DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-71/48681

The proposed decision of the hearing examiner dated August 14, 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.

_____
Thomas E. Alt, Deputy Secretary
Department of Health and Family Services

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

PROPOSED DECISION
ON REMAND

MRA-71/#48681

PRELIMINARY RECITALS

Pursuant to a petition filed April 2, 2001, under Wis. Stat. §49.45(5) to review a decision by the Wood County Dept. of Social Services regarding Medical Assistance (MA), a hearing was held on May 22, 2001, at Wisconsin Rapids, Wisconsin.

A proposed decision was issued on June 7, 2001. On July 24, 2001, the Deputy Secretary remanded the file to the examiner with instructions to make a finding concerning petitioner's assets, and to consider whether the finding would impact on the proposed decision conclusion that there were exceptional circumstances resulting in financial duress. The agency sent the examiner a copy of petitioner's February, 2001 asset assessment.

The decision remains the same with some additions. All additions to the findings and discussion are in italics.

The issue for determination is whether petitioner's spouse's income allocation may be increased.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

(petitioner)

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309
By: Carol Heuer, ES Supervisor
Wood County Dept. Of Social Services
P.O. Box 8095
Wisconsin Rapids, WI 54495-8095

EXAMINER:

Brian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a nursing home resident of Wood County.

2. Petitioner's wife's community spouse income allocation was set at $1,912.50 effective February 1, 2001. The county took the action on March 17, 2001.

3. Petitioner's monthly income is $3,416.10 in social security and retirement benefits. Petitioner's wife's monthly income is $435.70 social security.

4. Mrs. (wife) has multiple medical problems including hypothyroidism, congestive heart failure, gastroesophageal reflux, atrial fibrillation, hypertension, and anxiety disorder. She has limited vision and requires supervision in taking her twelve different medications. She needs assistance with all activities of daily living.

5. Mrs. (wife) lives in the community with her daughter and son-in-law. Her daughter charges her monthly $600 per for rent, $300 for food, and $2,100 for care. The son-in-law does not work outside the home and thus is generally the primary caretaker. Mrs. (wife) also pays $176 per month for health insurance along with co-pays for prescriptions. If not for her daughter's care, Mrs. (wife) likely would have to be placed in a nursing home.

6. *When the county assessed petitioner's assets in February, 2001, total assets were $40,524 liquid (bank accounts) and $14,500 real property, for a total of $55,024. As of the hearing date liquid assets were reduced to approximately $27,000.*

DISCUSSION

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home or in the community pursuant to MA Waiver eligibility, and that person has a "community spouse" who is not institutionalized or eligible for MA Waiver services. Wis. Stat. §49.455(1).

The MCAA established a new "minimum monthly needs allowance" for the community spouse at a specified percentage of the federal poverty line. This amount is the income considered necessary to maintain the community spouse in the community. Petitioner's wife's level was set at $1,912.50; it increased effective May 1, 2001 to a minimum of $1,935. MA Handbook, Appendix 23.6.0 (5-1-01).

A fair hearing officer can grant an exception to this limit on community spouse income. The hearing officer may increase the income allowance following a fair hearing. The hearing officer does not have unfettered discretion in creating an exception to the maximum allocation ceiling, however. The relevant statutory provision states that the test for exception is as follows:

> (c) 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 minimum monthly maintenance needs allowance determined under sub. (4)(c), the department shall determine an amount adequate to provide for the community spouse's needs and use that amount in place of the minimum monthly maintenance needs allowance in determining the community spouse monthly income allowance under sub. (4)(b).

Wis. Stat., §49.455(8)(c), emphasis added. Thus a hearing officer may augment the maximum allocation ceiling only by amounts needed to alleviate financial duress, to allow the community spouse to meet necessary and basic maintenance needs.

The issue in this case is whether petitioner would suffer financial duress if the Division of Hearings and Appeals refused to increase her income allocation. The decision involves several components. First, does petitioner require care to remain in the community? Second, are the charges reasonable? Third, is it reasonable for a daughter to charge her mother to care for her?

With regard to the first component, the letter from Dr. Price sets out in detail that petitioner has a number of maladies, and that she requires assistance with all activities of daily living. He states that she would be a likely candidate for nursing home placement if not for the care provided by her daughter and son-in-law. I am satisfied, and nobody at the hearing argued otherwise, that petitioner requires assistance to remain in her community setting.

With regard to the second issue, the total monthly charge to petitioner is $3,000. Petitioner's daughter breaks it down to $2,100 for care, $600 rent, and $300 groceries. I question charging one's mother rent, particularly $600 per month for essentially a room in a private home. I also question $300 per month for groceries for an 80-year-old woman. On the other hand, on the open market $2,100 for full time care is inexpensive. I contacted a consultant at the Division of Health Care Financing to get an idea of charges for home health care. The current MA rate for personal care worker (PCW) services is $15.50 per hour. PCW services are defined as "medically oriented activities related to assisting a recipient with activities of daily living necessary to maintain the recipient in his or her place of residence." Wis. Adm. Code §HFS 107.112(1). PCW services do not include assistance with medications, so petitioner's daughter and son-in-law actually are performing something more than PCW level services. At a rate of $15.50 per hour in a 30-day month, the $2,100 charged to petitioner would amount to 4.5 hours per day PCW services. If the entire $3,000 per month charge was considered, it would amount to 6.5 hours per day.

I do not know, if a complete assessment were done, how many daily hours of services an objective assessor would grant to petitioner. However, the charges do not appear to be unreasonable considering that petitioner needs assistance with all activities of daily living, medications, and transportation.

The most difficult factor is whether it is reasonable to pay petitioner's daughter and son-in-law these charges. In other words, if the income allocation were not increased, would petitioner's daughter refuse to care for her any longer? That is the key question, and one that we would only know the answer to if I refused to increase the allocation. On the other hand, another way to look at the situation is whether these charges would be considered reasonable if an unrelated third party provided the cares. I conclude that they would be considered reasonable if an unrelated provider performed them. If petitioner was placed in a nursing home, the rate for intermediate level care at a local nursing home would be over $3,600 per month. If petitioner were home and required daily assistance, the home health charges likely would be as much or more than the amounts charged by petitioner's daughter.

Petitioner also had $40,524 in liquid assets at the time of application. At the hearing (witness) testified that they had been reduced to $27,000 because the $3,000 per month payment was being made out of assets pending the hearing decision. I conclude that the assets are not a viable source to make payments for petitioner's wife's care. To require the spending down of her relatively small amount of assets (as compared to other Spousal Impoverishment cases) would contradict the purpose of the law.

I conclude that under the unique circumstances of this case, petitioner's monthly income allocation can be raised to $3,176 per month, for the cost of her care and the monthly health insurance premiums. I will not increase it more for medication co-pays because I feel that those amounts, for which petitioner did not provide a specific amount, can come from the $300 per month for groceries.

CONCLUSIONS OF LAW

Petitioner's wife requires $3,176 per month income to avoid financial duress.

NOW, THEREFORE, it is **ORDERED**

That the matter be remanded to the county with instructions to recalculate petitioner's cost of care, retroactive to February 1, 2001, taking into account an increased community spouse income allotment of $3,172 per month.

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 Dept. of Health and Family Services for final decision-making.

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

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

_____
Brian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals
0807/bcs

cc: Wood County DSS
DHFS - Susan Wood

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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MRA-71/#48681

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Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309
By: Carol Heuer, ES Supervisor
Wood County Dept. Of Social Services
P.O. Box 8095
Wisconsin Rapids, WI 54495-8095

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

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

_____
Brian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals
0605/bcs

cc: Wood County DSS
DHFS - Susan Wood