



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
c/o [Redacted]
[Redacted]
[Redacted]

DECISION
Case #: MDV - 200210

PRELIMINARY RECITALS

Pursuant to a petition filed on October 15, 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 December 3, 2020, at Waukesha, Wisconsin.

The issue for determination is whether the agency correctly determined a divestment penalty period.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Petitioner's Representative:

[Redacted]
c/o [Redacted]
[Redacted]
[Redacted]

[Redacted]
[Redacted]
[Redacted]
[Redacted]

Respondent:

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

By: [Redacted]
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 Waukesha County.
2. On May 27, 2020, the Petitioner's representative applied for standard MA. The application reported that the Petitioner resided in a CBRF. The application reported an irrevocable burial trust worth \$8500, a checking account with a balance of \$1500 and monthly income of \$6613.55. It was also reported that the Petitioner had "sold or given away assets"
3. On May 28, 2020, the agency issued a notice of decision to the Petitioner's representative informing her that the Petitioner's application for Medicaid was denied due to assets exceeding the program limit. It noted that it counted Petitioner's income as \$6613.55 which included income from an annuity, pension, and social security. It further noted that it counted assets of \$5,500 which included a checking account and burial assets.
4. On May 28, 2020, the agency also issued a notice to the Petitioner's representative with a summary of the information provided in the application. The summary indicates the Petitioner was not requesting community waivers or Institutional MA. The summary also indicates that the Petitioner had not sold or given away assets. The notice asked the Petitioner's representative to contact the agency by June 8, 2020 to report any incorrect information in the summary.
5. On June 2, 2020, the Petitioner's representative submitted additional documentation to the agency. The representative conceded the Petitioner divested assets of \$125,719.20 and submitted a signature page dated May 20, 2020, along with other documentation including pension verification, social security benefit verification, annuity/life insurance policy verification, and burial trust verification.
6. On June 4, 2020, the agency issued a notice of decision to the Petitioner's representative informing her that the Petitioner's application for Medicaid was denied due to income and assets exceeding the program limit. The agency counted income of \$6,557.61/month and assets of \$84,333.86. Assets of \$57,645.91 from his checking account and \$26,687.95 from a savings account were counted. The agency also sent the Petitioner's representative a summary of the information provided in the application. The summary indicates the Petitioner was not requesting community waivers or Institutional MA. The summary also indicates that the Petitioner had not sold or given away assets. The notice asked the Petitioner's representative to contact the agency by June 15, 2020 to report any incorrect information in the summary.
7. On June 16, 2020, the Petitioner's representative spoke with an agency worker and was advised the case had been closed because the agency had not received a referral from the Department of Aging for community waivers.
8. On June 18, 2020, the agency received a referral for community waivers. On June 19, 2020, the agency issued a notice of decision to the Petitioner's representative informing her that the Petitioner's application for Medicaid was denied due to assets and income exceeding the program limit. It also informed her that the application was denied for community waivers due to assets exceeding the program limit. The notice informs her that the agency counted income of \$6,577.61/month in determining both Medicaid and community waivers eligibility. The notice informs her that the agency counted assets of \$84,333.86 for May 2020 for Medicaid eligibility and assets of \$110,360.41 beginning June 2020 for both Medicaid and community waivers eligibility.
9. On June 19, 2020, the agency issued a notice to the Petitioner's representative with a summary of the information provided in the application. It noted that the Petitioner was requesting community waivers. It also noted that the Petitioner had not given away or sold assets. The notice asked the Petitioner's representative to contact the agency by June 29, 2020 to report any inaccurate information.

10. On June 24, 2020, the Petitioner's representative submitted verification of the establishment of an account into which a check for \$113,308.77 payable to the Petitioner's irrevocable trust had been deposited. She further sent information that shows the Petitioner's allowable monthly medical expenses totaled \$6,775.00 and his monthly income totaled \$6,571.61. The Petitioner's representative requested a calculation of the Petitioner's divestment penalty. On June 30, 2020, the Petitioner's representative submitted verification that the check to the irrevocable trust had been posted and the balance in the Petitioner's checking account was \$1,923.89. The balance in his savings account was \$586.56.
11. On July 8, 2020, the Petitioner's representative sent an email to the agency's mailbox requesting an update on the Petitioner's case. On July 15, 2020, the representative sent a follow-up email requesting an update. On July 15, 2020, the agency responded and there was discussion regarding the need for a new signature page within 30 days of a denial.
12. On July 16, 2020, the Petitioner's representative emailed the agency to report that the application summaries did not correctly calculate the Petitioner's assets.
13. On July 22, 2020, the Petitioner's representative was informed by an agency worker that the case was closed, and a new signature page was necessary. A new signature page was submitted.
14. On August 10, 2020, the Petitioner's representative emailed the agency to request an update.
15. On August 11, 2020, the Petitioner's representative was advised that a new application was necessary. A new application was submitted.
16. On August 17, 2020, the Petitioner's representative was advised by the agency that another referral would be needed from the Department of Aging because the Petitioner's case had closed.
17. On August 17, 2020, the agency issued a notice of decision to the Petitioner's representative informing her that the agency determined the Petitioner divested assets in the amount of \$125,719.20 and was imposing a divestment penalty period of September 1, 2020 – November 11, 2021.
18. On August 25, 2020, the agency received a referral for community waivers.
19. On September 9, 2020, the Petitioner's representative left a voicemail for the agency worker regarding the start date of the divestment penalty period. On September 16, 2020, the Petitioner's representative sent an email to the agency requesting an update on the Petitioner's case.
20. On September 21, 2020, the agency notified the Petitioner's representative that it would revise the start date for the divestment penalty period to August 25, 2020.
21. On October 27, 2020, the agency revised the divestment penalty period to start on August 11, 2020.
22. On October 15, 2020, the Petitioner filed an appeal with the Division of Hearings and Appeals.
23. On December 3, 2020, the agency issued a Negative Notice to the Petitioner informing him that his MA application was denied for the period of August 11, 2020 – October 21, 2021 due to a divestment of \$125,719.20.

DISCUSSION

The asset limit for a single person applying for/receiving MA, MA Waivers, or Family Care is \$2,000. A person cannot give their assets away to get under the asset limit.

A divestment is a transfer of assets with the intent to become eligible for MA. Sec. 49.453(2), Wis. Stats.; MA Eligibility Handbook, (MEH), 17.2.1. The penalty period is specified in sec. 49.453(3), Stats., to be the number of days determined by dividing the value of property divested by the average daily cost of nursing facility services. MEH, 17.5; 42 U.S.C. § 1396p(c).

The parties agree that the petitioner divested \$125,719.20, resulting in a 437-day divestment penalty period. They disagree as to the date on which the penalty period should start running. The MEH instruction on the penalty period start date is as follows:

17.5.3 Penalty Period Begin Date for Applicants

For divestments that occurred on or after January 1, 2009, the penalty period for an applicant begins on the date all of the following have occurred:

- * The person applies for Institutional LTC Medicaid, HCBW, or Managed LTC/IRIS.
- * The person enters an institution or meets the appropriate LOC and functional screen criteria.
- * The person meets all other Medicaid nonfinancial and financial eligibility requirements...

Note: If a person who had excess assets divests those assets during the three-month backdated period of an application, he or she is ineligible for excess assets until the date that he or she divested those assets. The divestment penalty period as well as the potential eligibility for card services would begin on the date of the divestment.

...

Example 3: Joan entered a nursing home on March 1 and applied for Medicaid on March 4. On her application, Joan reported that, in the previous month, she gave her adult daughter a \$100,000 cash gift, which is determined to be a divestment. All requested verification is received on March 27, and Joan meets all other Medicaid eligibility requirements; therefore, Joan's divestment penalty period would begin on March 1. If Joan had been over the asset limit at the time of application, she would not have been "otherwise eligible for Medicaid," so her divestment penalty period would not start until she was under the asset limit.

...

MEH, § 17.5.3.

The relevant tortured statutory language calls for the penalty period to start on the first of the month in which the person is in the nursing home, and the person would have been "otherwise eligible" for MA per "an approved application for the care":

(3) PERIOD OF INELIGIBILITY.

(a) The period of ineligibility under this subsection begins on either of the following for an applicant for Medical Assistance:

1. In the case of a transfer of assets made before February 8, 2006, ...
2. In the case of a transfer of assets made on or after February 8, 2006, the first day of a month ... during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance and would otherwise be receiving institutional level care described in sub. (2) (a) 1. to 3. based on an approved application for the care but for the application of the penalty period, whichever is later, and that does not occur during any other period of ineligibility under this subsection.

Wis. Stat. §49.453(3).

A valid application for MA must include the applicant's name, address, and a signature. MEH, § 2.4. The filing date is the date a signature is received. MEH, § 2.6. The agency is required to process all applications within 30 days of the filing date. MEH, § 2.7.1. The agency can extend the time for processing for up to 10 days to allow for requested verification or additional information. *Id.* If an application is denied, the Petitioner can re-open the application if the original application is re-signed and dated within 30 days of the denial. MEH, § 2.9.2. If more than 30 days have passed since the denial, a new application must be filed. *Id.* MA eligibility begins the first day of the month in which the valid application is submitted and all program requirements are met. MEH, § 2.8.1.

I note initially that the Petitioner's appeal is not timely concerning the agency denials dated May 28, 2020, June 2, 2020, and June 19, 2020. The Petitioner has argued that the agency calculation of assets resulting in the denials was incorrect. However, the Petitioner's appeal of October 15, 2020 is outside the 45-day period for filing an appeal of those denials. Therefore, I have no jurisdiction to review whether those denials were correct or whether the asset calculations that resulted in the denials were correct. I discuss the agency actions related to the denials and asset calculations only as they are needed for an analysis of the start date for divestment penalty period.

The agency's position is that the Petitioner's most recent application filing date was June 18, 2020 when the agency received a referral for community waivers. A denial was issued on June 19, 2020 based on assets exceeding the program limit. The agency acknowledges that it received the information on June 24, 2020 that the Petitioner's assets had been transferred to the irrevocable trust, but the case was closed at that time and a signature page was needed within 30 days of the date of closure for the case to re-open. The agency did not receive a new signature page by July 20, 2020. The Petitioner was required to file a new application after that date. On August 11, 2020, a new application was filed. Based on its interpretation of the policies, the agency asserts that it correctly imposed the divestment penalty period with a start date of August 11, 2020 because that is the date that the Petitioner had a valid approved application and met all other financial and non-financial requirements.

The Petitioner's representative argues that the Petitioner met all requirements for MA on May 26, 2020 and the divestment penalty period should begin on that date. She asserts that the information she submitted at the time of the initial application demonstrates the Petitioner's available assets were below the asset limit of \$2000. She noted that she submitted bank statements, the irrevocable trust, the Deed of Gift, and a copy of all checks that had been written to show that nearly all the funds currently in the Petitioner's checking account had been "assigned" to the irrevocable trust and were no longer available to

the Petitioner. The Petitioner's representative testified that she was unable to deposit the funds to the Petitioner's irrevocable trust until June 24, 2020 because of bank closures related to the pandemic.

Based on the circumstances and the applicable laws and policies, I concur with the agency that it correctly determined the start date for the Petitioner's divestment penalty period is August 11, 2020. As noted earlier, I do not have jurisdiction to review whether the denials by the agency were correct because the Petitioner's appeal was not filed within 45 days of those denial actions. It is undisputed that the Petitioner's case closed on June 19, 2020 and a new signature page was required by July 20, 2020 to re-open the case. It is undisputed that a new signature page was not submitted until July 22, 2020. It is further undisputed that a new application was not filed until August 11, 2020.

The Petitioner's representative argues that the agency had an affirmative duty to notify her of the requirement to file a new signature page by July 20, 2020. I find no support in law or policy for such affirmative duty on the agency. Despite the lack of an affirmative duty, the facts do not support the Petitioner's assertion that she was not aware of the requirement to submit a new signature page. In an email thread dated July 15, 2020, the Petitioner's representative and an agency worker discussed the requirement of a signature page within 30 days of the denial. The Petitioner's representative argues that when she contacted the agency on July 22, 2020, an agency worker notified her that the application could re-open with a new signature which she submitted that day. This was clearly an error by the worker, but it was a harmless error because the deadline for submitted a new signature page had already passed on July 20, 2020.

Based on the evidence submitted, I conclude that August 11, 2020 was the first date the Petitioner had a valid application for MA and met all other financial and non-financial requirements. The agency correctly determined the start date for the divestment penalty period.

CONCLUSIONS OF LAW

The agency correctly determined the start date for the divestment penalty period.

THEREFORE, it is ORDERED

That the Petitioner's appeal is dismissed.

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.

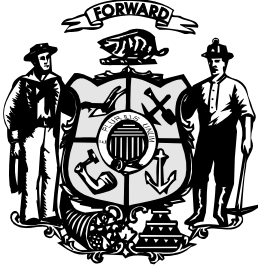
APPEAL TO COURT

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 21st day of January, 2021

\s _____
Debra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 21, 2021.

Milwaukee Enrollment Services
Division of Health Care Access and Accountability

