

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
One Judiciary Square
441 Fourth Street, NW
Washington, DC 20001-2714
TEL: (202) 442-9094 · FAX: (202) 442-4789

J_____ J_____
Petitioner,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF HUMAN SERVICES
Respondent

Case No.: 2012-DHS-00068
DHS Case No. _____

FINAL ORDER

I. Introduction

This Order reverses the decision of the Department of Human Services (“DHS”) that terminated the Medicaid benefits of Petitioner J_____ J_____. As a result, DHS must pay Ms. J_____’s Medicare Part B premiums for the months of March through October 2011.

II. Procedural Background

Ms. J_____ filed a hearing request on January 30, 2012, to challenge DHS’s decision to terminate her Medicaid benefits, effective December 31, 2010. I held a hearing on March 8, 2012. Ms. J_____ represented herself at the hearing and Jodie Spurlock, Supervisory Social Service Representative, represented DHS. Based on the testimony of the witnesses, my evaluation of their credibility and the exhibits admitted into evidence, I now make the following findings of fact and conclusions of law.

III. Findings of Fact

In January 2010, DHS approved Ms. J_____ to receive Medicaid benefits from the Qualified Medicare Beneficiaries (“QMB”) program. That program provides benefits to persons who are receiving Medicare but are also eligible for Medicaid. Among other benefits, the QMB program pays the premiums for the Medicare Part B program. During 2010, those monthly premiums for Ms. J_____ were \$110.50. Respondent’s Exhibit (“RX”) 205.

Ms. J_____ was living at _____, NE, at the beginning of 2010 but she moved during March of that year. Her new address is _____
_____. When she moved, Ms. J_____ filed a change of address form at her Post Office. Ms. J_____ receives Social Security benefits and she also informed the Social Security Administration of her new address. She did not inform DHS because she believed that DHS would learn of her new address from the Social Security Administration. DHS has access to the Social Security Administration’s data base so that it can verify Social Security income received by persons who receive benefits from the programs that DHS administers. From that data base, DHS can obtain the address of someone who is receiving both Social Security benefits and benefits from DHS.

On September 30, 2010, DHS mailed a recertification form to Ms. J_____, but Ms. J_____ never received it. On November 30, 2010, DHS mailed a termination notice to Ms. J_____ telling her that her Medicaid benefits would be terminated on December 31, 2010, because she had not returned a recertification form. RX 203. That notice said that Ms. J_____’s benefits would continue if she returned a recertification form by December 31 and if she remained eligible. *Id.* Ms. J_____ also did not receive the termination notice.

On the dates that DHS mailed both the recertification form and the termination notice, its records listed Ms. J_____’s old address as her mailing address. RX 202, 204. Those records also contained a telephone number for Ms. J_____. Ms. Spurlock did not know whether the Postal Service returned either the recertification form or the termination notice as undeliverable. In fact, based on Ms. Spurlock’s testimony, I find that DHS does not have any procedures in place to track whether or not the Postal Service returns mailings to it. Moreover, when the Postal Service returns notices that DHS has mailed to recipients of benefits, DHS has no standard procedure for taking any further action. In this case, DHS did not make any additional efforts to inform Ms. J_____ of either the recertification notice or the termination notice.

Although the termination notice said that Ms. J_____’s benefits would end on December 31, 2010, DHS paid her Medicare Part B premiums for January and February 2011. RX 205. There is no evidence of its reasons for doing so. When Ms. J_____ received her Social Security benefits for March 2011, she saw that her Medicare Part B premium was deducted from those benefits. After she made a series of telephone calls to Social Security and DHS, she eventually reached DHS’s QMB office. She was instructed to leave a voice mail and was promised that her call would be returned within 24 hours. She left a message but never received a return call.

Several months later, a representative of the Legal Aid Society contacted Ms. J_____ and helped her re-apply for Medicaid. DHS approved her application on November 17, 2011, and she is once again enrolled in the QMB program. RX 201. Her Medicare premiums are being paid, and she also received reimbursement for the Medicare premiums that were deducted from her Social Security benefits from July through November 2011.

IV. Conclusions of Law

A. The Burden of Proof

The Administrative Procedure Act, D.C. Official Code § 2-509(b), states that “the proponent of a rule or order shall have the burden of proof” in a contested case such as this one. The Act, however, does not say how an Administrative Law Judge should identify the “proponent” of an order. In *L.P. v. DHS*, 2009 D.C.Off. Adj. Hear. LEXIS 40 (January 5, 2009), Judge Goodie reasoned that the “proponent” of an order is the person who “ ‘generally seeks to change the present state of affairs.’ ” *Id.* at *12 (quoting MCCORMICK ON EVIDENCE § 337 (John W. Strong et al. eds., 5th ed. 1999)). I agree with that holding. As a result, DHS bears the burden of proof if it seeks to change or to terminate benefits that it previously has given. On the other hand, an applicant for benefits, who is seeking to change her situation by receiving benefits that she previously was not receiving, must bear the burden of proof if she is challenging the denial of her application. Because this is a termination case, DHS must bear the burden of proving facts sufficient to show that it properly terminated Ms. J_____’s benefits.

B. Was Ms. J_____’s Hearing Request Timely?

Ms. J_____ filed her hearing request on January 30, 2012. The District of Columbia Public Assistance Act, D.C. Official Code § 4-210.09(b), says:

A request for a hearing to review a decision . . . to terminate, reduce, or change the amount, kind, or conditions of public assistance benefits, or to take other action adverse to the recipient must be made within 90 days following the postmark of notice . . . of [the] intention to make such change or take such action.

DHS mailed the termination notice in November 2010. Ms. J_____’s hearing request, was filed more than a year later, well beyond the 90-day deadline set forth in § 4-210.09(b).

There is an important limitation upon that deadline, however. It begins to run only if DHS gives notice that is reasonably calculated to inform a recipient of the decision and of the right to request a hearing. *Zollicoffer v. District of Columbia Public Schools*, 735 A. 2d 944, 946 (D.C. 1999); *Thomas v. District of Columbia Department of Employment Services*, 490 A. 2d 1162, 1164-65 (1985). As discussed below, DHS's notice to Ms. J_____ did not meet that standard. This means that her hearing request was not filed too late; indeed, the improper notice is also a sufficient reason to reverse DHS's termination decision.

C. Did DHS Give Ms. J_____ Proper Notice of the Termination?

Due process requires that DHS may not terminate Medicaid benefits without prior notice to the recipient. *Salazar v. District of Columbia*, 954 F. Supp. 278, 326-27 (D.D.C. 1996). *See also* 42 CFR 206, 210, 211; D.C. Official Code § 4-205.55(a) (Federal regulations and District of Columbia statute also requiring prior notice before termination). The notice required by due process is notice reasonably calculated to reach the intended recipient. *Dusenbery v. United States*, 534 U.S. 161, 168 (2002). The question presented in this case is whether DHS complied with its due process obligations simply by mailing the recertification notice and the termination notice to Ms. J_____’s old address.

In *Jones v. Flowers*, 547 U.S. 220 (2006), the Supreme Court held that, when a government agency mails a notice required by due process but the Postal Service returns it, the government agency “must take additional reasonable steps to attempt to provide notice . . . , if it is practicable to do so.” *Id.* at 425. While that case considered the notice required before the government sells real property to satisfy a claim for unpaid taxes, both the Supreme Court and the Court of Appeals have cited *Jones* as stating a general rule of due process, not a rule

specifically limited to tax sales. *E.g., United Student Aid Funds v. Espinosa*, 130 S. Ct. 1367, 1378 (2010) (bankruptcy case); *District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2319 (2009) (criminal case; due process “imposes procedural limitations on a State's power to take away protected entitlements”); *Office of Management and Budget v. Webb*, 28 A.3d 602, 605 (DC 2011) (unemployment insurance case). *Jones*, therefore, establishes a standard for DHS in benefit termination cases, where due process requires prior notice. As a result, if the record is sufficient to find that the Postal Service returned DHS's mailings, DHS was required to “take additional reasonable steps to attempt to provide notice . . . , if it [was] practicable to do so.” 547 U.S. at 425.

The record contains no evidence showing whether the Postal Service returned either the recertification form or the termination notice to DHS. Because DHS failed to prove that the mailings were not returned, and because DHS has the burden of proof, I must conclude on this record that the Postal Service returned both the recertification form and the termination notice to DHS.¹ This means that due process required DHS to take additional reasonable steps to inform Ms. J_____ of the termination of her benefits, if any such steps were available to it.

I emphasize that I have not concluded that Ms. J_____’s non-receipt of the mailings automatically triggered additional obligations for DHS. Unless the record shows that DHS is aware that a recipient did not receive notice, DHS has no further obligations, even if the intended recipient never received the mailing. *Jones*, 547 U.S. at 226-27 (distinguishing cases in which

¹ Requiring DHS to prove a negative – that the Postal Service did not return the mailings – is not an unreasonable burden. If DHS established a regular procedure to account for returned mail and followed that procedure in this case, then the absence of any returned mail could support a finding that the Postal Service did not return the mailings sent to Ms. J_____. DHS, however, does not know whether the mail was returned. DHS is the party with the burden of proof and, indeed, the party with better access to evidence on this issue. Its lack of knowledge means that I must resolve the issue against it.

“the government attempted to provide notice and heard nothing back indicating that anything had gone awry”). In this case, DHS must show that it took additional steps to notify Ms. J_____ because of its failure to meet its burden of proof on the returned mail issue.

The evidence shows that DHS had at least two reasonable and available alternatives for informing Ms. J_____ that she had to return a recertification form or suffer termination of her benefits. DHS could have checked the Social Security records to learn Ms. J_____’s new address. It also had a telephone number for Ms. J_____, and could have called her to learn her new address.

Ms. J_____’s failure to tell DHS about her new address does not change the result. In *Jones v. Flowers*, the Supreme Court held that the taxpayer’s failure to comply with a state law requiring him to notify the tax authorities of any change of his address did not excuse the government’s failure to make additional efforts to learn his address when a notice was returned to it by the Postal Service. 547 U.S. at 232. It certainly would have been better for Ms. J_____ to tell DHS of her new address, but her failure to do so did not affect DHS’s obligation to make reasonable efforts to learn her new address.

Because DHS did not comply with its obligation to give Ms. J_____ proper notice, its termination of her Medicaid benefits was unlawful and must be reversed.² DHS must restore the

² When the law unambiguously requires termination of benefits, an agency’s failure to provide required notice sometimes has been excused because providing notice to the individual would not have changed the result. *Barry v. Little*, 669 A.2d 116 (DC 1995). That is not the case here. The termination notice expressly told Ms. J_____ that her benefits would be restored if she filed a timely recertification form. If Ms. J_____ had that information, she could have avoided the termination of her benefits. Unlike the individuals in *Barry v. Little*, Ms. J_____ was prejudiced by DHS’s failure to give her proper notice.

benefits that she did not receive – payment of her Medicare Part B Premiums for the months of March through June 2011.³

V. Order

Based on the findings of fact and conclusions of law, it is this 13th day of March 2012:

ORDERED, that the termination of Ms. J_____’s Medicaid benefits, effective December 31, 2010, is **REVERSED**; and it is further

ORDERED, that DHS shall pay Ms. J_____ the total amount that was deducted from her Social Security benefits for Medicare Part B premiums from March 2011 June 2011; and it is further

ORDERED, that any party may ask for reconsideration or relief from this Order as described below, and it is further

ORDERED, that any party may appeal this Order by following the instructions below.

_____/s/_____
John P. Dean
Principal Administrative Law Judge

³ DHS does not contend that Ms. J_____ was ineligible for benefits during those months for any reason other than her failure to return the recertification form.