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STATE OF WISCONSIN

Division of Hearings and Appeals

In the Matter of

PETITIONER c/o CONSERVATOR **DECISION**

Case #: FCP - 197076

CITY, WI

PRELIMINARY RECITALS

Pursuant to a petition filed on December 3, 2019, under Wis. Admin. Code § DHS 10.55, to review a decision by the Dane Cty. Dept. of Human Services regarding Medical Assistance (MA), a hearing was held on January 15, 2020, by telephone.

The issues for determination are (1) whether the respondent correctly budgeted petitioner's rent and property tax recoupment when determining petitioner's cost share; or (2) whether petitioner requires a reduction to her cost share on the basis of financial hardship.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

PETITIONER c/o
CONSERVATOR
ADDRESS
CITY, WI

Petitioner's Representative:

Attorney Roy Froemming
Froemming Law Office
4333 Nakoma Rd
Madison, WI 53711

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: Kara Ponti

Dane Cty. Dept. of Human Services
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343

ADMINISTRATIVE LAW JUDGE: Peter
McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Dane County.
2. Petitioner participates in the Family Care Partnership program through her Managed Care Organization, [REDACTED]. Petitioner pays a cost share based upon her income and expenses.
3. Petitioner owns life estate interests in real property located in Wisconsin and in California. Rental income is received from each of these properties, and petitioner has costs related to her interest in each of these real properties.
4. The California property is subject to a mortgage securing a loan. Petitioner is liable for this loan and the associated monthly payment obligations as the borrower and the life estate holder.
5. The respondent informed petitioner on October 18, 2019, that her cost share would increase from \$103.12 for the month of October, 2019 to \$943.12 for the month of November, 2019.
6. The October, 2019, petitioner's cost share amount had been reduced by a one-time expense ([REDACTED] Plumbing).
7. On November 4, 2019, the petitioner's Authorized Representative for Medicaid and Conservator filed an Application for Reduction of Cost Share. The application was denied by the respondent per written notice dated December 6, 2019.

DISCUSSION

A cost share amount is the monthly amount a home and community based long term care waivers participant must pay to contribute toward the cost of her services. Medicaid Eligibility Handbook (*MEH*), § 28.5.1. Family Care is a type of home and community-based long-term care waiver program.

Individuals who are functionally eligible for waiver services and who are also eligible for SSI or a full benefit Medicaid program are included in what is referred to as "Group A". *MEH* § 28.8.2 Group A members do not have to pay a cost share. *Id.* There is no evidence in the record that petitioner receives full benefit Medicaid and her monthly income renders her ineligible for SSI.

Petitioner's monthly income of \$3,057.31 (i.e., Social Security benefit amount + rental income amount) places her in what is referred to as "Group B+." *MEH* § 37.4. Group B and Group B+ members are required to pay a monthly cost share payment as a condition of eligibility. *Id.* at §37.4.2. The cost share is calculated by subtracting allowable deductions from an individual's gross income. Allowable deductions include but are not limited to a personal needs allowance which includes a \$963.00 basic allowance as well as certain monthly shelter expenses in excess of \$350, health insurance premiums, and certain out of pocket medical/remedial expenses. 42 C.F.R. §435.726; Wis. Admin. Code §DHS 103.07(1)(d); *MEH* §28.6.4.

At hearing, the agency representative and petitioner's attorney concurred that certain calculation issues in dispute had been resolved, leaving the following issues for determination: (1) whether the respondent

correctly budgeted petitioner's monthly principal payment of \$267.14 as an offset of rental income received for the California property; and (2) whether payments to a financial institution made toward a recoupment of property tax concerning the Wisconsin property were properly excluded as a deduction when budgeting petitioner's monthly cost share.

Generally speaking, income is only counted when it is available to an MA recipient. MA policy defines income that is "available" as:

General Rules:

1. Only count income when it is available.
2. Some income is disregarded (see Section 15.3 Exempt and Disregarded Income).
3. Always use gross income when calculating income.
4. Some income, even though it is unavailable income, must be counted (e.g., garnishments).

Income is available if all the following are true:

1. It is actually available.
2. The person has a legal interest in it.
3. The person has the legal ability to make it available for support and maintenance.

Note: Available income can include more than a person actually receives if amounts are withheld from earned or unearned income because of a garnishment or to pay a debt or any other legal obligation.

Examples of income sources that someone can make available are Social Security and unemployment compensation. This includes income increases such as COLAs.

When it is known that a member of the assistance group is eligible for some sort of income or an increased amount of income:

1. Count the income if the amount is known. Count it as if the person is receiving it.
2. Ignore the income if the amount is not known.

[example omitted]

Income is unavailable when it will not be available for 31 days or more. The person must document the following:

- It will not be available for 31 days or more.
- They have started the process to make it available.

Unavailability is usually documented by a letter from an agency stating when the person will receive the benefit. Thus, if he or she has just applied for benefits, do not add it to his or her income yet. The income is not ignored; it is only suspended until it becomes available.

MEH § 15.5.3.

MA policy also instructs that rental income should be considered thusly:

When a Medicaid group member reports rental income to the *IRS* as self-employment income, see Section 15.6.3 Self-Employment Income and Assets.

If he or she does not report it as self-employment income, add "net rent" to any other unearned income on the appropriate worksheet. Determine "net rent" as follows:

- When the owner is not an occupant, "net rent" is the rent payment received minus the interest portion of the mortgage payment and other verifiable operational costs. Operational costs include ordinary and necessary expenses, such as insurance, taxes, advertising for tenants, and repairs. Repairs include expenses, such as repainting, fixing gutters or floors, plastering, and replacing broken windows.

Capital expenditures are not deductible from gross rent. A capital expenditure is an expense for an addition or increase in the value of the property. It would include improvements, such as finishing a basement, adding a room, putting up a fence, putting in new plumbing, wiring, or cabinets, or paving a driveway.

If an institutionalized person has excess operational costs above the monthly rental income, carry the excess costs over into later months until they are offset completely by rental income. But do the carryover only until the end of the year in which the expenses were incurred.

When a life estate (see Section 16.8.1.6 Life Estate) holder moves off the property and the property is rented, count the net rental income the holder is entitled to receive. The operational costs are the same as the costs the holder was liable for when living on the property.

- When he or she receives income from a duplex, triplex, etc. and lives in one of the units, determine "net rent" as follows:
 1. Add the interest portion of the mortgage payment and other verifiable operational costs common to the entire operation.
 2. Multiply the number of rental units by the total in 1.
 3. Divide the result in 2. by the total number of units. This is the proportionate share.
 4. Add the proportionate share (the result of 3.) to any operational costs paid by the member that are unique to any rental unit. The result is the total member expense.
 5. Subtract the total member expense (the result of 4.) from the total rent payments to get "net rent."

MEH § 15.5.3 (emphasis added).

Finally, the petitioner cites to the Wisconsin Administrative Code's hardship provisions in support of the request for a cost share reduction:

- (4) Payment of cost share required.
 - (a) Except as provided in par. (b), a person who is required to contribute to the cost of his or her care but who fails to make the required contributions is ineligible for the family care benefit.
 - (b) If the department or its designee determines that the person or his or her family would incur an undue financial hardship as a result of making the payment, the department may waive or reduce the requirement. Any reduction or waiver of cost share shall be

subject to review at least every 12 months. A reduction or waiver under this paragraph shall meet all of the following conditions:

1. The hardship is documented by financial information beyond that normally collected for eligibility and cost-sharing determination purposes and is based on total financial resources and total obligations.
2. Sufficient relief cannot be provided through an extended or deferred payment plan.
3. The person is notified in writing of approval or denial within 30 days of providing necessary information to the department or its designee.

Wis. Admin. Code § 10.34(4).

Petitioner has a monthly mortgage obligation concerning her California property of approximately \$362.54 (\$267.14 in principal and \$95.40 interest). The respondent did not allow this payment as a deduction against the net rental income received for this property. Petitioner only owns a life estate in the California real property. Petitioner's court-appointed conservator manages the California property. He noted that he has attempted to seek the sale of the real property, but the petitioner's daughter, who holds the property deed, has not cooperated. Petitioner's attorney argues that essentially converting this obligation to "income" results in financial hardship for the petitioner. He further asserts that the principal payment amount due monthly for the mortgage on the California property should be deducted as "unavailable" income. In his trial brief, petitioner's attorney writes:

[Petitioner], by paying the mortgage principal, is not building equity against which she can borrow, or which she can sell. Her conservator's attempt to sell the property has failed due to lack of cooperation from the remainder-holder. Her conservator's attempt to borrow money to pay for repairs was denied because she has poor credit. As life estate owner, her interest does not provide security for a mortgage loan.

Petitioner's Trial Brief, p. 6 (January 15, 2020).

Similarly, the petitioner's attorney argues that at least a portion of the mortgage payments due concerning her Wisconsin property, \$279.69, is paid toward back property taxes previously covered by her financial institution. The respondent declined to deduct this expense from petitioner's rental income, and the petitioner argues that this amount should be treated as part of petitioner's mortgage payment (and therefore part of her shelter costs).

Petitioner's attorney seeks to have both California mortgage principal and the Wisconsin property tax obligations considered an offset against rent:

...payment of a cost essential to continue to generate rent from a life estate, which is then used to compute the cost-share, should be allowed as an offset against rent. ...the continued ability to generate rent benefits the state by enabling [petitioner] to pay her cost share.

Petitioner's Trial Brief, p. 7 (January 15, 2020).

The petitioner has not established that the agency incorrectly denied her request to offset her California rent by the amount of her mortgage principal payment. References to *MEH* § 15.1 reference income determinations for eligibility purposes in the presentations by both petitioner and respondent seem somewhat misplaced as chapter 15 determines how income is counted for eligibility purposes. *MEH* policies concerning cost share calculations, on the other hand, are included at *MEH* § 28.6.4, which specifies the

“how” of the cost share calculations. I note that *MEH* § 28.6.4 does not refer back to any provision of *MEH* § 15 applicable to petitioner’s cost share calculation here.

A review of the record before me and the cited cost share policy would support a conclusion that the petitioner has not established that the California property mortgage principal should be considered unavailable income to petitioner. However, the Wisconsin property tax obligations would appear to fall under the provisions for personal maintenance allowance

A personal maintenance allowance for room, board, and personal expenses must be deducted from income when calculating cost share. Do not give the special housing amount to waiver participants under age 18.

The personal maintenance allowance (Line 6 and Page 2 of the worksheet) is the total of the following:

1. Community Waivers Basic Needs Allowance (see Section 39.4.2 Elderly, Blind, or Disabled Deductions and Allowances).
2. Sixty-five dollars and ½ earned income deduction (see Section 15.7.5 \$65 and ½ Earned Income Deduction).
3. Special housing amount equal to monthly housing costs over \$350. If the waiver applicant's housing costs are over \$350, add together the following costs and subtract \$350 to get the special housing amount:
 - Rent.
 - Home or renters insurance.
 - Mortgage.
 - Property tax (including special assessments).
 - Utilities (heat, water, sewer, electricity).
 - "Room" amount for members in a CBRF, Residential Care Apartment Complex, or an Adult Family Home. The case manager determines and provides this amount.

If both spouses are applying and both have income, divide the special housing amount equally between them.

MEH § 28.6.4.1. I was unable to find specific policy or regulation language that would preclude the cost share budgeting of property taxes if they were paid untimely or via a third party, as is the situation here. While petitioner argues that the property tax repayment is essentially the repayment of a loan to the bank, I have no documentation of the actual obligation, and therefore am unable to address the issue further. The petitioner’s calculation arguments pertaining to both the California and the Wisconsin properties appear to argue for a determination based in equity considerations. It is the long-standing policy of the Division of Hearings & Appeals, Work & Family Services Unit, that the Department's assigned administrative law judges do not possess equitable powers. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. While I am sympathetic to petitioner’s reasonable and equitable argument, I am precluded from making equitable determinations.

Notwithstanding the foregoing, the record here does establish that the petitioner’s situation qualifies for a reduction in her cost share due to hardship. The Wisconsin Administration Code, § DHS 10.34(4), allows the Department to waive or reduce an FCP recipient’s cost share if the cost share would cause a financial hardship. As her attorney noted in his trial brief:

...The process by which the cost-share is determined is supposed to leave the participant with a Personal Maintenance Allowance (PMA) to fund living expenses. [Petitioner’s] calculated PMA is \$2,114.19. By definition, \$1,468.19 of that must go to her allowed housing expenses (Table 3) and \$45 to the allowed insurance cost. In a calculation for a typical Family Care participant, this would leave \$601 (\$951 - \$350 basic housing costs) for nonshelter personal needs, such as food, clothing, personal supplies, transportation and other needs.

...
 The denial of the request for cost-share reduction in the Bureau of Adult Programs and Policy Letter dated 12/6/19 to [petitioner] contains a finding that “your income is sufficient to cover your monthly necessary living expenses.” ... [Petitioner’s] income, after payment of the cost share, health insurance and allowed shelter expenses would leave her with \$610 per month for the other personal maintenance expenses. However, the other documented payments that she must make...total \$705¹, leaving her with no income at all to pay for food, clothing, transportation and other personal needs.

...
Petitioner’s Trial Brief, p. 5, p .8 (January 15, 2020). The respondent has not substantively rebutted the petitioner’s arguments in this regard, and I found them to be credible and convincing. As such, I will remand this matter to the respondent on the basis of hardship.

CONCLUSIONS OF LAW

- (1) The petitioner has not established that the respondent incorrectly budgeted petitioner’s net rent regarding the California property when determining her cost share.
- (2) The petitioner has not established that the respondent erred when it excluded petitioner’s back property tax payment (Wisconsin property) when determining her personal maintenance allowance and cost share.
- (3) Petitioner requires a reduction to her cost share on the basis of financial hardship.

THEREFORE, it is

ORDERED

That this matter shall be remanded to the respondent to, within 10 days of the date of this Decision, reduce petitioner’s cost share to allow petitioner \$601.00 for her non-shelter personal maintenance costs, after payment of the monthly cost share, health insurance and the shelter-related costs of: California utility payments of \$66.10, California mortgage principal payment of \$267.00, Wisconsin utility payment of 93.00, and the Wisconsin back property tax obligation of 279.69.

REQUEST FOR A REHEARING

¹ The issues for hearing involve the amounts of \$267 (California property) and \$279 (Wisconsin property), for a total of \$546. Two other issues, previously in dispute concerning California and Wisconsin utility payments were resolved prior to hearing.

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision.** Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5th Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 28th day of February, 2020

\s_____
Peter McCombs
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 28, 2020.

Dane Cty. Dept. of Human Services
Office of Family Care Expansion
Health Care Access and Accountability
Attorney Roy Froemming

CONSERVATOR