



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION
Case #: MDV - 210996

PRELIMINARY RECITALS

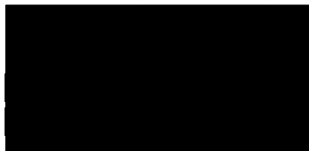
Pursuant to a petition filed on November 14, 2023, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Marinette County Department of Human Services regarding Medical Assistance (MA), a hearing was held on December 20, 2023, by telephone.

The issues for determination are: 1) whether the appeal of the February 6, 2023 determination was filed timely and, if so, whether the agency correctly failed to impose a divestment penalty period immediately upon receipt, on or about January 27, 2023, of information about the divestment and 2) whether the agency correctly imposed a divestment penalty period from October 1, 2023 through December 5, 2023.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney Scott J. Brogan
Law Office of Brogan & Yonkers
148 W. Hewitt Ave.
Marquette, MI 49855

Respondent:

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

By: Kelly Bruette

Marinette County Department of Human Services
Wisconsin Job Center Suite B
1605 University Drive
Marinette, WI 54143

ADMINISTRATIVE LAW JUDGE:

Beth Whitaker
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Marinette County.
2. Beginning January 9, 2020, petitioner resided in a nursing home.
3. On January 13, 2020, petitioner applied for Nursing Home Long Term Care Medicaid benefits, identifying her daughter [REDACTED] as the contact person.
4. The January 13, 2020 application was signed by petitioner and [REDACTED] as representative.
5. On January 10, 2023, the agency received from petitioner an Appoint, Change or Remove an Authorized Representative: Person form, in which petitioner authorized [REDACTED] as her representative and provided [REDACTED] contact information.
6. On December 1, 2021, the agency learned that petitioner's community spouse passed away in July 2021 and sought to verify sale of the home in which he lived.
7. On December 10, 2021, petitioner's authorized representative contacted the agency to report that petitioner was working with an attorney to list her house for sale and the agency requested verification of the house listed for sale, due on December 13, 2021.
8. On December 13, 2021 Attorney Ceello with the law firm Mouw & Ceello called the agency to state that he/she was taking action toward listing petitioner's house for sale. The agency extended the verification deadline and kept the case open. (Exhibit 5)
9. December 13, 2021, agency received a letter from Attorney Michale Scholke, with the law firm Mouw & Ceello regarding the listing of petitioner's house for sale but not stating that it represented petitioner.
10. On January 25, 2023, the agency received a Wisconsin Medicaid Change Report from the Law Office of Brogan and Yonkers, reporting that petitioner sold her home on January 6, 2023 and received \$68,193.76. (Exhibit 6) The form was signed by [REDACTED] on January 25, 2023 (Exhibit 7)
11. The agency received only one page of the transmission described on the fax cover sheet as 16 pages.
12. On January 27, 2023 the agency received verification of the sale of petitioner's home and updated the case on January 31, 2023. (Exhibit 7)
13. On February 6, 2023, the agency received verification of petitioner's annuity income and applied that income to the case in the amount of \$5,147.51 for three months beginning February 5, 2023. (Exhibit 8)
14. On February 7, 2023, the agency issued to petitioner and [REDACTED] an About Your Benefits notice informing her that effective March 1, 2023, she was enrolled in Nursing Home Long Term Care with a monthly cost of \$6,113.51 per month, because "someone in your home is now getting more money from sources other than work." The notice stated that the deadline to appeal was April 17, 2023.
15. On March 6, 2023, the agency issued to petitioner and [REDACTED] a notice informing her that her next Medicaid renewal deadline was September 30, 2023.
16. On April 3, 2023, the agency mailed to petitioner and [REDACTED] an About Your Benefits notice, informing her that effective May 1, 2023, she continued to be enrolled in Nursing Home Long Term Care and Medicare Savings Program with a monthly patient liability of \$966. The notice stated that deadline to appeal the determination was June 16, 2023.
17. On May 18, 2023, the agency issued to petitioner and [REDACTED] an About Your Benefits notice, informing her that her monthly patient liability for May 1, 2023 was \$353.50 and effective June 1, 2023, was \$966. The deadline to appeal the determination was July 3, 2023.
18. On August 25, 2023, the agency received petitioner's Access online renewal application and processed it on August 28, 2023. (Ex. 9) The application named [REDACTED] as authorized representative and contained her contact information.

19. On September 13, 2023, the agency issued to petitioner's authorized representative [REDACTED] an About Your Benefits notice informing her that effective October, petitioner was enrolled in Nursing Home Long Term Care and Medicare Savings Program (QMB) and that she had a divestment penalty period from October 1, 2023 through December 5, 2023.
20. On November 14, 2023, the division received petitioner's request for hearing by fax.

DISCUSSION

A divestment is a transfer of assets with the intent to become eligible for Medical Assistance (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 \$20,563.95 resulting in a 66 divestment penalty period. They disagree as to the date on which the penalty period should start running.

First, petitioner seeks to appeal the agency actions she was notified of on February 6, 2023, to count annuity income resulting in an increase in monthly patient liability and not to impose a divestment period resulting from a gift to petitioner's daughter. Petitioner asserts that the notice of that action was sent incorrectly because it should have been issued to petitioner's attorney. I understand petitioner's position to be that this asserted defect in the notice makes the November 14, 2023 appeal time regarding this determination.

The agency maintains that it correctly sent the February 6, 2023 notice to both the petitioner and her authorized representative, having received no request to send it to an attorney and having no attorney authorized to represent petitioner. The petitioner submitted no evidence to the contrary. From the Medicaid application in January 2020 to the date of hearing, [REDACTED] was authorized as petitioner's representative and her mailing address and other contact information was provided. The agency received information from an attorney unrelated to the Brogan and Yonkers firm at one time regarding the home sale. Neither that person nor any attorney associated with Brogan & Yonkers was ever appointed as authorized representative and no attorney ever stated anything to the agency that could be interpreted as an indication of an agreement to represent petitioner to any extent. The Wisconsin Medicaid Change Report submitted on January 27, 2023 was faxed to the agency and accompanied by a fax cover sheet with the law firm Brogan & Yonkers' letterhead and indicating that it was from [REDACTED]. The Change Report was signed by [REDACTED] on January 25, 2023, on a signature line for "Applicant /representative/guardian/power of Attorney /conservator."

I find that the agency correctly issued the February 6, 2023 notice to petitioner and her authorized representative [REDACTED]. It contained information sufficient for [REDACTED] to understand that petitioner's patient liability increased, that the increase was the result of additional income (the annuity) and was not related to imposition of a divestment penalty. There is no deficiency in the notice, either in its contents or the recipients. The deadline to appeal was April 17, 2023. Incidentally, before that deadline, the agency issued a notice on April 3, 2023, informing her of her monthly patient liability. Petitioner did not file an appeal until November 14, 2023, which was 119 days after the deadline.

A fax cover sheet with a law firm's letterhead and the name of an employee of the firm identified as the sender conveys nothing more than that the correspondence was transmitted from the firm's fax machine or application. It does not convey that petitioner authorized anyone from the firm to represent her or that any particular correspondence should be mailed to anyone associated with the firm. Petitioner and her representative were notified on February 6, 2023 that the agency had applied the annuity income and had not imposed a divestment penalty period. The appeal regarding those issues is untimely. The Division of Hearings and Appeals has no jurisdiction over any matter without express authority. I have no jurisdiction over an appeal that is filed late.

On September 13, 2023, the agency issued to petitioner and her authorized representative [REDACTED] an About Your Benefits notice informing her that effective October, petitioner was enrolled in Nursing Home Long Term Care and Medicare Savings Program (QMB) and that she had a divestment penalty period from October 1, 2023 through December 5, 2023. The notice explained that the divestment penalty period was calculated by dividing the divestment amount (\$20,563.95) by the average nursing home daily rate (\$308.71) to equal 66 days.

The appeal of that issue was filed timely on November 14, 2023. Petitioner does not disagree about the amount of the gift to [REDACTED] treated as a divestment or to the length or amount of the divestment penalty period but asserts that it should have been applied beginning in February 2023 rather than beginning on October 1, 2023.

The Medicaid Eligibility Handbook 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. ... MEH, § 17.5.3.

The agency did not apply these rules, rather it acted according to DMS Operations Memo 23-08, regarding the continuation of Temporary Health Care Policies Related to COVID-19 through March 31, 2023. One of the Temporary Health Care Policies that was the subject of this memo was suspension of imposition of divestment penalties for continuously enrolled Medicaid recipients. The Operations Memo instructed the agency that Medicaid recipients enrolled between March 18, 2020 through March 31, 2023 would maintain continuous health care eligibility until their next renewal, regardless of change in circumstance or non-payment of the patient share. The rule applied to Institutional Medicaid and Medicare Savings Programs. The Operations memo provided regarding Divestment:

Divestment penalty periods were not imposed for ongoing health care members with continuous eligibility. If a divestment was reported or discovered for an ongoing health care member with continuous eligibility, a divestment penalty period will be imposed at the member's next renewal that occurs after April 1, 2023.

Petitioner's argument that the October 2023 divestment penalty was imposed incorrectly is that the agency acted incorrectly when in February 2023, it failed to impose the divestment penalty for divestment related to a gift to petitioner's daughter of part of the proceeds of a sale of petitioner's house in the community. On January 27, 2023, the agency received documentation of the home sale with proceeds in the amount of \$68,193.76 and spending of the proceeds for a cemetery plot (\$3,745); prepaid funeral (\$10,000), attorney fees (\$5,000), brokerage fees for irrevocable annuity (\$1,900), ELCO annuity (\$15434.81); burial monument (\$9,750); gift to [REDACTED] (\$20,563.95), heaving \$20,563.95 as a divestment. (Exhibit 7) Petitioner asserts that this information was provided on January 25, 2023, that the information included a request for application of a divestment penalty at that time and that it should have been granted.

The agency maintains first that it received only one page of the Change Report faxed on January 25, 2023, and that that portion did not contain reference to the divestment penalty. It acknowledges receiving the information on January 27, 2023, but maintains that in the document received at that time petitioner did not request a divestment penalty, rather she acknowledged that one would be imposed. The addendum to the Change Report states, "The gift to [REDACTED] shall cause a divestment penalty period."

The agency imposed the divestment penalty beginning October 1, 2023 pursuant to the provision in Operations Memo 23-08 that the agency would not impose divestment penalty periods for ongoing health care members with continuous eligibility and that if a divestment was reported or discovered for a member with continuous eligibility, a divestment penalty period would be imposed at the next renewal occurring after April 1, 2023 (Exhibit 15)

The suspension of imposition of divestment penalty periods was in place beginning March 2020 and continued at the time of petitioner's January 2023 divestment and to April 1, 2023. Petitioner's next renewal after April 1, 2023 was on August 25, 2023. The agency imposed the divestment penalty period for the January 2023 divestment penalty at that time, beginning on October 1, 2023. The relevant Operations Memo does not expressly give the agency discretion to deviate from this procedure depending on the recipient's preference or request or based on the effect on that individual's eligibility. Further, there was no request from petitioner or anyone on her behalf for imposition of a divestment penalty in February 2023. The communication received on January 27, 2023 merely acknowledged that a divestment penalty period would be the result of the divestment and did not indicate for what time period it would or should be imposed. The agency followed its rules set forth in Operations Memo 23-08 without error. Petitioner provided no legal authority suggesting that the rules was invalid. The agency correctly imposed a divestment penalty from October 1, 2023 through December 6, 2023.

It appears based on the appeal and legal argument at hearing that petitioner's intention in January 2023 was to have annuity income to petitioner for the period of time beginning in February 2023 that a divestment penalty was anticipated. Instead, the annuity income was imposed but the divestment penalty was delayed, resulting in loss of benefits for petitioner for two periods of time. The result in this case may appear unfair to petitioner's representative who may not have understood the effect of COVID19-related Operations Memo 23-08 on petitioner's benefits. Attorney Brogan asserted at hearing that this application of the rule was contrary to its intent, which was to assure that Medicaid recipients continued to be eligible for benefits during the COVID-19 public health emergency. I have no authority to change the outcome of this dispute even if I believe it fair to do so. It is the long-standing position of the Division of Hearings & Appeals that its hearing examiners lack the authority to render a decision on equitable arguments. See, *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. No error was shown.

CONCLUSIONS OF LAW

- 1) Petitioner’s appeal of the February 6, 2023 determination was filed untimely. The Division has no jurisdiction over disputes regarding the agency’s determination to consider petitioner’s annuity income and not to impose a divestment penalty period; and
- 2) The agency correctly determined the start date for the divestment penalty period according to temporary rules set forth in DMS Operations Memo 23-08, requiring it to delay imposition of all divestment penalties until the benefit recipient’s next renewal after April 1, 2023.

THEREFORE, it is

ORDERED

That the petition for review 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 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.

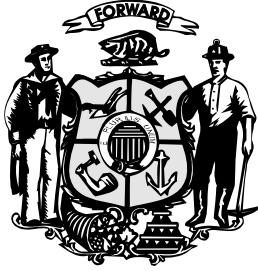
APPEAL TO COURT

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 27th day of December, 2023


 \s _____
 Beth Whitaker
 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 December 27, 2023.

Marinette County Department of Human Services
Division of Health Care Access and Accountability