FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION
Case #: MGE - 194293

PRELIMINARY RECITALS

Pursuant to a petition filed on June 13, 2019, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services regarding Medical Assistance (MA), a hearing was held on November 21, 2019, by telephone. The record was held open post-hearing for the parties to submit additional evidence.

The issue for determination is whether the agency correctly denied the Petitioner's application for Institutional MA for the period of February 1, 2019 – May 31, 2019.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By: [redacted]
Waukesha County Health and Human Services
514 Riverview Avenue
Waukesha, WI 53188

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 June 12, 2018, the Petitioner was determined by 2 physicians to meet the statutory definition of incapacity, to be unable to receive and evaluation information effectively or communicate decisions to an extent that he lacked the capacity to manage his health care decisions.

3. On July 17, 2018, an ADRC Specialist met with the Petitioner and his wife. Notes from the ADRC's Specialist in Care Coordination Plan state that there was discussion regarding adult day services, bathing, long term care programs, respite services, AFCSP and power of attorney. For the long term care program discussion, the Care Coordination Plan states: "Discussed, meeting with attorney to review assets, call for functional screen if interested." The Plan was signed by the Petitioner's wife and the ADRC Specialist.

4. Additional notes from the ADRC Specialist regarding the meeting on July 17, 2018 state as follows regarding the discussion of long term care options: "Writer [ADRC Specialist] also began conversation about LTC. [Blank] informed writer that since initially calling writer [blank] has met with [blank] attorney and determined their assets are much higher that initially reported. Writer reviewed spousal impoverishment protections – [blank] thinks they are over $247,000 and there will be another meeting with the attorney next week to review assets. Writer explained that a snapshot could be done and [blank] indicated the attorney was assisting with that. Writer explained that LTCFS may be needed and [blank] will call if needed. [Blank] did express that [blank] is feeling somewhat overwhelmed. [Blank] suggested that [blank] try respite at this time. They will continue to meet with attorney to review assets. A resource guide was provided and handouts on LTC, spousal impoverishment and estate recovery. Referral for respite will be made."

5. In October 2018, the Petitioner submitted a request for an asset assessment as of July 26, 2018.

6. On February 21, 2019, the Petitioner was admitted to a skilled nursing facility.

7. On March 21, 2019, the agency issued a notice "Information about Community Spouse Asset Share Calculation" to the Petitioner's wife informing her that the agency had determined the total combined countable assets for the Petitioner and his wife were $150,110.68 as of March 20, 2019. It informed her that the maximum total countable assets that the Petitioner could have was $75,055.34. It informed her that to meet Medicaid asset eligibility, combined assets must be $75,055.34.

8. On March 26, 2019, a MA application was submitted on behalf of the Petitioner. It was reported that the Petitioner was not residing in a skilled nursing facility. There was a request to backdate coverage to February 2019.

9. On April 18, 2019, a referral was made for a LTCFS for the Petitioner. The LTCFS was completed on April 24, 2019. The Petitioner was determined to be functionally eligible at a nursing home level of care.

10. On May 1, 2019, the agency issued a notice of decision to the Petitioner informing him that his MA application was denied due to assets and income exceeding program limits. The agency determined the Petitioner had countable assets of $52,588.82. Assets included a [redacted] IRS valued by the agency at $6212. Assets also included an [redacted] valued at $30,506.02.

11. On May 2, 2019, the agency issued a notice "Information about Community Spouse Asset Share Calculation" to the Petitioner's wife informing her that the agency had determined the total combined countable assets for the Petitioner and his wife were $87,136. It informed her that the

maximum total countable assets that the Petitioner could have was $50,000. It informed her that the maximum total countable assets that the Petitioner could have was $52,000.

12. On June 13, 2019, the Petitioner filed an appeal with the Division of Hearings and Appeals.

13. On August 7, 2019, the agency issued a notice of decision to the Petitioner informing him that he is not enrolled in Institutional MA effective June 1, 2019 due to assets and income exceeding program limits.

DISCUSSION

Generally a person cannot have more than $2,000 in assets and still be eligible for medical assistance. Wis. Stats., § 49.47(4). However, in order to prevent the spouse of an institutionalized person from becoming impoverished, the institutionalized spouse can allocate assets to the spouse who remains in the community. See Wis. Stat. § 49.455. The amount that can be allocated depends upon the amount of assets the couple has when the agency performs an assessment.

The law currently allows couples whose liquid assets are between $100,000 and $252,840 to assign half of the assets to the community spouse. Those whose assets are below $100,000 can assign $50,000 to the spouse in the community. Wis. Stat. § 49.455(6)(b); Medicaid Eligibility Handbook (MEH) § 18.4.3. Because the applicant can also have $2,000 in assets, this amount is added to the total amount of assets that a couple could have and one would still be eligible for medical assistance.

A. Asset Assessment Date

The primary issue in this case is whether the agency properly determined the Petitioner was over the asset limit for purposes of eligibility for Institutional MA for the period of February – May 2019. Specifically, the agency determined the Petitioner's assets using a date of February 21, 2019 after the agency received the Petitioner's application and functional screen determination on April 30, 2019. The Petitioner argues that the agency should have used the asset assessment based on the July 26, 2018 request. The agency relies on the following language in MEH, §18.4.2:

> 18.4.2 Asset Assessment
> The IM agency must make an assessment of the total countable assets of the couple at one of the following, whichever is earlier:
>
> - The beginning of the person's first continuous period of institutionalization of 30 days or more.
> - The date a functional screen was completed and the person was determined functionally eligible for HCBWs.
>
> Complete an asset assessment when a person applies, even if he or she had one done in the past, to get the most current asset share.

The agency notes that the functional screen was completed on April 24, 2019. The first continuous period of institutionalization of 30 days or more was February 21, 2019. Therefore, it asserts that it correctly assessed the Petitioner's assets as of February 21, 2019 at $87,136 and correctly denied the Petitioner's application because the Petitioner's assets exceeded the asset eligibility limit of $52,000. The agency notes that the request for an asset assessment on July 26, 2018 was a "snapshot assessment" and a new assessment asset must be completed at the time of application, even if there was a previous asset assessment requested and completed. The "snapshot assessment" is meant to assist a couple in planning and spending down assets.

The Petitioner contends that the agency should have used the asset assessment completed as a result of the July 2018 request. He asserts that during the July 17, 2018 meeting between the Petitioner's wife and the ADRC specialist, the Petitioner's wife requested that a functional screen be completed. Because the agency did not arrange for a functional screen to be completed, he asserts there was an agency error that delayed a determination of eligibility for the Petitioner.

The ADRC worker testified at the hearing regarding the meeting with the Petitioner's wife. She testified that there was a discussion about the functional screen but the Petitioner's wife declined the offer for the functional screen at that time, stating that she wanted to consult with her attorney first. She stated that the discussion focused on day services and respite services. The worker testified that the Petitioner's wife stated she would contact the ADRC if she decided to have the functional screen completed. The agency produced the ADRC worker's notes about the meeting in support of her testimony and the Authorization form signed by the Petitioner's wife which includes those services she was interested in, noting that the box for the functional screen is not checked off.

The Petitioner's wife testified at the hearing that she thought she had requested a functional screen for the Petitioner at the July 17, 2018 meeting with the ADRC. She stated that she heard nothing further from the ADRC regarding any of the services that were discussed. The Petitioner's attorney noted that, despite numerous contacts with the agency, there was no indication that the functional screen had not been completed.

Based on the evidence, I conclude the agency correctly determined the Petitioner's eligibility based on assets as of February 21, 2019. The agency correctly followed the mandate of MEH 18.4.2 which requires the asset assessment to be conducted at the time of application and based on assets either on the date of institutionalization or the completion of the functional screen. It is undisputed that a functional screen was not completed for the Petitioner until April 24, 2019. Therefore, the date of institutionalization was the earlier date and the correct date for the asset assessment.

I do not concur with the Petitioner's argument that the agency erred in nor completing a functional screen before April 24, 2019. While there may have been misunderstanding about the services requested, the evidence does not establish that there was an agency error that led to the misunderstanding or the delay in a functional screen. The agency notes about the meeting indicate that the Petitioner's wife declined the functional screen in July and that there was an agreement that she would contact the ADRC if she decided to have a screen done. I find these notes, created contemporaneously with the meeting, are the most reliable evidence of the discussion at the meeting.

B. Countable Assets

The Petitioner further disputes the agency's calculation of the Petitioner's assets for May 2019. Specifically, the Petitioner argues that the value of the [redacted] IRA account and the [redacted] should be reduced by the amount of the tax liability that will be incurred upon withdrawal of funds. The Petitioner asserts that the [redacted] IRA value should be reduced by $745.43 and the [redacted] should be reduced by the surrender costs of $1257.22. These adjustments would reduce the Petitioner's countable assets to under the eligibility limit for May 2019. The Petitioner relies on MEH 16.7.4.1.1 for his argument with regard to the annuity and MEH 16.7.19 for the IRA. The Petitioner notes that there is nothing in those sections that prohibit consideration of the tax liability for withdrawals. The Petitioner argues that the fact that 16.7.4.1.1 specifically allows for the deduction of surrender costs supports his position. In addition, the Petitioner asserts that both the IRA and annuity were given to the Petitioner's wife to be used for home repairs and thus they should be disregarded as countable assets under MEH 16.7.19.

MEH, § 16.7.4.1.1 states as follows:

> 16.7.4.1.1 Annuities That Can Be Surrendered
> If the annuity's cash value is available for withdrawal (minus any penalty) the annuity can be "surrendered."
>
> To determine the value of annuities that can be surrendered (for example, an annuity in the accumulation phase), use the following formula:
>
> 1. Total deposits made to the annuity.
> Plus
> 2. Earnings on the deposits not previously paid out.
> Minus
> 3. Withdrawals and surrender costs charged for withdrawal.
> Equals
> 4. Annuity's value

The county relies on MEH, §16.7.20 and asserts the policy does not state that tax withholding should be deducted as an unavailable asset. It notes that the policy regarding pension plans explicitly states that the agency is not to deduct potential tax withholding as an unavailable asset. That policy states:

> 16.7.20 Retirement Benefits
> Retirement benefits include work-related plans for providing income when employment ends (e.g., pension disability or retirement plans administered by an employer or union).
>
> Other examples of retirement funds include accounts owned by the individual, such as IRAs and plans for self-employed individuals, sometimes referred to as Keogh plans.
>
> - Employment related pension plans should be treated as follows:
>
> If an applicant or member has the ability to cash in a work-related benefit, the net amount of the benefit (after any penalties but **before any tax withholding**) available to the applicant or member should be treated as an available asset. . . .
>
> - Individually-owned retirement funds, such as IRAs, Keogh plans, etc., that are owned by the applicant or member should be counted as available non-exempt assets (**minus any early withdrawal penalty**) for the Medicaid applicant or member. The applicant or member always has access to the principal in these accounts, subject to an early withdrawal penalty.

(emphasis added).

I conclude that the agency correctly determined the value of the Petitioner's IRA and annuity. There is no provision that allows the agency to deduct tax withholdings when determining the value of an IRA or annuity. Surrender costs for an annuity are not the equivalent of tax liability. Surrender costs are a specific type of cost imposed by the insurer for an early withdrawal during the surrender period, as defined by the contract. Without some explicit authority in the law that allows for tax withholdings to be deducted, I must conclude that the agency correctly determined the values of the annuity and the IRA.

C. Home repair expenses

MEH, § 16.7.19 states as follows:

> 16.7.19 Replacing and Repairing Exempt Assets
> Vehicles and homes are examples of exempt assets. If an exempt asset is lost, stolen, or damaged, disregard any cash (and interest earned) or in-kind replacement received from any source to repair or replace it.
>
> The cash or in-kind payment must be used within nine months of the date it is received. After the end of the ninth month, count as an asset leftover cash not used for the repairs or replacement.
>
> Extend the nine-month period for up to another nine months if the person has good cause for not repairing or replacing the thing. Good cause means circumstances beyond the person's control to prevent repair or replacement. This includes not being able to contract it out. When there is good cause, count as an asset any amount not used for repairs or replacement. Begin with the month after the end of the extension.

Petitioner argues that the IRA and annuity were expected to be used for anticipated home repairs including a new roof, furnace, tree removal and painting. The total anticipated cost of the repairs was $19,793. The Petitioner notes that on February 4, 2019, he executed a General Durable Power of Attorney to allow him to transfer the IRA and annuity to his wife. He asserts that the execution of the POA constitutes a transfer of funds to his wife on February 4, 2019 for the anticipated home repairs and the funds should be considered exempt under MEH 16.7.19.

The agency asserts that the MA policies do not allow an applicant to earmark money for repairs as a way to decrease countable assets. There must be evidence of "cash or in-kind replacement received". The policy indicates that funds must be used within 9 months of receipt for the repairs. There is no evidence when the Petitioner actually transferred the IRA and annuity to his wife. It appears that this was done by the time the 2nd MA application was filed in June 2019.

I concur with the agency that there must be evidence of the date funds were "received". I do not find merit in the Petitioner's argument that February 4, 2019 is the date money was transferred. The power of attorney only authorizes the Petitioner's wife to transfer funds but there is no evidence of an actual transfer or when it took place. There was also no evidence presented as to whether the funds were actually used for repairs. Without additional evidence, I find the agency correctly determined that it cannot count the funds for anticipated repairs as exempt assets.

CONCLUSIONS OF LAW

1. The agency correctly determined the Petitioner's MA eligibility based on assets as of February 21, 2019.
2. The agency correctly determined the value of the Petitioner's IRA and annuity.
3. The agency correctly determined the anticipated costs of home repairs are not exempt assets.

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 6th day of January, 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 January 6, 2020.

Waukesha County Health and Human Services
Division of Health Care Access and Accountability
[redacted]