COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

LESLIE WHEATON	:	
Plaintiff-Appellant	:	**CASE NO. 2011 CVF 02097**
vs.	:	**Judge McBride**
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES	:	
Defendant-Appellee	:	**DECISION/ENTRY**
	:	

Pro Seniors, Miriam H. Sheline, for the plaintiff-appellant Leslie Wheaton, 7162 Reading Road, Suite 1150, Cincinnati, Ohio 45237.

Ohio Attorney General's Office, Rebecca L. Thomas, Assistant Attorney General, Health and Human Services Section, for the defendant-appellee Ohio Department of Job and Family Services, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215-3400.

This cause is before the court for consideration of an appeal filed by the plaintiff-appellant Leslie Wheaton of the administrative decision denying his application for Medicare Premium Assistance through the Medicaid program.

The court scheduled and held a hearing on the appeal on September 7, 2012. At the conclusion of the oral arguments, the court took the issues raised by the appeal under advisement.

Upon consideration of the appeal, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

The following are the facts as they existed at the time the plaintiff-appellant Leslie Wheaton made his application for the Medicare Premium Assistance Program:

Leslie Wheaton, a 67-year old Medicare recipient, is married and lives with his wife, who is ineligible for Medicare due to her age. Mr. Wheaton has a gross monthly income of $1,323.00, which consists of $735.00 from Social Security and $588.00 from a Veterans Affairs pension.

On January 24, 2011, Leslie Wheaton applied with the Clermont County Department of Job and Family Services (DJFS) for the Medicare Premium Assistance Program (hereinafter "MPAP"). The Clermont County DJFS determined that Mr. Wheaton's income exceeded the eligibility guidelines for the three MPAP assistance programs, namely the Qualified Medicare Beneficiary (QMB), Specified Low Income Medicare Beneficiary (SLMB), and Qualified Individual (QI-1) programs, and, consequently, his application for MPAP benefits was denied. When determining his eligibility, the county office considered Mr. Wheaton's family size to be "one." The parties agree that, had the appellant's family size been considered to be "two," he would have been approved for the MPAP programs.

Mr. Wheaton requested a state hearing and the State Hearing Officer upheld the Clermont County agency's decision denying the appellant's application, finding that the agency correctly calculated the appellant's income and that the income exceeds the applicable income standards.[1] In so finding, the hearing officer noted that "[t]he Appellant's wife cannot be considered a member of the assistance group because she is not eligible for Medicare."[2]

Leslie Wheaton then filed an administrative appeal to the Director of the Ohio Department of Job and Family Services. The Administrative Appeal Officers affirmed the decision of the State Hearing Officer, finding that, pursuant to a State Medicaid Director Letter issued by the Center for Medicaid and Medicare Services, states have the option of defining the term "family of the size involved" for their Medicare Savings Programs and that the approach used by Ohio is allowed by federal law.[3]

Mr. Wheaton now appeals to this court, arguing that the decision of the agency is contrary to both Ohio and federal law.

STANDARD OF REVIEW

Pursuant to R.C. 5101.35(E), "[a]n appellant who disagrees with an administrative appeal decision of the director of job and family services or the director's designee issued under division (C) of this section may appeal from the decision to the court of common pleas pursuant to section 119.12 of the Revised Code. The appeal shall be governed by section 119.12 of the Revised Code * * * ."

[1] Certified Record, State Hearing Decision, pg. 2-3.
[2] Id. at pg. 2.
[3] Certified Record, Administrative Appeal Decision, pg. 1-2.

R.C. 119.12 provides in pertinent part that "[t]he court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.* * * " The Ohio Supreme Court has defined the evidence required by R.C. 119.12 as follows:

> "(1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) 'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) 'Substantial' evidence is evidence with some weight; it must have importance and value."[4]

"An agency's interpretation of a statute that governs its actions should be given deference so long as the interpretation is not irrational, unreasonable, or inconsistent with the statutory purpose."[5] "Similar deference should be given an agency's interpretation of the rules and regulations it is required to administer, unless that interpretation is unreasonable or conflicts with a statute covering the same subject."[6] However, "[t]he agency's interpretation and application of its rules cannot be arbitrary, capricious or otherwise contrary to law, nor can the interpretation and application constitute an abuse of discretion."[7]

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[4] *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, 589 N.E.2d 1303.
[5] *Morning View Care Center-Fulton v. Ohio Dept. of Human Serv.*, 148 Ohio App.3d 518, 774 N.E.2d 300, 2002-Ohio-2878, ¶ 47 (Ohio App. 10th Dist., 2002), citing *Ellis Ctr. for Long Term Care v. DeBuono* (1998), 175 Misc.2d 443, 448, 669 N.Y.S.2d 782.
[6] Id., citing *State ex rel. Celebrezze v. Natl. Lime & Stone Co.* (1994), 68 Ohio St.3d 377, 382, 627 N.E.2d 538.
[7] Id. at ¶ 48, citing *Ohio Academy of Nursing Homes, Inc. v. Barry*, supra, 56 Ohio St.3d at 129, 564 N.E.2d 686.

LEGAL ANALYSIS

(A) OHIO LAW

The appellant first argues that excluding a spouse as part of the family when applying the relevant federal poverty level is contrary to the Ohio Administrative Code.

The MPAP is provided for by federal law and is to be put into operation by the individual states. Specifically, 42 U.S.C. § 1396a orders in relevant part that:

> "(a) A State plan for medical assistance must—
>
> (10) provide –
>
> (E)(iii) for making medical assistance available for medicare cost sharing described in section 1396d(p)(3)(A)(ii) of this title subject to section 1396d(p)(4) of this title, for individuals who would be qualified medicare beneficiaries described in section 1396d(p)(1) of this title but for the fact that their income exceeds the income level established by the State under section 1396d(p)(2) of this title but is less than 110 percent in 1993 and 1994, and 120 percent in 1995 and years thereafter of the official poverty line (referred to in such section) for a family of the size involved."[8]

With regard to determining one's eligibility for the MPAP, O.A.C. § 5101:1-39-01.1(C) provides in pertinent part as follows:

> "(C) To be eligible for a medicare premium assistance program, an individual must meet all of the following conditions:
>
> * * *
>
> (3) Have income, as determined under paragraph (D) of this rule, within the income limits for the MPAP:

[8] 42 U.S.C.A. § 1396a(a)(10)(E).

> (a) For QMB, no greater than one hundred per cent of the federal poverty level (FPL) for the individual's family size; or
>
> (b) For SLMB, greater than one hundred per cent of the FPL but less than one hundred twenty per cent of the FPL for the individual's family size; or
>
> (c) For QI-1, at least one hundred twenty per cent of the FPL but less than one hundred thirty-five per cent of the FPL for the individual's family size."

Pursuant to O.A.C. § 5101:1-39-21(A), which addresses the monthly income levels to be applied in the Medicaid program for aged, blind, or disabled assistance groups: " * * * [f]or an eligible individual, countable income is compared to the appropriate individual need standard. For an eligible couple, countable income is compared to the appropriate couple need standard. For an eligible individual with an ineligible spouse, countable income is compared to the appropriate individual need standard."

The wife of the appellant in the case at bar is not eligible for Medicare and she is, therefore, an "ineligible spouse." As such, under O.A.C. § 5101:1-39-21(A), when determining Mr. Wheaton's eligibility for Medicare Premium Assistance Programs, his countable income is to be compared to the appropriate individual need standard, not the couple need standard.

The appellant argues that the definition of "family" contained in O.A.C. § 5101:1-37-01 should be applied in this instance. That code section provides in relevant part as follows:

> "(A) This rule contains the definitions of terms used in Chapters 5101:1-37, 5101:1-38, 5101:1-39, 5101:1-40, 5101:1-41, and 5101:1-42 of the Administrative Code.

> These definitions apply unless a term is otherwise defined in a specific rule.
>
> (B) Definitions:
>
> (15) "Family" means the following persons living in the same household as the individual for whom medical assistance is sought or received:
>
> (a) The individual;
>
> * * *
>
> (c) The spouse of any person listed in paragraph (B)(15)(a) or (B)(15)(b) of this rule."[9]

As noted in O.A.C. § 5101:1-37-01(A), the definitions in that section are to be applied to O.A.C. § 5101:1-39 unless a term is otherwise defined in a specific rule. O.A.C. § 5101:1-39-21(A) specifically provides that the monthly income of an individual applying for the Medicaid programs for the aged, blind, or disabled is to be compared to the appropriate individual need standard when that individual is married to an ineligible spouse. As such, that code section has determined that the family size of an individual who is applying for MPAP assistance and who is married to an ineligible spouse is to be considered "one" for the purposes of comparing that applicant's monthly income to the need standard. The effect of O.A.C. § 5101:1-39-21(A) is clear and the more specific rule set out in that code section overrides the general definition of "family" set forth in O.A.C. § 5101:1-37-01.

The appellant argues that this application of O.A.C. § 5101:1-39-21(A) directly conflicts with O.A.C. § 5101:1-39-19 which states in relevant part:

> "(A) When an eligible individual resides in the same household with his or her ineligible spouse, or a child under age eighteen resides in the same household with his or her

[9] O.A.C. 5101:1-37-01(B)(15).

> parent(s), the income and resources of such spouse or parent are included in determining the individual's eligibility and payment amount.
>
> (B) The basis for deeming lies in the concept that husband and wife and parents of children, under age eighteen, who are individuals related by blood, marriage or adoption and living together have a responsibility for each other to share income and resources. However, it is unrealistic and inequitable to assume that all of one individual's income and resources are totally available to the other person. This deeming provision recognizes some measure of relative responsibility as it applies from spouse-to-spouse or parent-to-child. It is utilized instead of determining support and maintenance in accordance with rule 5101:1-39-17 of the Administrative Code."

The appellant is correct that a portion of the income of an ineligible spouse is considered when determining an individual's eligibility under O.A.C. § 5101:1-39-19(A) and the presence of that spouse in the household is not considered when determining the individual's eligibility as it relates to comparing his monthly income to the need standard. This distinction was likely made for the reasons discussed in the section below regarding the presumption of the ability of an ineligible spouse to contribute to the household financially. However, this distinction does not make either code section contrary to law and it does not affect the clear language of O.A.C. § 5101:1-39-21(A).

(B) FEDERAL LAW

The appellant also argues that the administrative appeal decision allowing the consideration of Mr. Wheaton's monthly income level against the individual need standard violates federal law.

42 U.S.C. 1396d(p) provides in pertinent part:

> "(p) Qualified medicare beneficiary; medicare cost-sharing
>
> (1) The term "qualified medicare beneficiary" means an individual--
>
> * * *
>
> (B) whose income (as determined under section 1382a of this title for purposes of the supplemental security income program, except as provided in paragraph (2)(D)) does not exceed an income level established by the State consistent with paragraph (2), * * *
>
> * * *
>
> (2)(A) The income level established under paragraph (1)(B) shall be at least the percent provided under subparagraph (B) (but not more than 100 percent) of the official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 9902(2) of this title) applicable to a family of the size involved."

The appellant argues that the language of the above code section and its use of the term "family of the size involved" when discussing an individual's income level as it relates to the federal poverty level indicates Congressional intent to include dependent household family members as members of the individual's "family size" for the purposes of determining income levels and eligibility for the MPAP programs. The appellant points out that the federal poverty level is determined by considering annual income and the number of persons in the family.[10]

42 U.S.C. 1396d(p)(1)(B) mentions "an income level established by the State." This indicates a state's ability to establish the applicable income levels. The appellant argues that O.A.C. § 5101:1-39-21(A) essentially goes one step too far by then also setting forth how to determine when an applicant should be compared to the individual

[10] Appellant's Exhibit A.

need standard or the couple need standard and ordering that an applicant married to an ineligible spouse must be compared to the individual need standard.

In a letter sent in on February 18, 2010 to State Medicaid Directors (hereinafter "SMDL # 10-003"), the Director of the Centers for Medicaid and State Operations (CMS), a division of the Department of Health & Human Services, discussed the Medicare Part D Low-Income Subsidy and Medicare Savings Programs.[11] In so doing, the Director set forth the following discussion relative to "defining family size":

> "The income standards for both MSP and LIS are expressed as various percentages of the Federal poverty level (FPL) 'applicable to a family of the size involved.' States have the option of defining what 'family of the size involved' means for their MSPs, although most States follow the approach of the Supplemental Security Incomes (SSI) program under which either the standard for an individual or the standard for a couple is used.
>
> For the purposes of making LIS determinations, SSA defines a 'family of the size involved' as the individual and the individual's spouse * * *.
>
> The LIS definition of a 'family of the size involved' is more expansive than the SSI-based approach most States use when determining eligibility for MSPs. Because States have the option of defining 'family of the size involved' differently for MSPs, a State could elect to use SSA's LIS definition of that term when determining eligibility for MSP.* * *"[12]

While the Director of CMS goes on in the letter to encourage states to adopt the definition of "family of the size involved" used when making LIS determinations, as it would allow more individuals to be eligible for Medicare Savings Programs, it recognizes the state's right to make that determination. This letter also specifically recognizes that most states follow the approach of the SSI program when defining

[11] Appellee's Exhibit G.
[12] Id. at pg. 3.

"family of the size involved" for the purpose of determining eligibility for Medicare Savings Programs, which is the approach that has been adopted by Ohio as set forth above.

In *Martin v. North Carolina Dept. of Health and Human Services*, 194 N.C.App. 716, 670 S.E.2d 629 (N.C.App., 2009), the court examined the language of 42 U.S.C. 1396d(p)(1) and (2) and the determination of when an individual is a qualified medicare beneficiary. That court discussed the issue as follows:

> "We note that DHHS's interpretation of 42 U.S.C. § 1396d(p) utilizes SSI methodology in its determination of the meaning of 'family of the size involved.' The SSI methodology referred to in paragraphs(1)(B) and (1)(C) of 42 U.S.C. § 1396d(p) is the language upon which DHHS has based its promulgation of 10A N.C.A.C. 21B.0312(e)(4). This methodology does not address the meaning of 'family,' but rather treats applicants and recipients in terms of 'eligible individuals' who may or may not have eligible spouses. *See* 42 U.S.C. § 1382(a) (2000). Under SSI regulations, ' couple means an eligible individual and his eligible spouse.' 20 C.F.R. § 416.120(c)(5) (2006). Under 20 C.F.R. § 416.1801(c), a person is only considered to be married to an eligible spouse for SSI methodology purposes if the spouse is eligible for SSI. *See* 20 C.F.R. § 416.1801(c) (2006). The SSI definition of 'couple' thus functions as a term of art rather than a descriptive or practical reference.
>
> Our reading of 42 U.S.C. § 1396d(p) reveals, however, that SSI methodology applies only to determinations of *income* discussed in paragraphs (1)(B) and (1)(C). *Income level,* as provided for in paragraph (2)(A), is not determined by SSI methodology, but instead is to be determined in part by 'the percent provided under subparagraph (B) ... of the official poverty line ... applicable to a family of the size involved.' 42 U.S.C. § 1396d(p)(2)(A). This aspect of the statute is not ambiguous. However, Title 42 does not define 'a family of the size involved.'
>
> Where a statute does not define a term, we must rely on the common and ordinary meaning of the words used. *See Lafayette Transp. Serv., Inc. v. County of Robeson,* 283 N.C.

> 494, 500, 196 S.E.2d 770, 774 (1973). A family is defined as 'a group consisting of parents and their children; a group of persons who live together and have a shared commitment to a domestic relationship.' Black's Law Dictionary 637 (8th ed. 2004). Under this definition, petitioner's family would include her disabled husband who lives with her and relies on her for financial support. This plain reading of the statute is supported by a mandate to liberally construe the statute in order to provide disability payments for all qualified persons. *See Rowe v. Finch,* 427 F.2d 417, 419 (4th Cir.1970). Such a reading is also supported by our Supreme Court's holding that 'courts may use subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve.' "[13]

The *Martin* court then goes on to discuss that the "most recent addition to the Medicare program, Medicare Part D [as codified in 42 U.S.C. § 1395w-114(A)(1)], utilizes language identical to that of 42 U.S.C. § 1396d(p)(2)(A) to determine eligibility for that program[,]" and the court notes that the federal Department of Health & Human Services published regulations interpreting that Part D code section which states that " 'family size means the applicant, the spouse who is living in the same household, if any[,] and the number of individuals who are related to the applicant or applicants, who are living in the same household and who are dependent on the applicant or the applicant's spouse for at least one-half of their financial support.' "[14] The *Martin* court found this interpretation of the Part D language persuasive in its interpretation of 42 U.S.C. 1396d(p)(2)(A).[15]

It is important to note that the *Martin* decision was issued prior to the issuance of SMDL # 10-003. This court cannot speculate if this letter would have altered the court's decision in *Martin* and, in fact, this court does not need to do so, as *Martin* is not binding

[13] *Martin*, supra, 670 S.E.2d at 634.
[14] Id., quoting, 42 C.F.R. § 423.772.
[15] Id.

law on this court. However, when addressing the very LIS definition of family size discussed by the *Martin* court, the Director of CMS noted that most states did not use such a definition when defining "family of the size involved" for Medicare Savings Program purposes and, while it encouraged states to use the LIS definition, it recognized that the states have the option to define "family of the size involved" for MSP programs for themselves. While the letter from the Director of CMS is not binding in any way upon this court, it certainly may be considered by a court when examining an issue such as the one currently at bar.

This court agrees that there is no applicable definition of "family of the size involved" as that term is used in 42 U.S.C. 1396d(p)(2)(A). As such, Congress has not directly defined the term "family of the size involved" as it is used in 42 U.S.C. 1396d(p)(2)(A) and that term is ambiguous for the purposes of this statutory construction. It should be noted that if there were such an obvious definition of the term, it is nonsensical that the Department of Health & Human Services would feel the need to issue a regulation interpreting a code section with identical language in order to define that term as it did in 42 C.F.R. § 423.772.

This also comports with the CMS letter which implicitly recognizes the lack of a definition of that term for MSP programs when it acknowledges that states, who are charged with implementing these programs, have the option of defining the term "family of the size involved" for MSP but not for LIS because the term has been explicitly defined by the SSA as it is applied to the LIS program.

The appellant urges the court to follow the reasoning of the *Martin* decision and, in recognizing the lack of a definition for "family of the size involved," apply the general

dictionary definition of "family" for the purposes of this code section, as the *Martin* court did. However, while there is no federal regulation which defines the term, when one reads the applicable sections of the Ohio Administrative Code in conjunction with one another, it becomes clear that Ohio has exercised its discretion and has provided such a definition. O.A.C. § 5101:1-39-01.1(C) and O.A.C. § 5101:1-39-21(A), in conjunction with one another, provide the method by which an MPAP applicant's family size is determined.

The appellant also urges this court to utilize the definition of "family" as was defined in the general Poverty Income Guidelines federal regulations as they existed at the time 42 U.S.C. § 1396 was enacted. However, there is nothing in the language of 42 U.S.C. § 1396 which provides that the definition of "family" from the Poverty Income Guidelines was to be used when interpreting "family of the size involved" as that term is used in 42 U.S.C. § 1396d(p)(2)(A).

Finally, the appellant argues that the limitation of benefits that results from the interpretation above violates the Equal Protection Clause of the 14th Amendment to the United States Constitution.

"The Equal Protection Clause of the Fourteenth Amendment commands that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' "[16] "The states cannot make distinctions which either burden a fundamental right, target a suspect class, or intentionally treat one differently from others similarly situated without any rational basis for the difference."[17] "A statutory classification that involves neither a suspect class nor a fundamental right, as here, does not violate the Equal Protection

[16] *Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 312 (6th Cir.,2005), quoting U.S. Const. amend. XIV, § 1.
[17] Id., citing, *Vacco v. Quill* (1997), 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834, 138 L.Ed.2d 834

Clauses if it bears a rational relationship to a legitimate governmental interest."[18] "Under the rational-basis standard, a state has no obligation to produce evidence to sustain the rationality of a statutory classification."[19]

While it is not made entirely clear by the appellant's brief exactly which law he is challenging and whether that challenge is facial or "as applied," after reading the appellant's brief the court surmises that the appellant is seeking to advance a facial challenge to O.A.C. § 5101:1-39-21(A) and its distinctions between applicants with an eligible spouse and applicants with an ineligible spouse. "Ohio law states that, when bringing a facial challenge to a statute, ' * * * the challenger must establish that there exists no set of circumstances under which the statute would be valid.' "[20]

The appellee notes that a spouse who is not eligible for Medicare by virtue of age or disability is presumed to be amongst a group of individuals who are likely still able to work and the state and federal government would not wish to remove the incentives for such a spouse to remain employed and continue to contribute to the household financially. In other words, an ineligible spouse is presumed to be able to contribute financially to support the applicant in a manner that a spouse eligible for Medicare is not. This does not mean that this actually has to be the case in every applicant's household; instead, it is sufficient that this is a fair and rational general expectation. This reasoning provides a rational basis for the distinction at issue between applicants

[18] *Ohio Apt. Assn. v. Levin* (2010), 127 Ohio St.3d 76, 936 N.E.2d 919, 2010-Ohio-4414, ¶ 34, citing *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29, 550 N.E.2d 181.
[19] Id., citing, *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.* (1999), 87 Ohio St.3d 55, 58, and 60, 717 N.E.2d 286.
[20] *Harrold v. Collier* (2005), 107 Ohio St.3d 44, 836 N.E.2d 1165, ¶ 37, citing *United States v. Salerno* (1987), 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697. See, also, *Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468, 880 N.E.2d 420, ¶ 26.

with eligible and ineligible spouses. As such, there is no violation of Mr. Wheaton's right to equal protection under the laws.

CONCLUSION

Based on the above analysis, the court finds that the Administrative Appeal Decision issued by the Ohio Department of Job and Family Services is supported by reliable, probative and substantial evidence and is in accordance with law. Therefore, the court hereby affirms the Administrative Appeal Decision denying the appellant's application for the Medicare Premium Assistance Program.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 2nd day of November 2012 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride