Circuit Court for Baltimore County
Case No. C-03-CV-23-000973

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0990

September Term, 2024

IN THE MATTER OF RENATE LUNN

Arthur,
Beachley,**
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: July 10, 2026

* This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be cited as persuasive authority only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

** Beachley, J., now retired, participated in the hearing and conference of this case while an active member of this Court. He participated in the adoption of this opinion after being recalled pursuant to Maryland Constitution, Article IV, Section 3A.

The Maryland Department of Health denied an elderly and disabled woman's application for a means-tested Medicaid benefit that would allow her to receive home health care rather than be separated from her husband and institutionalized in a nursing home. An administrative law judge from the Office of Administrative Hearings affirmed the Department's decision, as did the Circuit Court for Baltimore County.

On appeal to this Court, the Department concedes that the administrative law judge erred but argues that the error is "immaterial." For the reasons stated herein, we shall reverse and remand for further proceedings.

THE CO WAIVER PROGRAM

This case concerns an application for benefits under the Maryland Home and Community Based Options Waiver, a means-tested State Medicaid program that pays for in-home care for elderly and disabled persons who would otherwise require an institutional level of care. The program is authorized by section 1915(c) of the Social Security Act, 42 U.S.C. § 1396n(c); and by section 15-132 of the Health-General Article of the Maryland Code (1982, 2023 Repl. Vol.).

The Maryland Department of Health refers to the program as the "CO" or "Community Options" waiver. The program waives a requirement that would otherwise apply to recipients of long-term care under Medicaid—the requirement that care be provided in an institutional setting, such as a nursing home or an assisted-living facility. Simply put, the program allows recipients to remain in their homes, in the community, rather than to be institutionalized.

The CO waiver is one product of the Patient Protection and Affordable Care Act of 2010. Before the passage of that legislation, Medicaid benefits were available to persons who were institutionalized, but not to persons who lived in the community but might otherwise be institutionalized. The Affordable Care Act gave states the option to extend Medicaid benefits to persons who lived in the community (*see* 42 U.S.C. § 1396n(c)), as long as they received a similar level care to what they would receive in a nursing home or an assisted-living facility.

Financial eligibility for the CO waiver is governed by the long-term care rules for Medicaid or, as it is sometimes called, "Medical Assistance." As the Department explains in its brief: "Because an aged, blind, or disabled individual's eligibility for Medicaid is determined under the criteria for 'MAGI [Modified Adjusted Gross Income] Exempt' coverage groups based on the income and resources of the applicant's assistance unit. . . , applicants for the CO Waiver are assessed under the same criteria[.]" Under those criteria, individuals are financially eligible for a CO waiver only if their "countable resources" are less than or equal to $2000.00. COMAR 10.09.24.08(N).[1]

Congress, however, has recognized that the financial eligibility requirements for individuals cannot be applied fairly to married couples: if a couple were required to expend all but $2000.00 of their liquid assets to pay for the care of the ailing spouse, then

[1] In the context of Medicaid or "Medical Assistance," "countable resources" generally include cash, bank accounts, stocks, bonds, and other liquid assets that can be converted to cash. COMAR 10.09.24.02(B)(53). They generally do not include an applicant's primary residence or personal belongings. COMAR 10.09.24.08(F).

the healthy spouse would become impoverished before the ailing spouse would ever qualify for assistance.[2] Thus, to protect the healthy spouse, Congress created what is called the "spousal resource allowance," which exempts half of the couples' countable resources from the evaluation of financial eligibility.

The computation of the spousal resource allowance is dictated by 42 U.S.C. § 1396r-5(c) (section 1924(c) of the Social Security Act). That statute states:

> There shall be computed (as of the beginning of the first continuous period of institutionalization . . . of the institutionalized spouse)—
>
> (i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and
>
> (ii) a spousal share which is equal to ½ of such total value.

In other words, the spousal resource allowance equals one-half of the married couple's countable resources "as of the beginning of the first continuous period of institutionalization . . . of the institutionalized spouse."

In general, a married applicant becomes financially eligible for the CO Waiver when the couple's resources have declined to the point where they are less than or equal to one-half of their countable resources "as of the beginning of the first continuous period of institutionalization . . . of the institutionalized spouse," plus $2000.00. The additional $2000.00 is called the applicant's "individual resource allowance."

[2] The healthy spouse might also attempt to secure a "Medicaid divorce" in order to avoid dissipating nearly all of the couples' assets on the ailing spouse's care.

To illustrate: If a married couple's countable resources totaled $60,000.00 "as of the beginning of the first continuous period of institutionalization . . . of the institutionalized spouse," then the spousal resource allowance would equal $30,000.00, and the applicant would be financially eligible for a CO waiver when the couple's assets were less than or equal to $32,000.00 (the sum of the spousal resource allowance and the $2000.00 individual resource allowance).

