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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

██████████
c/o Atty. Anne McIntyre
2675 N Mayfair Rd Suite 420
Wauwatosa, WI 53226

DECISION

MDV/146016

PRELIMINARY RECITALS

Pursuant to a petition filed December 18, 2012, 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 in regard to Medical Assistance, a hearing was held on February 14, 2013, at Waukesha, Wisconsin.

The issue for determination is the date upon which a divestment period begins to run.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

██████████
c/o Atty. Anne McIntyre
2675 N Mayfair Rd Suite 420
Wauwatosa, WI 53226

Petitioner's Representative:

Attorney Anne McIntyre
2675 N Mayfair Rd Suite 420
Wauwatosa, WI 53226

Respondent:

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

By: Karen Pearson, Mark Kompa
Waukesha County Health and Human Services
500 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # ██████████) is a resident of Waukesha.
2. Petitioner applied for Family Care on September 28, 2012. The application was filed by Petitioner's attorney and the letter accompanying the application states that it is a Family Care application.

*Family Care
Application
Divested
Analysis*

3. Shortly before Petitioner's application for Family Care she divested \$11,856.09. The penalty period for this divestment was determined to be 55 days.
4. A functional screen was not performed for Petitioner's September 28, 2012 Family Care application until November 14, 2012, apparently because the agency was not aware that this was a Family Care application.
5. The agency began the divestment period on the date of the completion of the functional screen, November 14, 2012.
6. Petitioner is 89 years of age and has lived in assisted living for about 2 years. Her functional abilities have not changed during the past year. Petitioner made multiple inquiries to the agency about Family Care eligibility in the 2 years prior to the application.

DISCUSSION

The non-exempt asset limit for a single person applying for/receiving Institutional MA or Family Care is \$2,000. A person cannot give their assets away to get under the asset limit.

A divestment is a transfer of assets for less than fair market value. §49.453(2), *Wis. Stats.*; *MA Eligibility Handbook, (MEH), 17.2.1*. A divestment or divestments made after December 31, 2008, and within 60 months before an application/review for institutional Medicaid or Family Care may cause ineligibility. § 49.453(1)(f), *Stats.*; *MEH, 17.3*. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in § 49.453(3), *Stats.*, to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services. *MEH, 17.5*.

Here there is no dispute as to the fact that a divestment occurred or as to the fact that the divestment period is 55 days. Rather, the dispute is over when the penalty period is to begin. Per the *MEH*:

17.5.3.2 Divestments That Occurred On or After January 1, 2009

For divestments that occurred on or after January 1, 2009, the penalty period for an applicant for a HCBW program or FC begins on the date:

- The person applied for a HCBW/FC program and
- Meets the appropriate level of care and functional screen criteria and
- Meets all other Medicaid non-financial and financial eligibility requirements, regardless of whether or not the waiver funding is actually available

...
MEH, §17.5.3.2.

The agency maintains that Petitioner did not meet the functional screen requirements until the functional screen testing was completed on November 14, 2012. The agency also argues that it is unreasonable to require it to perform a functional screen for persons on a waiting list because the functional screen will simply have to be performed again when waiver funding becomes available for that individual.

Conversely, Petitioner contends that the divestment penalty should begin in this case on the date of application. Petitioner's representative makes at least two arguments here.

Beginning in August 2010 Petitioner's son made multiple inquiries concerning the Family Care Program for Petitioner and was continuously told that Petitioner was not eligible because there was a waiting list and that Petitioner should apply about two months before assets were reduced to \$2000. In July 2012 Petitioner's law firm again contacted the agency to inquire about Family Care for Petitioner and was informed that there was no longer waiting list and that she could apply when she had reduced her assets.

When the application was finally made in September 28, 2012 it was another six weeks before the functional screen was completed. Petitioner's representatives presented evidence from Petitioner's physician that indicated that Petitioner's functional abilities have not changed over the course of the past year.

Given this, Petitioner argues, in essence, that an application should have been permitted here much earlier than September 28, 2012. She notes that the Department of Health Services website indicates that the Family Care application process consists of three steps. First, the local Aging and Disability Resource Center is to visit the individual to complete the long term care functional screen to access level of need. Second, the individual is to be put in contact with the economic support agency to determine financial eligibility. Third, once functionally and financially eligible person is notified as to when they may enroll. See <http://www.dhs.wisconsin.gov/LTCare/Generalinfo/Apply.htm>. Petitioner's representative also points to *DLTC Numbered Memo Series/Action 2009-05, issued March 12, 2009, indicates that effective January 1, 2009* which indicates that a penalty period would begin on the date the person applies for and is eligible for care even if they are placed on a waiting list. This is essentially an equitable argument. Petitioner is arguing that had the agency encouraged the application earlier as it really should have, Petitioner would have had an opportunity to divest assets well in advance of the enrollment opening in mid-2012. The Division of Hearings and Appeals does not, however, have equitable authority¹ and this matter is resolvable without resorting to equity.

Second, Petitioner also notes that a divestment is to begin on the date the person meets functional screen criteria, has filed an application and meets all other eligibility criteria not the date functional screen is completed. Again, *MEH*, § 17.5.3.2. That Petitioner submitted an application on September 28, 2012 and that it was noted to be a Family Care application is clear. Unrefuted medical evidence indicates that Petitioner's functional abilities have been no different over the year prior to November 2012. There is some tangential confirmation of that evidence by virtue of the facts that Petitioner has been residing in assisted living for two years, private paying for that assisted living and inquiring routinely as to Family Care eligibility over those two years. I conclude, therefore, that Petitioner met all of the eligibility requirements, including functional eligibility, on September 28, 2012 and that the divestment period should have begun on that date.

CONCLUSIONS OF LAW

That Petitioner met all requirements necessary for Family Care eligibility as of September 28, 2012 thus the divestment penalty period involved here began in September 28, 2012.

THEREFORE, it is

ORDERED

This matter is remanded to the agency with instructions to take the steps necessary to begin the 55 day divestment penalty involved here on September 28, 2012 and to adjust benefits accordingly. These steps must be taken within 10 days of the date of this decision.

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

¹ The Division of Hearings and Appeals that the Division does not possess equitable powers. See, e.g., *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977). The Division of Hearings and Appeals must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

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

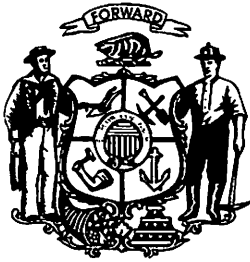
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

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 Milwaukee,
Wisconsin, this 5th day of March, 2013

\sDavid D. Fleming
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 March 5, 2013.

Waukesha County Health and Human Services
Division of Health Care Access and Accountability

