
Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-1027-77

CIVIL ACTION

ON APPEAL FROM FINAL AGENCY

LENA GILFONE,

Appellant,

-vs-

STATE OF NEW JERSEY, DEPARTMENT
OF HUMAN SERVICES, DIVISION OF
MEDICAL ASSISTANCE AND HEALTH
SERVICES,

Respondents.

ACTION BY THE DIVISION OF MEDICAL
ASSISTANCE AND HEALTH SERVICES NEW
JERSEY DEPARTMENT OF HUMAN SERVICES

SAT BELOW

Thomas M. Russo, Acting Director
Division of Medical Assistance and
Health Services

BRIEF ~~AND APPENDIX~~
FOR

APPELLANT

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PROCEDURAL HISTORY

On May 10, 1977, a fair hearing was held by the Division of Medical Assistance and Health Services, New Jersey Department of Human Services, in the matter of Lena Gilfone. Record Item No. 10. 10

On or about July 18, 1977, the hearing officer issued a report of the fair hearing, which contained his conclusions and recommendations. Record Item No. 10.

A statement of exceptions was submitted to the hearing officer, on behalf of plaintiff Gilfone, on or about August 24, 1977. Record Item No. 11. 20

In response to the statement of exceptions, the hearing officer issued an addendum to his report on or about September 19, 1977. Record Item No. 12.

On October 7, 1977, the Acting Director of the Division of Medical Assistance, New Jersey Department of Human Services issued a final agency decision in the matter of Lena Gilfone, adopting the hearing officer's report in its entirety. Record Item No. 9. 30

On November 21, 1977, a notice of appeal was filled by plaintiff Lena Gilfone. 40

STATEMENT OF FACTS

Appellant Lena Gilfone is a Medicaid recipient who has been a nursing home patient at the Essex County Geriatrics Center since 1971. Record Item No. 10.

On or about October 21, 1975, the nursing home received an \$1886.60 check from the Social Security Administration which was made payable to Ms. Gilfone and which was a lump sum payment of widow benefits for the sixteen month period, June 1974 through September 1975. The Essex County Geriatrics Center held the check for ten months, from October 1975 to August 1976. Record Items Nos. 3a, 6.

On or before July 2, 1976, the Essex County Welfare Board advised the nursing home to hold the money for Ms. Gilfone's burial expense. Record Item No. 1.

On or about August 12, 1976, the nursing home sent the check to the Bureau of Claims and Accounts, Division of Medical Assistance and Health Services, New Jersey Department of Human Services. The Bureau advised the Essex County Geriatrics Center that the money was excess income under the Medicaid program which had to be applied to the cost of Ms. Gilfone's nursing home care. Record Items Nos. 2, 6, 10.

ARGUMENT

POINT I

THE SOCIAL SECURITY ACT RAISES A BROAD
BAR PREVENTING THE N.J. DIVISION OF
MEDICAL ASSISTANCE FROM RECOUPING THE
RETROACTIVE LUMP SUM SOCIAL SECURITY
BENEFITS IN THE CASE AT BAR

10 The instant case involves a lump sum payment of widow's
benefits (Record Item No. 3a)* received by the appellant under
Title II of the Old Age Survivor's and Disability Insurance Program,
42 U.S.C.A. § 301 et.seq., popularly known as the Social Security
20 Act. In the final agency decision below, the Director of the
Division of Medical Assistance and Health Services affirmed the
holding of the hearing officer that the Division of Medical Assistance
could recover this lump sum payment.

30 Federal law, 42 U.S.C.A. § 407, prohibits New Jersey
from using any legal process to recover Social Security payments.
The language of the statute is unqualified and absolute. It states
in pertinent part:

40 ...none of the moneys paid or payable or
rights existing under this subchapter
shall be subject to execution, levy,
attachment, garnishment or other legal
process, or to the operation of any
bankruptcy or insolvency law. 42 U.S.C.A.
§ 407, 49 Stat. 624 (1939)

50 The statutory language "none of the monies paid... shall
be subject to legal process" could not be clearer. Where, as here,
a statute is plain and unambiguous, there is no occasion for
construction and the statute must be given effect according to its
plain and obvious meaning. Ex Parte Collett, 337 U.S. 55, 58-61
69 S. Ct. 944. 93 L.Ed. 1207 (1949). See also Packard Motor Co.

* Appellant and Respondent filed a joint record. References
are to the numbered items therein.

v. National Lab. Rel. Bd., 330 U.S. 485, 492, 67 S. Ct. 789, 91 L.Ed. 1040, 1050 (1947); United States v. American Trucking Assos., 310 U.S. 534, 543, 60 S. Ct. 1059, 84 L.Ed. 1345, 1351 (1940) (and cases there cited) reh. den. 311 U.S. 724, 61 S. Ct. 53 85 L.Ed. 472 (1940).

10 The only instance in which a statute is open to construction is when the language is ambiguous or requires interpretation. As stated by the Supreme Court of the United States, "....as this court has so often held, where the words are plain there is no room for construction" Osaka Shosen Kaisha Line v.
20 U.S., 300 U.S. 98, 101, 57 S. Ct. 356, 81 L.Ed. 532 (1936).

 Where the language of a statute is clear, it has been presumed conclusively to express the legislative intention, and the plain meaning of the statute is to be followed. In United States v. American Trucking Assos., the United States Supreme
30 Court stated:

 There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislature. In such cases we have followed their plain meaning. Supra. at 310 U.S. 534, 543. See also United States v. Hill, 248 U.S. 420, 39 S.Ct. 143, 63 L.Ed. 337 (1919).

40 Section 407 is not ambiguous and the above mentioned principles of statutory construction must be applied. The plain language of the statute prohibits the State from recovering the
50 lump sum payment at issue.

 The United States Supreme Court has interpreted 42 U.S.C.A.

§ 407 and held that it prohibited the State of New Jersey from recouping lump sum retroactive Social Security payments.* Philpott v. Essex County Welfare Board, 409 U.S. 413, 93 S. Ct. 590, 34 L.Ed. 2d 608 (1973).** In a plainly worded unanimous opinion the Supreme Court said that 42 U.S.C.A. § 407

10 ...imposes a broad bar against the use of any legal process to reach all social security benefits. That is broad enough to include all claimants, including a State. Philpott, supra. 409 U.S. at 417.

Philpott clearly applies to the instant case. Appellant is a medicaid recipient who received a lump sum Social Security payment of \$1,886.60. This payment was a widow's benefit, authorized under Title II of the Social Security Act and protected by 42 U.S.C.A. § 407. Appellant contends that the payment was recovered by New Jersey's "use of legal process" which thereby violated the command of 42 U.S.C.A. § 407.

30

*

The case involved a recipient of Essex County Welfare who had been required to sign a reimbursement agreement in which he promised to repay the board for advances made to him. The Welfare Board commenced an action to reach federal disability payments which had been received by the welfare recipient.

**

40 The principles of the Philpott decision have been applied to prevent the repayment of Social Security benefits to a state by a patient receiving care at a State mental health facility. McAuliffe v. Carlson, 386 F. Supp. 1245 (D.C. Conn. 1975); to prevent the enforcement of a welfare regulation which treated Social Security benefits received by a minor child as available to meet the needs of an AFDC recipient, Johnson v. Harder, 512 F.2d 1188 (2d Cir. 1975); and to prevent the enforcement of a regulation calling for income attribution of Social Security benefits from a non-institutionalized spouse to a spouse confined to a long-term care facility. Manfredi v. Maher, 435 F. Supp. 1106 (D. Conn. 1977).

10 The "use of any legal process" has been interpreted to include within its broad meaning the use of administrative compulsion to recoup funds. In Manfredi v. Maher, 435 F. Supp. 1106 (D. Conn. 1977), the District Court found as a lesser included holding that "...overwhelming administrative coercion is not beyond the meaning of the term 'other legal process' in § 407." Id. at 1115. See also Randle v. Beal, - F. Supp. - (Civil Action No. 73-1709) (E.D. Pa. May 17, 1976), rev'd on other ground sub nom. Fanty v. Department of Public Welfare, 551 F.2d 2 (3rd Cir. 1977).

20 The administrative coercion involved in Manfredi was the state of Connecticut's practice of reducing an institutionalized patient's Medicaid benefits in anticipation of contributions from the non-institutionalized spouse. Manfredi v. Maher, Id. at 1115. The administrative coercion employed against appellant in the instant case, was nothing less.

30 Appellant's lump sum Social Security payment was received in October, 1975. Record Item Nos. 3a and 6.* The money was held by the nursing home at which appellant was a patient until on or about August 12, 1976. Record Item Nos. 2 and 6. At that time, the New Jersey Division of Medical Assistance and Health Services
40 decided that it was entitled to recover the entire payment as excess income. Record Item Nos. 2 and 10 at 2. The nursing home then forwarded the money despite knowledge of a protest by the Appellant's family who had been advised by the Essex County Welfare Board that they could retain these funds. Record Item No. 10 at 2.

50 *

Respondents filed a statement of items comprising the record on appeal on or about December 29, 1977. All references are to the numbered items therein.

In fact, Appellant contended that she had never been asked to endorse the check for payment. Record Item No. 11 at 2. In response to a request by appellant's daughter, a fair hearing was held and a decision rendered denying appellant her retroactive benefits, (Record Item Nos. 4 and 10), thereby placing the imprimatur of the State administrative hearing process upon the action of the Division of Medical Assistance in taking the benefits.

Not only did the New Jersey Division of Medical Assistance take the benefits after they had been held for ten months by the nursing home and after the appellant's family had protested, but then the hearing officer sanctioned these actions by rendering an opinion concluding that "the decision of the Division...to recover Lena Gilfone's social security check is hereby affirmed." Record Item No. 10 at 8. These actions taken by agencies of the State are clearly within the broad meaning of "the use of any legal process" envisioned by § 407.

The hearing officer sought to distinguish the case of Philpott v. Essex County Welfare Board, supra., on two grounds. First he stated that the Welfare Board in Philpott held the status of a creditor, implying (if not holding) that the Division of Medical Assistance was not acting as a creditor in the instant case. This distinction fails for several reasons.

It appears from the Hearing Officer's decision that the New Jersey Division of Medical Assistance recouped the money as a creditor of Appellant at least in part, because "Medicaid had been subsidizing the patient in the nursing home since 1971, and was entitled to the money." Record Item No. 10 at 2. More importantly, the Philpott decision does not limit itself to a bar on creditors,

and the court expressly rejected such a narrow interpretation of the statute.

In Philpott, the New Jersey Supreme Court had found that at times an entity is a creditor for purposes of exemption statutes and at other times it is not. Essex County Welfare Board v. Philpott, 59 N.J. 75, 85 (1971). In rejecting that contention the Supreme Court of the United States stated:

But § 407 does not refer to any 'claim of creditors'; it imposes a broad bar against the use of any legal process to reach all social security benefits. That is broad enough to include all claimants, including a state. Philpott v. Essex County Welfare Board, supra. at 409 U.S. 413, 417.

Under Philpott, 42 U.S.C.A. § 407 protects against all claimants, not merely claims by creditors; the fact that New Jersey was a "claimant" is sufficient to prohibit the recovery of appellant's lump sum Social Security payment.

The second basis of distinction from Philpott which the hearing officer made was that "in Philpott the recipient was living in the community, not in an institutional setting such as Lena Gilfone." Record Item No. 10 at 7. However, the Philpott decision has already been applied by at least one federal district court, to an institutional setting. See Manfredi v. Maher, supra. at 1115.

In addition, the hearing officer's decision completely disregarded section 407 and gave the statute no effect when Social Security recipients are institutionalized. The statute should apply regardless of whether or not the recipient is in a nursing home; as its protection must be liberally construed.

The Social Security Act is in the nature of remedial legislation and is to be liberally construed, Haberman v. Finch,

418 F.2d 664 (2nd Cir.) (1972); Rodriguez v. Celebrezze, 349 F.2d 494 (1st Cir.) (1965); Pippin v. Richardson, 349 F. Supp. 1365 (M.D. Fla.) (1972), and narrow technicalities or a narrow and legalistic interpretation are to be avoided, Schroeder v. Hobby, 222 F.2d 713 (10th Cir.) (1955), as not in furtherance of the intent of Congress and the remedial and beneficent purposes for which the Act was enacted. Brown and Barrett v. United States, 330 F.2d 692 (6th Cir.) (1964); Ewing v. Black, 172 F.2d 331, 6 A.L.R. 2d 948 (6th Cir.) (1949); Henry Broderick, Inc. v. Squire, 163 F.2d 980 (9th Cir.) (1947); Ketcherside v. Celebrezze, 209 F. Supp. 226 (D.C. Kan.) (1962); Wray v. Folsom, 166 F. Supp. 390 (D.C. Ark.) 1958). Or, in the words of the Fifth Circuit (per Rives, Bell and Ainsworth, JJ.) in Pleasant v. Richardson, 450 F.2d 749 at 753 (1971): the "...Act should be interpreted '...in such a manner that its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation.'" citing Haberman v. Finch, supra.

Furthermore, this court should not base an implied exemption from the statute upon the ground that the recipient lived in an institution. Courts may not read exceptions into statutes where no exceptions were intended. Nor can they engraft artificial distinctions upon a statute that is clear on its face for the purpose of achieving a particular policy. Hilton v. Sullivan, 334 U.S. 323, 339, 68 S. Ct. 1020, 92 L.Ed. 1416, (1948); Packard Motor Co. v. National Lab. Rel. Bd., 330 U.S. 485, 490, 67 S. Ct. 789, 97 L.Ed. 1040, 1050, (1947); Jefferson v. Hackney 406 U.S. 535, 92 S. Ct. 1724, 32 L.Ed. 2d 285, (1972). Lastly, not only is there no exception in 42 U.S.C.A. § 407, but there is no exception in

the Medicaid statute, 42 U.S.C.A. § 1396 a et. seq., which supports the hearing officer's decision. The hearing officer relied upon 42 U.S.C.A. § 1396 a (10)(c) as the basis for New Jersey's Medicaid program for nursing home patients. Record Item No. 10 at 5. Nowhere in that section nor in any provision of the Medicaid statute is there language denying efficacy or applicability to § 407. While the hearing officer relied upon a federal regulation, discussed infra at Point II, he failed to give any effect whatsoever to the statutory command of 42 U.S.C.A. § 407.

In sum, the Philpott decision applies to the instant case in which a lump sum social security check had been received by appellant and Philpott as well as 42 U.S.C. § 407 is controlling so as to prevent the state from reaching the benefits.

A. THE AUTHORITIES RELIED ON BY THE HEARING EXAMINER ARE NOT DISPOSITIVE OF THE QUESTION OF WHETHER APPELLANT CAN RETAIN THE RETROACTIVE LUMP SUM SOCIAL SECURITY BENEFITS.

The hearing officer cited the case of Friedman v. Berger, 547 F.2d 724 (2nd Cir. 1976) and the federal regulation providing for a minimum of \$25.00 per month personal needs income for Medicaid recipients located in nursing homes. 45 C.F.R. § 248.3 (b)(7)(i). Under these authorities, he found that all income above the personal needs allowance (PIE) must be applied to the cost of nursing home care and he concluded that the State had a right to collect appellant's "income" in excess of the \$25.00 minimum. Record Item No. 10 at 7.

Friedman v. Berger, supra., a non New Jersey case, involved the issue of "how much personal income of 'medically needy' medicaid recipients...can be required to be applied toward

the cost of institutional care as a condition of their receiving Medicaid." Id. at 726. The court held that a \$28.50 "spend down" requirement did not violate Federal law. Id. at 732.

There are several reasons why the reasoning of the Friedman case is inapplicable to the case at bar. First, the Friedman case involves an eligibility requirement for the medically needy program which controls the disposal of current income. In the instant case, receipt of a lump sum retroactive check was involved, and an initial question must be resolved as to whether it represented "income" or "resources." That question is addressed at Point II, infra.

Second, and most important, the Friedman court did not in any way consider the Social Security statute 42 U.S.C. § 407, which is involved here. The case is neither dispositive nor authoritative since the applicability of the statute was not involved.

Third, assuming arguendo that the retroactive check is income in the month received, the choice of ineligibility must be offered to a Medicaid recipient in order to retain income which has been received. The Friedman v. Berger case involved only whether Medicaid recipients could retain more than a \$28.50 personal needs income per month while remaining eligible.

The Medicaid program is voluntary. The manual governing the program provides:

PURPOSE AND INTENT OF THE MEDICAID ONLY PROGRAM

Choice of Program by Applicant

An aged, blind or disabled person who desires Medicaid and does not wish to receive a money payment may apply for the Medicaid Only Program. To qualify

for this program he/she must have financial eligibility as determined by the regulations and procedures set forth in this manual. (Emphasis supplied)
N.J.A.C. § 10:94-1.2.

10 Neither the welfare board nor the Division of Medical Assistance can force a recipient to remain eligible and turn over any income received in a particular month. To so rule would fly in the face of the above regulation.

The Appellant must be given this option of ineligibility for the period in which the lump sum payment is considered income. The effect of this option is discussed at Point II.

20 Finally, Harold Dreschel, the caseworker herein from the Essex County Welfare Board, suggested in his testimony that the family should repay any money in excess of \$1,500.00 so that Appellant would not lose her eligibility for Medicaid. He considered the check to be a resource from the time received. Record Item No. 10 at 2.
30 If the check is found to be a "resource," Friedman could not apply since it deals only with "income" regulations under the Medicaid program.

In sum, although the reasoning of Friedman v. Berger regarding the "income" allowable to a medicaid recipient may be
40 valid, it is not dispositive of the case at bar because it involves the provision of the Social Security Act prohibiting the taking of benefits, it involves the receipt of a lump sum retroactive social security check, not current income as in Friedman, and because ineligibility is an option which must be offered to
50 Appellant.

POINT II

THE HEARING OFFICER'S DETERMINATION
THAT APPELLANT'S SOCIAL SECURITY
PAYMENT WAS INCOME IS ERRONEOUS,
ARBITRARY, AND NOT BASED ON SUFFICIENT
CREDIBLE EVIDENCE

A threshold issue in this case is whether an \$1886.60 Social Security payment to appellant Gilfone is income or a re- 10
source for the purposes of New Jersey's Medicaid program. The
hearing below determined that all of the money was income in
excess of the \$25.00 per month that appellant is allowed, accord-
ing to Medicaid regulations, for her personal incidental expenses
(PIE) as an institutionalized patient in a nursing home. The 20
hearing officer affirmed the decision by the New Jersey Division
of Medical Assistance and Health Services to recover the entire
amount of Ms. Gilfone's Social Security payment because of the
Medicaid requirement "to collect all income over the PIE allow-
ance and apply it to the cost of nursing home care." Record 30
Item No. 10 at 8.

Appellant contends that the Social Security payment
is not income but a resource under New Jersey's Medicaid program
and that the hearing officer's decision is erroneous, arbitrary
and not based on sufficient credible evidence. Appellant further 40
contends that, even if all of the \$1886.60 is considered income,
there is no evidence whatsoever that the New Jersey Division of
Assistance and Health Services is entitled to recover the entire
amount.

50

At issue is a lump sum payment to Appellant Lena Gil-
 fone of \$1886.60 from the Social Security Administration. The
 Social Security Award Certificate, dated October 21, 1975, states
 that the payment was a widow's benefit for the sixteen (16)
 month period June 1974 through September 1975. Record Item No. 3a.
 The Essex County Geriatrics Center, the nursing home at which 10
 Ms. Gilfone has been a patient since 1971, held the money for
 the subsequent ten (10) months, from October 1975 to August 1976.
 Record Item No. 6. The record indicates that, at least by July
 2, 1976, the Essex County Welfare Board had instructed the home
 not to dispose of the money as excess income but to hold it for 20
 Appellant Gilfone's burial expense. Record Item No. 1. The
 nursing home then wrote Mr. Herbert Glover, Chief of the Bureau
 of Claims and Accounts, New Jersey Division of Medical Assistance
 and Health Services. Mr. Glover responded that he considered
 the money to be income which had to be applied to the cost of Ms. 30
 Gilfone's nursing home care. Record Item No. 2. The nursing
 home, despite the conflicting instructions from the Essex County
 Welfare Board and from the Bureau of Claims and Accounts, sent
 the money to the latter agency on or about August 12, 1976.
 Record Item No. 10 at 2.* 40

*
 The record is silent as to whether Ms. Gilfone made an intelli-
 gent, knowing and voluntary endorsement of her Social Security
 check. See Record Item No. 12 at 2.

As an institutionalized patient in a nursing home, Appellant's Medicaid eligibility is governed by the Medicaid Only Manual, N.J.A.C. §§ 10-94-1.2(a); 10:94-1.3(b); 10:94-3.14.* A resource is defined, in pertinent part, as:

[A]ny real or personal property (that is, asset) which is owned by the applicant...and which would be converted to cash to be used for his/her support and maintenance. Both liquid and nonliquid resources shall be considered in the determination of eligibility.... N.J.A.C. § 10:94-4.2.

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The Manual provides that a liquid resource is:

An accessible resource which can be liquidated or negotiated within 20 working days such as, but not limited to, cash, demand deposits, time deposits, United States bonds, securities, and notes receivable.... N.J.A.C. § 10:94-4.6(a).

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Appellant maintains that the \$1886.60 payment from Social Security is a resource within the meaning of the Medicaid Only Manual.

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The Medicaid Only Manual, N.J.A.C. § 10:94-4.35, expressly provides for a \$25.00 per month personal needs allowance before any determination of excess income, a requirement which the hearing officer only considered in terms of federal law and regulations. Although the hearing officer did not discuss the New Jersey Regulations, he recognized that federal law "allows institutionalized individuals to receive medical assistance.... [and] New Jersey does have in effect this type of program for nursing home patients." Record Item No. 10 at 8. The Medicaid Only Manual is referred to in the Addendum to the Hearing Officer's Report. See Record Item No. 12 at 2.

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A. The Standard Of Judicial Review Over An
Administrative Decision Is The Substantial
Credible Evidence Test

It has long been the law in New Jersey that:

Administrative action quasi-judicial
in character is void if a hearing is
denied; if that granted was "inadequate
or manifestly unfair"; if the finding
was contrary to the "indisputable
character of the evidence", or if the
facts do not, as a matter of law, support
the order made. Interstate Commerce
Commission v. Louisiana & Nashville R.R.
Co., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed.
431 (1913). In re Plainfield-Union Water
Co., 11 N.J. 382, 393 (1953).

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A seminal case in the area of administrative law was In re Larson,
17 N.J. Super. 564 (App. Div. 1952), where the court stated that
the purposes of judicial review were to determine if an adminis-
trative adjudication "offends the State or Federal Constitution,
is ultra vires the statutory grant, is unsupported by adequate
evidence, or is unreasonable, unjustly discriminatory, arbitrary
or capricious." Id. at 570. In his concurring opinion, then
Judge Brennan summarized the duty of reviewing courts:

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The measure of our duty is to set
aside any administrative decision
when we "cannot conscientiously
find that the evidence supporting
that decision is substantial, when
viewed in the light that the record
in its entirety furnishes... The
substantiality of evidence must
take into account whatever in the
record fairly detracts from its
weight." Universal Camera Corp.
v. N.L.R.B., 340 U.S. 474, 95 L.Ed.
456 (1951). In re Larsen (Brennan,
J., concurring), supra, at 577.

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Arbitrary and capricious administrative action means will-
ful and unreasoning action, without consideration for or in dis-
regard of a rational basis. Bayshore Serv. Co. v. Dep't. of Env.,

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N.J., 122 N.J. Super. 184 (Ch. Div. 1973). It is a fundamental of due process that an administrative decision must be rationally founded upon adequate supporting evidence, Abelsons, Inc. v. Newark, 83 N.J. Super. 205 (App. Div. 1964), and when administrative agencies fail to sufficiently ground their ultimate conclusions and findings of fact, they have acted arbitrarily, 10
Application of Howard Savings Institution of Newark, 32 N.J. 29 (1960). The standard as to whether an agency has adequately grounded its decision upon a rational basis has been denominated a test of "substantial credible evidence," Parkview Village Assoc. v. Bor. of Collingswood, 62 N.J. 21, 34 (1972). 20

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B. There Is No Substantial
Credible Evidence In The
Record That The \$1886.60
Payment Is Income Under
New Jersey's Medicaid Program.

At the hearing Mr. Harold Drechsel, Appellant's case-
worker from the Essex County Welfare Board, testified that she was
entitled to keep the lump sum check and that "the family repay
any money in excess of \$1,500 so that the appellant would not lose
her eligibility for Medicaid." Record Item No. 10 and 2. Since
Medicaid eligibility is to be terminated if an individual's countable
resources exceeds \$1,500, N.J.A.C. §10:94-4.19, it is clear that
the Essex County Welfare Board had determined that all of the
\$1886.60 was a resource. Mr. Drechsel also submitted a memorandum
from the Director of the Essex County Welfare Board which set forth
agency procedure as follows: "On all pending claims for all types
of Social Security benefits, follow-up is to be maintained as with
any other potential resource...." (emphasis added) Record Item
No. 1a.

The only testimony or evidence in the record that
the lump sum payment should be considered income was the conclu-
sory and unsubstantiated opinion of Mr. Herbert Glover, from
New Jersey Medicaid's Bureau of Claims and Accounts. It was
Mr. Glover who had written the nursing home, on August 12, 1976,
stating "it is my opinion that this money is income." Record
Item No. 2. No explanation, factual or legal, for Mr. Glover's

opinion was set forth.* At the hearing, Mr. Glover testified that the Bureau of Claims and Accounts was entitled to the money "because it was really income" and that the lump sum payment of Social Security widow's benefits:

did not represent accumulated personal incidental funds or resources available at the time of redetermination for financial eligibility whereby the patient might have been allowed to keep up to \$1,500 (the resource limit currently in effect). Record Item No. 10 at 2.

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Again, neither a factual nor a legal basis for such opinions was stated. In a post hearing memorandum to the hearing officer, Mr. Glover repeated the same conclusory and unsubstantiated opinion that the money represented income and not a resource. Record Item No. 6.

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Mr. Glover made it clear that his opinions were not based upon the Medicaid Only Manual nor upon any other Medicaid rule or regulation as he informed the hearing officer: "I am not aware of any Division rules or regulations which defines income and resources." (emphasis added) Record Item No. 6. Mr. Glover also expressed an erroneous definition of resources which substantially differed from the Medicaid Only Manual and he stated to the hearing officer: "Resources are defined by me as monies available at the time eligibility

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Mr. Glover also stated: "I do not feel that this [money] can be treated as resources available at the time of determining eligibility, which incidentally cannot exceed \$1,500.00 in cash, nor do I feel it can be set aside for the patient's burial expenses." Record Item No. 2. No basis for these opinions was expressed.

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was determined." Record Item No. 6.*

By providing no grounds whatsoever to support the claim that the lump sum payment represented income, and by erroneously defining resources, Mr. Glover's evidence was both insufficient and incredible. There was other evidence, presented by Mr. Dreschel, that the Essex County Welfare Board considered the payment to be a resource. In deciding between these conflicting positions, the hearing officer did not rely upon any legal authority defining income or resources for the purposes of the Medicaid program. There was no rational basis for the hearing officer to accept Mr. Glover's opinions and to affirm the decision by the Division of Medical Assistance and Health Services to recover the entire Social Security payment as excess income.

* N.J.A.C. §10:94-4.2 defines resources not as "monies available" but as an asset owned by the individual which would be converted to cash to be used for his/her support and maintenance. N.J.A.C. § 10:94-4.16 also identifies eight classes of available resources that are excludable. Availability of resources, N.J.A.C. § 10:94-4.3, is not limited to the time that eligibility was determined and at least annual redeterminations of resources (and income) are required, N.J.A.C. §§ 10:94-5.1(a), 10:94-5.3(b).

C. It Was Error For The Hearing
Officer To Disregard The
Medicaid Only Manual And The
County Welfare Board In
Determining That Appellant's
Social Security Payment Was
Income And Not A Resource

A considerable portion of the hearing officer's report concerns a federal Medicaid regulation, 45 CFR § 248.3(b)(4)(i) which pertains to "the use of [a] nursing home recipient's income." (emphasis added) Record Item No. 10 at 6. Absent from his report is any mention of federal or state law which defines, for the purposes of the Medicaid program, income and resources. The federal regulations make clear that it is the State plan which must specify applicable financial eligibility conditions, 45 CFR §248.3(a)(1). Similarly, the federal Medicaid statute requires the State plan to provide for the reasonable evaluation of income and resources, 42 U.S.C.A. § 1396a (17) (c), and that eligibility for medical assistance shall be made by the State or local agency administering the State plan, 42 U.S.C.A. § 1396a (5).

In New Jersey, the Department of Human Services is the single State agency which administers the Medicaid program, by rules and regulations and through the Division of Medical Assistance and Health Services, N.J.S.A. § 30:4D-5. The Department contracts with and pays for "appropriate agencies that investigate and determine whether applicants under this act are eligible therefor under the standards provided by the department." N.J.S.A. § 30-4D-7(n).

The Medicaid Only Manual, N.J.A.C. § 10:94-1.1 et seq., sets forth the applicable income and resource standards (subchapter 4). The Manual also provides that the appropriate agency to determine income and resources is the County Welfare Board:

The CWB [County Welfare Board] shall be responsible for determining income and resource eligibility, as outlined in subchapter 4 of this chapter, for Medicaid Only, when applicant is receiving care in institutions defined above. N.J.A.C. § 10:94-3.15*

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The County Welfare Board's responsibility includes all re-determinations of eligibility, at which time:

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The IM [Income Maintenance] worker shall review all eligibility factors in accordance with the provisions set forth in subchapter 3 and 4 of this chapter. Particular attention shall be directed to identification of any changes in resources and income. (emphasis added) N.J.A.C. § 10:94-5.3(b)

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There is no authority for the Bureau of Claims and Accounts to apply or interpret any income or resource standard; the County Welfare Board has been delegated comprehensive authority to

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The institutions referred to include, inter alia, long term care facilities such as skilled nursing homes and intermediate care facilities. See N.J.A.C. § 10:94-3.14 (C) (2).

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determine and redetermine financial eligibility.*

The responsibilities of the County Welfare Board involve considerable judgment and expertise. Apart from the complex rules concerning availability, disregards and exclusions, the basic definitions of resources and income overlap one another** For certain individuals (including appellant Gilfone) who have continuously participated in the Medicaid program since December 1973, the County Welfare Board is responsible for determining income and resources in accordance with pre-1974 regulations "if it is more advantageous to the individual", N.J.A.C. § 10:94-4.20. Further a lump sum payment, if it is determined to be includable income, may then be considered by the County Welfare Board "either in the month in which it is received or prorated over three months

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* Cf. N.J.A.C. § 10:94-1.5 ("The Medicaid Only Program is administered by the county welfare boards.... [which] contract with the Division of Medical Assistance and Health Services for the purposes of providing Medicaid Only benefits to eligible persons"); N.J.A.C. § 10:94-4.6(a)(1) (when verification is required, "the county welfare board shall definitively establish the existence or non-existence of liquid resources"); N.J.A.C. § 10:94-4.39 (it is the applicant's responsibility to "immediately inform the county welfare board of any change in his/her income or resources"); N.J.A.C. § 10:94-4.40 ("The county welfare board shall determine that the applicant's total income and resources...as reported during the application and redetermination interview, are completely and definitely identified"); N.J.A.C. § 10:94-5.1 (redeterminations of eligibility provide "an opportunity provide to evaluate the total situation and enable the income maintenance worker to ascertain whether the individual's eligibility has changed").

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A resource is any asset (real or personal property) owned by the individual which would be converted to cash to be used for support or maintenance, N.J.A.C. § 10:94-4.2. Income is defined as the receipt by an individual of "any property or service which he/she can apply, either directly or by sale or conversion, to meet his/her basic needs for food, shelter, or clothing." N.J.A.C. § 10:94-4.28(a).

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when the payment exceeds the individual's monthly deficit,"
N.J.A.C. § 10:94-4.32(a)(10).

It was error for the hearing officer to deprive Appellant Gilfone of an opportunity to have her lump sum payment considered according to pre-1974 regulations "if it is more advantageous to the individual", N.J.A.C. § 10:94-4.20. It was error for the hearing officer to find that the proration provision for lump sum payments, N.J.A.C. § 10:94-4.32(a)(10), "does not really pertain to a recipient who is already receiving assistance." Record Item No. 12 at 2.*

It was error for the hearing officer to disregard the responsibility of and the determination by the County Welfare Board in regards to Appellant's lump sum payment. And it was error for the hearing officer to hold that her lump sum payment was excess income without referring to any rule or regulation defining income and resources.

By disregarding the Medicaid Only Manual and the County Welfare Board, and by imposing an unauthorized definition of income, the hearing officer's decision is erroneous. New Jersey Regulations require:

There shall be strict adherence to law and complete conformity with administrative policies. Requirements other than those established by law or regulations shall not be imposed on any person as a condition of receiving medical assistance. (emphasis added) N.J.A.C. § 10:94-1.6(a)(4)

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There is no suggestion in the Medicaid Only Manual that this or any other income or resource provision is applicable only at the time of determining initial eligibility. Mr. Glover, Bureau of Claims and Accounts, expressed a similar misunderstanding when he informed the hearing officer: "Resources are defined by me as monies available at the time eligibility was determined." Record Item No. 6.

D. Even If All Of The \$1886.60
Is Considered Income, There
Is No Evidence In The Record
That Medicaid Is Entitled To
Recover The Entire Amount

In affirming the recovery of the entire \$1886.60,
the hearing officer determined that all income in excess of
Appellant's \$25.00 per month PIE allowance had to be collected and
applied "to the cost of nursing home care." Record Item No 10 at
8. Assuming arguendo that all of the lump sum payment is income,
there is no evidence in the record that the Division of Medical
Assistance and Health Services was entitled to recover the entire
amount.

The lump sum payment was received in October 1975, Re-
cord Item No. 6, and Appellant Gilfone was to receive a monthly
Social Security check of \$125.50 thereafter, Record Item No. 3a.
The Medicaid Only Manual provides that a lump sum payment of income
may be counted by the County Welfare Board either in the month
received or prorated over three months when it exceeds the in-
dividual's monthly deficit, N.J.A.C. § 10:94-4.32(a)(10). If for
example, the payment had been considered income in the month
received, Appellant would be ineligible for Medicaid and responsi-
ble for paying the cost of her nursing home care. To uphold the
hearing officer, Appellant's nursing home cost would have to be
\$1886.60 for the one month in which the payment was received. Pre-
sumably, if the cost was less, Medicaid would be limited in its
recovery to the lower amount and Appellant Gilfone would be
entitled to keep the remainder.

Because the record is silent as to the nursing home cost for Appellant's care, neither a monthly deficit nor the amount recoverable by New Jersey Medicaid can be determined. Because the hearing officer disregarded the County Welfare Board, the record is silent as to whether the \$1886.60 should have been counted in the month received or prorated over three months. Thus, the actual amount to be recovered, even if the full amount of the Social Security payment is income, is still to be determined. Clearly, the mere designation of the money as income does not entitle Medicaid to recover the entire \$1886.60.

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CONCLUSION

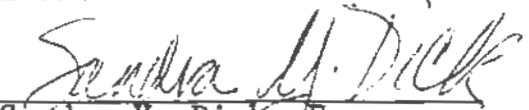
For the foregoing reasons, the plaintiff-appellant respectfully request that the Final Agency Decision be reversed and remanded for further determinations as set forth herein.

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Respectfully submitted,

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BY:


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