



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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

DECISION

MRA-70/81834

PRELIMINARY RECITALS

Pursuant to a petition filed January 5, 2007, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Winnebago County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on January 23, 2007, at Neenah, Wisconsin.

The issue for determination is if the community spouse may retain assets to increase her monthly income.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:
(petitioner)

Represented by:
Louis Archambault
301 Nicolet Boulevard
Neenah, WI 54956-2788

Respondent:

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: Mary Beth Gehrke, ESS
Winnebago County Dept Of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903-2187

ADMINISTRATIVE LAW JUDGE:

Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #xxxxxxxx) is a resident of Winnebago County.

2. The petitioner became a resident of a skilled nursing facility on September 7, 2006. On December 20, 2006, the petitioner applied for institutional MA retroactive to September 1, 2006.
3. Between the petitioner and the community spouse, the combined total of all Social Security was \$1,441 per month from September through December, 2006, decreasing to \$1,391 starting in January, 2007. (See Exhibit #20.) After a \$505.16 pension payment is added and the \$45 personal allowance subtracted, the total available income was \$1,901.16 in 2006, and is \$1,851.16 in 2007.
4. As of September 7, 2006, there was monthly dividend income of \$2.11 and interest income of \$258.21 from investments bringing the total monthly income amount to \$260.32. The interest was derived from three accounts at Badger Globe Credit Union, one in the amount of \$77,483.79 earning an annual yield of 3.5%, another in the amount of \$35,565.09 earning an annual yield of .70%, and the third in the amount of \$7,703.93 earning an annual yield of 2.50%. On November 14, 2006, these three accounts were combined into one account at the Badger Globe Credit Union with a balance of \$118,556 and that generated 3.5% interest per annum. Thus, the investment income as of December 1, 2006 was dividend income of \$2.11 and interest income of \$345.79 for a monthly total of \$347.90.
5. On September 7, 2006, the petitioner and his wife had assets of \$129,712.93.
6. On January 5, 2007, the county agency notified the petitioner that he was ineligible for MA from September, 2006, and onward due to excess assets. The county agency determined that the maximum assets for eligibility would be \$66,856.46 plus the normal \$2,000 asset limit.

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. See 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 amount of income considered necessary to maintain the community spouse in the community. After the institutionalized spouse is found eligible, the community spouse may, however, prove through the fair hearing process that he or she has financial need above the "minimum monthly needs allowance" based upon exceptional circumstances resulting in financial duress. Wis. Stat. §49.455(4)(a).

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

The Minimum Monthly Maintenance Needs Allowance (MMMNA) is the established amount the MA program allows a community spouse based upon what has been determined necessary to allow that spouse to continue residing in the community. The MMMNA is the *lesser* of \$2,541 (\$2,488.50 prior to January 1, 2007) per month, or \$2,200 plus the amount of shelter expenses incurred each month by the community spouse which exceed \$660, known as the "excess shelter allowance". Wis. Stat. §49.455(4)(b), *Medicaid Eligibility Handbook*, 5.10.6. (See Release 06-03 effective July 1, 2006)

To clarify the issue in this hearing, the petitioner is seeking MA eligibility for the months of September, 2006 and onward by the reallocation of the \$129,712.93 in assets to the community spouse. There is no dispute of fact as the county basically agreed with the figures presented by the petitioner.

The \$66,856.46 asset limit is based on the *Medicaid Eligibility Handbook*, §5.10.4, which is based upon Wis. Stat. §49.455(6)(b). \$2,000 (the MA asset limit for the institutionalized individual) is then added to the asset allowance to determine the asset limit under spousal impoverishment policy. If the couple's assets are at or below the determined asset limit, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a general rule the spouse is not MA eligible.

As an exception to this general rule, assets above the allowance may be retained as determined through the fair hearing process, if income-producing assets exceeding the asset limit are necessary to raise the community spouse's monthly income to the minimum monthly needs allowance. Wis. Stat. §49.455(6)(b)3 explains this process, and subsection (8)(d) provides in its pertinent part:

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).

Based upon the above, a hearing examiner can override the mandated asset allowance by determining assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs allowance for the community spouse. Therefore, the above provision has been interpreted to grant a hearing examiner the authority 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 spousal impoverishment asset limit.

Not all assets may be transferred. The purpose of increasing the asset limit is to allow the community spouse to maintain a basic standard of living after the institutional spouse enters a nursing facility. An important decision in regard to resource allocation is Blumer v. DHFS, 2000 WI App 150, 237 Wis. 2d 810. The key principle behind Blumer is that assets may be reallocated so that they can generate income. Thus, if an asset is not generating income, it may not be reallocated. There would be no reason to do so. Only resources that generate income can be reallocated by the Fair Hearing process so as to be included in the CSRA. Wis. Stat. § 49.455(8)(d) (1995-96); Final Decision, DHA Case No. MRA-70/15380 (Department of Health and Family Services August 19, 1997) adopting Proposed Decision DHA Case MRA-70/15380 (Wis. Div. Hearings & Appeals July 2, 1997). See also MRA-68/48394, and Decision MRA-10/65997.

Preliminarily, there are some basic givens associated with the filing unit. The petitioner and his wife had total available income no greater than \$1,901.16 in Social Security and pension payments during the time period at issue, which is below the minimum monthly needs allowance. The petitioner agreed that the correct MMMNA is \$2,200, thus indirectly conceding that there was no applicable excess shelter allowance.

The above principles can be applied to this case. My discussion will divide the months in question into three time periods, the first being prior to December 1, 2006. As of September 7, 2006, the income \$1,901.16 was increased by the \$260.32 in interest generated by the assets. This brings the total available income amount to \$2,161.48 per month, which is beneath the MMMNA of \$2,200.

However, the total income changed for December when the three accounts at the Badger Globe Credit Union were merged and started to generate an annual yield of 3.5%. The monthly investment income rose to \$347.90 making the total monthly income for December, 2006, \$2,249.06, which is beyond the \$2,200. That means that not all of the assets had to be reallocated to the community spouse in order to reach her MMMNA. I note that at 3.5%, \$2,000 would generate a monthly income of \$5.83. Thus, the petitioner is over the asset limit for December, 2006, which is the month of application, and is ineligible for MA that month. I note that as December is the month of application, it must be considered in and of itself, just as the months to be backdated are considered separately.

As of January 1, 2007, the monthly income decreased to \$1,851.16. With the investment income of \$347.90, the total income was and still is \$2,199.06. This is a good example of the idiom of succeeding "by a hair's breadth". Thus, all of the assets may again be reallocated starting with January, 2007.

CONCLUSIONS OF LAW

1. The petitioner is entitled to the transfer of \$129,712.93 of assets so as to produce income to allow the community spouse to reach the MMMNA of \$2,200.
2. The petitioner is eligible for Institutional MA for the months from September, 2006, and onward with the exception of December, 2006.
3. The petitioner's assets exceeded the \$2,000 asset limit in December, 2006, as at least that amount was not needed to allow the community spouse to reach the MMMNA of \$2,200.

NOW, THEREFORE, it is

ORDERED

That the matter be remanded to the county with instructions to increase the community spouse asset share to \$129,712.93, and to determine petitioner's MA eligibility retroactive to September 1, 2006, *but excluding December, 2006*, based upon the new community spouse asset allocation and the rest of the above decision. The county shall do so within 10 days 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 8th day of
February, 2007

/sJoseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
213/JAN