The Department, however, has also established what it calls the "Minimum Spousal Share," which represents the minimal amount of countable resources that must be preserved for the use of the healthy spouse. In 2022, the year of the application in the present case, the "Minimum Spousal Share" was $27,480.00. It appears that if a married couple's countable resources were less than or equal to $54,960.00 (or two times $27,480.00) in 2022, the ailing spouse would meet the financial eligibility requirements for a CO waiver: to require the couple to spend additional resources on the ailing spouse's care would deplete the amount of countable resources below the level of the Minimum Spousal Share.[3]

In Medicaid parlance, the date on which the computation of the spousal resource allowance occurs—"the beginning of the first continuous period of institutionalization

[3] The Department also establishes a so-called Maximum Spousal Share, which apparently represents the maximum amount of countable resources that the healthy spouse may retain. In 2022 the Maximum Spousal Share was $137,400.00. It appears, therefore, that if a married couple's countable resources were greater than $274,800.00 (or two times $137,400.00) in 2022, the ailing spouse could not meet the financial eligibility requirements for a CO waiver.

. . . of the institutionalized spouse"—is called the "snapshot date."

When a married applicant is institutionalized in a nursing home or an assisted-living facility, the Department evaluates whether she meets the financial eligibility requirements for a CO Waiver by comparing her and her spouse's assets on the snapshot date against their assets at or around the time of the application. The record suggests that, in evaluating the application from a married applicant who is institutionalized in a nursing home or an assisted-living facility in 2022, the Department would give the applicant and her spouse six months to reduce or "spend down" their assets in order to meet the financial eligibility requirements for a CO Waiver. This practice appears to conform with the Department's regulations concerning the specific application requirements for MAGI Exempt coverage groups, which state that "[c]urrent eligibility shall have a period of consideration of a 6-month period beginning with the month of application for Medical Assistance, except as specified in Regulation .04H(3) of this chapter." COMAR 10.09.24.04-1(C).[4] Similarly, section 1000.1(d) of the Department's

[4] "Regulation .04H"—COMAR 10.09.24.04(H)—states:

H. Period under Consideration.

(1) The Department or its designee shall establish a current period under consideration based on the date of application established pursuant to § F(6) of this regulation.

(2) The period under consideration shall be for retroactive eligibility, the 1, 2, or 3 months immediately preceding the month of application for Medical Assistance, except as specified in § H(3) and § N of this regulation.

Medical Assistance ("MA") Manual, an internal guidance document for program administration, states that "[c]urrent eligibility for institutionalized persons is determined for the initial period under consideration as well as the succeeding 6-month period under consideration." And since October 1, 2022, section 15-132(e)(1)(ii) of the Health-General Article has required the Department to inform applicants that they must "meet all of the eligibility criteria for participation in the waiver within 6 months after submitting the application."

A married applicant who lives in the community but who might otherwise be institutionalized is deemed to be an "institutionalized spouse." *See* 42 U.S.C. § 1396r-5(h)(1). Nonetheless, no statute or regulation clearly defines the method by which the Department must compute the snapshot date—"the beginning of the first continuous period of institutionalization . . . of the institutionalized spouse"—for an "institutionalized spouse" who lives in the community.

The Department has taken the position that, for a married applicant who lives in the community, the first day of the month in which the application is submitted is both the snapshot date and the date on which the applicant's financial eligibility is assessed. The Department based its position on section 800.3 of the MA Manual, an internal

> (3) For a deceased individual, the retroactive and current periods under consideration shall begin as stated in § H(1) and (2) of this regulation and may not extend beyond the month of death.

document that (unlike a statute or regulation) does not have the force or effect of law. In pertinent part, section 800.3 reads as follows:

> If resources are a factor of eligibility for the AU's[5] coverage group, resource eligibility exists when the AU's total countable resources are within the applicable resource standard for the coverage group and household size. Resources are considered based on their value as of the first moment of the first day of the period under consideration. If the AU's total countable resources are within the applicable standard as of that moment, the AU is resource-eligible for Medical Assistance for the entire month. If the AU's total countable resources exceed the applicable standard as of that moment, the AU is ineligible for Medical Assistance for the entire month. Then, the AU remains ineligible until the total countable resources are within the resource standard as of the first moment of the first day of the subsequent month. *For a determination of current eligibility, resources of the A/R*[6] *and other AU members are considered as they existed on the first moment of the first day of the current period under consideration.*

(Emphasis added.)

The Department relies on the final italicized sentence for its contention that if a married applicant from the community has countable resources that exceed the eligibility requirements on the first day of the first month in which the application is submitted, it must deny the application. The Department's position means that in 2022 it could deny an application for a CO waiver unless the countable resources of the applicant and her spouse were less than or equal to $54,960.00 (or twice the Minimal Spousal Share) as of

[5] The term "AU" appears to mean "assistance unit," which, in the context of a married applicant from the community, would appear to mean the applicant and the applicant's spouse.

[6] The MA Manual uses the term "A/R" as an abbreviation for the term "applicant/recipient."

the first day of the month in which the application was submitted. In the Department's view, it could properly deny an application in those circumstances even if the applicant's countable resources no longer exceeded the financial-eligibility requirements by the time the Department had completed its evaluation and announced its decision.

The Department's regulations for MAGI-Exempt coverage groups state that "[a] Unit shall be ineligible for any month in which countable resources exceed the applicable standard, but may reapply for any following month in which countable resources are less than or equal to the applicable standard." COMAR 10.09.24.08(L). Notwithstanding this regulation, however, an applicant for a CO waiver may not reapply at will once the Department has denied an application because of the failure to meet the financial-eligibility requirements. Instead, to apply for the waiver, even in the first instance, the applicant must secure a place on the "Service Registry," a waitlist of 20,000 or more people. An applicant can apply for the waiver only when the Department invites her to apply. And if the Department denies the application, the applicant must go back onto the registry and wait for another invitation to apply.

The CO waiver program has been a subject of legislative concern. Although the program could accommodate 7500 participants, the Department informed the General Assembly that as of January 11, 2022, there were a total of only 6348 approved community options waiver slots, of which only about 4286 were filled. Dep't of Leg. Servs., Fiscal and Policy Note, Senate Bill 28, at 2 (2022 Session). At the same time,

there were over 21,000 people on the registry, and thousands more were going onto the registry every year. *Id.*

In the 2022 legislative session, the General Assembly amended section 15-132(e) of the Health-General Article, the principal State statute concerning the CO waiver program. Among other things, the legislation required the Department to increase its efforts to reduce the size of the registry to fill available slots in the program. As previously stated, the amendment, which took effect on October 1, 2022, required the Department to inform applicants that they had six months to meet all of the eligibility criteria for participation in the waiver, presumably including the financial eligibility criteria.

THE FACTUAL AND PROCEDURAL BACKGROUND OF THIS CASE

A. Mrs. Lunn and Her Application for a CO Waiver

Mrs. Renate C. Lunn was born on December 23, 1940. She was diagnosed with ataxia, or loss of muscle control, in 1990. She lived in Baltimore County with her husband and their adult son, who is disabled.

After years of paying for in-home health care, Mrs. Lunn secured a place on the registry on September 10, 2014. The Department placed her in Priority Group One, indicating the highest level of assessed need.

On December 25, 2014, Mrs. Lunn was institutionalized in a short-term rehabilitation facility. She was discharged on February 8, 2015. Mrs. Lunn asserts that

on December 1, 2014, the first day of the first month of her institutionalization, her and her husband's countable resources totaled $81,480.33.[7]

On May 10, 2022, after Mrs. Lunn had spent more than seven years on the registry, the Department invited her to apply for a CO Waiver. Through an attorney, Mrs. Lunn submitted the application on June 28, 2022.

While preparing the application, Mrs. Lunn's attorney communicated with the Department's Deputy Director of Medicaid Eligibility Policy about how the Department evaluated the financial resources of an applicant who was not institutionalized in a nursing home or similar facility. The attorney seems to have been interested in whether the Department allowed a community applicant and her spouse to meet the resource limit by expending some of their assets after the application is filed, as the Department did in cases involving applicants who were institutionalized in a nursing home or assisted-living facility, or whether the Department looked solely at the amount of resources on the first day of the month in which the application was submitted. The Deputy Director responded that she "was not sure" how the Department evaluates the applicant's resources, but that she was attempting to get a "proper answer."

On June 28, 2022, the day on which Mrs. Lunn submitted her application, the Deputy Director informed Mrs. Lunn's attorney that the Department had an unwritten policy under which it "us[ed] the first day of the month of application as the snapshot

[7] Therefore, if calculated on that date, the spousal resource allowance would have equaled $40,740.17.

date for calculating spousal resources for an individual applying from the registry." The Deputy Director added that she had "suggested that it might be good" to put the policy into writing.

In her application, Mrs. Lunn disclosed that she and her husband had countable resources of $68,135.14.[8] Mrs. Lunn also disclosed that she had been institutionalized for approximately six weeks beginning in late 2014.

On August 2, 2022, a caseworker for the Maryland Medicaid Eligibility Determination Division ("EDD") told Mrs. Lunn's attorney that the Lunns' "joint resources," of $68,135.14, "exceed the allowable resource limit by $13,260.42."[9] The caseworker asked whether the "resource amount" had "changed" since June 1, 2022. In an apparent effort to ascertain whether the value of the Lunns' assets had decreased since June 1, 2022, the caseworker later requested bank statements for the Lunns' accounts as of August 2022.

On August 8, 2022, Mrs. Lunn's attorney sent an email to the caseworker, in an attempt to "sort out the confusion regarding the financial eligibility resource standard to be applied to" Mrs. Lunn, "a spousal applicant invited from the registry to apply for a

[8] Therefore, if calculated on that date, the spousal resource allowance equaled $34,067.57.

