



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-67/#48937

PRELIMINARY RECITALS

Pursuant to a petition filed April 25, 2001, under Wis. Stat. §49.455(8), to review a decision by the Waukesha County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was held on July 10, 2001 at Waukesha, Wisconsin. At the request of the petitioner and the county agency, a hearing begun on May 24, 2001 was rescheduled (and continued) on July 10, 2001. During that period from May 24th to July 10th, petitioner provided to the county agency her monthly self-employment income reports for the period of January, 2001 through June, 2001.

The issue for determination is whether the county agency correctly determined the amount of the increase in the income allocation to the community spouse.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Representative:

(petitioner's spouse)

Wisconsin Dept. of Health and Family Services
Bureau of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53701-0309

By: Linda Zellmer, ESS
Waukesha County Dept. of Health & Human Services
500 Riverview Avenue
Waukesha, WI 53188

Gary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) has been residing in an institution in Waukesha County. His wife resides in the community at x, in Waukesha, Wisconsin.

2. On or about April 16, 2001, the petitioner's wife applied for institutional MA on behalf of the petitioner under spousal impoverishment.
3. The county agency found the petitioner eligible for MA. In its determination, the county determined the petitioner's wife's total income to be \$1,934.83 (\$894 in Social Security, \$503.33 from a Waukesha county pension, and estimated petitioner's self-employment income from her business to be \$537.50). The petitioner's only income was \$1,062 in Social Security. See Exhibits 1 & 5. Based upon those figures, the county calculated the community spouse's income allocation to be \$240.17. See Exhibit 5.
4. During the July 10, 2001 hearing, the county agency stipulated that after reviewing petitioner's self-employment forms for the months of January, 2001 through June, 2001, it determined that petitioner's self-employment income from the business was 0. As a result (petitioner's spouse) total income was calculated to be \$1,397.33 (Exhibit 6) because the \$537.50 in self-employment income was reduced to zero.
5. Based upon Finding of Fact #4, the county agency recalculated the community spouse's income allocation to increase from \$240.17 to \$777.67 (Exhibit 6); and petitioner's patient liability to be reduced to \$86.03 to contribute toward the cost of his nursing home care. See Exhibit 7.
6. The petitioner's spouse has identified basic and necessary expenses of \$2,230 as monthly living expenses. The \$36 expense for food and litter for her cats is not a basic and necessary expense.

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. 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.

If the community spouse's monthly income is below a certain amount, the institutionalized spouse may allocate some of his or her income to bring the community spouse's income up to that amount. That amount is the lesser of \$2,175 or \$1,935.00 plus an excess shelter allowance. In this case, sec. 49.455(4)(c), Wis. Stats., the Medical Assistance Handbook, Appendix 23.6.0. (1-1-01 edition), and sec. 49.455(4)(b), Wis. Stats., allow an increase in the monthly community spouse allotment by order of a fair hearing examiner or

a court. See also MA Handbook, Appendix 23.6.0. In order to increase the allotment, the examiner must find exceptional circumstances resulting in financial duress. See sec. 49.455(8)(c), Stats.

In this case, the county agency originally determined (petitioner's spouse) income to be \$1,934.83. However, as indicated in Finding of Fact #4, the county agency lowered its calculation of (petitioner's spouse) income to \$1,397.33 based upon a review of her pertinent self-employment forms. The Department therefore increased the income allocation from (petitioner) to (petitioner's spouse) from \$240.17 to 777.67.

It is important to emphasize that even if income allocation is possible, not all expenses qualify. In order for a Hearing Officer 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. In this case, petitioner's list of monthly expenses are basic and necessary except for the \$36 for food and litter for her cats. The total amount petitioner listed for her monthly expenses is \$2,256. I am therefore reducing this amount by \$36 so that petitioner's monthly basic and necessary expenses are \$2,230.

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. That allowance is currently set, for purposes of this discussion, at \$2,175. See MA Handbook, Appendix 23.6.0 (1-1-01). The institutionalized person may divert some of his income to his community spouse rather than contributing to his cost of care. The amount of the diverted income, when combined with the spouse's income, cannot exceed the maximum allocation.

A fair hearing officer can grant an exception to this limit on income diversion. The hearing officer does not have unfettered discretion in creating an exception to the maximum allocation ceiling, however. 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).

Sec. 49.455(8)(c), Stats, emphasis added. Thus a hearing officer 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 county agency did not dispute that the petitioner needed an increase in her minimum monthly maintenance due to her out-of-pocket expenses for her foot problems and other non-reimbursed medical needs.

During the hearing, the petitioner has established that she has basic and necessary expenses of \$2,230. Those expenses of \$2,230 are \$55 over (petitioner's spouse) income allocation of \$2,175. Therefore, I conclude that (petitioner's spouse) circumstances warrant a small increase in her community spouse income

allocation from \$2,175 to \$2,230 (an increase of \$55). These changes are retroactive to petitioner's date of MA application (April 16, 2001).

CONCLUSIONS OF LAW

The basic and necessary expenses of petitioner's wife warrant a \$55 increase in her income allotment to \$832.67 (\$777.67 + \$55).

NOW, THEREFORE, it is ORDERED

That the matter is remanded to the county with instructions to: a) increase the income allotment to the petitioner's wife to \$832.67; and b) reduce the petitioner's cost of care contribution (patient liability) based upon the increased income allocation to the community spouse, within 10 days of the date of this Decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, 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 must explain what mistake the examiner 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.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can 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 thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Wisconsin Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this _____ day
of _____, 2001.

Gary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals
8-18-2001gmw

cc: