



FH  
[REDACTED]

**STATE OF WISCONSIN  
Division of Hearings and Appeals**

In the Matter of

[REDACTED]  
[REDACTED]  
c/o [REDACTED]  
[REDACTED]  
[REDACTED]

**DECISION ON REHEARING**  
Case #: MGE - 203510

**PRELIMINARY RECITALS**

Pursuant to a petition filed on October 18, 2021, 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 1, 2021, by telephone. A decision was issued on January 7, 2022 dismissing petitioner’s appeal. The petitioner timely requested a rehearing on January 24, 2022, which was granted. The rehearing was conducted on February 23, 2022.

The issue for determination is whether the respondent correctly calculated Petitioner’s patient liability.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

**Petitioner:**

**Petitioner's Representative:**

[REDACTED]  
[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:**

Peter McCombs  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) was a resident of Milwaukee County; she passed away on August 25, 2021. Exhibit R-3.
2. Prior to her death, Petitioner was admitted to a facility operated by [REDACTED] and [REDACTED], located at [REDACTED] on January 20, 2021. She was a resident of [REDACTED] until her date of death. Exhibit R-4.
3. Petitioner applied for Elderly, Blind, or Disabled (EBD) Medicaid benefits on May 27, 2021. Per information provided in the application, Petitioner reported receipt of gross Social Security income of \$1,981.00 per month and pension income of \$987.00 per month. Exhibit R-4.
4. The respondent received a hardship request, and noted that Petitioner is a hospice patient, that she has been unresponsive or otherwise unable to assist in identifying her husband. The request listed Petitioner's assets as unavailable based upon a determination that Petitioner's spouse could not be located. [REDACTED] testimony; Exhibit 1 to Petitioner's Rehearing Request
5. Via notices dated November 1, 2021, and November 2, 2021, the agency informed Petitioner that she would have a \$1,936.00 patient liability as of February 1, 2021. Exhibits R-6 and R-7.
6. Petitioner filed a timely appeal of the patient liability amount, asserting that petitioner's income should not be counted for purposes of the patient liability once it became an asset. Exhibit P-1.

## DISCUSSION

Institutionalized individuals who receive Medicaid must generally pay a "cost of care" each month. This amount is referred to as a patient liability. See *Medicaid Eligibility Handbook (MEH)* §27.7.1. EBD Medicaid recipients who are in, or who are likely to be in medical institution for 30 or more days, are considered to be institutionalized and must therefore pay a patient liability. *MEH* §27.4. The term "medical institution" includes but is not limited to skilled nursing facilities, intermediate care facilities, institutions for mental disease, and hospitals. *MEH* §27.1.1. Family Care members who reside in the community, on the other hand, are required to pay a cost share. *MEH* § 28.6. Although a patient liability and a cost share both refer to a Medicaid recipient's required monthly contribution to the cost of her or his care, patient liability amounts for institutionalized individuals and cost share amounts for Family Care members residing in the community are calculated using different formulas. *Id.* at §§ 27.7.1 and 28.6.

Because Petitioner was admitted to a skilled nursing facility in January 2021, and remained there since that time, the agency determined that her cost of care must be calculated according to the formula for patient liability. The following income deductions may be applied when calculating the patient liability.

1. \$65 and ½ earned income [disregard](#)
2. Monthly cost for health insurance
3. Support payments
4. Personal needs allowance (typically \$45 per month)
5. Home maintenance costs, if applicable
6. Expenses for establishing and maintaining a court-ordered guardianship or protective placement, including court-ordered attorney and/or guardian fees
7. Medical Remedial Expenses.

*Id.* at §27.7.1.

The issue presented by this case is whether the agency properly declined to disregard petitioner's income after determining that petitioner's assets were unavailable. In her appeal, petitioner argued that considering petitioner's income in the patient liability calculation was improper when that income became an asset, and thus became unavailable. Regarding income, the *Medicaid Eligibility Handbook* provides the following relevant instructions:

### 15.1.6 Availability

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.

...

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.

...

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.

### 15.1.6 Countable Income

Countable income is the prospective gross monthly amount used in the eligibility determination and post-eligibility calculations.

*Id.* at §15.7.1.

The agency calculated Petitioner's patient liability as of February 1, 2021, based upon the income that was reported. Based upon the hardship waiver grant, the respondent has conceded that the income was not available to her after it converted to an asset. Petitioner's representative asserted that it was unable to ascertain the exact amount of Petitioner's income or where her income was deposited due to Petitioner's incapacity. The representative had commenced guardianship proceedings, but those were not complete due to Petitioner's death.

The original decision determined that the Petitioner had not established that her income was unavailable to her in the month of issuance, i.e., she could not prove a negative. In retrospect, I find that the petitioner also had a responsibility here. Specifically, when determining a patient liability, the agency is instructed to only count available income. Among the qualifying factors for "available income" is a finding that the person has the legal ability to make the income available for support and maintenance. *MEH* 15.1.6. It is clear, based upon Petitioner's credible testimony, that petitioner lacked any ability to make her income available. Petitioner's representative testified that petitioner never had access to the income, and had no guardian or power of attorney in place to access the income. Corroborating this testimony, an Affidavit of Petitioner's Authorized Representative that was submitted with the Undue Hardship Waiver Request noted that Petitioner was medically compromised and unable to assist in the application process, that her daughter would not cooperate with the process, and that her marital status was unclear. See, Exhibit 1 to Petitioner's Rehearing Request. The Undue Hardship request also referenced the pending repossession of her home by her lender. This further corroborates the unavailability of her income to be applied to her legal obligations.

Based upon petitioner's testimony and corroborating documentation, I find that the Petitioner has established that her income was unavailable as she lacked the legal ability to make it available for support and maintenance. As her income was unavailable, the agency erred in using this income for purposes of calculating Petitioner's patient liability. This is a very specific case, and I cannot fault the agency for its initial determination of the patient liability. However, the facts of the case establish that petitioner had no way of accessing her income, could not participate in the pursuit of that income, and without the appointment of a guardian, could not use that income to pay for her support and maintenance.

### CONCLUSIONS OF LAW

The agency incorrectly determined that petitioner's income was available for support and maintenance effective February 2021.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the respondent to redetermine petitioner's patient liability effective February 2021, based upon a determination that her income was unavailable. All actions required by this Order shall be completed within 10 days following issuance of this Decision.

## 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, 5<sup>th</sup> 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).

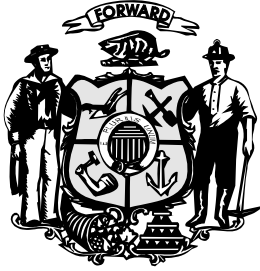
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 9th day of March, 2022

\s 

---

Peter McCombs  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin \DIVISION OF HEARINGS AND APPEALS**

Brian Hayes, Administrator  
5<sup>th</sup> Floor North  
4822 Madison Yards Way  
Madison, WI 53705-5400

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

The preceding decision was sent to the following parties on March 9, 2022.

Milwaukee Enrollment Services  
Division of Health Care Access and Accountability