



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

BCS/145945

PRELIMINARY RECITALS

Pursuant to a petition filed December 17, 2012, under Wis. Stat. § 49.45(5)(a), to review a decision by the Fond Du Lac County Department of Social Services in regard to Medical Assistance, a hearing was held on February 15, 2013, at Fond Du Lac, Wisconsin. An earlier hearing scheduled for January 18, 2013, was rescheduled at the petitioner's request. Post-hearing, the record was held open to allow petitioner to submit further documentation; said documentation was timely received on February 15, 2013, and marked as Exhibit 4.

The issue for determination is whether the respondent properly included petitioner's husband's income from a Subchapter S Corporation in determining household income.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

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

By: Deb Bohlman

Fond Du Lac County Department of Social Services
87 Vincent Street
Fond Du Lac, WI 54935-4595

ADMINISTRATIVE LAW JUDGE:

Peter McCombs (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Fond Du Lac County.

2. The petitioner, her husband and two minor children were certified for the BadgerCare+. Exhibit 2, Page 5.
3. Pursuant to notice from respondent dated October 17, 2012, petitioner would be required to pay a premium in the amount of \$551.45, effective November, 2012, covering all four identified BadgerCare+ beneficiaries, due to increased income and the change in coverage from BadgerCare+ Standard plan to the BadgerCare+ Benchmark plan. Id.
4. The petitioner's husband is the sole shareholder of Outdoor Specialists, Inc., and is also an employee of the corporation. Exhibit 2, p. 1.
5. Petitioner timely filed a Request for Fair Hearing on December 17, 2012, writing that the hearing was requested because: "Raised premium Nov. 1st, 2012 saying my husband is self-employed and he is not." Exhibit 1.

DISCUSSION

Wisconsin's MA program provides a number of different forms of medical coverage for various segments of society. BC+ has two major health care benefit plans: Standard and Benchmark. The Standard Plan is for families with income at or below 200% of the Federal Poverty Level (FPL). The Benchmark plan, which provides more limited services than the Standard Plan, is for families with income above 200% of the FPL, and for self-employed parents and Caretakers. See *BadgerCare Plus Eligibility Handbook* § 1.1.1. Eligibility is usually based on income along with other factors.

Self-employment income from ownership in a corporation is countable income. This tenet is well-documented in prior decisions issued by the Division of Hearings and Appeals (DHA), to wit:

A Subchapter S corporation is considered a self-employment entity. Handbook, App. 16.4.3. State MA law requires the agency to add depreciation back in when determining self-employment income. See Wis. Admin. Code, §DHS 103.07(2)(a). The agency should take net yearly earnings, add back in depreciation, and then divide by twelve. See also the self-employment worksheets found in the BC+ Handbook, App. 16.4.3.2.2. To be eligible for the Benchmark Plan the self-employed parents' income must drop below 200% if poverty if depreciation is excluded from the budget. Handbook, App. 19.2.

The agency must use the prior year's income method unless there is a change in the business circumstances. Handbook, App. 16.4.3.2.4. One example given of such a change is: "Sales, for an unknown reason, are consistently below previous levels. The relevant period may vary depending on the type of business (consider normal sales fluctuations)."

Decision, DHA Case No. MOP/144963.

As a first point, petitioner complains that the agency treated him as self-employed instead of as an employee of a corporation. The county did so correctly based upon Department policy. The Department's BC+ Handbook, Appendices 16.4.3 and 16.4.3.3.2.2 make clear that a Subchapter S corporation is to be treated as a self-employment enterprise.

The key issue is whether the 2011 tax returns act as a reasonable estimate of income. For self-employment operations the agency must utilize the prior year's income tax returns and divide net income by twelve. Handbook, App. 16.4.3.2; see also Wis. Admin. Code, §DHS 103.07(2). Income paid directly by a corporation as wages also is included. Handbook, App. 16.4.

The sole issue here is what the petitioner's income is that must be budgeted for the purpose of establishing eligibility for BadgerCare +.

Decision, DHA Case No. BCS/140798.

The *BadgerCare + Eligibility Handbook* discusses what should be used to make an income determination for a person engaged in self-employment.

16.4.3.1 Income Sources

Self-employment income sources are:

1. Business. Income from operating a business.

As the petitioner is a working shareholder, it is self-employment.

Decision, DHA Case No. BCS/133010.

Countable income is to be computed in the manner required by the *BadgerCare Plus Eligibility Handbook*, as follows:

16.4.3.2 Calculating BC+ Self Employment Income

Calculate BC+ income by either:

1. Using IRS tax forms ([16.4.3.2.1](#)) completed for the previous year, or
2. Anticipating earnings ([16.4.3.2.4](#)).

16.4.3.2.1 IRS Tax Forms

Don't fill out any IRS tax forms (or the Self-Employment Income Report Form- DES 2131) yourself. This is the responsibility of the member.

Consult IRS tax forms only if:

1. The business was in operation at least one full month during the previous tax year, and
2. The business has been in operation six or more months at the time of the *application*, and
3. The person doesn't claim a change in circumstances since the previous year.

If all three conditions aren't met, use anticipated earnings ([16.4.3.2.2](#)).

16.4.3.2.2 Worksheets

If you decide to use IRS tax forms, use them together with the self-employment income worksheets (HCF 16034, HCF 16035, HCF 16036 and HCF 16037).

The worksheets identify net income and depreciation by line on the IRS tax forms.

For each operation, select the worksheet you need and, using the provided tax forms and/or schedule, complete the worksheet. These are:

* * *

Corporation

IRS Form 1120 - Corporation Income

* * *

Next, divide IM income by the number of months that the business was in operation during the previous tax year.

The result is monthly IM income. Add this to the fiscal test group's other earned and unearned income. If monthly IM income is a loss, add zero to the non self-employment income.

When a household has more than one self-employment operation, the losses of one may be used to offset the profits of another. Apply this offset only to those self-employment operations that produced earned income. Don't apply a loss from unearned income to a gain in earned income. Losses from self-employment can't be used to offset other earned or unearned income.

If you use more than one worksheet because there is more than one operation, combine the results of each worksheet into one monthly IM income amount before adding that total to any other income. Remember that while a salary or wage paid to a test group member is an allowable business expense, you must count it as earned income to the payee.

Continue to process the group through the balance of the Handbook, including some additional work-related expenses that IRS doesn't allow as business expenses.

16.4.3.2.3 Disallowed Expenses

Generally, expenses that are allowed by the IRS on business tax forms are considered allowed expenses for BadgerCare Plus. However, some specific expenses allowed in the calculation of Self Employment Income on the IRS tax forms but are not allowed for BadgerCare Plus. These are:

1. Depreciation: Net self-employment income for BC+ groups is first determined without allowing depreciation expenses. If the group's total countable IM income exceeds 200% of the Federal Poverty Level, the self employed group is allowed a second income test. For the second test, net self-employment income is redetermined, this time deducting depreciation expenses. If the total countable IM income minus the depreciation is less than 200% of the Federal Poverty Level,, the adults and children are eligible for the Benchmark Plan. The premium for the parents and children in the household is 5% of the household's total countable gross income including depreciation. (i.e., depreciation expenses are not deducted)

* * *

16.4.3.2.3.1. Self Employed Depreciation Calculation

Self Employed BC+ groups are first tested with the IM income, including depreciation, against the BC+ income limits. If the group's countable IM income exceeds the BC+ income limits, the self employed group is allowed a second income test using the IM income without the depreciation. If the countable IM income minus the depreciation is less than the BC+ income limit, the adults and children are eligible for the Benchmark Plan. The premium for the parents and children in the household is 5% of the household's total countable gross income including depreciation.

The petitioner has not pointed to any error in the respondent's computations of her husband's self-employment income, but instead contends that, as an employee of the corporation, he is not, in fact, self-employed. Respondent counters that, for BadgerCare+ purposes the petitioner's husband is self-employed.

The petitioner has submitted several documents to support her assertion that her husband is an employee of the corporation, and is not self-employed. See, Exhibits 3 and 4. She asserts that due to the contractual nature of the corporation's business and its dependence on weather-related events, his schedule is not under his control. She notes that all employees are required to maintain daily work logs, her husband does not file self-employment taxes, and that no income is transferred to her husband from the company. *Id.* From a corporate law standpoint, I would concur that petitioner's husband has taken many appropriate steps to shield himself from personal liability for the actions of his company.

While contracts may dictate his work hours, he is a signatory to those contracts; it is inaccurate to assert, then, that his hours are dictated to him by his employer. While petitioner notes that the corporation's profits and losses stay in the company¹, as the company's sole shareholder, the petitioner has de facto control over any such distribution of income or loss. I note that the laws and regulations governing BadgerCare eligibility are distinct from tax and liability concerns in many ways. In the instant matter, the respondent has demonstrated that it properly determined that petitioner's self-employment income from ownership in a corporation is countable income. See, *BadgerCare Plus Eligibility Handbook* § 16.4.3.1. The petitioner has failed to substantively rebut this determination, and has not alleged or established any specific mathematical calculation errors.

CONCLUSIONS OF LAW

Petitioner's self-employment income from ownership in a corporation is countable income.

THEREFORE, it is

ORDERED

That the petition be, and hereby 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.

¹ See, Exhibit 3, handwritten note.

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 26th day of March, 2013

\sPeter McCombs
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 March 26, 2013.

Fond Du Lac County Department of Social Services
Division of Health Care Access and Accountability