



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION
ON REMAND

MED-67/53178

PRELIMINARY RECITALS

Pursuant to a petition filed April 18, 2002, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Waukesha County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on June 28, 2002, at Waukesha, Wisconsin.

On August 30, 2002 the Division of Hearings & Appeals issued a Proposed Decision, sending the matter to the Secretary of the Dept. of Health & Family Services for review prior to issuance in final decision format, pursuant to Wis. Stat. §227.47.

On November 21, 2002 the Secretary issued a decision, remanding the matter to the Administrative Law Judge requesting additional proceedings be conducted to supplement the record and answer additional questions not addressed in the June 28, 2002 hearing.

On December 19, 2002 further proceedings were conducted to supplement the record as requested by the Secretary. The additional Findings of Fact are specifically noted in this decision. The additional information submitted into the record at the December 19, 2002 were marked Exhibits 7-10.

The primary issue for determination remains whether the facts of this particular case present an MA overpayment subject to recovery pursuant to Wis. Stat. §49.497. The additional issues for determination as specifically addressed in this Decision on Remand are: (1) whether information was misstated or omitted in the MA application for petitioner and her spouse, and (2) when particular assets were received by petitioner or her spouse.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Representative:

Attorney Ann L. DeLeo
Nelson, Irving & Waeffler, S.C.
2401 North Mayfair Road, Suite 210
Wauwatosa, WI 53226

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: Ann Oven, ESS

ADMINISTRATIVE LAW JUDGE:

Kenneth P. Adler
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN: xxx-xx-xxxx CARES #xxxxxxxxxx) is a married resident of Waukesha County.
2. On November 1, 2000 petitioner was admitted to a nursing home.
3. The December 2000 MA application of petitioner did not omit or misstate the assets and income of petitioner at the time of application. Exhibit 3, 8, 9, 10
4. All of the assets which were divested were correctly disclosed and reported at the time of petitioner's December 2000 MA application. Exhibits 3, 8, 9, 10
5. Petitioner did not receive any assets - either prior to the December MA application nor after MA eligibility was granted - which should have been reported but were not. All assets were appropriately reported by petitioner.
6. On October 8, 2001 petitioner's husband admitted to nursing home.
7. The December 2001 MA application of petitioner's spouse did not omit or misstate the assets and income of petitioner's spouse at the time of application. Exhibit 7

DISCUSSION

As explained in the decision issued on August 30, 2002, the issue for determination is whether an ongoing MA recipient's failure to report a change in assets which would have affected her MA eligibility if reported (inaudible) timely fashion results in an MA overpayment which is subject to recovery. In this particular case the "change" in assets was the divestment of assets which had been reported at application.

Upon review I must agree with Attorney DeLeo. First, criterion 1 in Wis. Stat. §49.497 applies to an *applicant* - petitioner was an ongoing MA *recipient*. Second, while criterion 2 applies to an ongoing recipient, it only concerns the failure to report the *receipt* of income or assets which affects MA eligibility. The statute does not apply to the situation where a *change* (in this case, a divestment of assets) in income or assets affects MA eligibility. As outrageous as that may appear, I can find no persuasive legal authority to indicate petitioner's representative is incorrect in her reading of Wis. Stat. §49.497(1). (parenthetical explanation added).

The reason the administrative law judge issued the initial decision as a Proposed Decision was Attorney DeLeo's assertion the MA Handbook provision referenced by the county agency as authorizing the MA overpayment recovery is not in conformity with Wis. Stat. §49.497 authorizing recovery of MA overpayments. The administrative law judge found he had to agree with Attorney DeLeo's assertion, and believed the matter should be brought to the attention of the Secretary of the Department of Health & Family Services.

The Secretary determined the administrative law judge had correctly read Wis. Stat. §49.497 which authorizes overpayment *only if*:

1. incorrect payment results from any *misstatement or omission of fact* by a person supplying information in an *application* for benefits, or
2. a recipient or any other person responsible for giving information on the recipient's behalf fails to report *the receipt* of income or assets in an amount that would have affected the recipient's eligibility for benefits.

However, the Secretary requested the administrative law judge conduct additional proceedings to supplement the record. The Secretary correctly noted the record did not contain: (1) the application of either petitioner or her spouse to determine whether there was any misstatement or omission of fact which caused the MA overpayment, and (2) did not contain any factual findings as to when assets were received by petitioner or her spouse.

On December 19, 2002 the parties conducted another hearing to supplement the record as requested by the Secretary. At that time the MA applications of both petitioner's spouse and petitioner were marked as Exhibits 7 and 8 respectively and submitted into the record.

The county agency agreed with Attorney DeLeo that the MA overpayment under review did no result from any misstatement or omission of fact in either of the MA applications signed December 18, 2001 (Exhibit 7) and December 15, 2000 (Exhibit 8). The county agency explained the assets which were divested by petitioner as referenced in Exhibit 3 were in fact reported at petitioner's initial MA application. See Exhibits 8, 9, 10.

CONCLUSIONS OF LAW

1. That all assets which were subsequently divested were correctly reported at the time of the institutional MA application.
2. That the MA overpayment resulting from a divestment is not recoverable pursuant to Wis. Stat. §49.497 as it was not the result of any *misstatement or omission of fact* by a person supplying information in *an application* for benefits, nor was the overpayment due to any failure to report *the receipt* of income or assets in an amount that would have affected the recipient's eligibility for benefits.

NOW, THEREFORE, it is

ORDERED

That the original decision dated August 30, 2002 is hereby affirmed.

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
Milwaukee, Wisconsin, this 30th day of
August, 2002.

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



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MED-67/53178

REMAND OF PROPOSED DECISION

This matter is remanded to the administrative law judge (ALJ) for further factual findings. On the basis of those findings, the ALJ should determine whether recovery of overpayment is authorized by section 49.497, Stats.

As a matter of law, the ALJ correctly read the statute as authorizing overpayment recovery if:

1. incorrect payment results from any misstatement or omission of fact by a person supplying information in an application for benefits, or
2. a recipient or any other person responsible for giving information on the recipient's behalf fails to report the receipt of income or assets in an amount that would have affected the recipient's eligibility for benefits.

The record does not include the application of either the petitioner or her spouse. It therefore cannot be determined whether asset information may have been omitted or misstated. The record also contains no factual findings as to when assets were received by either the petitioner or her spouse.

Finding of Fact #4 refers to receipt by the county agency of a letter indicating that petitioner and her spouse had been divesting, through the gifting of money, since April, 2001 in a total amount of \$32,763.30. The amended notice of overpayment, dated June 28, 2002 (Exhibit 1) states that, of this amount, (petitioner) divested \$16,036.85. Exhibit 3 is a copy of two checks payable to (petitioner) totaling precisely that amount. The checks bear dates of late October 2001, and a handwritten note on Exhibit 3 states that the checks were cashed on November 8, 2001.

The ALJ should obtain and review copies of the applications submitted by petitioner and her spouse. A finding should then be made as to whether or not any facts were omitted or misstated on either application, bearing in mind the assets that were eventually divested. Furthermore, the ALJ should find as a matter of fact whether or not petitioner received assets that should have been reported, including a specific finding regarding disclosure and receipt of assets revealed in Exhibit 3. Based on those findings, the ALJ should determine whether or not overpayment recovery is authorized under sec. 49.497, Stats.

Given under my hand at the City of
Madison, Wisconsin, this 21st day of
November, 2002.

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



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION
ON REMAND

MED-67/53178

PRELIMINARY RECITALS

Pursuant to a petition filed April 18, 2002, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Waukesha County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on June 28, 2002, at Waukesha, Wisconsin. A hearing previously set for May 16, 2002 was rescheduled at petitioner's request. The record was held open for 15 days for petitioner to submit additional information.

The issue for determination is whether petitioner's admitted divestment results in a recoverable MA overpayment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Representative:

Attorney Ann L. DeLeo
Nelson, Irving & Waeffler, S.C.
2401 North Mayfair Road, Suite 210
Wauwatosa, WI 53226

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: Ann Oven, ESS
Waukesha County Health & Human Serv
500 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Kenneth P. Adler
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN: xxx-xx-xxxx CARES #xxxxxxxxxx) is a married resident of Waukesha County.
2. Since November 1, 2000 petitioner has been an MA recipient as an institutionalized spouse.

3. On October 9, 2001 petitioner's Power of Attorney contacted the county agency to schedule an MA review and report that petitioner's husband, the community spouse, had been admitted to a nursing home.
4. On December 5, 2001 the county agency received a letter indicating that petitioner and her spouse had been divesting, through the gifting of money, since April 2001. The total divestment amounted to \$32,763.30. At not time had this gifting of assets been reported to the county agency. Exhibit 5
5. Based upon the divestment information, the county agency initiated a fraud referral. The results of that investigation concluded that petitioner should be assessed an eight month divestment penalty period. The divestment was divided between the spouses, resulting in a four month period assigned to each which ran from April through July 2001. Exhibit 5
6. For the divestment penalty period of April through July 2001 the MA program paid a total of \$11,957.98 for petitioner's nursing home room & board. Exhibit 2
7. On March 14, 2002 the county agency issued a Notice of MA Overpayment to petitioner, asserting she had been overissued MA in the amount of \$11,957.98 and that this amount was subject to recovery. Exhibit 5
8. On June 28, 2002 the county agency issued an Amended Notice of MA Overpayment stating petitioner had been overpaid MA in the amount of \$8,598 for the period April 1, 2001 - June 31, 2001. Exhibit 1

DISCUSSION

The issue in this particular case concerns an ongoing MA recipient's failure to report a change in assets which would have affected her MA eligibility if it had been reported in a timely fashion. The question is whether the failure to timely report that information results in an MA overpayment which is subject to recovery.

The statutory section governing the recovery of alleged overpayments of MA benefits is found at Wis. Stat. § 49.497(1). That section provides, in relevant part, as follows:

The department may recover any payment made incorrectly for benefits specified under s. 49.46, 49.468 or 49.47 if the incorrect payment results from any misstatement or omission of fact by a person supplying information in an *application* for benefits...The department may also recover if a medical assistance recipient or any other person responsible for giving information on the recipient's behalf fails to report the *receipt* of income or assets in an amount that would have affected the recipient's eligibility for benefits. (italics added)

Pursuant to this grant of authority, the department's Income Maintenance Manual, Ch. II, Part D, 3.1.0, requires that counties do the following:

Attempt to recover incorrect payments if they've been the result of a:

1. Misstatement or omission of fact by the person applying for MA or by anyone responsible for giving information on the recipient's behalf.
2. Failure to report a *change* of assets or income which would have affected the recipient's eligibility. (italics added)

The misstatement or omission need not be intentional. The statute does not limit recoveries to situations involving fraudulent misrepresentations.

Finally, the MA Handbook, which contains a recitation of the Department's policies for MA administration including the following:

Improper Benefits Recover MA payments when made for someone who wasn't eligible for them. The amount of recovery may not exceed the amount of the MA benefits incorrectly provided.

The incorrect payment *shall* have resulted from:

- A misstatement or omission of fact by the person supplying information during an *application* for MA benefits, or
- Failure by the client, or any other person responsible for giving information on the client's behalf, to report income or assets in an amount which would adversely affect the client's eligibility for benefits or premium amount.

Changes to Case A client receiving MA must notify his/her ES worker within 10 days of any change in their case. If she fails to report the change and continues to receive assistance based on the originally stated facts, such failure to notify may be considered fraud, resulting in an overpayment.

See MA Handbook, App. 34.1.0, 34.3.0.

The county agency references the above MA Handbook sections and asserts petitioner's representative failed to report a change, within ten days, in assets which would have affected petitioner's MA eligibility. Therefore, the county agency asserts petitioner was overissued MA which is subject to recovery.

Petitioner's representative does not deny that petitioner divested assets, that the divestment of those assets was not reported in a timely fashion, nor that the divestment of those assets properly resulted in a divestment penalty period which resulted in petitioner being ineligible for MA for the period April through June 2001. However, petitioner's representative asserts that the county agency cannot recover the MA benefits paid on petitioner's behalf during the divestment penalty period as the failure to report a *change* in assets for an *ongoing* MA recipient does not meet the statutory requirement for allowing an MA recovery to occur.

Attorney DeLeo asserts the MA Handbook provisions cited above are not in conformity with Wis. Stat. § 49.497(1). And, as the statutory authority overrides the Handbook summarization of those statutory sections, Attorney DeLeo explains the statutory provision must be followed.

Petitioner's representative presents the support for her assertion as follows. Attorney DeLeo references Wis. Stat. § 49.497(1) and notes first that the incorrect payment in this case did not result from a misstatement or omission of fact by person supplying information on an *application* for benefits. As petitioner was an ongoing MA recipient, Attorney DeLeo argues the factual situation under review does not meet this first situation and therefore no recoverable overpayment can be based upon this statutory provision.

Second, Attorney DeLeo notes that the failure to report in this situation was the failure to report the *divestment* of assets which would have affected petitioner's eligibility for benefits. Wis. Stat. § 49.497(1) states the department may recover an overpayment if the recipient or anyone responsible for giving

information on her behalf fails to report the *receipt* of income or assets in an amount which would have affected her eligibility for benefits.

Based upon the above, Attorney DeLeo asserts there is no legal basis for the attempted overpayment recovery under review. While the MA Handbook provisions cited above and relied upon by the county agency appear to allow the overpayment recovery, the state statute clearly does not. As the clear statutory authority must take precedent over the department's Handbooks, it is the statutory authority which must be applied.

Upon review, I must agree with Attorney DeLeo. First criterion 1 in Wis. Stat. § 49.497 applies to an *applicant* - petitioner was an ongoing MA *recipient*. Second, while criterion 2 applies to an ongoing recipient, it only concerns the failure to report the *receipt* of income or assets which affects MA eligibility. The statute does not apply to the situation where a *change* in income or assets affects MA eligibility. As outrageous as that may appear, I can find no persuasive legal authority to indicate petitioner's representative is incorrect in her reading of Wis. Stat. § 49.497(1).

CONCLUSIONS OF LAW

1. that MA Handbook Appendix 34.4.0 providing for the recovery of an overpayment from an MA recipient that who failed to timely report a change in assets which affect MA eligibility is in direct conflict with the state overpayment statute Wis. Stat. § 49.497(1).
2. That the county agency may not recover the overpayment of MA because the action does not meet the requirements of Wis. Stat. § 49.497(1).

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be remanded to the county agency with instructions to remove the overpayment of MA from its records and cease all efforts to recover MA payments made on behalf of petitioner from April 1, 2001- June 31, 2001. These actions shall be completed within 10 days of the date the Secretary adopts this proposed decision as the final decision of the Department, if and only if, it is so adopted.

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 IMPLEMENTED 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 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
Milwaukee, Wisconsin, this 28th day of
February, 2003.

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