



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)
c/o Atty Benjamin Adams
Adams & Woodrow, S C
301 Nicolet Boulevard
Neenah, WI 54956-2788

DECISION

MRA-68/48394

The proposed decision of the hearing examiner dated June 12, 2001 is hereby adopted as the final order of the Department.

REQUEST FOR A REHEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Wisconsin Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison,
Wisconsin, this _____ day of
_____, 2001.



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

**PROPOSED
DECISION**

(petitioner)
c/o Benjamin M. Adams
Adams & Woodrow, S.C.
301 Nicolet Boulevard
Neenah, WI 54956

MRA- 68/48394

PRELIMINARY RECITALS

Pursuant to a petition filed March 8, 2001, under Wis. Stat. §§ 49.455(8)(a)1. & 5. (1999-00) and Wis. Admin. Code §§ HFS 103.075(8)(a)1. & 5. (November 2000), to review the Community Spouse Resource Allowance (CSRA) and Minimum Monthly Maintenance Needs Allowance (MMMNA) under the spousal impoverishment rules of the Medical Assistance (MA) program, a hearing was held on April 18, 2001 in Waupaca, Wisconsin. At petitioner's request the record was held open until April 27, 2001.

The only issue for determination is whether, under the spousal impoverishment rules of the MA program, the Community Spouse Resource Allowance (CSRA) may be increased.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioners:

(petitioner) [not present at April 18, 2001
hearing]

c/o Benjamin M. Adams
Adams & Woodrow, S.C.

Attorneys

301 Nicolet Boulevard

Neenah, Wisconsin 54956

Represented by:

Benjamin M. Adams

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Wisconsin Department of Health and Family Services

Division of Health Care Financing

1 West Wilson Street

Room 250

P.O. Box 309

Madison, Wisconsin 53707-0309

BY: Patricia A. Moe, ESS

HEARING OFFICER:

Sean P. Maloney
Administrative Law Judge
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN 233-03-1887; CARES # 411-117-5945; DOB August 17, 1914) is married and is a resident of Waupaca County; petitioner lives in a nursing home (she entered the nursing home in October 2000) and her husband lives in a Community Based Residential Facility (CBRF) in the community. Exhibits #1 & #4.
2. Petitioner applied for MA, under spousal impoverishment rules, with the County on January 30, 2001.
3. By a computer-generated "Notice of Decision" dated March 6, 2001 petitioner's MA application was denied due to excess assets.
4. Until April 2001 the countable assets of petitioner and her husband included the following whole life insurance policy with a cash surrender value, at all times relevant to this Decision, in excess of \$2,000.00: Policy Number 001396179 from GE Life and Annuity Assurance Company of Richmond, Virginia. ["Life Policy"] Exhibits #1 & #2.

DISCUSSION

(I) CSRA

Under the normal MA eligibility rules applicable to persons such as petitioner, a person is not eligible for MA unless they are first in poverty. If these rules applied to situations, such as petitioner's, where one spouse is in a nursing home and the other in the community, the community spouse would be forced into poverty before the spouse in the nursing home would be eligible for MA. This is because married couples have a legal claim to the income and assets of one another.

To avoid forcing community spouses into poverty, persons, such as petitioner, who are residents of a nursing home and still have a spouse living in the community may apply for MA under special rules known as "Spousal Impoverishment" rules. These rules are designed to allow the community spouse to keep a certain portion of the married couples assets and income. See, Wis. Stat. § 49.455 (1999-00); Wis. Admin. Code HFS § 103.075 (November 2000); MA Handbook, Appendix 23.0.0.

The amount of assets a community spouse is allowed to keep is called the Community Spouse Resource Allowance (CSRA) [also sometimes called the Community Spouse Asset Share (CSAS)]. There is a standard CSRA amount. The CSRA can be invested by the community spouse to generate income, which the community spouse can then use for living expenses. If the amount of income generated by the CSRA, combined with any other income the community spouse receives (or should receive), does not rise to the level of a certain minimum monthly amount, an increase in the CSRA may be requested by way of the fair hearing process. The purpose of increasing the CSRA is to give the community spouse a greater amount of assets to invest, thereby generating a greater amount of income, which can then be used by the community spouse for living expenses. In this case, petitioner has requested that the CSRA be

increased by the fair hearing process. See, Wis. Stat. §§ 49.455(6)(b)(3) & (8)(d) (1999-00); Wis. Admin. Code §§ HFS 103.075(8)(a)5. & (8)(d) (November 2000); MA Handbook, Appendix 23.4.3.3.

As an Administrative Law Judge (ALJ), I am bound to follow Final Decisions of the Secretary of the State of Wisconsin Department of Health and Family Services (DHFS). Final Decisions are made subsequent to Proposed Decisions issued by the Division of Hearings and Appeals (DHA). Pursuant to prior Final Decisions, a request to increase the CSRA by the fair hearing process is ripe for decision only if it can be established that the MA applicant, in this case petitioner, is otherwise eligible for MA.

Specifically, Final Decisions of the DHFS Secretary state that only resources that generate income can be added to the CSRA by the fair hearing process. Put another way, any assets of the nursing home resident and the community spouse that do not generate income cannot be used to increase the CSRA. The MA asset limit is \$2,000. Wis. Stat. § 49.47(4)(b)3g.e. (1999-00); Wis. Admin. Code § HFS 103.04(2) (November 2000). Thus, if the nursing home resident and the community spouse have in excess of \$2,000 in assets that do not generate income, no increase in the CSRA can be made because the nursing home resident is not otherwise eligible for MA. This is because, even if the CSRA were increased so as to include all resources that do generate income, the nursing home resident would still not be eligible for MA because the \$2,000 MA asset limit would be exceeded by the non-income-generating assets. See, DHA Case No. MRA-5/35807 (Wis. Div. Hearings & Appeals; Final Decision December 7, 1998; Proposed Decision October 7, 1998) (DHFS); and, DHA Case No. MRA-70/15380 (Wis. Div. Hearings & Appeals; Final Decision August 19, 1997; Proposed Decision July 2, 1997) (DHFS).

In this case, petitioner is not otherwise eligible for MA. Petitioner is not otherwise eligible for MA because petitioner and her husband have in excess of \$2,000 in assets that do not generate income. Therefore, I cannot grant petitioner's request to increase the CSRA.

Specifically, until April 2001 petitioner's husband owned the Life Policy noted in Finding of Fact #4, above. This policy had a value in excess of \$2,000 and did not generate income.

It is the normal assumption that an applicant is not entitled to benefits unless and until the applicant proves eligibility. *Lavine v. Milne*, 424 U.S. 577, 584 (1976). In this case, it has not been established that petitioner is otherwise eligible for MA because petitioner and her husband have not shown that they do not have in excess of \$2000 in assets that do not generate income. Specifically, on the date of application, January 30, 2001, petitioner and her husband owned the Life Policy. The Life Policy had a value in excess of \$2,000.00 and it has not been established that it generated any income.

It appears from the evidence in the record of this matter that the Life Policy did increase in value from February 5, 2001 to April 12, 2001 from \$4,151.05 to \$4,215.81. Exhibit #2. However, it is not clear what accounts for this increase -- the information in the record of this matter is that the Life Policy was a whole life policy but that there were no dividends for the Life Policy. Exhibit #2. At petitioner's request the record was left open but no conclusive evidence was submitted to show that the Life Policy generated income. Therefore, I cannot grant petitioner's request to increase the CSRA because petitioner has failed to show that the Life Policy generates income.

Furthermore, even if the Life Policy paid dividends petitioner's request to increase the CSRA still could not be granted. An increase in the value of a life insurance policy due to the payment and reinvestment of dividends is not the same as the generation of income. The cash value of a life insurance policy is to be counted as an asset for MA purposes -- not income. Life insurance policy dividends are to be disregarded as income for MA purposes. MA Handbook, Appendix 11.6.5 & 15.2.16. Likewise, for purposes of the federal Supplemental Security Income Program (SSI) program dividends paid on life insurance policies are not income. POMS SI 00830.500(C) (June

2001). For SSI, life insurance policy dividend accumulations are an asset, not income. POMS SI 01130.300(A)(5)(b) & (B)(1) (June 2001); See also, 20 C.F.R. §§ 416.1103(c), 416.1207(b) & 416.1230 (2000).

This treatment of life insurance policies is consistent with the purpose of increasing the CSRA. The purpose of increasing the CSRA is to give the community spouse a greater amount of assets to invest, thereby generating a greater amount of income that can be used by the community spouse for living expenses. In order to serve such a purpose an asset must generate income that can be put to immediate use by the community spouse for living expenses. Life insurance policies producing dividends that are reinvested do not do this.

Petitioner argues that the Life Policy does generate income and, as persuasive authority, relies on the following: *Ruebin Spease*, No. 99-CV-95 (Wis. Cir. Ct. Grant County June 23, 1999). In that Decision the Circuit Court reversed, in relevant part, the following DHA Decision: DHA Case No. MRA-22/38149 (Wis. Div. Hearings & Appeals February 12, 1999) (DHFS).

In *Spease* the Circuit Court noted that the DHA ALJ found “that the two whole life insurance policies are nonincome generating and therefore by deduction need not be allocated to the noninstitutionalized spouse” The Circuit Court then reversed this ALJ finding stating: “The essence of a whole life insurance policy is that interest or earnings are derived from the policy’s cash value and added to the holder’s equity or used to pay premiums. The fact that the cash value held in a whole life insurance policy and the earnings which are derived therefrom may be used to make premium payments does not, in the Court’s view, differentiate the funds from those held in a savings account or other depository account under the definition utilized by the [ALJ]. *Id.* at pp. 3-4.

For the reasons discussed above, I must respectfully disagree with the Circuit Court. There is a very real and important distinction between the increase in value of a life insurance policy and the income generated by funds held in a savings account or other depository account. The increase in value of a life insurance policy typically is not readily available for use unless and until the policy is cashed-in. It may not be possible to immediately cash in the policy and restrictions may exist on when and how the policy may be cashed-in. On the other hand, the income generated by funds held in a savings account or other depository account is readily available for use. This distinction is crucial since, as pointed out above, the purpose of increasing the CSRA is to give the community spouse a greater amount of income to be used for living expenses. This purpose is not served by an asset whose increase in value is not readily available.

Finally, petitioner cites to the following two prior DHA Decisions: DHA Case No. MRA-70/47970 (Wis. Div. Hearings & Appeals April 13, 2001) (DHFS) [Exhibit #5]; and, DHA Case No. MRA-44/47850 (Wis. Div. Hearings & Appeals March 1, 2001) (DHFS) [Exhibit #4]. However, neither of those two Decisions discusses or analyzes the life insurance generation of income issue.

If a person is not eligible on the date of application due to non-income producing assets in excess of \$2,000 they cannot become eligible without reapplying even if the non-income producing asset is disposed of. The person must reapply. Other circumstances affecting eligibility may also have changed. Petitioner may file a new MA application if she wishes.

(II) MMMNA

Petitioner is also requesting an increase in her husband’s “Minimum Monthly Maintenance Needs Allowance” (MMMNA). The MMMNA provided for by law without a fair hearing is the lesser of \$2,175.00 or \$1,875.00 plus excess shelter costs. Wis. Stat. § 49.455(4)(c) (1999-00), MA Handbook, Appendix 23.6.0.; See also, Wis. Admin. Code § HFS 103.075(6)(b) (November 2000). In petitioner’s case the MMMNA, provided for by law without a fair hearing or court order, is \$2,175.00. Exhibit #1. Petitioner is requesting that this amount be increased to \$2,707.78.

The MMMNA can be increased if either spouse establishes at a fair hearing that, due to exceptional circumstances resulting in financial duress, the community spouse needs income above the level provided by the MMMNA. Wis. Stat. § 49.455(8)(c) (1999-00); Wis. Admin. Code § HFS 103.075(8)(c) (November 2000); MA Handbook, Appendix 23.6.0. The phrase “exceptional circumstances resulting in financial duress” means situations that result in the community spouse not being able to provide for his or her own necessary and basic maintenance needs. Wis. Admin. Code § HFS 103.075(8)(c) (November 2000); MA Handbook, Appendix 23.6.0.

As explained above, petitioner is not eligible for MA because petitioner and her husband had in excess of \$2,000 in assets that do not generate income. Therefore, petitioner’s request to increase the MMMNA is moot.

CONCLUSIONS OF LAW

For the reasons discussed above, petitioners' request to increase the CSRA by the fair hearing process is not ripe for decision and must be denied and petitioner’s request to increase the MMMNA is a moot.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby DISMISSED if this Proposed Decision is adopted by the Secretary of DHFS as the Final Decision.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as “PARTIES IN INTEREST.”

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties’ objections and argument will be referred to the Secretary of the Department of Health and Family Services (DHFS) for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this _____ day of
_____, 2001.

Sean P. Maloney
Administrative Law Judge
Division of Hearings and Appeals
05152001/SPM

xc:
Waupaca County Department of Health and Human Services
Susan Wood, DHFS