



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

In the Matter of

██████████
c/o Atty Carol J Wessels
11649 N Port Washington Rd Suite 210
Mequon, WI 53092

DECISION
FCP/173457

The attached proposed decision of the hearing examiner dated July 1, 2016, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed April 05, 2016, under Wis. Admin. Code § DHS 10.55, to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance (MA), a hearing was held on May 10, 2016, at Waukesha, Wisconsin.

The issue for determination is whether the agency properly denied the Petitioner's Family Care application.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

██████████
c/o Atty Carol J Wessels
11649 N Port Washington Rd Suite 210
Mequon, WI 53092

Petitioner's Representative:

Attorney Carol J. Wessels
11649 N Port Washington Rd Suite 210
Mequon, WI 53092-3459

Respondent:

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

By: ██████████

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. He is married.
2. On August 3, 2015, the Waukesha County ADRC conducted a functional screen on the Petitioner. On August 4, 2015, the screen was completed and the Petitioner was found to be functionally eligible for Family Care.
3. On October 8, 2015, a request for Family Care was submitted to the agency on behalf of the Petitioner along with a Medicaid Asset Assessment and supporting documentation.
4. On October 26, 2015, the agency issued a Community Spouse Asset Share notice informing the Petitioner that the agency had determined total combined countable assets as of October 23, 2015 are \$197,002.88. The notice further informed the Petitioner that in order to meet MA asset eligibility, the Petitioner and his spouse together could have \$100,501.44 in assets. The parties agreed that the correct date that should have been included in the notice for this asset determination was October 9, 2015, not October 23, 2015.
5. On February 29, 2016, an application for Family Care benefits was submitted to the agency on behalf of the Petitioner.
6. On April 5, 2016, the agency issued a Community Spouse Asset Share notice informing the Petitioner that the agency had determined total combined countable assets as of April 4, 2016 were \$149,340.34. The notice further informed the Petitioner that in order to meet MA asset eligibility, the Petitioner and his spouse together could have \$76,670.17 in assets. This determination was made based on an asset assessment date of August 4, 2015, the date the functional screen was completed for the Petitioner. The parties agreed that the correct date that should have been included in the notice for this asset determination was August 4, 2015, not April 4, 2016.
7. On April 5, 2016, the agency issued a Notice of Decision informing the Petitioner that his application for Family Care was denied due to assets exceeding the program limit. It further indicated that Petitioner's counted assets had been determined to be \$89,979.80.
8. On April 5, 2016, an appeal was filed on behalf of the Petitioner with the Division of Hearings and Appeals.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized under Wisconsin Statute, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10. See also Medicaid Eligibility Handbook (MEH), Chapter 29.

This is a companion case to In the Matter of [REDACTED] Case No. MRA-173524, which determined that the agency improperly determined the petitioner's community spouse asset allocation share in relation to the petitioner's application for enrollment in the Family Care program. The issue in this case is whether the agency properly denied the Petitioner's application for Family Care due to its determination that the Petitioner was over the asset limit. Specifically, the agency made its initial asset determination on or about October 9, 2015 after the Petitioner submitted a request for Family Care on October 8, 2015. The Petitioner's representative stipulated at the hearing that the Petitioner does not contest the actual calculations by the agency.

When the Petitioner filed the Family Care application on February 29, 2016, the agency informed the Petitioner that the previous asset determination date of October 9, 2015 was incorrect and the agency instead used an asset determination date of August 4, 2015, the date the functional screen was completed for the Petitioner.

In determining that the petitioner was over the asset limit, and thereby denying his request for enrollment in the Family Care program, the agency did so relying on an improper determination date for the amount of assets that could be retained by the petitioner's spouse. The final decision in the companion case determined that the agency used the wrong determination date. The reliance on this incorrect asset allocation calculation means that the agency's determination of financial eligibility for the Family Care program is in doubt. The matter must be remanded to the agency to determine whether the petitioner is in fact financially eligible for the Family Care program, using the corrected community spouse asset allocation calculation.

DHA Decision case no. MRA-173524 remanded the matter to the agency to calculate the community spouse asset allocation amount using an October 9, 2015 asset determination date, when the petitioner first applied for enrollment in the Family Care program. It appears that on that date the petitioner and his wife retained too many assets to meet financial eligibility requirements; *see*, Finding of Fact #4. It further appears, assuming the initial spousal asset calculation was correct, that the petitioner would have met the financial eligibility requirements when the second application for enrollment was submitted based upon the asset count in April, 2016; *see*, Finding of Fact # 7. The agency denied the application for enrollment in April 2016 due to the petitioner being over the asset limit. The denial was very likely incorrect.

If it is determined that the petitioner met all eligibility requirements as of February 29, 2016, the date of the second application for enrollment, the agency should enroll him in the Family Care program as of that date. Although there is no retroactive enrollment in the Family Care program, enrollment as of the date established in correcting an agency error is necessary and appropriate.

CONCLUSIONS OF LAW

The agency based its denial of the petitioner's application for enrollment in the Family Care program, submitted on February 29, 2016, utilizing an improper calculation of the amount of assets that the petitioner's community spouse could retain.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to take all administrative steps necessary to re-determine the Petitioner's eligibility for Family Care based on the request for Family Care and request for asset determination made on October 9, 2015 and the February 29, 2016 application. A new notice of decision shall be issued to the Petitioner regarding the agency's eligibility determination. These actions shall be completed within 10 days of the 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, 5005 University Avenue, Suite 201, 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, Madison, WI, 53703, **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 request (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 15th day
of September, 2016.


Thomas J. Engels, Deputy Secretary
Department of Health Services



FH
5174317853

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

██████████
c/o Atty Carol J Wessels
11649 N Port Washington Rd Suite 210
Mequon, WI 53092

PROPOSED DECISION

FCP/173457

PRELIMINARY RECITALS

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Petitioner's Representative:

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11649 N Port Washington Rd Suite 210
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Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: ██████████

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

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DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized under Wisconsin Statute, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10. See also Medicaid Eligibility Handbook (MEH), Chapter 29.

The issue in this case is whether the agency properly denied the Petitioner's application for Family Care due to its determination that the Petitioner was over the asset limit. Specifically, the agency made its initial asset determination on or about October 9, 2015 after the Petitioner submitted a request for Family Care on October 8, 2015. The Petitioner's representative stipulated at the hearing that the Petitioner does not contest the actual calculations by the agency.

When the Petitioner filed the Family Care application on February 29, 2016, the agency informed the Petitioner that the previous asset determination date of October 9, 2015 was incorrect and the agency instead used an asset determination date of August 4, 2015, the date the functional screen was completed for the Petitioner.

At the time of the Petitioner's request for Family Care and application for Family Care, the Medicaid Eligibility Handbook (MEH) stated as follows:

The IM Agency must make an assessment of the total countable assets of the couple at the:

1. Beginning of the person's first continuous period of institutionalization of 30 days or more, or

2. Date of the first request for Home and Community Based waivers, whichever is earlier.

Complete an asset assessment when someone applies, even if he or she had one done in the past, to get the most current asset share.

If a member was not married on the first date of institutionalization or waivers request, apply the policy from the point he or she is married. If he or she has remarried since the first date of institutionalization or waivers request, apply the policy from the date he or she married his or her current spouse.

The IM agency should inform the person for whom an assessment is being made what documentation is required. He or she must document ownership interest in and the value of any available assets the couple had at the time of his or her first period of continuous institutionalization. **The same documentation procedures are used as when an application is filed.**

MEH, §18.4.2 (effective June 15, 2015). (emphasis added).

The agency argues that the date of the completion of the functional screen on August 4, 2015 was a request by the Petitioner for community waivers.

The Petitioner asserts that October 8, 2015 was the Petitioner's first request for community waivers. Therefore, it asserts that the initial asset determination completed by the agency on October 9, 2015 is the correct determination.

DHS explains the process for requesting Family Care as follows:

There are three steps to determine eligibility and enrollment in a Family Care MCO. The ADRC helps people with each step.

1. The ADRC will visit the person and complete the Long-Term Care Functional Screen to assess the person's level of need for services and functional eligibility for the Family Care benefit. Once the individual's particular needs for long-term care are determined, the ADRC will provide advice about the options available to him or her. Options may include enrollment in Family Care, Partnership, IRIS or a different long-term care program. Or the person could choose to receive services through the Medicaid fee-for-service system, or to privately pay for services.
2. If the person is interested in Family Care or another Medicaid program, the ADRC will help the person contact an income maintenance agency to determine financial eligibility.
3. Once functional and financial eligibility is established, the ADRC notifies an "enrollment consultant" to contact the person, either by phone or in person. The enrollment consultant makes sure the person understands what it means to become a member of the MCO, and that he or she understands all the options for long-term care available. If the person decides on Family Care, the resource center finishes the enrollment process and notifies the MCO of the enrollment date.

<https://www.dhs.wisconsin.gov/familycare/apply.htm>.

On August 4, 2015, the ADRC completed Step #1 above by completing a functional screen for the Petitioner. Step #2 above was commenced on October 8, 2015 when the Petitioner made a request for Family Care. Based on the asset determination by the agency, the Petitioner was over the asset limit. When the Petitioner submitted an application on February 29, 2016, the Petitioner had spent down assets to below the limit determination on October 9, 2015.

At the hearing, the agency worker testified that she erred in using October 9, 2015 as the asset determination date after receiving the Petitioner's request for Family Care on October 8, 2015. She bases this assertion on guidance she received from an unnamed source at the Department of Health Services and a written but unpublished CARES Information and Problem Resolution Center Q/A document which states as follows:

*Volume 11 February 17, 2016 *Subject to change

Medicaid

Q20: Applicant is requesting an asset assessment now but they had an eligible functional screen in 2012. Do we do the asset assessment from 2012 when they first met the functional screen or now?

A20: You would do the AA from the date the first functional screen was completed and they were determined functionally eligible. We will be updating the handbook, 18.4.2 Asset Assessment with the following highlighted language. This clarification has been provided in the past.

The IM agency must make an assessment of the total countable assets of the couple at the:

1. Beginning of the person's first continuous period of institutionalization of 30 days or more, **or**
2. Date of the first request for Home and Community-Based Waivers, whichever is earlier.

*****Note: The date of the first request is the date a functional screen was completed and the person was determined functionally eligible.**

This document was not a published document or contained in any rules or regulations at the time of the Petitioner's functional screen or application. It was not until June 10, 2016 that a revised Medicaid Eligibility Handbook was published and released and the highlighted change was made to § 18.4.2. The new policy states as follows:

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 of the first request for HCBW s.

Note: The date of the first request is the date a functional screen was completed and the person was determined functionally eligible.

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.

If a member was not married on the first date of institutionalization or waivers request, apply the policy from the point he or she is married. If he or she has remarried since the first date of institutionalization or waivers request, apply the policy from the date he or she married his or her current spouse.

The IM agency should inform the person for whom an assessment is being made what documentation is required. He or she must document ownership interest in and the value of any available assets the couple had at the time of his or her first period of continuous institutionalization. The same documentation procedures are used as when an application is filed (see Section 20.1 Verification Introduction).

The Petitioner's representative correctly noted that the county agency's position in this case is directly contrary to a position that this same agency took in a similar case designated as DHA Case No. FCP/162467. In that case, the agency argued that the completion of a functional screen alone is not a request for Family Care and that the asset assessment should not be determined until a request for Family Care or application is submitted. The Petitioner in that case had argued that the date of the functional screen was the first request for waivers. DHA agreed with the agency in that case and held that the agency properly used the date of the Family Care application as the first request for waivers. The Petitioner in that case appealed the decision to Waukesha County Circuit Court (Case No. 15-CV-781). The circuit court reviewed the case on its merits and, on December 3, 2015, upheld the determination of the agency and DHA that the completion of a functional screen was not a request for waivers and the proper asset assessment date was the date the Family Care application was submitted.

While the previous DHA case and the circuit court case are not precedential in value, they are certainly persuasive in this case. Indeed, the county agency's argument in the previous case was persuasive. Under the published rules and policies for Family Care that existed at the time of this Petitioner's request for the program, October 8, 2015 was the Petitioner's first request for Family Care. The agency is not allowed to base its determination on an unpublished policy or rule, especially when it is a policy that can reasonably be argued is inconsistent with the published rule or policy. The governing rules for Family Care in Wis. Admin. Code § DHS 10.31 state as follows:

(6) Eligibility determination.

(a) Decision date. Except as provided in par. (b), as soon as practicable, but not later than 30 days from the date the agency **receives an application** that includes at least the applicant's name, address, unless the applicant is homeless, and signature, the agency shall **determine the applicant's eligibility and cost sharing requirements** for the family care benefit, **using a functional screening and a financial eligibility and cost-sharing screening** prescribed by the department. If the applicant is a family care spouse, the agency shall notify both spouses in accordance with the requirements of s. 49.455 (7), Stats. (Emphasis added).

An individual may not be enrolled in Family Care until both a functional eligibility and a financial eligibility determination is made. Often, for planning purposes, an individual may request a functional eligibility screen but may not intend to apply for Family Care at that time. Section 18.4.2 clearly states that the asset determination is done when the Petitioner **applies** for Family Care. Thus, it had been longstanding policy of DHS to consider the date of application as the date an individual first makes a request for Family Care. I find the "Note" added to 18.4.2 is inconsistent with the rest of the language in the policy stating that the asset determination is done "when someone **applies**" and inconsistent with

DHS 10.31(6) which contemplates an eligibility determination when a Family Care request or application is received by the agency.

In this particular case, I conclude the agency's asset determination on October 9, 2015 based on the October 8, 2015 request for Family Care is the proper asset determination date because the rules and the policies that existed at the time of this Petitioner's functional screen and application did not state that the date of the functional screen was a request for Family Care and the longstanding policy of the agency had been to consider the date of request or application as the first request.

CONCLUSIONS OF LAW

The agency did not properly deny the Petitioner's Family Care application based on the asset determination on August 4, 2015.

THEREFORE, it is

ORDERED

That, if this Decision is adopted by the Secretary of the Wisconsin Department of Health Services (DHS) as the Final Decision, this matter is rescinded to the agency to take all administrative steps necessary to re-determine the Petitioner's eligibility for Family Care based on the request for Family Care and request for asset determination made on October 9, 2015 and the February 29, 2016 application. A new notice of decision shall be issued to the Petitioner regarding the agency's eligibility determination. These actions shall be completed within 10 days of the issuance of a final decision in this matter.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Children and Families for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Milwaukee,
Wisconsin, this 1~~st~~ day of July, 2016

By: 

Debra Bursinger
Administrative Law Judge
Division of Hearings and Appeals