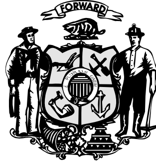
DHA-15 (R10/97)



STATE OF WISCONSIN
DEPARTMENT OF HEALTH SERVICES

In the Matter of

DECISION

MRA-70/110322

The proposed decision of the hearing examiner dated May 19, 2010, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed March 16, 2010, under Wis. Stat. § 49.455(8)(a)5. (2007-08) and Wis. Admin. Code § DHS 103.075(8)(a)5. (December 2008), to review petitioner's Community Spouse Resource Allowance ["CSRA"] under the spousal impoverishment rules of the Medical Assistance ["MA] program, a Fair Hearing was held via telephone on April 30, 2010.

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.

PARTIES IN INTEREST:

Petitioner:

(not present at April 30, 2010 Hearing)

Represented by:

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OTHER PERSONS PRESENT:
Sharon Nisler, Legal Assistant, Adams & Woodrow, S.C.

ADMINISTRATIVE LAW JUDGE:
Sean P. Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES [redacted] age 84 years) is a resident of Winnebago County, Wisconsin.

2. Petitioner lives in a nursing home.

3. Petitioner is married and his wife lives in the community.

4. The total combined countable assets of petitioner and his wife as of January 31, 2010 were $224,378.07; these total combined countable assets produced monthly income of $501.41. Exhibit #1.

5. Effective February 17, 2010 all of the countable assets of petitioner and his wife produce income; prior to February 17, 2010 petitioner and his wife owned some life insurance policies that paid dividends with the dividends being reinvested into the policy. Exhibit #1.

6. The total monthly income of petitioner and his wife, excluding income generated by the total combined countable assets of petitioner and his wife, is $1,646.40 per month consisting of $1,174.00 per month of Social Security for petitioner and $472.40 per month of Social Security for petitioner's wife. Exhibit #1.

7. The Minimum Monthly Maintenance Needs Allowance [”MMMNA"] for petitioner’s wife, without a Fair Hearing or Court Order, is at least $2,428.33.

DISCUSSION

(I) ASSET REALLOCATION

Under the normal MA eligibility rules, a person is not eligible for MA unless they are first in poverty. If these rules applied to situations, such as petitioner’s, where one spouse is in a nursing home and the other in the community, the community spouse would be forced into poverty before the spouse in the nursing home would be eligible for MA. This is because married couples have a legal claim to the income and assets of one another.

To avoid forcing community spouses into poverty, persons, such as petitioner, who are residents of a nursing home and still have a spouse living in the community may apply for MA under special rules known as "Spousal Impoverishment" rules. These rules are designed to allow the community spouse to keep a certain portion of the married couple's assets and income. See, Wis. Stat. § 49.455 (2007-08); Wis. Admin. Code DHS § 103.075 (December 2008); *Medicaid Eligibility Handbook* ["MEH"] Chapter 18.

The amount of assets a community spouse is allowed to keep is called the Community Spouse Resource Allowance ["CSRA"] {also sometimes called the Community Spouse Asset Share ["CSAS"]}. The CSRA can be invested by the community spouse to generate income, which the community spouse can then use for living expenses. If the amount of income generated by the CSRA, combined with any other income the community spouse receives, does not rise to the level of a certain minimum monthly amount, an increase in the CSRA may be requested by way of the Fair Hearing process. The purpose of increasing the CSRA is to give the community spouse a greater amount of assets to invest, thereby generating a greater amount of income, which can then be used by the community spouse for living expenses. In this case, petitioner has requested that the CSRA be increased by the Fair Hearing process. See, Wis. Stat. §§ 49.455(6)(b)(3) & (8)(d) (2007-08); Wis. Admin. Code §§ DHS 103.075(8)(a)5. & (8)(d) (December 2008); MEH 18.6.2.Section A1.

The CSRA can be increased if it is established at a Fair Hearing that the CSRA determined without a Fair Hearing does not generate enough income to raise the community spouse's income to the Minimum Monthly Maintenance Needs Allowance ["MMMNA"]. In such a case a CSRA will be established by the Fair Hearing process that generates enough income to raise the community spouse's income to the MMMNA. Wis. Stat. § 49.455(8)(d) (2007-08); Wis. Admin. Code § DHS 103.075(8)(d) (December 2008).

In this case, the MMMNA is at least $2,428.33. MEH 18.6.2.Section A1 & 39.4.2.7. The total monthly income of petitioner and his wife, <u>excluding</u> income generated by the total combined countable assets of petitioner and his wife, is $1,646.40. Petitioner is not required to make the following amount of his income available to his wife: an amount equal to the sum of his personal needs allowance, any family allowances paid by him, and amounts incurred as expenses for medical or remedial care for himself. Wis. Stat. § 49.455(8)(d) (2007-08).

The total combined countable assets of petitioner and her husband ($224,378.07) produced monthly income of $501.41.

Thus, the total amount of monthly income available to petitioner's wife, <u>including</u> income generated by the total combined countable assets of petitioner and his wife, is $2,147.81 ($1,646.40 plus $501.41). Thus, even if all countable assets are assigned to the CSRA, the monthly income of petitioner's wife still will fall below the MMMNA of $2,428.33. It is evident, therefore, that a CSRA determined without a Fair Hearing, or even with a Fair Hearing, could not generate enough income to raise petitioner's wife's income to the MMMNA. It is also evident that the CSRA must be increased so as to include, up to a maximum of $224,378.07, all of the countable assets of petitioner and his wife. This will bring petitioner's wife as close as possible to the MMMNA, given the total countable assets that are available to petitioner and his wife.

<u>(II) RETROACTIVITY</u>

Petitioner applied for Spousal Impoverishment MA on February 19, 2010. He has requested that the asset reallocation be made retroactive to January 1, 2010. However, prior to February 17, 2010 petitioner and his wife owned life insurance policies that paid dividends with the dividends being reinvested into the policy. Effective February 17, 2010 petitioner changed those life insurance polices to pay out dividends on a periodic basis (instead of having the dividends reinvested). The reallocation can be made effective retroactive to January 1, 2010, as requested by petitioner, only if the life insurance polices can be reallocated during times prior to February 17, 2010 when they paid dividends with the dividends being reinvested into the policy.

In this regard, Final Decisions of the Secretary of the Wisconsin Department of Health Services ["DHS"][1] state that only resources that generate income can be added to the CSRA by the Fair Hearing process. Put

[1] Prior to July 1, 2008 DHS was the Wisconsin Department of Health and Family Services ["DHFS"].

another way, any assets of the nursing home resident and the community spouse that do not generate income cannot be used to increase the CSRA. The MA asset limit is $2,000. Wis. Stat. § 49.47(4)(b)3g.e. (2007-08); Wis. Admin. Code § DHS 103.04(2) (December 2008). Thus, if the nursing home resident and the community spouse have in excess of $2,000 in assets that do not generate income, no increase in the CSRA can be made because the nursing home resident is not otherwise eligible for MA. This is because, even if the CSRA were increased so as to include <u>all</u> resources that <u>do</u> generate income, the nursing home resident would still not be eligible for MA because the $2,000 MA asset limit would be exceeded by the non-income-generating assets. DHA Case No. MRA-5/35807 (Wis. Div. Hearings & Appeals December 7, 1998) (DHFS Final Decision subsequent to DHA Proposed Decision); and, DHA Case No. MRA-70/15380 (Wis. Div. Hearings & Appeals August 19, 1997) (DHFS Final Decision subsequent to DHA Proposed Decision). Final Decisions are made subsequent to Proposed Decisions issued by DHA. See, Wis. Stat. §§ 227.46 & 227.47 (2007-08); Wis. Admin. Code § HA 3.09(9) (November 1999).
Thus, the question here is: are life insurance policies that pay dividends with the dividends being reinvested into the policy considered to be generating income?

The DHS Secretary has held in ~~two~~ Final Decisions that an increase in the value of a life insurance policy due to the payment and reinvestment of dividends is not the same as the generation of income, and the Secretary has never expressly reversed those rulings. Examples: DHA Case No. MRA-22/48084 (Wis. Div. Hearings & Appeals July 24, 2001) (DHFS Final Decision subsequent to DHA Proposed Decision); and, DHA Case No. MRA-68/48394 (Wis. Div. Hearings & Appeals July 19, 2001) (DHFS Final Decision subsequent to DHA Proposed Decision). Consistent with this, the DHS Secretary has also held that life insurance polices may be reallocated when they pay dividends directly in cash, the dividends are not reinvested, and a check is sent to petitioner or petitioner's spouse on a yearly basis. DHA Case No. MRA-59/49531 (Wis. Div. Hearings & Appeals October 19, 2001) (DHFS Final Decision subsequent to DHA Proposed Decision).

In light of all of the above, the life insurance polices in question are not allowed to be reallocated during times prior to February 17, 2010 when they paid dividends and the dividends were reinvested into the policy. It follows that petitioner's request that the asset reallocation be made retroactive to January 1, 2010 will not be allowed.

CONCLUSIONS OF LAW

For the reasons discussed above, petitioners' asset reallocation may not be retroactively applied to January 1, 2010.

NOW, THEREFORE, it is

ORDERED

That this matter be herein dismissed.

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 rehearing. You may also ask for a rehearing 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 as "PARTIES IN INTEREST" in the proposed decision. 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 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing 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 a rehearing, if you ask for one). The process for Circuit Court is in Wisconsin Statutes §§ 227.52 and 227.53.

You must also serve your appeal either personally or by certified mail on the Respondent, Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703.

The appeal must also be served on the other 'PARTIES IN INTEREST' named in the proposed decision.

Given under my hand at the City of Madison, Wisconsin, this ________ day of _________________, 2010.

____
Kenneth Munson, Deputy Secretary
Department of Health Services