

Matter of Cutolo v Daines

2009 NY Slip Op 33352(U)

June 12, 2009

Sup Ct, New York County

Docket Number: 115275/08

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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In the Matter of the Application of
LORRAINE CUTOLO,

Petitioner,

Index No. 115275/08

For Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

**DECISION and
ORDER**

RICHARD F. DAINES, M.D., Commissioner,
New York State Department of Health, and
ROBERT DOAR, Commissioner, New York City
Human Resources Administration,

Respondents.

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KORNREICH, SHIRLEY WERNER, J.:

Petitioner Lorraine Cutolo brings this Article 78 proceeding and seeks a judgment vacating the decision of the New York State Department of Health (DOH), which, after an evidentiary hearing, affirmed the New York City Human Resources Administration's (HRA) decision to deny Petitioner's application for Residential Health Care Medical Assistance.

Respondents oppose.

Background

In August 2006, Petitioner entered the New York Center for Rehabilitation, a nursing home, to receive long term care. Four months later, on December 1, 2006, she signed a personal services contract (PSC) with her two sons, Arthur and Joseph Cutolo. *Id.* Petitioner agreed to pay her sons \$297,000 in a lump sum. In exchange, they would supervise her personal and medical care and manage her finances for the rest of her life on an as-needed basis. The PSC explicitly noted that neither Petitioner nor her estate had any right to any refund of any money

paid to the sons. The PSC was made retroactive to August 1, 2006 and the record shows that payment had been made on August 18 of that year.

On January 3, 2007, Petitioner applied for Residential Health Care Medical Assistance, with a requested pick-up date of January 1, 2007. On February 26, 2007, HRA denied her application. It issued a second denial on April 2, 2007. Petitioner then requested a hearing before DOH.

DOH issued its decision on August 19, 2008 in after a Fair Hearing (DAFH). DOH affirmed the denials on the ground that the payment that Petitioner had made to her children pursuant to the PSC was an uncompensated transfer and rendered Petitioner ineligible for Medicaid for a certain penalty period. The administrative law judge (ALJ) cited GIS 07/MA019 (GIS), a DOH memorandum that declared that a personal services contract between a patient and a caretaker which required an up-front lump sum payment for lifetime services was void for the purposes of Medicaid if it did not provide for a partial refund in the event of the contract's early termination. Any payment made under such a contract was an uncompensated transfer of assets. The GIS similarly invalidated contracts that only guaranteed services on an as-needed basis. Since the PSC violated both of these criteria, the ALJ found Petitioner's payment to be an uncompensated transfer.

The ALJ also held that even if he were to disregard the GIS he could still find the PSC to be invalid and the payment to be uncompensated. He cited a state administrative directive which stated that that there is a presumption that "services provided by the children [of a Medicaid applicant] are intended to be without compensation." Pet. Ex. B 27 citing N.Y. Dep't of Soc. Servs., 96 ADM-8 p. 11 (Mar. 29, 1996), *available at* http://www.health.state.ny.us/health_care/medicaid/publications/docs/adm/96adm8.pdf. The presumption can be rebutted by "tangible evidence." *Id.*

After a review of the evidence and arguments, the ALJ held that Petitioner had failed to rebut the presumption set forth in the administrative directive. The ALJ found that the absence of an early termination clause in the PSC created a situation where the brothers had no incentive to fulfill their side of the bargain by providing services, and he doubted the ability of Petitioner to enforce the PSC on her own. *Id.* at 28. (“From an *evidentiary point of view*, absent such language, there is no incentive for the caregivers to comply with their part of the bargain”) (emphasis added). Furthermore, the PSC was signed four months after Petitioner entered the nursing home, and many of the services promised by the brothers were already being performed by the nursing home. These features indicated that the PSC was made “solely for the foreseeable prospect of applying for [Medicaid] and preserving the [Petitioner]’s cash.” *Id.* at 29. The ALJ concluded that the payments were an uncompensated asset transfer. Ms. Cutolo then filed an Article 78 petition with this Court, challenging the DAFH.

Discussion

This Court is authorized to review administrative determinations for errors of law. N.Y.C.P.L.R. 7803(3). Petitioner challenges the DAFH on this basis, alleging that DOH erred in relying on the GIS. Petitioner argues that the ALJ treated the GIS as a binding rule even though the memorandum had not gone through the notice and comment process required by the State constitution. Furthermore, Petitioner argues that the GIS’s criteria for compensated transfers is more restrictive than the ones used for the Supplemental Security Income program, a violation of federal law. Consequently, Petitioner contends, the GIS was not a valid rule and should not have been relied upon by the ALJ.

However, as noted, the ALJ also based his decision on administrative directive 96 ADM-8, finding that none of Petitioner’s evidence rebutted the presumption set forth therein. The cited portion of this directive actually reproduces material found in the State Medicaid Manual, a

publication by the federal government's Health Care Financing Administration. Health Care Financing Administration, *State Medicaid Manual* Transmittal § 3258.1 [A] [1]. An agency determination that is in accord with the HCFA guidelines is entitled to deference. *Brown v. Wing*, 93 N.Y.2d 517, 525 (1999). Thus, Petitioner's challenges to the legitimacy of the GIS are irrelevant, since the DAFH can be upheld on other grounds.

Petitioner also alleges that the ALJ acted in an arbitrary and capricious manner in finding that the services guaranteed by the Contract were only *partially* duplicative of the services provided by the nursing home but concluding that the *entire* payment was uncompensated. Petitioner argues that by finding that only part of the services were covered by nursing home care, the ALJ recognized that there were some services that were not covered by nursing home care. Petitioner, therefore, concludes that she received value for at least those non-duplicated services and the ALJ ought to have concluded that Petitioner received fair market value for at least a portion of her payment. To do otherwise, she argues, would be "internally inconsistent" and "incoherent." (Pet'r's Reply Mem. of Law 4.)

However, a review of the DAFH shows that Petitioner's characterization of the ALJ's finding is incorrect. Had the ALJ's reasoning been that the duplicated services were valueless and that Petitioner did not receive fair market value for them, he might have needed to determine the value of the non-duplicated services by remanding to the agency. *See* N.Y. Soc. Serv. § 366.5(e)(2) (McKinney Supp. 2009). Instead, the ALJ used the duplication of services, in conjunction with the timing of the PSC's drafting and execution, as proof that the PSC itself was only entered into with the intent to protect Petitioner's assets. The DAFH reads:

The [PSC] . . . does not constitute tangible evidence that the services provided by the [Petitioner]'s two caregiver sons was for valuable consideration based on the above reasons. A review of the caregiver agreement submitted shows that the contract was entered into over three months after the Appellant entering [sic] a Residential Health Care facility and approximately four weeks prior to the Appellant's Medicaid application filing on January 3, 2007 and *part of the*

services expected to be performed under the terms of the caregiver agreement are already being performed by the skilled nursing system and built into the total cost of care. (emphasis added)

(Pet. Ex. B 30-31.)

Had the ALJ found that the PSC constituted tangible evidence that could rebut the presumption against a compensated transfer, then it might have been inconsistent to recognize that some services were not already covered by nursing home care. The ALJ, here, concluded that the PSC was *not* a valid rebuttal. This matter, as a result, is distinguishable from *Carolla*, the fair hearing cited by the Petitioner in her administrative appeal, where the DOH had determined that the contract therein *was* a valid rebuttal. *Carolla*, FH 3565848H at 7 (July 23, 2001).

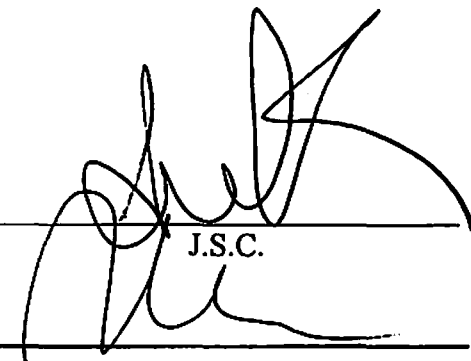
In sum, it is clear that the ALJ never drew the conclusions that Petitioner alleges he erroneously drew. The alleged error must first exist for the Court to decide that it was arbitrary and capricious. Similarly, Petitioner's claim cannot raise the question of whether the ALJ's conclusions were based on substantial evidence. Consequently, referral to the Appellate Division is unwarranted. Accordingly, it is

ORDERED and ADJUDGED that petitioner's application seeking to vacate DOH's August 19, 2008 order is denied and the proceeding is dismissed.

FILED
JUL 01 2009
NEW YORK
COUNTY CLERK'S OFFICE

Date: June 12, 2009
New York, New York

ENTER:



J.S.C.

Clerk