



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
4190 Washington Street, West
Charleston, WV 25313

Earl Ray Tomblin
Governor

Michael J. Lewis, M.D., Ph.D.
Cabinet Secretary

December 16, 2011

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held December 15, 2011. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your Long Term Care Medicaid due to an uncompensated transfer of assets.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

Eligibility for the Long Term Care Medicaid program is based on current policy and regulations. These regulations provide that an uncompensated transfer of assets for the sole purpose of qualifying for Long Term Care Medicaid will result in a period of ineligibility (WV Income Maintenance Manual § 17.10).

The information submitted at your hearing revealed that the Claimant's policies with Employees Life Company are an inaccessible endowment life insurance policy and are not considered an uncompensated transfer of assets.

It is the decision of the State Hearing Officer to **reverse** the proposal of the Department to terminate your Long Term Care Medicaid.

Sincerely,

Cheryl Henson
State Hearings Officer
Member, State Board of Review

cc: Chairman, Board of Review
Misty Fielder, Kanawha DHHR / ----- / [REDACTED]

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW**

IN RE: -----,

Claimant,

v.

ACTION NO.: 11-BOR-2368

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,**

Respondent.

DECISION OF STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing for ----- . This hearing was held in accordance with the provisions found in the Common Chapters Manual, Chapter 700 of the West Virginia Department of Health and Human Resources. This fair hearing was convened on December 15, 2011.

It should be noted here that the Claimant's benefits under the Long Term Care Medicaid program have continued pending a decision.

II. PROGRAM PURPOSE:

The program entitled Long Term Care Medicaid (nursing facility services) is a medical service which is covered by the State's Medicaid Program. Payment for care is made to nursing homes which meet Title XIX (Medicaid) standards for the care provided to eligible recipients. To qualify for Nursing Home Care, an individual must meet financial and medical eligibility criteria.

III. PARTICIPANTS:

-----, Claimant's representative
-----, Claimant's witness
-----, Claimant's witness – testified by telephone

Misty Fielder, Department's representative

Presiding at the Hearing was Cheryl Henson, State Hearing Officer and a member of the Board of Review.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether or not the Department's proposal to terminate Claimant's Long Term Care Medicaid is correct.

V. APPLICABLE POLICY:

WV Income Maintenance Manual § 11.1 and 17.10 B

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Brief overview of Policy Number L103410 - \$47,237.00 from Employees Life Company (Mutual)
- D-2 Brief overview of Policy Number L097809 - \$74,372.00 from Employees Life Company (Mutual)
- D-3 5 Year Pure Endowment Policy Illustration for Policy L103410
- D-4 5 Year Pure Endowment Policy Illustration for Policy L097809
- D-5 WV Income Maintenance Manual § 17.10.B

Claimant's Exhibits:

- C-1 Fax dated December 8, 2011, excerpts of Policy Number L097809

VII. FINDINGS OF FACT:

- 1) The Claimant purchased a Single Premium Endowment Life Insurance policy (D-2, D-4, and C-1) on November 22, 2010. The one-time premium amount for the policy was \$74,000 with a maturity date of November 22, 2015.

The Claimant applied and was found eligible for Long Term Care (LTC) Medicaid during December 2010. The Claimant's insurance policy was deemed by the Department at that time to be a life insurance policy and the action to acquire the policy during November 2010 was not considered to be an uncompensated transfer of assets.

- 2) The Claimant purchased another Single Premium Endowment Life Insurance policy (D-1, D-3,) on May 28, 2011, after the sale of her home. The one-time premium amount for the policy was \$47,000 with a maturity date of May 28, 2016. This transaction was

also not considered by the Department at the time to be an uncompensated transfer of assets.

- 3) The Department's representative, Misty Fielder, stated that she is employed as an Economic Service Worker with the Department and that she has specialized in Long Term Care eligibility for several years. She stated that when the Claimant first applied for the program, the Claimant provided the cover letters from the company in verification of the policy information and that the Department did not apply the transfer of asset penalty at that time because those policies were looked at as life insurance policies; however, she added that this year during a review of eligibility, the Department requested all pages of both policies as verification, and that in reviewing those policies and after receiving recent training regarding asset policy, she determined that the Claimant's purchase of the policies was considered the purchase of a balloon annuity because there is a "balloon payment at the end." She acknowledged that the policies do not include the word "annuity" in any part of them, and that it is shown as a Single Premium Pure Endowment Life Insurance Contract. She stated that the Department's policy does not specifically address "Endowment" policies, but added that the Department looks at them as annuities because they have balloon payments at the end and they do not have monthly payments issued as income; also because they do not list a life insurance cash surrender [cash-in] value on them. She stated that for life insurance policies, the Department considers the "cash-in" value as an asset. She also confirmed that if someone owns a life insurance policy, no transfer of asset penalty is applied. Ms. Fielder stated that she has never worked in the life insurance field and does not consider herself to be an expert on the subject.
- 4) Policy in the West Virginia Income Maintenance Manual, §17.10, B, 7, a, (1), provides in pertinent part:

Annuity-Related Transfers

(1) Institutional Spouse is Annuitant

Establishment of an annuity is treated as a transfer of resources, unless the annuity meets the following criteria:

- * The individual disclosed to the State any interest the individual or his spouse has in any annuity;
- * The state is named as the remainder beneficiary, or as the second remainder beneficiary after a community spouse or minor or disabled adult child, for an amount at least equal to the amount of Medicaid benefits provided when the annuity is purchased by an applicant/recipient or spouse;
- * The annuity was purchased by or on behalf of the individual and one of the following applies.

- * The annuity is considered either:
 - * An individual retirement annuity (according to Section 408 (b) of the Internal Revenue Code of 1986 (IRC); or
 - * A deemed individual Retirement Account (IRA) Under a qualified employer plan (according to Section 408§ of the IRC).

OR

- * The annuity is purchased with proceeds from one of the following:
 - * A traditional IRA (IRC Section 408a); or
 - * Certain account or trusts which are treated as traditional IRAs (ORC Section 408§(c)); or
 - * A simplified retirement account (IRC Section 408§(p)); or
 - * A simplified employee pension (IRC Section 408§(k)); or
 - * A ROTH IRA (IRC Section 408A).

OR

- * The annuity meets all of the following requirements:
 - * The annuity is irrevocable and non-assignable; and
 - * The annuity is actuarially sound; and
 - * The annuity provides payments in approximate equal amounts with no deferred or balloon payments.

- 5) Ms. Fielder stated that she reviewed the Claimant's policies to determine if they met any of the requirements found in the Income Maintenance Manual under Section 17.10, B, 7, a, (1), for annuities to be exempted from the transfer of asset penalty. She stated that she determined that the Claimant did not meet the criteria for exemption because she did not name the State as the remainder beneficiary after a community spouse or minor or disabled child, for an amount at least equal to the amount of Medicaid benefits

provided when the annuity is purchased, and because there is a balloon payment at the end of the policy.

- 6) ----- of West Virginia Medicaid Advisors testified that he has worked in the field for 10 years and that he was hired by the Claimant to help her qualify for Medicaid. He stated that when the Claimant became approved for Medicaid in December 2010, she was the owner of one of the policies now in question. He added that at the time of approval, the policy was considered by the Department to be life insurance and therefore a countable resource with nothing counted as an asset. He stated that the Claimant is the owner of the policies and that no transfer has occurred. He stated that if the Claimant is denied Medicaid she has no way to pay for her nursing home care because she has no access to the funds of the policies. He contends that the policies are not annuities and have no income provisions whatsoever because they are life insurance policies. Furthermore, he contends that the annuity policy cited by the Department does not apply. He added that when the policies mature, the benefit would be paid to the owner – the Claimant; should she become deceased prior to the maturity date, the money would be paid to her named beneficiary. He added that all life insurance policies mature at some point.
- 7) -----, Senior Vice President of Employees Life Company, testified that he has worked for the company for thirty-three (33) years. He stated that the contracts purchased by the Claimant from his company are considered life insurance and not annuities. He stated that his company filed the policies with the State of West Virginia as life insurance policies and that Employees Life Company pays a higher premium tax to the State for them than it would pay for an annuity policy. He added that when the policies mature, the payment would be paid to the owner – in this case the Claimant, if she is living; otherwise, it would be paid to her named beneficiary. In comparing the difference between life insurance and annuities, he explained that an annuity generates a stream of income to the owner of the annuity, and the Claimant's policy does not generate any income nor can money be withdrawn from the policy prior to the maturity date. He stated the Claimant's policies are single premium endowments, and are considered life insurance. Furthermore, he stated that the Claimant's policies are inaccessible and cannot be transferred or cancelled (D-4).
- 8) WV Income Maintenance Manual § 11.1, defines:

ANNUITY - An investment contract or agreement, which gives the right to receive fixed, periodic payments, either for life or a term of years.

LIFE INSURANCE - A contract whereby one party insures his own life or the life of another party for a specified amount of money.

CASH SURRENDER OR CASH-IN VALUE - The amount of cash received by the owner of the policy, if redeemed before death of the insured.

FACE VALUE - The specified amount payable on death of the insured.

TERM INSURANCE - Policies which do not have a cash surrender value.

WHOLE LIFE INSURANCE - Insurance policies which have a cash surrender value.

- 8) WV Income Maintenance Manual § 17.10 B (1) states:

The following policy is used for transfers of resources made on or after 2/8/06.

1. Definitions

For purposes of this item (item B.), the following definitions apply.

- Fair Market Value (FMV): An estimate of the value of a resource, if sold at the prevailing price at the time it was actually transferred.

For a resource to be considered transferred for FMV, or to be considered transferred for valuable consideration, the compensation received for the resource must be in a tangible form, with intrinsic value. A transfer for love and consideration, for example, is not considered a transfer for FMV. Also, while relatives and friends legitimately can be paid for care they provide to the individual, it is presumed that services provided for free, at the time, were intended to be provided without compensation. Therefore, a transfer to a relative for care provided in the past normally is not a transfer of assets for FMV. However, an individual may rebut this presumption.

VIII. CONCLUSIONS OF LAW:

- 1) Policy specifies that an annuity is an investment contract, or agreement, which gives the right to receive fixed periodic payments, either for life or a period of years.
- 2) Policy specifies that a life insurance policy is a contract whereby one party insures his own life or the life of another party for a specified amount of money.
- 3) The question for this hearing is whether the policies owned by the Claimant are life insurance policies or annuities. The Department has indicated that if the policies are life insurance policies, no transfer of asset penalty would apply.
- 4) The totality of the evidence supports that the two policies owned by the Claimant are life insurance policies and not annuities. The Department's policy definition of an annuity is not consistent with the circumstances of these policies. The Claimant does

not receive fixed periodic payments from them. The testimony from Mr. Leach is given greater weight as he is considered to be an expert in the field of insurance policies based on his thirty-three (33) years of involvement in the insurance industry. His testimony regarding the policies being life insurance policies and not annuities is found to be credible and sound. His testimony that the company pays a higher tax premium for life insurance policies is compelling considering that the company is paying a higher tax premium on the Claimant's policies because they are considered life insurance policies. It is reasonable that a life insurance company would not pay a higher premium tax for a policy than was necessary.

- 5) Based on the above findings, the Department was incorrect in its decision to apply a transfer of asset penalty to this case which caused the Claimant's eligibility to be terminated.

IX. DECISION:

It is the decision of the State Hearing Officer to **reverse** the proposal of the Department to terminate Claimant's Long Term Care Medicaid.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 16th day of December, 2011.

**Cheryl Henson
State Hearing Officer**