[9] Thus, in the caseworker's view, the resource limit would have been $54,874.58 ($68,135.14 minus $13,260.42). The caseworker reportedly reached that figure by doubling the "Minimum Spousal Share," which is the minimum amount of money that an applicant's spouse is entitled to retain from the parties' joint assets in order to avoid becoming impoverished.

waiver slot." The attorney related her "understanding" that the EDD "uses the 1st day of the month of [the] application as the snapshot date" and that "the applicant has six months to spend down to half the snapshot date value." She asked which date the EDD would use as the snapshot date—June 1, 2022, the first day of the month of the application; or December 1, 2014, the first of the month in which Mrs. Lunn was institutionalized for more than 30 days.

Later that same day, August 8, 2022, the chief of the EDD responded that it would calculate "spousal impoverishment" as of June 1, 2022; that the EDD "would not use the 2014 date as the customer was not found eligible and the spousal impoverishment was not completed"; and that there is no "6 month time frame for spenddown."
The chief added: "Once the application is denied"—as she evidently foresaw it would be—Mrs. Lunn would have to ask "to be added back to the registry."

In an email dated August 12, 2022, the chief of the EDD informed Mrs. Lunn's attorney that Mrs. Lunn's spousal resource allowance was "$34,067.00," or one-half of the Lunns' countable resources of $68,135.14, as of June 1, 2022.[10]

On the following day, Mrs. Lunn's attorney submitted documentation establishing that as of August 13, 2022, the Lunns' "combined resources" now totaled $30,796.61—i.e., she submitted documentation establishing that the Lunns had reduced their countable resources by almost $38,000.00 since the date of the application. The $30,796.61 figure

[10] The chief rounded the figures after the decimal point down to zero.

is less than the spousal resource allowance of $34,067.00 plus the individual resource allowance of $2000.00.

Nonetheless, on August 15, 2022, an EDD caseworker asserted that the countable resource limit was actually $29,480.00—the Minimum Spousal Share of $27,480.00 plus $2000.00 for the individual resource allowance. Because the Lunns' combined resources totaled $30,796.61 as of mid-August 2022, the caseworker concluded that "Ms. Lunn's resources still exceed the allowable resource amount by $1,316.61." The caseworker added: "Whenever the client's joint total resources exceed $27,480.00[,] the case will be overscale."[11]

On September 8, 2022, the EDD formally denied Mrs. Lunn's application. In the denial notice, the EDD asserted yet another rationale for the decision: it said that the Lunns had countable resources of $68,135.14, which exceeded "the asset limit" of "$2000.00." In other words, the EDD used the amount of countable resources in the June 2022 application, but proceeded as though the resource limit was only $2000.00—the limit for individuals—and not the considerably higher figure dictated by the spousal resource allowance. In effect, the EDD used June 1, 2022, as both the snapshot date and

[11] As of July 1, 2022, $27,480.00 was the Minimum Spousal Share. As discussed above, the "Minimum Spousal Share" represents the minimum amount of money that an applicant's spouse is entitled to retain from the parties' joint assets in order to avoid becoming impoverished. Contrary to the caseworker's assertion, the "Minimum Spousal Share" does not purport to cap, limit, or override the spousal resource allowance if that allowance is higher than the "Minimum Spousal Share."

the date for evaluating whether Mrs. Lunn and her spouse met the financial-eligibility requirements.

After denying her application for a CO waiver, the Department placed Mrs. Lunn back on the registry, at a lower priority than she previously had. She was almost 82 years old at the time.

B. The Administrative Proceedings

Mrs. Lunn challenged the denial of her application by requesting a hearing before the Office of Administrative Hearings ("OAH").[12] An administrative law judge ("ALJ") conducted the hearing on January 9, 2023.

At the hearing, the Department did not defend the EDD's conclusion that the applicable resource limit was only $2000.00. Instead, it asserted that the resource limit was $36,057.57 (the countable resources of $68,135.14 divided by two to account for the spousal resource allowance, plus $2000.00 for the individual resource allowance). Nonetheless, the Department took the position that, in determining the amount of the Lunns' countable resources, it could look only to the amount of resources on the first day of the month of the application—$68,135.14. Because $68,135.14 is greater than $36,057.57, the Department concluded that it had correctly denied the application.

[12] The Department has delegated to OAH the authority to hold "fair hearing" appeals under the Medicaid program. *Albert S. v. Department of Health and Mental Hygiene*, 166 Md. App. 726, 730 (2006).

At the hearing Mrs. Lunn established that as of November 1, 2022, her and her husband's countable resources totaled $24,605.32. In essence, she disputed that her financial eligibility should be judged as of the date of her application. In addition, she argued that because of the denial of her application, she had been relegated to the registry even though her and husband's resources were now well below the resource limit. She argued that even though she and her husband were indisputably impoverished (by the Department's own standards), she could not reapply for a CO Waiver until the Department invited her to do so.

The ALJ issued his decision on February 7, 2023. Neither party to this case defends the central rationale for the ALJ's decision.

Most notably, the ALJ decided that because Mrs. Lunn was "not institutionalized and live[d] at home with her spouse," the EDD should not have applied the spousal resource allowance against the Lunns' countable resources. Instead, the ALJ decided that the EDD should have applied the individual resource allowance of $2000.00. Because Mrs. Lunn's countable resources exceeded $2000.00 as of the first day of the month of her application (June 1, 2022), the ALJ concluded that the EDD properly denied her application.

The ALJ also concluded that the EDD correctly used the first day of the month of the application (June 1, 2022) as both the snapshot date and the date for evaluating Mrs. Lunn's financial eligibility. In support of that conclusion, the ALJ cited no statutes or

regulations. He cited only section 800.3 of the MA Manual, an internal document that does not have the force or effect of law.

C. Judicial Review in the Circuit Court

Mrs. Lunn sought judicial review of the ALJ's decision. In those proceedings, the Department conceded that the ALJ had erred in failing to apply the spousal resource allowance against the Lunns' countable resources. But although the Department's concession arguably should have ended the proceedings with a decision reversing the ALJ and remanding the case for further proceedings before the OAH,[13] the Department went on to argue that it was entitled to evaluate the Lunns' resources as of June 1, 2022, the first day of the month of the application. Even accounting for the spousal resource allowance, the Department argued that the Lunns' resources exceeded the resource limit as of that date.

The circuit court affirmed the ALJ on June 20, 2024. Like the ALJ, the circuit court seems to have concluded that the EDD could value the Lunns' resources on June 1, 2022, and that the spousal resource allowance did not apply.

[13] *See, e.g., Department of Health and Mental Hygiene v. Campbell*, 364 Md. 108, 111 n.1 (2001) (stating that courts "review an adjudicatory agency decision solely on the grounds relied upon by the agency[]").

D. Mrs. Lunn's Death and the Substitution of Her Personal Representative

Mrs. Lunn died on June 20, 2024, the day on which the circuit court issued its decision. She was 83 years old and had been waiting for a CO waiver for more than nine years.

On July 18, 2024, Mrs. Lunn's daughter, Renate J. Lunn, was appointed as her mother's personal representative. On the following day, July 19, 2024, the personal representative filed a notice of substitution, substituting herself as the petitioner in her late mother's action for judicial review. On that same day, the personal representative filed a timely notice of appeal.

QUESTIONS PRESENTED

The personal representative presents the following questions, which we have edited for clarity and concision:

1. Did the ALJ commit reversible error by failing to correctly compute and apply the spousal resource allowance in evaluating Mrs. Lunn's countable resources?

2. Did the ALJ commit reversible error in upholding the Agency's policy of using only the first day of the application month both to calculate the spousal resource allowance and to determine resource eligibility and refusing to consider any changes in Mrs. Lunn's resources after that date?[14]

[14] The personal representative formulated her questions as follows:

1. Did the Circuit Court (and Agency) commit reversible error by failing to correctly compute and apply the [spousal resource allowance] in evaluating Mrs. Lunn's countable resources?

2. Did the Circuit Court (and Agency) commit reversible error in upholding the Agency's policy of "Apply and Deny"—i.e. using only

STANDARD OF REVIEW

On judicial review of a decision by the OAH, we look through the circuit court's decision and evaluate the decision of the ALJ. *See Miller v. Department of Pub. Safety and Corr. Servs.*, 228 Md. App. 439, 446 (2016). When, as in this case, the only question is whether the ALJ correctly interpreted and applied the law, "we must 'determine if the administrative decision is premised upon an erroneous conclusion of law.'" *See id.* at 447 (quoting *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 573 n.3 (2005)).

DISCUSSION

I. Mootness

The Department has moved to dismiss this appeal on the ground that it is moot because of Mrs. Lunn's death. In support of its contention that the appeal is moot, the Department argues that "[a] person who has passed away . . . can no longer receive services through the program, and thus cannot benefit from a judicial determination that she was improperly deemed financially ineligible."

"Generally, a case is moot . . . 'when the court can no longer fashion an effective remedy.'" *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 351-52 (2019) (quoting *In re Kaela C.*, 394 Md. 432, 452 (2006)). "Ordinarily, an appellate court should not decide moot questions." *In re Thompson*, 260 Md. App. 286, 296 (2024).

> the first day of the application month to calculate both the [spousal resource allowance] and for determining resource eligibility, and refusing to consider any changes in Mrs. Lunn's resources after that date?

We agree that the case would be moot if Mrs. Lunn's personal representative were seeking to recover future benefits for ongoing in-home health care and seeking to receive other services through the CO Waiver program. The Department is correct that Mrs. Lunn is not entitled to those benefits or services because she did not live long enough to exhaust her right to judicial review of the ALJ's decision.

We disagree, however, that the case has become entirely moot, as the personal representative claims to have a right to "corrective payments" under 42 C.F.R. § 431.246.[15]

Tellingly, the Department does not clearly deny that the personal representative has the right to corrective payments. Instead, it asserts that "[t]he issue of corrective payments to recipients is a complex one," involving a number of factors, "including . . . whether the reimbursement[s] [are] limited to expenses paid by the recipient directly, whether the reimbursements are limited to the Medicaid payment rate, and whether the subject out-of-pocket medical expenses also factored into the recipient's would-be financial eligibility in a self-fulfilling fashion." In addition, the Department questions the

[15] 42 C.F.R. § 431.246 provides as follows:

> The agency must promptly make corrective payments, retroactive to the date an incorrect action was taken, and, if appropriate, provide for admission or readmission of an individual to a facility if—
>
> (a) The hearing decision is favorable to the applicant or beneficiary; or
>
> (b) The agency decides in the applicant's or beneficiary's favor before the hearing.

personal representative's ability to recover "corrective payments" because it did not develop and approve a plan of service for her (having denied her application).[16] "Ultimately, however," the Department asserts that "corrective payments cannot be issued in this administrative appeal" because, it says, "under the Administrative Procedure Act and the Department's Medicaid Fair Hearing [R]egulations, the proceedings at issue here are limited in scope to the underlying agency action being challenged—here, the Department's September 8, 2022, determination relating only to Mrs. Lunn's *financial* eligibility." (Emphasis in original.)

We need not decide whether the personal representative is entitled to corrective payments in any particular amount, whether in this proceeding or in another. Suffice it to say that because the personal representative may have the right to corrective payments if we conclude that the Department erroneously denied Mrs. Lunn's application, the issues before us are not moot.

The Department's position seems to be that it can keep an aged and infirm applicant on the registry for years, thereby preventing her from applying for a CO waiver; deny the waiver, arguably on erroneous grounds, when she is finally invited to apply; relegate her to the registry and require her to wait for many more years before she may

[16] The Department seems not to recognize that the personal representative might be able to put on evidence—perhaps in the form of expert testimony—to establish what the plan of service would probably have been had the Department not denied the application. It borders on the absurd to say that Department could escape judicial review of an erroneous decision to deny a CO waiver merely because its decision prevented the establishment of a plan of service that would result from the waiver.

reapply; and claim that its actions are unreviewable if she dies before an appellate court has an opportunity to consider the case. We reject that position.

II. The Merits

The Department does not defend the central pillar of the ALJ's decision. To the contrary, the Department agrees that the ALJ erred.

The ALJ concluded that Mrs. Lunn was not entitled to the spousal resource allowance because, he said, she was not "institutionalized." As a consequence, he concluded that she was entitled only to an individual allowance of $2000.00. The ALJ failed to recognize that, under governing federal statute, "community spouses" are considered to be "institutionalized spouses." *See* 42 U.S.C. § 1396r-5(h)(1). In view of the ALJ's patent error, the Department "concedes" that "the ALJ should have applied the spousal allowance when determining Mrs. Lunn's resource eligibility[.]"

But although the Department concedes that the ALJ committed an error of law, it argues that the error is "immaterial" because, it says, we can sustain his decision on other grounds. According to the Department, the ALJ also concluded that Mrs. Lunn could qualify for the CO waiver only if she met the financial-eligibility requirements on June 1, 2022, the first day of the first month of her application, but she indisputably did not meet the requirements as of that date.

In advancing that argument, the Department arguably ignores the well-established principle of administrative law, stated "time and time again," that a court may affirm an agency's decision only on the grounds on which the agency relied. *See, e.g., Department*

of Health and Mental Hygiene v. Campbell, 364 Md. 108, 111 n.1 (2001). But even if we could consider the Department's alternative grounds, we would not affirm the ALJ.

The main question in this case is whether, in September 2022, the Department could deny an application for a CO waiver on the ground that the applicant was not financially eligible by looking solely to the applicant's resources as of the first day of the first month of the application, or whether the Department was required to give the applicant up to six months to meet the financial-eligibility requirements. Based on the arguments that the parties have presented in this case, we are satisfied that Mrs. Lunn and her husband had up to six months from the first day of the first month of the application to satisfy the financial-eligibility requirements.[17]

The Department does not cite a statute, or a duly-adopted regulation, that permits or requires it to evaluate a community member's application for a CO waiver only on the

[17] The personal representative argues that the Department had to use the date of Mrs. Lunn's initial institutionalization in December 2014 as the snapshot date for computing the spousal resource allowance. The Department disagrees, principally citing the procedures outlined in its MA Manual. We need not resolve this dispute, because the personal representative agrees that even if the Department used a snapshot date of December 1, 2014, the Lunns' resources as of June 1, 2022, the first day of the month of the application, would have exceeded the spousal resource allowance. Specifically, the personal representative agrees that, had the Department used a snapshot date of December 1, 2014, the spousal resource allowance would have been $40,740.17 ($81,480.33 divided by two), which is less than the Lunns' countable resources of $68,135.14 as of the putative snapshot date of June 1, 2022. Thus, regardless of whether the Department had to use December 1, 2014, as the snapshot date, Mrs. Lunn would have qualified for a CO waiver only if the Department had to evaluate her resource eligibility during the six-month period following the application. It follows that the decisive question in this case is whether the Department had to evaluate her resource eligibility during that six-month period.

first day of the month in which the applicant is invited to apply. The Department mentions, but does not elaborate on the meaning or implications of, COMAR 10.09.24.04-1(C), which states that "[c]urrent eligibility shall have a period of consideration of a 6-month period beginning with the month of application for Medical Assistance." The Department does not mention section 1001.1(d) of the MA Manual, which states, similarly, that "[c]urrent eligibility for institutionalized persons"—a category that includes Mrs. Lunn[18]—"is determined for the initial period under consideration as well as the succeeding 6-month period under consideration." The Department certainly does not explain why COMAR 10.09.24.04-1(C) and section 1001.1(d) of the MA Manual mean anything other than what they seem to say, which is that an applicant has six months to satisfy the financial-eligibility requirements.

Instead, the Department relies principally on a provision in its internal policy manual, which states, in part, that "[r]esources are considered based on their value as of the first moment of the first day of the period under consideration[]" and that, "[f]or a determination of current eligibility, resources of the A/R[ ] and other AU members are considered as they existed on the first moment of the first day of the current period under consideration." MA Manual § 800.3. The Department goes on to cite COMAR 10.09.24.04-1(E)(3), which states that, "[i]f an applicant is determined ineligible for the current period under consideration due to a nonfinancial factor or excess resources, the application shall be disposed of and the application date may not be retained." On those

[18] *See* 42 U.S.C. § 1396r-5(h)(1).

bases, the Department concludes that it may "dispose" of an application for a CO waiver if the applicant fails to meet the financial-eligibility requirements on the first day of the month in which the application was made.

The Department's position is not fully consistent even with the language of the MA Manual. Section 800.3, by its terms, suggests that the Department should review the applicant's financial applicability on a month-by-month basis during the six-month "period of consideration":

> If the AU's total countable resources are within the applicable standard as of that moment [i.e., as of "the first moment of the first day of the period under consideration"], the AU is resource-eligible for Medical Assistance for the entire month.
>
> If the AU's total countable resources exceed the applicable standard as of that moment, the AU is ineligible for Medical Assistance for the entire month. Then, the AU remains ineligible until the total countable resources are within the resource standard as of the first moment of the first day of the subsequent month.

In other words, section 800.3 of the MA Manual seems to say that, even if the applicant's resources exceed the financial-eligibility limits as of the first day of the month on which the applicant applies, the applicant may nonetheless qualify at some later date, when "the total countable resources are within the resource standard as of the first moment of the first day of the *subsequent* month." (Emphasis added.) That interpretation could not be more at odds with the Department's contention that it may "dispose" of an application and relegate the applicant to the registry if her financial resources exceeded the eligibility limits at some point even before she submitted the application.

Furthermore, the Department's position seems to be at odds not only with section 800.3 but also with section 1000.1(d) of the MA Manual. Section 1000.1(d) states, among other things, that "the 6-month period under consideration begins with the month of application." The Department has offered no explanation for why we have a six-month "period under consideration," which "begins" with the month of the application, if the only date that matters is the first day of the month in which the applicant submits the application.

The Department's position is inconsistent with the interpretation that the OAH has adopted in other cases involving CO waivers. In at least three administrative decisions, ALJs have required the Department to evaluate the applicants' financial resources over a six-month period and have found that the applicants met the eligibility requirements for some of those months even though they may not have met the requirements for the first month. MDH-___-10A-17-36846 (Feb. 13, 2018); MDH-___-10A-17-37990 (Mar. 8, 2018); MDH-___-10A-18-07228 (June 18, 2018). Those administrative decisions do not bind us, but we regard them as persuasive, particularly because the Department has delegated the power to decide these interpretative questions to the OAH and because the Department can, but apparently did not, seek judicial review. "[T]he ALJ's decision is final and binding on the Department." *Albert S. v. Department of Health and Mental Hygiene*, 166 Md. App. 726, 731 (2006).

The Department attempts to distinguish these administrative decisions by arguing that they involve applicants who were institutionalized in nursing homes, and not

applicants from the community, like Mrs. Lunn (who is nonetheless deemed to have been "institutionalized" under federal law). There is no principled basis for that distinction: nothing in the governing statutes, the regulations, or even the MA Manual permits a distinction between a person who applies from a nursing home or an assisted-living facility and a similarly infirm person who applies from the community.

The Department's position is also inconsistent with at least some of its conduct in the handling of Mrs. Lunn's application. The EDD caseworker evidently thought that Mrs. Lunn might qualify for a CO waiver if she had reduced her resources (or "spent down") in the months after she submitted the application. On August 2, 2022, the caseworker asked whether the amount of the Lunns' resources had "changed" since the effective date of the application two months earlier. On August 12, 2022, she requested bank statements postdating the effective date of the application. And on August 15, 2022, she concluded that the resources "still" exceeded the limit (though she did so based on an erroneous understanding of the applicable spousal resource allowance). In short, in interpreting the pertinent requirements through her conduct, the EDD caseworker did not endorse the Department's position that she could deny the application merely because the Lunns' financial resources exceeded the resource limit on the first day of the month in which the application was submitted.

Finally, the 2022 amendments to section 15-132(e) of the Health-General Article demonstrate conclusively that the Department's position is incorrect.

The 2022 amendments evidence some legislative dissatisfaction with the Department's management of the CO waiver program, and specifically with the long waiting list or registry (which included over 21,000 people by early 2022) and the Department's failure to fill a significant percentage of the available slots in the program. Dep't of Leg. Servs., Fiscal and Policy Note, Senate Bill 28, at 2 (2022 Session). As amended, section 15-132(e)(1)(i) requires the Department to increase the number of CO waiver applications that it sends:

> If the Department maintains a waiting list or registry, each month the Department shall send a waiver application:
>
> 1. If there are fewer than 600 individuals on the waiting list or registry, to all individuals on the waiting list or registry; and
>
> 2. If there are 600 or more individuals on the waiting list or registry, to at least 600 individuals on the waiting list or registry.

For our purposes, the crucial language appears in section 15-132(e)(2)(ii), which specifies the contents of the waiver application:

> (ii) A waiver application sent under subparagraph (i) of this paragraph shall state clearly and conspicuously that:
>
> 1. The applicant must submit the application within 6 weeks after receiving the application; and
>
> 2. *The applicant is required to meet all of the eligibility criteria for participation in the waiver within 6 months after submitting the application.*

(Emphasis added.)

In their briefs, both parties largely assumed that section 15-132(e)(1)(ii) creates a new obligation under which the Department must give all CO waiver applicants six

months to meet all of the eligibility requirements. They debated whether section 15-132(e)(1)(ii) applies retroactively to applications, like Mrs. Lunn's, that the Department denied before October 1, 2022, the effective date of the amendment. They also debated whether the amendment could truly be said to apply retroactively if it were invoked in administrative proceedings and actions for judicial review that took place after the effective date of the amendment. In arguing that this case is moot and that we should not entertain it under the exception for moot cases involving issues that are capable of repetition, the Department agreed that since October 1, 2022, it has been required to give all applicants six months to meet the financial eligibility requirements for a CO waiver.

In a footnote, however, Mrs. Lunn's personal representative also argued that the 2022 amendments did not actually change the law, but "rather[] . . . clarified and articulated existing policy regarding [the] timing and procedure of [CO waiver] applications, and created a requirement that the state give notice of these requirements to applicants." Similarly, in her reply brief, the personal representative recognized that if the General Assembly had intended to create a new obligation requiring the Department to give all applicants six months to meet the eligibility requirements, section 15-132(e)(1)(ii) would be an odd way to go about doing it. As she puts it:

> Had the [2022 amendments] been viewed as expanding existing deadlines, there was no reason for the legislature to have included only a "notice" provision. The more logical construction of the [2022 amendment] is that it seeks to ensure applicants receive notice of the existing deadline. The six-month "period under consideration" is (and always has been) the period during which an applicant may satisfy eligibility criteria[.]

The personal representative is correct. If the General Assembly had intended to create a completely new right under which applicants had six months to satisfy the eligibility criteria, it would not have said that the Department must send a waiver application that informs applicants that they must "meet all of the eligibility criteria for participation in the waiver within 6 months after submitting the application." Instead, the General Assembly would have said something like, "applicants shall have six months from the date of the application to meet all of the eligibility criteria for participation in the waiver" or "the Department shall allow applicants to have six months from the date of the application to meet all of the eligibility criteria for participation in the waiver."

Section 15-132(e)(1)(ii) says nothing of that sort. By its terms, section 15-132(e)(1)(ii) does not obligate the Department to give applicants six months to meet the requirements; it obligates the Department to send a notice informing applicants that they have six months to meet the eligibility requirements. In our judgment, the most sensible reading of section 15-132(e)(1)(ii) is not that it creates a new right to satisfy the eligibility requirements within six months of the application, but that it obligates the Department to inform applicants of a *pre-existing* right to satisfy the requirements within those six months. In enacting that provision, the General Assembly may well have been concerned that worthy applicants were being deterred from applying for the CO waiver because they did not understand that under existing law they had six months from the date of the application to meet all of the requirements.

In summary, we conclude that Mrs. Lunn and her husband had six months from June 1, 2022, the first day of the month of her application, in which to satisfy the financial-eligibility requirements of a CO waiver. The Department's contrary approach might have been an effective way to deny applications and limit participation in the CO waiver program, but it was premised on an erroneous view of the law. The ALJ, therefore, erred in concluding otherwise. We remand the case to the Circuit Court for Baltimore County with directions to remand the case to the Office of Administrative Hearings for further proceedings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.