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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MRA/138721

PRELIMINARY RECITALS

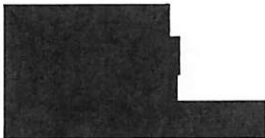
Pursuant to a petition filed February 07, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03, to review a decision by the Milwaukee Enrollment Services in regard to Medical Assistance, a hearing was held on April 05, 2012, at Milwaukee, Wisconsin. At the request of petitioner, a hearing set for March 20, 2012 was rescheduled.

The issue for determination is whether the community spouse's income allocation may be increased and the petitioner's patient liability reduced retroactive to November 29, 2011.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney Anne McIntyre
Nelson, Irvings & Waeffler, S.C.
2675 N Mayfair Rd Suite 420
Wauwatosa, WI 53226

Respondent:

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

By: Bryan Williams, ESS
Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a 59 year old resident of Milwaukee County who has been a resident of a nursing home, since November 29, 2011, due to worsening early onset Alzheimer's disease from 2008. His wife, [REDACTED], resides in the community in a private residence.
2. Due to petitioner's need for substantial in-home care and then placement in several group homes, the petitioner and his wife have incurred credit card bills of about \$17,527. See Exhibit R.
3. Petitioner's wife (age 51) was employed full time and had an average, monthly gross income of \$3,175.46 (based upon full-time annual salary of \$38,105.60). See Exhibit C.
4. Mrs. [REDACTED] was diagnosed with breast cancer on February 17, 2012, and underwent surgery on March 16, 2012. She was scheduled to begin chemotherapy, and would need at least one additional surgery. She was scheduled to be on unpaid medical leave as of March 16, 2012. After 30 days, she would be eligible for short term disability which will pay her 60% of her annual salary (\$22,863.36). See Exhibits D-1 and D-2.
5. The petitioner receives the following monthly income: a) Social Security of \$1,961.90; and b) Transport Employee's Pension income of \$1,337.04. See Exhibit B. The petitioner has \$3,109.04 (after deductions) which could be transferred to his community spouse.
6. The total gross monthly income of petitioner and his wife is \$6,474.44.
7. On December 21, 2011, the petitioner's representative applied for Institutional MA on behalf of the petitioner seeking backdated coverage to November 29, 2011.
8. The Milwaukee Enrollment Services (MES) approved petitioner's MA application on January 30, 2012 retroactive to November 29, 2011, but with a monthly cost share of \$3,154.04. See Exhibits 9 and 10 and Petitioner Exhibit A.
9. Milwaukee Enrollment Services denied any income allocation to the community spouse because [REDACTED] gross income was greater than the MMMNA of \$2,841.00.
10. Petitioner's representative filed this February 7, 2012 appeal requesting an increase in petitioner's community spouse's income allocation as of November 29, 2011 to raise petitioner's wife's Minimum Monthly Maintenance Needs Allowance (MMMNA) from \$2,739.00 (increased to \$2,841 as of January 1, 2012) to \$5,430.66, and a reduction to zero in petitioner's cost of care liability.
11. During the April 5, 2012 hearing, petitioner's representative submitted substantial evidence that Mrs. [REDACTED] had exceptional expenses of substantial credit card bills for privately paying for the petitioner's care in-home and then group homes, and decreased earnings (due to her breast cancer) which required an increase in her monthly income allocation retroactive to November 29, 2011.
12. The petitioner's wife established that she has basic and necessary monthly expenses totaling \$5,430.66.

DISCUSSION

The federal Medicare Catastrophic Coverage Act of 1988 included extensive changes in State Medicaid eligibility determinations as they relate to spousal impoverishment where one spouse is a resident in a nursing home. The purpose of the new act was to protect a "community" spouse's assets and resources and designate how a spousal share would be computed. The Act also established a new minimum needs allowance for the community spouse at a specified percentage of the federal poverty line. Sec. 49.455, Wis. Stats., is the Wisconsin codification of 42 U.S.C. s.13964-5 (MCCA). Among other thing, the "spousal

impoverishment" provisions at sec. 49.455 direct the Department to establish an income allowance for the community spouse of an institutionalized person. Consequently the Wisconsin Legislature enacted sec. 49.455, Wis. Stats. in order to bring the Wisconsin Medicaid program into conformity with federal law. Section 49.455 specifically states that the department is to use the criteria of that statutory section in determining the eligibility for medical assistance under §49.46 or 49.47, Wis. Stats. and the required contribution toward the care of an institutionalized spouse.

"Community spouse" refers to the person who is married to an institutionalized individual. See sec. 49.455(1), Wis. Stats. As a general rule, no income of a spouse is considered to be available for use by the other spouse during any month in which that other spouse is an institutionalized spouse. See sec. 49.455(3), Wis. Stats. However, after an institutionalized person is found eligible for medical assistance (MA), he or she may allocate income to the community spouse.

The Minimum Monthly Maintenance Needs Allowance (MMMNA) is the established amount the MA program allows a community spouse based upon what has been determined necessary to allow that spouse to continue residing in the community. The MMMNA has increased to \$2,739.00 as of January 1, 2009. Wis. Stat. §49.455(4)(b), *Medicaid Eligibility Handbook*, 18.6.2. The MMMNA is a general number considered to be the amount of monthly income the spouse of an institutionalized individual requires to continue residing in the community and meeting his or her *basic* maintenance needs. In the instant case, the applicable MMMNA was \$2,739.00 for November and December, 2011, and then increased to \$2,841.00 as of January 1, 2012.

The Community Spouse Income Allocation (CSIA) is the amount which a particular community spouse is determined to need to continue residing in the community and may actually exceed the MMMNA. The CSIA is defined as the greater of the MMMNA or an amount determined by a fair hearing. Wis. Stat. §49.455(4)(b).

Administrative law judges (ALJs) have the authority to increase the CSIA above the MMMNA where the MMMNA is insufficient to meet a particular community spouse's *basic* maintenance needs. Wis. Stat. §49.455(8)(c); Wis. Admin. Code §DHS 103.075(8)(c); *Medicaid Eligibility Handbook* 18.6. However, an increase in the CSIA above the MMMNA can be made through the fair hearing process only if it is established that the community spouse requires income above the level provided by the MMMNA due to the existence of "exceptional circumstances resulting in financial duress" for the community spouse. Wis. Stat. §49.455(8)(c); Wis. Admin. Code §DHS 103.075(8)(c). The relevant statutory provision states that the test for exception is as follows:

(c) If either spouse establishes at a fair hearing that, due to exceptional circumstances resulting in financial duress, the community spouse needs income above the level provided by the minimum monthly maintenance needs allowance determined under sub. (4)(c), the department shall determine an amount adequate to provide for the community spouse's needs and use that amount in place of the minimum monthly maintenance needs allowance in determining the community spouse monthly income allowance under sub. (4)(b).

(emphasis added)

Sec. 49.455(8)(c), Wis. Stats. Thus an ALJ may augment the maximum allocation ceiling only by amounts needed to alleviate financial duress, to allow the community spouse to meet necessary and basic maintenance needs. During the hearing, the petitioner's representative established exceptional circumstances regarding substantial nursing home, medical, credit card debt, household expenses, and other

necessary expenses resulting in financial duress, which justified an increase in her minimum monthly maintenance allowance.

It is important to emphasize that even if income allocation is possible, not all expenses qualify. In order for an administrative law judge to use expenses, they must meet "**necessary and basic maintenance needs**" MA Handbook, Appendix 23.6.0. "Income Allocation". This corresponds to the statutory language that the new income amount is in lieu of the "minimum monthly maintenance needs". Sec. 49.455(8)(c), Stats., (emphasis added.) Because the community spouse is essentially asking state taxpayers to give the nursing home or group home resident more welfare in the form of MA, I do not think that every expense is automatically appropriate for inclusion, even if it is not frivolous.

During the hearing, petitioner's representative established that Mrs. [REDACTED] has average monthly expenses totaling \$5,430.66, due to exceptional expenses related to medical, and significant credit card debts. During the hearing, the Milwaukee Enrollment Services representative did not object to any of the petitioner's documented monthly expenses.

Petitioner's wife's has established basic and necessary expenses substantially above the MMMNA of \$2,739.00 (and \$2,841 as of 1-1-2012), and therefore her monthly income allocation should be increased to raise her monthly income from \$2,739 or \$2,841 to the income of \$5,430.66 retroactive to November 29, 2011. Accordingly, based upon the above analysis, the petitioner's request to increase the community spouse's income allocation as of November 29, 2011 is approved; and petitioner's request for a reduction in his cost of care contribution is also approved.

CONCLUSIONS OF LAW

1. The petitioner's wife was able to establish exceptional circumstances resulting in financial duress which justified an increase in her minimum monthly maintenance pursuant to sec. 49.455(8)(c), Wis. Stats.
2. The basic and necessary monthly expenses of petitioner's wife (community spouse) as of November 29, 2011 in the amount of \$5,430.66 do warrant an increase in her income allotment and a reduction in petitioner's cost of care contribution.

THEREFORE, it is

ORDERED

That the matter is remanded to Milwaukee Enrollment Services with the following instructions: a) increase the community spouse's income allotment to increase her monthly income from \$2,739.00 (and then \$2,841 as of 1-1-2012) to \$5,430.66 retroactive to November 29, 2011; and b) reduce petitioner's cost of care liability retroactive to November 29, 2011, 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 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 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, Room 651, 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 Madison,
Wisconsin, this 15th day of May, 2012

/sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals

c:

