



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

MGE/145326

PRELIMINARY RECITALS

Pursuant to a petition filed November 16, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Rock County Department of Social Services in regard to Medical Assistance (MA), a hearing was held on February 6, 2013, at Janesville, Wisconsin.

The issue for determination is whether the agency correctly denied the petitioner's Elderly/Blind/Disabled MA application, due to excess assets. More specifically, the issue is whether the petitioner is "institutionalized," thereby triggering use of the more generous "spousal impoverishment" asset limit for her application.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
By: [REDACTED]
[REDACTED]

Respondent:

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

By: Pat Nixon, ESS

Rock County Department of Social Services
1900 Center Avenue
PO Box 1649
Janesville, WI 53546

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Rock County.
2. An EBD MA application was filed on the petitioner's behalf on October 11, 2012. The county agency issued written notice of denial of non-institutional EBD MA on October 16, 2012. The basis for denial was ownership of assets above \$2,000.
3. At the time of application, the petitioner owned a checking account with a balance exceeding \$2,000.
4. The petitioner resides at [REDACTED], which is licensed as a community-based residential facility (CBRF). It is not licensed as a nursing home in Wisconsin.
5. The petitioner is married to a spouse who resides in the community. She is on a lengthy Home & Community-Based Waiver (HCBW) waiting list. More generous "spousal impoverishment" financial limits (e.g., \$52,000) apply to married persons on a HCBW, and HCBW recipients can receive help with a portion of CBRF costs (not room and board).
6. The petitioner, age 89, is afflicted with Alzheimer's disease. She also has advanced arthritis, and is confined to a wheelchair for mobility. Her physician has recommended that she receive nursing home-level care.

DISCUSSION

An applicant for Institutional/Elderly-Blind-Disabled MA has to satisfy nonfinancial and financial tests to be found eligible. The petitioner has passed the nonfinancial tests. The agency has concluded that she has not passed the asset test, which is that a single person cannot have nonexempt assets exceeding \$2,000, and a couple may not have nonexempt assets exceeding \$3,000. Wis. Stat. §49.47(4)(b)3g; *Medicaid Eligibility Handbook (MEH)*, § 39.4.1, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>.

The pertinent Wisconsin statute contains this declaration that a person cannot have nonexempt assets over the \$2,000 limit:

(4) ELIGIBILITY.

(a) ...

(b) Eligibility exists if the applicant's property, subject to the exclusion of any amounts under the ... federal Social Security Act, does not exceed the following:

1. Subject to par. (bc), a home and the land used and operated in connection therewith or in lieu thereof a manufactured home or mobile home if the home ...is used as the person's or his or her family's place of abode.

2. Household and personal possessions.

2m. One or more motor vehicles as specified in this subdivision.

...

3. For a person who is eligible under par. (a) 3. or 4., funds set aside to meet the burial ...

3g. Liquid assets for a single person limited to:

a. In 1985, \$1,600.

b. In 1986, \$1,700.

c. In 1987, \$1,800.

d. In 1988, \$1,900.

e. After December 31, 1988, \$2,000.

Wis. Stat. § 49.47(4)(b)3g [*emphasis added*]. See also, *MEH*, § 16.1.

The petitioner believes that the nonexempt assets owned by her and her community spouse fall under the “spousal impoverishment” assets limits, which range from \$52,000 to \$115,640. *MEH*, § 18.4.3. See in accord, the federal law at 42 USC § 1396r-5(c). However, the spousal impoverishment limits apply only when there is one institutionalized spouse, and one community spouse:

18.1 SPOUSAL IMPOVERISHMENT INTRODUCTION

Spousal impoverishment is a Medicaid policy that allows persons to retain assets and income that are above the regular MA financial limits. Spousal impoverishment policy applies to institutionalized persons (See [18.2.3 Institutionalized](#)) and their **community spouse** ([18.2.1 Community Spouse](#)).

MEH, § 18.1. There is no dispute that Mr. ██████ resides in the community.

The question presented here is whether the petitioner is an institutionalized person. Mr. ██████ eloquently argued that his wife’s status in a CBRF was analogous to receiving nursing home care.

The state policy definition of “institutionalized” is as follows:

18.2.3 Institutionalized

"Institutionalized person" means someone who:

1. Participates in Community Waivers, **or**
2. Has resided in a medical institution for 30 or more consecutive days, **or**
3. Is likely to reside in a medical institution for 30 or more consecutive days, as attested to by the medical institution.

MEH, § 18.2.3. This aligns with the state spousal impoverishment statute, which defines an “institutionalized person” as follows:

(d) “Institutionalized spouse” means either an individual who is in a medical institution or nursing facility and is married to an individual who is not in a medical institution or nursing facility or an individual who receives services under a waiver under 42 USC 1396n(c) or (d) and is married to an individual who is not in a medical institution or nursing facility and does not receive services under a waiver under 42 USC 1396n(c) or (d).

Wis. Stat. § 49.455(d). See also the matching federal law definition at 42 USC § 1396r-5(h)(1).

What then, is a medical institution or nursing facility? The pertinent federal rule, which Wisconsin must follow, is too lengthy to reproduce here. A medical institution in this context is a hospital, or nursing home providing psychiatric care, and that provides comprehensive care; the facility’s comprehensive charge – including room and board -- is paid by MA. See, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Support/Long-Term-Services-and-Support.html>. Room and board charges cannot be paid by MA for a CBRF. The federal statute defines a “nursing facility” as a facility that provides “skilled nursing” (another term of art) or rehabilitation services, and then lists an exhaustive list of performance standards for such a facility. 42 USC § 1396r(a). Given that ██████ is not licensed as a nursing home in Wisconsin, I conclude that it does not meet the definition of a nursing facility. Therefore, the county agency was correct to treat the

petitioner's application as an EBD MA application, rather than an MA application for an institutionalized person, and to apply the lower asset limit.

CONCLUSIONS OF LAW

1. The county agency correctly denied the petitioner's October 2012 MA application, due to excess assets.

THEREFORE, it is

ORDERED

That the petition is dismissed.

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 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 Madison,
Wisconsin, this 14th day of February, 2013

\sNancy J. Gagnon
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 February 15, 2013.

Rock County Department of Social Services
Division of Health Care Access and Accountability