



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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June 10, 2014

[REDACTED]  
c/o Atty Andrew G. Falkowski  
120 N Main St Suite 310  
West Bend, WI 53095

Kenneth Benedum  
Washington County Department of Social Services  
333 E. Washington Street  
Suite 3100  
West Bend, WI 53095

Re: Final Decision  
[REDACTED], Case Number FCP - 153514

Dear Parties:

Enclosed is a copy of the Final Decision in the above-referenced matter.

Sincerely,

A handwritten signature in cursive script that reads "Joan Alt".

Joan Alt  
Legal Associate Supervisor

c: Moraine Lakes Consortium - email  
Office of Family Care Expansion - email  
Attorney Andrew Falkowski - email



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

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In the Matter of

██████████  
c/o Attorney Andrew G. Falkowski  
120 N. Main St. Suite 310  
West Bend, WI 53095

DECISION  
  
CFCP/153514

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The attached proposed decision of the hearing examiner dated April 10, 2014, is hereby adopted as the final order of the Department.

**PRELIMINARY RECITALS**

Pursuant to a petition filed November 18, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Washington County Department of Social Services in regard to Medical Assistance, a hearing was held on December 18, 2013, at West Bend, Wisconsin. On January 31, 2014, the undersigned Administrative Law Judge issued a decision in the underlying appeal on the merits of that action. On February 28, 2014, Petitioner's attorney filed a motion seeking to recoup attorney's fees.

The issue for determination is whether the Petitioner's motion for attorney's fees and costs must be granted and, if so, whether the requested \$5,149.95 may be awarded.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

██████████  
c/o Attorney Andrew G. Falkowski  
120 N. Main St., Suite 310  
West Bend, WI 53095

Petitioner's Representative:

Attorney Andrew Falkowski  
120 N. Main St., Suite 310  
PO Box 87  
West Bend, WI 53095

Respondent:

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

By: Kenneth Benedum

Washington County Department of Social Services  
333 E. Washington Street  
Suite 3100  
West Bend, WI 53095

ADMINISTRATIVE LAW JUDGE:  
Mayumi M. Ishii  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Washington County. He and his wife have had gross income of less than \$150,000 for each of the last three years.
2. Petitioner's attorney is licensed to practice in the State of Wisconsin.
3. On February 28, 2014, Petitioner's attorney submitted a motion for costs in the amount of \$5,149.95, related to filing an appeal, preparing for the hearing and appearing for the hearing. This sum consists of 27.8 hours of legal services billed at \$185.25 per hour.
4. The \$185.25 rate, properly takes into account an adjustment for inflation, of the \$150 per hour rate proscribed in Wis. Stats. §814.425. See [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm)
5. To date, no response to the motion has been submitted by the Department of Health Services or Washington County.
6. This case arose from a November 13, 2013 denial of Petitioner's application for Family Care Benefits. The county agency contended:
  - a) That Petitioner and his wife were part of the same fiscal test group;
  - b) That a court order requiring a monthly transfer of income to Petitioner's spouse did not constitute a special exempt income deduction for purposes of determining Petitioner's Spend Down amount. Specifically, the agency contended that the court ordered transfer of income did not constitute a support payment.
7. Petitioner's attorney filed an appeal that was received by the Division of Hearings and Appeals on November 18, 2013.
8. Petitioner was the prevailing party in that appeal, case FCP-15314.

### DISCUSSION

Wis. Stat., §227.485(3), provides:

- ...
- (3) 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.
- ...

§227.485(2)(f) provides: "'Substantially justified' means having a reasonable basis in law and fact." The Wisconsin Supreme Court, in considering the issue of "substantial justification" in Sheely v. Wisconsin Department of Health and Social Services, 150 Wis. 2d 320, 442 N.W. 2d 1 (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 EAJA 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 actually was correct but whether a reasonable person could think that the action by the agency was 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.

**I. Was the Agency substantially justified in its position that Petitioner and his wife were in the same fiscal test group?**

There does not appear to be any assertion that the county agency had an unreasonable basis in truth for the facts alleged, because the facts were not in dispute. Both parties agreed that Petitioner resided in an institution and that his wife lived in her own separate residence. There was no dispute about the fact that the Petitioner had been living in the institution since 2012.

Petitioner's attorney argues that the county agency, acting on behalf of the Department of Health Services, did not have a reasonable basis in law, for asserting that the Petitioner and his wife were in the same fiscal test group.

The Medicaid Eligibility Handbook (MEH) §15.1.1, states that, "An EBD fiscal group includes the individual who is non-financially eligible for Medicaid and anyone who lives with them and who is legally responsible for them. Spouses who live together are in each other's fiscal group. This means that the income and assets of both spouses are counted when determining Medicaid eligibility for either or both spouses. The fiscal group size for this situation/living arrangement is two."

That same section of the MEH goes on to state, "An individual living in a medical institution for 30 or more consecutive days would be a one person fiscal group. If the institutionalized person is married, refer to chapter 18.1 Spousal Impoverishment for special instructions regarding spousal impoverishment procedures."

At the hearing, the county agency asserted that it was relying upon an ambiguous e-mail exchange with the DHS CARES Call Center in which the county agency asked, "We have a married couple. Only one is applying. This would be a fiscal test group of two? Is that correct?" and the DHS CARES Call Center responded, "The simple answer is, yes. Even though only one spouse is applying if they are married, the fiscal test group would be two. Thanks." (See Hearing Exhibit 3, pg. 8)

Being misled by the DHS Call Center is not the same as having a reasonable basis in law to believe the Petitioner and his spouse were in the same fiscal test group.

The Medicaid Eligibility Handbook is easily accessed on-line at:

<http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>

There is nothing unclear or equivocal about the language in Medicaid Eligibility Handbook §15.1.1, that would make a reasonable person believe that spouses who live separately would be counted as a single fiscal test group, particularly when one spouse has been living in an institution for 30 or more days and the other has not.

Consequently, it is found that the county agency was not substantially justified in its position that Petitioner and his wife were in the same fiscal test group.

## **II. Was the Agency substantially justified in its position that the Court Ordered Transfer of Income to Petitioner's Spouse did not constitute Special Exempt Income?**

Again, there does not appear to be any assertion that the Agency had an unreasonable basis in truth for the facts alleged. As discussed above, the parties agreed that the Petitioner and his spouse did not live together and there was no dispute that the Petitioner had been living in an institution for more than 30 days. In addition, there was no dispute that the order for transfer of income arose from an Order on Petition to Authorize Transfer of Income and Assets of Person under Guardianship. The order required Petitioner's spouse, who is also his guardian, to transfer to herself, each month, \$1,905.10 of Petitioner's income.

The Agency argued that this did not qualify as a category of special exempt income known as court ordered support payments, because Petitioner's spouse was not outside his fiscal test group.

The Agency was correct in its statement that MEH §15.7.2.1 defines "support payments" as, "payments which a Medicaid member makes to another person outside of the FTG [fiscal test group] for the purpose of supporting and maintaining that person." However, as discussed above, the Agency did not have a reasonable basis in law, to believe that the Petitioner and his spouse were part of the same fiscal test group. As such, it cannot be said that the Agency had a reasonable basis in law to believe the transfer of income to the Petitioner's spouse, was not a support payment, since Petitioner and his spouse did not live together and since Petitioner had been in an institution for more than 30 days.

## **III. May the \$5,149.95 be awarded to Petitioner?**

The \$185.25 hourly rate properly takes into account an adjustment for inflation of the \$150 per hour rate proscribed in Wis. Stats. §814.425. See [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm). As such, it is found that the \$185.25 rate is appropriate and based upon Wis. Stats. §§227.485(5) and 814.25(5) and *Stern v. DHFS*, 222 Wis.2d 521, 588 N.W.2d 658 (Ct. App. 1998).

After reviewing the billing statement, it is found that one modification needs to be made. Counsel billed for 1.5 hours for work done on November 8, 2013, one week before the agency issued its denial of Petitioner's application. As such, that time cannot be said to have been used for the appeal that resulted from the agency's erroneous denial of Petitioner's application for benefits.

Thus, the amount that may be awarded works out as follows:

$$1.5 \text{ hours} \times \$185.25 = \$277.88$$

$$\$5,149.95 - \$277.88 = \$4872.07$$

## **CONCLUSIONS OF LAW**

The Petitioner is awarded attorney's fees in this matter in the total amount of \$4872.07.

**THEREFORE, it is**

**ORDERED**

That, if this "Proposed Costs Motion Decision" is adopted by the Secretary of the Wisconsin Department of Health Services (DHS) as the Final Decision in this matter, Petitioner's Motion for Award of attorneys' fees is granted and DHS must, within 10 days of the date of the Final Decision, award attorneys' fees and costs to Petitioner in the total amount of \$4872.07.

**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 10<sup>th</sup> day  
of June, 2014.

Kevin E. Moore  
Kevin E. Moore, Deputy Secretary  
Department of Health Services