on behalf of the Department.

The Appellant testified and presented the following witness: [REDACTED]

FINDINGS OF FACT

Based on the evidence presented, I find the following facts by a preponderance of the evidence:

1. The Appellant is a fifty-seven year-old individual.
2. The Appellant suffers from several health conditions, including spinal muscular atrophy, spinal cord injury, and pressure wounds. She is a quadriplegic and requires the use of a wheelchair for mobility.
3. The Appellant has a master's degree and maintained gainful employment for several years. She has earned several distinguished awards as a [REDACTED] and [REDACTED].
4. The Appellant retired in [REDACTED] when a pressure wound developed.
5. For a period of time, the Appellant received care in a hospital and then moved to her parent's home, where she resided with her parents and a disabled sibling.
6. In 2016, the Appellant moved to her own home, where she received services through the Community First Choice Program to renovate her home and to assist with her activities of daily living.
7. On October 2, 2018, the Appellant submitted an application for MA benefits under the HCB Waiver.

8. The Appellant's monthly income consists of Social Security Income and a [REDACTED] Pension, as follows:

Social Security	\$1,244.00
[REDACTED] Pension	<u>\$1,730.84</u>
Total:	\$2,974.84

(Dept. Ex. 1 at 7).

9. For the purpose of determining eligibility, the Appellant is entitled to a \$20.00 general disregard, which brings her monthly income to \$2,954.84.

10. The Appellant's income exceeds the maximum monthly income for one person to be financially eligible for the Waiver program. ($\$2,954.84 - \$2,250.00 = \$704.84$).

11. The Department sent two notices to the Appellant on October 29, 2018, informing the Appellant that she was ineligible for services under the HCB Waiver because her income exceeded the program limit, and detailing the income which placed her over the limit.

DISCUSSION

Title 10, Subtitle 09, Chapter 24 of COMAR governs eligibility for the Maryland MA Program. The eligibility of aged, blind, or disabled individuals is determined under the criteria for "MAGI Exempt"³ coverage groups, COMAR 10.09.24.01B(2), whose financial eligibility is based on the income and resources of the applicant's assistant unit. COMAR 10.09.24.06A.

Regulations found under COMAR 10.09.26 provide community based services for developmentally disabled individuals; the HCB Waiver is one such program. In order to meet the financial requirements of the programs, individuals must meet the eligibility criteria provided

³ "MAGI" means modified adjusted gross income, as calculated for purposes of determining eligibility for insurance affordability programs under the Affordable Care Act." COMAR 10.09.24.02-1B(5). "MAGI exempt coverage group" means a coverage group as described under Regulation .03 of this chapter whose eligibility is not determined by MAGI or by the Maryland Health Benefit Exchange." COMAR 10.09.24.02-1B(6).

for in COMAR 10.09.26.12B and for the MA program for aged, blind or disabled people under COMAR 10.09.24. There are two groups of MA recipients, the categorically needy and the medically needy.⁴ As a disabled person, the Appellant is in the categorically needy group. COMAR 10.09.24.02B(11). Financial eligibility for MA is determined on the basis of the countable resources and income of members of the assistance unit. COMAR 10.09.24.10B(1).

An applicant meets the income limits as a categorically needy individual if his or her income does not exceed 300 percent of the payment rate for Supplemental Security Income (SSI) benefits. Md. Code Ann., Health-Gen. § 15-132(c)(3)(iii) (2015).⁵ The 2018 SSI rounded monthly rate for an individual was \$750.00; 300 percent of that amount is \$2,250.00 per month.⁶ The 2019 SSI rounded monthly rate for an individual is \$771.00; 300 percent of that amount is \$2,313.00 per month.⁷

Section 15-132 of the Health-General Article also sets forth specific eligibility criteria for the HCB Waiver, which include in pertinent part:

(c) The Department's waiver shall include the following:

(3) Financial eligibility criteria which include:

(i) The current federal and State medical assistance long-term care rules for using services provided by a nursing facility, per §§ 1902, 1919, and 1924 of the federal Social Security Act, and applicable regulations adopted by the Department;

(ii) Medically needy individuals using services provided by a nursing facility under the current federal and State medical assistance eligibility criteria governed by regulations adopted by the Department and § 1919 of the federal Social Security Act; and

⁴ “‘Categorically needy’ means aged, blind, or disabled persons; or families and children, who are otherwise eligible for Medical Assistance and who meet the financial eligibility requirements for a [Family Investment Program, Supplemental Security Income,] or Optional State Supplement.” COMAR 10.09.24.02B(11). “‘Medically needy’ means persons who are otherwise eligible for Medical Assistance, who are not categorically needy, and whose income and resources are within the limits set under the State Plan.” COMAR 10.09.24.02B(38).

⁵ Unless otherwise noted, all references to the Health-General Article hereinafter cite the 2015 Replacement Volume.

⁶ See Soc. Sec. Admin., SSI Federal Payment Amounts, <https://www.ssa.gov/oact/cola/SSIamts.html>.

⁷ Soc. Sec. Admin., SSI Federal Payment Amounts for 2019, <https://www.ssa.gov/oact/cola/SSI.html>.

(iii) Categorically needy individuals with income up to 300% of the applicable payment rate for supplemental security income

Health-Gen. § 15-132(c)(3)(i-iii). Under the HCB Waiver, certain services are provided to adults in the community as an alternative to the recipient's admission to a nursing facility. *See* COMAR 10.09.54.03. An applicant must meet financial criteria in order to be eligible for an HCB Waiver, and with certain exceptions [not relevant here], "[a]ll provisions of COMAR 10.09.24 which are applicable to aged, blind, or disabled institutionalized persons are applicable to waiver applicants and participants" COMAR 10.09.54.03C(2). An individual whose income exceeds the applicable income limit is ineligible for a HCB Waiver.

In this case, the Appellant contends that the Department should find her eligible for the HCB Waiver notwithstanding her income. At the hearing, she did not dispute the Department's evidence. Rather, she argued that, because the costs to the State for her care in a nursing facility would be substantially more than the costs for her to receive HCB Waiver services in her home, the State should find her eligible for this program or modify the criteria to establish eligibility. She expressed her need for services under the HCB Waiver in order to remain in her home, and stated she has many expenses that the Department did not consider when it made its determination. The Department asserts that the Appellant is not eligible for the HCB Waiver because her income exceeds the program limits.

There is no clear statutory or regulatory authority establishing which party bears the burden of proof in this type of case. *See* COMAR 10.01.04.01 through 10.01.04.12 (procedural rights, advice, and notifications). Under State common law principles, the burden of proof lies with the party asserting the affirmative of an issue before an administrative body or the party asking to change the status quo. *Md. Comm'r of Labor & Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996). The Appellant, as an applicant for HCB Waiver services, has the burden of

proof to show that the Department improperly denied her eligibility for Waiver services. The burden is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014). To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so," when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting Maryland Pattern Jury Instructions 1:7 (3d ed. 2000)). For the following reasons, I find that the Appellant has not met her burden in this case.

The Department presented documents to establish that the Appellant's monthly income as of October 2018 was \$2,974.84.⁸ (Dept. Ex. 1 at 28). This amount exceeds the income limit for the HCB Waiver program. While I sympathize with the Appellant's circumstance, I must apply the regulations to determine whether the Department's decision was correct. Certainly, the Appellant has established a need for services. I also understand her concern for her future care without the services provided through the HCB Waiver. Unfortunately, in this case, the Appellant's income exceeds the applicable income limit by \$704.00, once the \$20.00 credit is applied. While this amount may seem small compared to the costs of services that may be incurred for resident care in a nursing facility, it nevertheless disqualifies the Appellant for the HCB Waiver. There is no applicable exemption to excuse the income requirement. Further, while medical costs may be considered in determining eligibility for some MA programs, an individual whose income exceeds the applicable income limit is ineligible for the HCB Waiver. As such, the Department's decision is correct.

I also am not persuaded by the Appellant's argument that she is entitled to a modification of the program requirements to establish eligibility under *Olmstead v. L. C. ex rel. Zimring*, 527

⁸ In her application, the Appellant reported monthly income of \$2,977.62 (SSI \$1,158.00 + Pension \$1,819.62). I have calculated the income based on the income as reflected on the Appellant's [REDACTED] Statement. (Dept. Ex. 1 at 28).

U.S. 581, 607 (1999). In *Olmstead*, the Supreme Court held that public entities must provide community-based services to an individual when it is appropriate, not opposed by the individual, and it can be accomplished by a reasonable modification of the rules, policies, or procedures of the program in question. The Appellant requests that I modify the financial eligibility requirements and find that she is eligible for the HCB Waiver so she can continue residing in her home in the community. The Appellant pointed out the savings to the State if she is allowed to reside in the community versus the cost to maintain her in a nursing home.

Unlike the plaintiffs in *Olmstead*, who were confined to mental institutions, the confinement that the Appellant is opposed to is a nursing home, a confinement not as restrictive as a mental institution. Also, unlike the plaintiffs in *Olmstead*, the Department has not discriminated against the Appellant. The Department reviewed the Appellant's Waiver application, as it would any other applicant. The Appellant was medically qualified for nursing facility level of care but her income exceeded the eligibility limits for the HCB Waiver. Thus, the Department determined that she did not meet the financial eligibility requirements for the HCB Waiver. Ignoring the Appellant's income to allow her to stay in the community is not a "reasonable modification," it is treating the Appellant differently from other individuals whose income exceeds the eligibility limits, which would run afoul of other federal mandates against discrimination. The Department's decision to deny the Appellant eligibility for the HCB Waiver because her income exceeded the program limit was proper and consistent with the law.

CONCLUSION OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Department's Eligibility Determination Division properly determined that the Appellant is not eligible for a Home and Community-Based Options Waiver because her income exceeds

the program limit for eligibility. Md. Code Ann., Health Gen. § 15-132(c)(3) (2015); COMAR 10.09.24.06; COMAR 10.09.54.03C(2).

ORDER

I hereby **ORDER** that the decision of the Maryland Department of Health to deny the Appellant's application for a Home and Community-Based Options Waiver is **AFFIRMED**.

Signature Appears on Original

March 11, 2019
Date Decision Issued

Michelle W. Cole
Administrative Law Judge

MWC/dlm
#178670

REVIEW RIGHTS

This is the final decision of the Maryland Department of Health. A party aggrieved by this final decision may file a written petition for judicial review with the Circuit Court for Baltimore City, if any party resides in Baltimore City or has a principal place of business there, or with the circuit court for the county where any party resides or has a principal place of business. Md. Code Ann., State Gov't § 10-222(c) (Supp. 2018). The original petition must be filed in the circuit court within thirty (30) days of the date of this decision, with a copy to David Lapp, Office of the Attorney General, Suite 302, 300 W. Preston St., Baltimore, MD 21201. Md. Rules 7-201 through 7-210.

The petition for judicial review should identify the Maryland Department of Health, which administers the Medicaid program, as the agency that made the decision for which judicial review is sought. The address of the Maryland Department of Health should be included on the petition: 201 W. Preston St., Room 511C, Baltimore, MD 21201.

A separate petition may be filed with the court to waive filing fees and costs on the ground of indigence. Md. Rule 1-325. No fees may be charged to Medical Assistance Program recipients, applicants, or authorized representatives for transcription costs or for preparation or delivery of the record to the circuit court. The Office of Administrative Hearings is not a party to the judicial review process.

Copies Mailed To:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]