



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-44/79082

PRELIMINARY RECITALS

Pursuant to a petition filed September 1, 2006, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Outagamie County Dept. of Human Services in regard to Medical Assistance (MA), a telephone hearing was held on September 26, 2006. The record was held open for 15 days for the submission of additional information.

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

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

Attorney James L. Rudd
219 East Wisconsin Avenue
Neenah, WI 54956

Respondent:

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, P.O. Box 309
Madison, WI 53707-0309

By: Evelyn DeFatte-Singh, ESS
Outagamie County Dept Of Human Services
401 S. Elm Street
Appleton, WI 54911-5985

ADMINISTRATIVE LAW JUDGE:

Kenneth P. Adler
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #xxxxxxxxxx) is a resident of Outagamie County. He was admitted to a nursing home prior to application. His spouse continues to reside in the community.
2. On August 15, 2006 an Institutional MA application was filed on the petitioner's behalf. An asset assessment was completed, and the agency determined the couple's combined assets on August 15, 2006 to be \$106,634.28. The applicable Community Spouse Asset Share (CSAS)/Community Spouse Resource Allowance (CSRA), for this couple was \$53,317.14.

3. On August 16, 2006 the agency issued written notice of MA denial explaining the couple's assets exceeded the applicable asset limit of \$55,317.14. Exhibit 1
4. As of August 16, 2006 the total combined countable assets of petitioner and her husband were \$106,634.28. These total combined countable assets produced monthly income of \$217 which is an annual rate of return of approximately 2.5% [(monthly X 12)/total assets].
5. The total monthly income of petitioner and his spouse as of August 16, 2006, excluding income generated by the total combined countable assets of petitioner and her husband is \$988 per month consisting of \$697 per month of Social Security for petitioner plus \$291 per month of Social Security for petitioner's spouse.
6. The Minimum Monthly Maintenance Needs Allowance (MMMNA) for petitioner's spouse, without a Fair Hearing, is \$2,200.
7. Petitioner has made all of his income, except for an amount equal to the sum of his personal needs allowance of \$45, and amounts incurred as expenses for medical or remedial care for himself, available to his spouse.
8. The petitioner's spouse's monthly income of \$1,204 is well under the MMMNA of \$2,200. The petitioner's spouse seeks to have her CSAS/CSRA increased to \$106,634.28.

DISCUSSION

Introduction

At the outset it should be noted that the asset assessment completed by the county agency on August 15, 2006 and detailed in the August 16, 2006 notice of decision do not match the assets as listed by the county agency on the CARES worker asset summary. As the figures from the August 16th notice of decision were those used by petitioner's attorney in his brief submitted the day of hearing, I will use those same figures for the discussion which follows.

The issue presented in this case is whether the petitioner is MA eligible, under spousal impoverishment rules, where the household's assets exceed the special \$55,317.14 asset limit, and the community spouse has income that falls below the Minimum Monthly Maintenance Needs Allowance (MMMNA, or "income allowance," or "Community Spouse Income Allocation" in the *Medicaid Eligibility Handbook*).

"Spousal impoverishment" rules were created with passage of the federal Medicare Catastrophic Coverage Act of 1988 (MCCA), which included extensive changes in state Medicaid (MA) eligibility determinations in cases involving married persons. In spousal impoverishment cases, the institutionalized spouse resides in a nursing facility and "community spouse" refers to the person married to the institutionalized individual. Wis. Stat. §49.455(1). Generally, no income of a community spouse is considered to be available for use by the other spouse during any month in which that other spouse is institutionalized. Wis. Stat. § 49.455(3).

The MCCA created *asset* eligibility limits for spousal impoverishment households that are more generous than those for a non-spousal impoverishment household (e.g., \$2,000 for a single person). The MCCA also established a Minimum Monthly Maintenance Needs Allowance (MMMNA)/*income* allowance for the community spouse at a specified percentage of the federal poverty line. This income allowance is the amount of monthly income deemed necessary for the community spouse to live on. A community spouse may, however, prove through the fair hearing process that she has financial need above the MMMNA based upon exceptional circumstances resulting in financial duress. Wis. Stat. § 49.455.

Establishing the Asset Limit in a Spousal Impoverishment Case

When initially determining whether an institutionalized spouse is MA eligible, county agencies review the combined assets of the institutionalized spouse and the community spouse. *Medicaid Eligibility Handbook (MEH)*, 5.10.4. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial is exempt from the determination. The couple's total assets are then compared to the CSAS (i.e., an asset limit) to determine eligibility.

MEH, 5.10.4 – 5.10.4.3, explains the asset eligibility determination process: First, a Community Spouse Asset Share (CSAS) – also termed the Community Spouse Resource Allowance (CSRA) – is calculated as follows: **(1)** If the couple's total countable assets are \$199,080 or more, the CSAS is \$99,540; **(2)** If the couple's total countable assets are less than \$199,080 but greater than \$100,000, the CSAS is 1/2 of the total countable assets of the couple; and **(3)** if the total countable assets of the couple are \$100,000 or less, the CSAS is \$50,000. Wis. Stat. § 49.455(6)(b)3.

Second, \$2,000 (the MA asset limit for the institutionalized individual) is then added to the CSAS to determine the total asset allowance for the couple. Generally, if the couple's assets are at or below the determined asset allowance, the institutionalized spouse is eligible for MA. If the assets exceed the asset allowance calculated for the couple, the institutionalized spouse is not MA eligible.

In this case, the parties do not dispute the couple's assets at the time of nursing home entry were \$106,634.28. Based upon the above, the amount of assets the couple would be allowed to retain would be \$55,317.14 – with \$2,000 of that amount being retained by the institutionalized spouse seeking MA eligibility. Therefore, per the assessment, the petitioner and his community spouse exceeded the \$55,317.14 MA asset limit by \$51,317.14.

As an exception to the general rule, the CSAS may be increased, through the fair hearing process, if the assets generate income on a monthly basis and are necessary to raise the community spouse's income to the MMMNA. Wis. Stat. § 49.455(8)(d), Wis. Admin. Code § HFS 103.075(8)(c). Currently, the MMMNA is defined as the lesser of \$2,488.50 per month, or \$2,200.00 plus excess shelter costs. *MEH*, 5.10.6.

The petitioner does not assert that the community spouse requires more than the designated \$2,138 income allowance to continue residing in the community. However, petitioner asserts the couple should be able to retain assets above the \$55,317.14 asset limit in order to generate income to reach the MMMNA to which the community spouse is entitled. He requests that the couple be allowed to retain the bank accounts, thus asking this administrative law judge to find that all of these assets are necessary to generate a monthly income which will approach or meet the MMMNA.

The pertinent state statute, Wis. Stat. § 49.455(6),(8), allows an administrative law judge (ALJ) to increase the CSAS/resource allowance under limited circumstances:

(6) PERMITTING TRANSFER OF RESOURCES TO COMMUNITY SPOUSE.

...

(b) The community spouse resource allowance equals the amount by which the amount of resources otherwise available to the community spouse is exceeded by the greatest of the following: . . .

3. The amount established in a fair hearing under sub. (8)(d).

...

(8) FAIR HEARING. . .

(d) If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), *the department shall establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates*

enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). Except in exceptional cases which would result in financial duress for the community spouse, the department may not establish an amount to be used under (6)(b)3 unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b) . . .
(Emphasis added.)

Based upon the above, an administrative law judge (ALJ) is allowed to modify the CSAS by determining assets in excess of the limit are necessary *to generate income up to the MMMNA for the community spouse*. Therefore, the above provision has been interpreted to allow an ALJ to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the asset allowance. See MED-62/94792, MED-36/93977.

Wisconsin statutes also direct the department to require the institutionalized spouse to *first* make all his/her *income* available to the community spouse before additional *assets* above the CSAS are allowed to be retained by the community spouse to raise her income to the MMMNA. See also MED-23/12842 (*Blumer*).

In this case, when the institutionalized petitioner's countable income of \$697 is added to the community spouse's non-investment income of \$291, the combined sum of \$988 is below the \$2,200 MMMNA. When the \$217 in investment income is added to their other joint income, the total is only \$1,417 which is still well below the \$2,200 MMMNA.

As explained by petitioner's attorney, in order for the couple's assets total assets of \$106,634 to raise enough income to meet the MMMNA, those assets would need to be invested in instruments which would generate an annual return of 11.7%. I am in agreement that the current financial and economic conditions would necessitate those assets be placed in areas requiring an excessive amount of risk to generate such returns.

Conclusion

Those assets of the petitioner's which are generating a reasonable investment return must be allocated to the community spouse to raise her monthly income to an amount that is closer to the MMMNA. The petitioner has asked that the other income-producing assets be so allocated. The CSAS for this household shall be increased to \$106,634.28. This case shall be remanded to the county to make the determination as to whether the household's assets subsequently dropped below this revised CSAS.

CONCLUSIONS OF LAW

That the CSAS for this household shall be increased to \$106,634.28, in order to increase the community spouse's income to a level approaching (but not exceeding) the MMMNA.

NOW, THEREFORE, it is

ORDERED

That the petition herein be remanded to the county agency with instructions to (1) increase the Community Spouse Asset Share to \$106,634.28 for the petitioner's household effective August 1, 2006 and (2) certify petitioner for Institutional MA effective August 1, 2006 if otherwise eligible. These actions shall be taken within 10 days of the date of this Decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge 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.

To ask for a rehearing, 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 for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wisconsin Statutes § 227.49. 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 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Wisconsin Department of Health and Family Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 650, 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 appeals to the Circuit Court is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of
Madison, Wisconsin, this 7th day of
November, 2006

/s/s/Kenneth P. Adler
Administrative Law Judge
Division of Hearings and Appeals
118/KPA