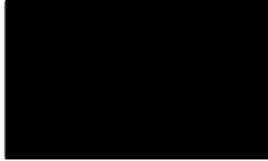




FH

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

In the Matter of



**PROPOSED DECISION
ON MOTION FOR COSTS**

Case #: CCWA - 216742

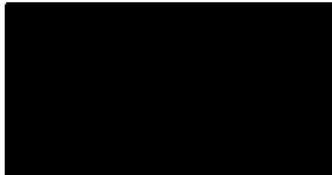
PRELIMINARY RECITALS

Pursuant to a petition filed on January 16, 2025, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support regarding Medical Assistance (MA), a hearing was held on April 23, 2025, by telephone. On May 14, 2025, a Decision was issued remanding the matter to the agency for action in accordance with the Order. On June 4, 2025, petitioner's attorney filed a motion for fees. The Department of Health Services filed no response to the cost motion.

The issue for determination is whether the petitioner is entitled to attorney costs and/or fees.

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney Lori Kornblum
Law Offices of Lori S. Kornblum
10936 N Port Washington Rd Ste 296
Mequon, WI 53092

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By: Melanie Malm, TMG
Bureau of Long-Term Support
PO Box 7851
Madison, WI 53707-7851

ADMINISTRATIVE LAW JUDGE:
Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of ██████████ County and has earned less than \$150,000 in each of the last three years.
2. Petitioner was an individual who was the prevailing party in an administrative hearing (Case No. CWA-216742) held on April 23, 2025.
3. The issue in Case No. CWA – 216742 was whether the IRIS agency met its burden to show that it correctly sought to terminate petitioner’s Daily Living Skills (DLS) services.
4. On May 14, 2025, a Decision was issued and found that the IRIS program did not meet its burden, remanding the matter to the IRIS program with instructions to rescind the termination of petitioner’s DLS.
5. On June 4, 2025, the petitioner’s attorney submitted a timely motion for costs that were incurred in connection with Case No. CWA- 216742 to the Division of Hearings and Appeals (DHA). This motion was submitted with a detailed, itemized statement of attorney fees in the amount of \$1800.47, which indicated the actual time expended and hourly fee pursuant to Wis. Stats. § 227.485(5).

DISCUSSION

Wis. Stats., § 227.485(3), provides in pertinent part:

In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

“Substantially justified” means having a reasonable basis in law and fact. Wis. Stats. § 227.485(2)(f). The Wisconsin Supreme Court, in considering the issue of “substantial justification” in Sheely v. Wisconsin Department of Health and Social Services, 442 N.W. 2d 1, 150 Wis. 2d 320 (1988), recited the following language from Phil Schmidt and Son v. NLRB, 810 F. 2d 638, 642 (7th Cir. 1987):

To satisfy its burden the government must demonstrate 1) a reasonable basis in truth for the facts alleged; 2) a reasonable basis in fact for the theory propounded; and 3) a reasonable connection between the facts alleged and the legal theory advanced.

Sheely also cites the federal Equal Access to Justice Act decision in Pierce v. Underwood, 108 S.Ct. 2541 (1988). In that case, the United States Supreme Court discussed the concept of “substantial justification” as follows:

We are of the view, therefore, that as between the two commonly used connotations of the word “substantially,” the one most naturally conveyed by the phrase before us here is not “justified to a high degree,” but rather “justified in substance or in the main” - that is, justified to a degree that could satisfy a reasonable person. That is no different from the “reasonable basis in law and fact” formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue... [cites omitted].

Pierce, 108 S.Ct. at 2550. This approach was followed in U.S. v. Paisley, 957 F.2d 1161 (4th Cir. 1992) and Johnson v. U.S. Dept. of Housing & Urban Dev., 939 F.2d 586 (8th Cir. 1991). Thus, the question is not whether the agency was actually correct but whether a reasonable person could think that the action by the agency was properly taken and correct, *i.e.*, whether a person could find at the time of the action, a reasonable basis in law for the theory propounded, a reasonable basis in truth for the facts alleged, and a reasonable connection between the two.

The agency has not provided any response to the cost motion to provide any explanation as to how it or its agent's actions were substantially justified. In the underlying case, the agency explained at hearing that the termination of DLS was due to no showing of improvement over the course of the 6 years that he has been receiving DLS services and that the Long Term Care Functional Screen (LTCFS) formed the basis for its determination that no improvement has occurred because he is still dependent in all of his iADLS. The Decision in the underlying case explained that there was no professional opinion in the record to show that he failed to show improvement in DLS. There was no professional opinion to show that there is a specific timeframe in which such skills should be mastered either generally, or for this petitioner specifically, that he has failed to meet. There was no professional opinion or evidence to support a finding that the LTCFS can form the sole basis for showing improvement. Rather, the preponderance of the evidence showed that he has shown improvement in his DLS and that he is still progressing. There was therefore no reasonable explanation to find that the agency was "substantially justified" in its action. Therefore, I find the petitioner is entitled to recover fees incurred in connection to this case.

The amount of the fees awarded is governed by Wis. Stats. § 814.245(5) and provides:

If the court awards costs under sub. (3), the costs shall include all of the following which are applicable:

(a) The reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the case and reasonable attorney or agent fees. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that:

1. No expert witness may be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency which is the losing party.
2. Attorney or agent fees may not be awarded in excess of \$150 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee.

(b) Any other allowable cost specified under s. 814.04 (2).

Wis. Stats. § 814.04(2) provides:

DISBURSEMENTS. All the necessary disbursements and fees allowed by law; the compensation of referees; a reasonable disbursement for the service of process or other papers in an action when the same are served by a person authorized by law other than an officer, but the item may not exceed the authorized sheriff's fee for the same service; amounts actually paid out for certified and other copies of papers and records in any public office; postage, photocopying, telephoning, electronic communications, facsimile transmissions, and express or overnight delivery; depositions including copies; plats and photographs, not exceeding \$100 for each item; an expert witness fee not exceeding \$300 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and in actions relating to or affecting the title to lands, the cost of procuring an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.

The Court of Appeals in Stern v. DHFS, 212 Wis.2d 393 at 404 (Ct. App. 1997) stated, "When cost of living increases are supported by the record, adjustment should be based on the 'All Items' component of the Consumer Price Index (CPI-AI)." Thus, if fees are awarded, it would be appropriate to adjust the statutorily mandated fee for inflation, as the history notes included with Wis. Stats. § 814.245 indicate that the \$150 fee was established in 2004, specifically by 2003 Wisconsin Act 135.

The 2025 rate of \$150/hour turns out to be \$254.59/hour when adjusted for inflation at the time the case was decided in May. This was determined using the inflation calculator found at https://www.bls.gov/data/inflation_calculator.htm. The statute provides that reasonable attorney fees are allowable. See Wis. Stat. § 814.245(5)(a). The petitioner's attorney submitted her motion and included an itemized statement stating the actual time expended of 6.95 hours pursuant to the statutory requirement. See Wis. Stat. § 227.485(5). I find those fees reasonable and allowable in the amount of \$1769.40. It appears the request for \$1800.47 was due to an error in petitioner's attorney's use of the incorrect dollar amount for April 2025.

CONCLUSIONS OF LAW

1. The agency did not have substantial justification for its action to terminate petitioner's DLS services.
2. Petitioner's attorney has properly established that she is entitled to a reimbursement of \$1769.40 in attorney fees as petitioner was the prevailing party.
3. There are no special circumstances in existence that would make the award for attorney fees unjust.

THEREFORE, it is

ORDERED

That, if and only if, this Proposed Decision is adopted by the Secretary of the Wisconsin Department of Health Services (DHS) as the Final Decision in this matter, petitioner's Petition for Attorney Fees and Costs is GRANTED and DHS must, within 10 days of the date of the Final Decision, award attorney's fees to petitioner's attorney in the total amount of \$1769.40.

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, 4822 Madison Yards Way, Madison, WI, 53705. 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 Health Services 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 4th day of August, 2025

/s _____
Kelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals