



STATE OF WISCONSIN  
Division of Hearings and Appeals

In the Matter of



DECISION

MRA-70/105

086

PRELIMINARY RECITALS

Pursuant to a petition filed June 27, 2009, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Winnebago County Department of Human Services in regard to Medical Assistance, a hearing was held on July 30, 2009, at Oshkosh, Wisconsin. The hearing record was held open for seven days for a submission, which was received.

The issue for determination is whether the petitioner was ineligible for Institutional MA in April, 2009, due to excess assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53702

By: Cassie Smith-Gregor, ES Spec.  
Winnebago County Department of Human Services  
220 Washington Ave.  
PO Box 2187  
Oshkosh, WI 54903-2187

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon, Attorney (telephonically)  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Winnebago County.
2. The petitioner entered a nursing home in December, 2008, while his wife remained in the community. The agency determined that the couple had non-exempt assets of \$131,988.70, which would have required them to go under the pertinent CSAS (asset limit) for 2008 of \$106,400. The top tier CSAS was increased to \$109,560 effective January 1, 2009.
3. The petitioner applied for Institutional MA in May, 2009. Per a notice dated May 19, 2009, the petitioner was found to be eligible effective May 1, 2009, with no patient liability amount. However, the petitioner sought MA going back to April 1, 2009. The petitioner was not found to be eligible for April due to excess assets.
4. The petitioner's non-exempt assets at the end of April, 2009, were as follows:

Anchor Bank Money Mkt Acct	\$24,503.82
Anchor Bank checking acct	2,903.44
Thrivent Money market acct	1,898.56
Prudential Life ins. policy (petitioner) – CV	4,006.19
Aviva Life ins. policy (petitioner) – CV	5,418.73
NY Life policy (petitioner) – CV	9,803.24
Thrivent ins. policy (petitioner) – CV	12,007.35
Thrivent ins. policy (petitioner) – CV	<u>48,811.01</u>
TOTAL	109,352.34

CV is cash value of a life insurance policy, which is a counted asset. The petitioner wrote a check to the nursing home for April care in the amount of \$7,233. Because the \$109,352.34 in non-exempt assets plus an added-back-in check of \$7,233 (paid 4/20/09) exceeded the 2009 CSAS of \$109,560, the agency asserts that the petitioner remained over the asset limit for April.

**DISCUSSION**

Prior to 1988, an institutionalized person receiving MA could not have assets exceeding \$2,000. The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) made extensive changes in state Medicaid (MA) eligibility determinations for an institutionalized person who is married to a non-institutionalized person. Such a case is referred to as a "spousal impoverishment" case, although the policy notion behind the law change was to avoid impoverishment of the spouse. In most of these cases, an "institutionalized spouse" resides in a nursing home and has a "community spouse" living in the community, *i.e.*, a spouse who is not institutionalized or receiving MA Waiver services. Wis. Stat § 49.455(1).

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. *MA Eligibility Handbook (MEH)*, §18.4. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the

determination. The couple's total non-exempt assets are compared to the "asset allowance" to determine eligibility.

In this case, the agency performed an asset assessment for this couple based on assets owned in December, 2008, which was the month of nursing home admission. The agency decision *at the time* to base the assessment on the December assets was prompted by the following state policy language:

#### **18.4.2 Asset Assessment**

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 community waivers, whichever is earlier.

Complete an asset assessment using the F-10095 "Medicaid Asset Assessment" when someone applies, even if s/he had one done in the past, to get the most current asset share.

*MEH*, 18.4.2 (01/09) online at [www.emhandbooks.wi.gov/meh/](http://www.emhandbooks.wi.gov/meh/). The petitioner had entered the nursing home in December, so the agency used the assets present in December. The agency determined that the couple had non-exempt assets of \$131,988.70, which would have required them to go under the pertinent CSAS (asset limit) at the time of \$106,400. However, the petitioner reapplied in May, 2009, and the agency is now using the 2009 CSAS of \$109,560.

The agency determined in May, 2009, that the petitioner and his wife were slightly over the CSAS in April. After reviewing additional submissions from the petitioner post-hearing, the agency continues to assert that the couple's assets in April, 2009, exceeded the \$109,560 CSAS. Although the couple's assets on hand totaled only \$109,352.34 (after subtraction of same-month income payments) at the end of April, the agency added the April 20 check to the nursing home for \$7,233 to that asset total, which put the couple over the limit. The agency did this because it asserts that, once found MA eligible for April, the petitioner will have the \$7,233 refunded to him by the nursing home after MA makes its payment:

However, there was a payment made to [REDACTED] Home for [REDACTED] private pay charges for April 20 09 in the amount of \$7,233.92 paid on 4/20/09 which was part of the spend down of the assets. If they had not paid privately, then the \$7,233.92 would still be an available asset to them. All of [REDACTED] income is being allocated to [REDACTED] so none of this would be paid as liability. As such, this amount would then need to be included in the figures above making the total assets available at \$116,586.26.

Exhibit 3, county letter of 8/6/09. No policy citation is offered in support of this practice to add the paid care cost back into the asset total.

I appreciate that the counter-intuitive nature of (1) paying a month's nursing home charge so that (2) MA will in turn pay the same month's nursing home charge, which will (3) ultimately result in a refund to the petitioner, is what probably prompted the agency's position here. However, I can find no legal support for that position. Non-exempt assets are counted in any MA eligibility determination if they are "available."

The nursing home received and cashed the \$7,233 check in April. At that point, those funds could no longer be transferred/disposed of by the petitioner. The petitioner also had no legal basis for getting the money back from the nursing home, as the home had already been providing him with services for April. Under this scenario, the \$7,233 was not available to the petitioner at the end of April:

#### **16.2.1 Assets Availability Introduction**

An asset is available when:

1. It can be sold, transferred, or disposed of by the owner or the owner's representative, and
2. The owner has a legal right to the money obtained from sale of the asset, and
3. The owner has the legal ability to make the money available for support and maintenance, and
4. The asset can be made available in less than 30 days.

Consider an asset as unavailable if:

1. The member lacks the ability to provide legal access to the assets, and
2. No one else can access the assets, and
3. A process has been started to get legal access to the assets.

or

When the owner or owner's representative documents that the asset will not be available for 30 days or more.

Use the criteria above to determine whether an asset was available in a backdate month unless an asset is deemed unavailable in the month of application because it will not be available for 30 or more days (considered unavailable in any or all backdate months).

*MEH*, 16.2.1. See in accord, the federal rule at 20 C.F.R. §416.1201(a), as directed by 42 C.F.R. §435.601. I believe it was error to add the \$7,233 check back into the asset total. The fact that the petitioner will likely receive a refund in some later month does not change the fact that he was under the asset limit in April. The possibility of a refund several months down the road was not an asset that the petitioner could liquidate in April. Thus, the agency's position regarding April 2009 assets was incorrect.

#### **CONCLUSIONS OF LAW**

1. The petitioner's eventual receipt of a refund of his April 2009 nursing home payment (payment made in April 2009) more than 30 days after April 31, 2009, does not make his April payment check an available asset in April 2009.
2. The petitioner was under the appropriate asset limit for Institutional MA (spousal impoverishment) for April, 2009.

#### **ORDERED**

That the petition be remanded to the county agency with instructions to certify the petitioner for MA for April 2009, in accord with the above Conclusions of Law, if he was otherwise eligible.

This action shall be taken within 10 days of the date of this Decision. In all other respects, the petition is dismissed.

### REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Department of Health Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53702

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53

Given under my hand at the City of  
Madison, Wisconsin, this \_\_\_\_\_ day  
of \_\_\_\_\_, 2009

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Nancy J. Gagnon, Attorney  
Administrative Law Judge  
Division of Hearings and Appeals  
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c:

