



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted case name]

DECISION
Case #: MGE - 198872

PRELIMINARY RECITALS

Pursuant to a petition filed on May 14, 2020, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services regarding Medical Assistance (MA), a hearing was held on June 16, 2020, by telephone.

The issue for determination is whether the agency correctly denied the Petitioner's application due to the Petitioner being over the asset limit and failure to provide verification.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted petitioner name]

Petitioner's Representative:

[Redacted representative name]

Respondent:

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

By: [Redacted signature]
Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:
Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. On October 31, 2019, the agency received an EBD MA application for the Petitioner and her husband. It reported the Petitioner and her husband reside in a skilled nursing facility. It reported the Petitioner and her husband have assets that include a [REDACTED] checking account with a balance of \$658.01. It reported real property owned by [REDACTED]. It reported life insurance policies. Self-employment at [REDACTED] was reported as rental/property manager. Income from social security was reported as \$1259/month for the Petitioner's husband and \$745/month for the Petitioner.
3. In December 2019, the agency received documents from the Petitioner in response to requests for verification. The documents included several items related to [REDACTED]: Quit Claim Deeds for real properties transferred from the Petitioner and her husband to the LLC, an Operating Agreement signed June 6, 2014 which appointed the Petitioner's husband as the property manager, Articles of Incorporation, rent receipts for the rental properties, a statement that all rental properties are currently occupied or will be in the next twelve months and an agreement appointing the Petitioner's son as property manager on March 24, 2016.. In addition, the agency received documentation that one of the properties is a homestead property to which the Petitioner intends to return. Further, the agency received documentation verifying the sale of [REDACTED] on March 18, 2014.
4. On December 16, 2019, the agency issued a notice of decision to the Petitioner informing her that her application was denied due to failure to provide requested verification and being over the income limit.
5. On December 27, 2019, the Petitioner and her husband filed appeals with the Division of Hearings and Appeals. The cases were designated as Case Nos. 197378 and 197380. On February 26, 2020, a hearing was held.
6. On February 28, 2020, the agency received an EBD MA application for the Petitioner and her husband. The information was the same as that reported on the October 31, 2019, for all purposes relevant herein. There was a request to backdate MA coverage to November 1, 2019.
7. On March 2, 2020, DHA issued decisions in Case Nos. 197378 & 197380 remanding the matters to the agency to allow at least an additional 30 days to the Petitioners to provide verification and for the agency to make a determination of eligibility based on additional verification.
8. On March 5, 2020, the agency issued a Notice of Proof Needed to the Petitioner's representative requesting verification of a life insurance policy, verification concerning real property owned by the Petitioners, tax information for [REDACTED] and self-employment information. A note from the worker stated: "Taxes are needed and need to know where the funds went from the sale of [REDACTED] as it was sold on 2/25/2015 for \$27,000 and also need to know why was it sold for less than fair market value of \$50,000." The due date for the information was April 2, 2020.
9. On March 20, 2020, the agency issued a letter to the Petitioner's representative with a list of verification items requested by the agency to continue processing the Petitioner's application. The requested information included Petitioner's 2018 income taxes, verification regarding the sale of property on [REDACTED] verification from [REDACTED] bank account for July, August and September 2019 and verification of the proceeds of sale of [REDACTED] and spend down of the proceeds.
10. On March 31, 2020, the agency received the Petitioner's 2018 tax return. The tax return reports the Petitioners own 4 rental properties on [REDACTED] and [REDACTED] in Milwaukee. It

is reported that the properties are rented 365 days/year. There is income reported for each property. Two of the properties had a net loss on the year and two of the properties had a net gain in income. Rent receipts for 2019 for the properties was included. In addition, the agency received a real estate closing statement for the sale of ██████ St. property in 2015. The agency received an Account Transaction Detail Report to show that a █████ money market account was closed on October 26, 2018. In addition, the agency received a statement from the Petitioner regarding the spend-down of funds from the sale of ██████.

11. On April 3, 2020, the agency issued a notice of decision to the Petitioner's authorized representative informing her that the Petitioner's application was denied due to failure to provide verification requested, being over the income limit and being over the asset limit. Specifically, the notice indicated that the Petitioner failed to provide a █████ bank statement. Further, the notice indicated that the Petitioner had counted assets of \$165,424.38 for MA. In addition, the notice indicates that the Petitioner's counted income for MA was \$1984/month for January and February 2020 and \$2002/month beginning March 2020.
12. On May 14, 2020, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

To be eligible for Wisconsin MA, an individual's assets may not exceed \$2000. Wis. Stats., § 49.45. All available assets must be counted with some exceptions. Medicaid Eligibility Handbook (MEH), § 16.1. The primary issue in this case is whether rental properties owned by the Petitioner and her husband are available assets that must be counted in determining MA eligibility.

The Wisconsin Administrative Code, §DHS 103.06(5)(b) provides that non-homestead real property is not counted as an asset if it produces a reasonable amount of income, defined as a fair return considering the value and marketability of the property. The MEH interprets the code provision in the following policies:

15.6.3.1 Business Assets

Business assets are generally income producing property. Exclude assets directly related and essential to producing goods or services.

In EBD cases, all real and non-real business property is exempt if the business is currently operating (see Section 15.6.1.3 Operating) for the self-support of the EBD individual. There is no profitability test.

Ask the EBD person to furnish the documents needed to:

- Describe the business, its properties, and its assets.
- Show the number of years it has been operating.
- Identify any co-owners.
- Show the estimated gross and net earnings for the current tax year.

15.6.1.3 Operating

A business is operating when it is ready to function in its specific purpose. The period of operation begins when the business first opens and generally continues uninterrupted up to the present. A business is operating even if there are no sales and no work is being

performed. . . A business is not operating when it cannot function in its specific purpose. For instance, if a mechanic cannot work for four months because of an illness or injury, he or she may claim his or her business was not in operation for those months.

16.9 NON-HOME PROPERTY EXCLUSIONS

Non-home property is any countable asset other than a homestead. Exclusions of non-home property in EBD cases include:

...

2. Property excluded regardless of value or rate of return. Property used in a trade or business is in this category (see Section 15.6.3.1 Business Assets). The property may be excluded as used in a trade or business when the applicant/member is actively involved in the business operation on a day to day basis. The information reported on the Schedule E, Supplemental Income and Loss, should be checked to determine whether the individual is actively engaged in the business. If the income is listed as Non-Passive Income, the individual is actively engaged in the business.

...

Note: Rental property cannot be exempt as a business property unless the property owner is in the business of renting and managing properties. If a person simply owns a piece of property and is renting it, he or she is not considered to be the owner of a trade or business (see 2. above for more information).

At the hearing, the agency representative testified that she determined the Petitioner and her husband are not actively managing the LLC based on their age and the fact that they are living in a skilled nursing facility. She noted that, according to the 2018 Schedule E, the Petitioner and her husband are losing money from the properties. She testified that there is nothing to support their claim that the properties are a trade or business.

The Petitioner's daughter and POA testified at the hearing that her father (the Petitioner's husband) has been in the property rental business since 1966. He has had a broker's license since the 1950s and maintains his license today. In 2014, her father transferred all rental properties to ██████████, LLC. Until 2016, the Petitioner's husband actively managed the day-to-day operation of the properties. When his health started to decline, the Petitioner's children started managing the day-to-day operations, including collecting rent and paying expenses. Though the children are doing the day-to-day tasks, the Petitioner's husband is the sole manager/owner of the LLC. She stated that the income from the rentals has been used to help pay for her parents' care.

The Petitioner's representative cited to previous DHA decisions and a Circuit Court decision overturning DHA in his assertion that the rental properties are exempt business assets. In *Crow v. WDHS*, ██████████ ██████████ Court Case No. ██████████, the court overturned a DHA decision which found that rental property was not an exempt asset. In the DHA decision, the ALJ found that the Petitioner's spouse was using the rental property for his own support rather than for the support of the EBD applicant. She further found that none of the exemptions under MEH 16.9 applied and the property was not therefore an exempt business asset. In the Circuit Court decision, the judge noted that the agency representative testified at the hearing that the main criteria the agency is required to apply to determine whether a rental property is a business asset is whether the individual is claiming business income from the property. The judge noted that both the ALJ and the agency found that the applicant's Schedule E was not sufficient to determine if

a trade or business exists though Schedule E reported business income. The judge noted that a previous DHA decision in Case No. MDV 45/86382 concluded that a rental property was an exempt business asset based on information reported in Schedule E. The judge noted that MEH is guidance only and concluded that there was evidence to find that the Petitioner's spouse's income from the properties as reported in Schedule E was used for her support and therefore it met the criteria as an exempt business asset.

The Petitioner's representative distinguished DHA Case No. 181279 which concluded that rental property was not an exempt business asset because the evidence established that the property was rented for a total of 31 days. The ALJ initially found that there was insufficient evidence to establish the existence of a bona fide business. On rehearing, the petitioner in that case presented additional evidence that there was a bona fide business operation. However, the ALJ still found the properties were not exempt because the petitioner did not actively manage the business. The Petitioner's representative in this case asserts that the evidence in this case establishes that the rental properties are rented 365 days/year and produce income that is used by the Petitioner for support. Further, the representative distinguishes the previous DHA case by noting that the Petitioner's husband in this case still maintains his broker's license and is still the manager of the LLC.

Based on DHS 103.06(5)(b) and the evidence, I conclude the rental properties in question are exempt business assets in determining the Petitioner's eligibility for MA. The evidence establishes that they are income-producing properties and that the income is used to support the Petitioner. I note that Schedule E reports that the 4 properties are rented 365 days/year and overall produced a negative net income for 2018. However, there appear to have been some specific issues with two of the properties that caused the loss, including roofing repairs and water damage. I further note that the MEH provides guidance that there is not to be a profitability test. Regarding whether the Petitioner's husband is actively managing the business, I note that such requirement is not found in DHS 103.06 but rather in the MEH guidance. Even if the guidance is correctly interpreting the code, I find that there is sufficient evidence to conclude the Petitioner is actively managing the LLC with his children. He continues to maintain his real estate broker's license.

An additional ground for denial was failure to provide verification of a [REDACTED] bank account ending in [REDACTED]. At the hearing, the agency representative testified that a request for verification of this bank account was not issued because the case was closed for being over assets. The agency representative conceded the agency cannot deny an application for failure to provide verification that was never requested.

There is a question as to whether this appeal concerns the application that was filed in October 2019 or the application filed in February 2020. The Petitioner's representative testified that the February 2020 application was filed in case the decision in Case Nos. 197378 and 197380. She asserts that the application became irrelevant when the ALJ remanded the case to allow additional verification to determine eligibility based on the October 2019 application.

Because the ALJ remanded the case to the agency on March 2, 2020 to allow additional verification and a new eligibility determination for the October 2019 application, I conclude this case is related to that October 2019 application and whether the agency correctly denied the application again after additional time was allowed for verification to be submitted, in accordance with the previous remand order. Based on the requests for verification after the March 2, 2020 remand and the evidence of the information submitted by the Petitioner, it appears the Petitioner has now submitted all requested information. However, if the agency is still required to verify [REDACTED] bank account [REDACTED], the agency must do so within 10 days of this decision and make a final determination of eligibility.

CONCLUSIONS OF LAW

The rental properties reported on Schedule E of the Petitioner's 2018 tax return are exempt business assets. The agency did not correctly deny the Petitioner's MA application based on the Petitioner being over the asset limit.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to take the following actions:

1. Re-determine the Petitioner's countable assets, exempting the rental properties reported on Schedule E as business assets.
2. If still necessary to determine Petitioner's eligibility, issue a request for verification of [REDACTED] bank account ending in [REDACTED]. This request must be issued within 10 days of the date of this decision.
3. Upon receipt of verification of [REDACTED] bank account [REDACTED] (if still needed), re-determine the Petitioner's MA eligibility.

The agency shall re-determine the Petitioner's eligibility within 10 days of the date of this decision if additional verification of the [REDACTED] bank account is not necessary. If verification is required, the agency shall re-determine the Petitioner's eligibility within 10 days of receipt of the verification. The date of eligibility shall be based on the Petitioner's application filed on October 31, 2019.

REQUEST FOR A REHEARING

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, 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.

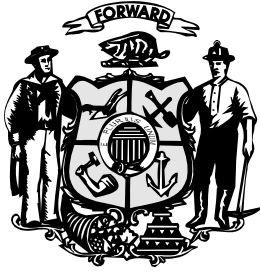
APPEAL TO COURT

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 Milwaukee,
Wisconsin, this 12th day of August, 2020

\s _____
Debra Bursinger
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 August 12, 2020.

Milwaukee Enrollment Services
Division of Health Care Access and Accountability

