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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MKB/147848

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 17, 2012, under Wis. Stat. §49.45(5), and Wis. Admin. Code §HA 3.03(1), to review a decision by the Disability Determination Bureau (DDB) in regard to Medical Assistance (MA), a telephonic hearing was held on April 16, 2013, at Waukesha, Wisconsin.

The issue for determination is whether the Disability Determination Bureau (DDB) correctly determined that the petitioner is not a disabled child for MA-Katie Beckett purposes.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: No Appearance  
Disability Determination Bureau  
722 Williamson St.  
Madison, WI 53703

**ADMINISTRATIVE LAW JUDGE:**

Kelly Cochrane  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Waukesha County. He lives with his parents and five-month-old sister in the community.

2. On or about August 17, 2012 petitioner applied for Katie Beckett MA. By a letter dated November 16, 2012 the DDB found that petitioner was not disabled. Petitioner sought reconsideration, but the DDB affirmed its determination on or about March 4, 2013. Petitioner's file was then forwarded to the Division of Hearings and Appeals for this appeal.
3. DDB determined that the petitioner is not disabled because, although his impairment is "severe," it does not meet, medically equal, or functionally equal the severity of a listed impairment. More specifically, his impairment allegedly does not cause sufficiently marked and severe functional limitations.
4. The petitioner, now age 3, is diagnosed with Autism.
5. *Listing 112 Criteria:* The petitioner's condition does not meet the Listing criteria for §112.04 (Mood Disorders), §112.08 (Personality Disorders) or §112.011 (Attention Deficit Hyperactivity Disorder).
6. In the domain of acquiring and using information, the petitioner has no limitation. The petitioner does grade level work in all of her academics, but has had some problems when not taking her ADHD medication.
7. In the domain of attending and completing tasks, the petitioner has a less than marked limitation. She is able focus, organize and complete work without distracting herself and others without significant problems when she is taking her ADHD medication. Without medication, she has obvious problems with this domain.
8. In the domain of interacting and relating with others, the petitioner has a "less than marked" limitation. When she is on her ADHD medication, her problems with maintaining friendships, playing cooperatively, respecting personal space, speaking too loud and fast, and responding to negative or positive feedback, are better controlled and without serious problems.
9. In the domain of moving about and manipulating objects, the petitioner has no limitations.
10. In the domain of caring for herself, the petitioner has a "less than marked" limitation. She can care for herself in an age-appropriate manner but may need some reminders and supervision. Mood swings and tantrums are noted in the home but not at school. When she is on her medication, there are no noted serious problems in the home or at school.
11. In the domain of health and physical well-being, the petitioner has no physical disabilities. No vision concerns have been noted. The petitioner concedes that she has no limitations in this domain. She did have some problems with blood sugar elevation, however, that issue was resolved when she switched to a different ADHD medication.

### DISCUSSION

The purpose of the Katie Beckett waiver is to encourage cost savings to the government by permitting children under age 18, who are totally and permanently disabled under Social Security criteria, to receive MA while living at home with their parents. Wis. Stat., §49.47(4)(c)1m. The Division of Long Term Care in the Department of Health Services is required to review "Katie Beckett" waiver applications in a five-step process. The first step is to determine whether the child is age 18 or younger and disabled. The disability determination is made for the Division by the Disability Determination Bureau (DDB). If the child clears this hurdle, the second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child.

The disability determination is the heart of the matter in this case. "Disability" is defined as an impairment or combination of impairments that substantially reduces a child's ability to function independently, appropriately, and effectively in an age-appropriate manner, for a continuous period of at least 12 months. Katie Beckett Program Policies and Procedures Manual, page 32. Current standards for childhood disability were enacted following the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The current definition of a disabling impairment for children is as follows:

If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments:

- (1) Must meet or medically or functionally equal the requirements of a listing in the Listing of Impairments in appendix 1 of Subpart P of part 404 of this chapter, or
- (2) Would result in a finding that you are disabled under §416.994a.

20 C.F.R. §416.911(b). §416.994a referenced in number (2) describes disability reviews for children found disabled under the prior law.

The process of determining whether an individual meets this definition of disability is sequential. See 20 C.F.R. §416.924. First, if the claimant is doing "substantial gainful activity", he is not disabled and the evaluation stops. Petitioner is not working, so he passed this step.

Second, physical and mental impairments are considered to see if the claimant has an impairment or combination of impairments that is severe. If the impairment is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, it will not be found to be severe. 20 C.F.R. §416.924(c). Petitioner was determined to meet this step.

Next, the review must determine if the claimant has an impairment(s) that meets, medically equals or functionally equals in severity any impairment that is listed in Appendix 1 of Subpart P of Part 404 of the regulations. The DDB found that petitioner does not meet the Listings. I reviewed Listing no. 112.10 for Autistic Disorder. To be eligible under that Listing the child must have the level of severity required for the development of social interaction, verbal/nonverbal communication and imaginative play, and markedly restricted repertoire of activities and interests, and at least one of the following:

- a. Gross or fine motor development at a level generally acquired by children no more than one-half the child's chronological age, documented by:
  - (1) An appropriate standardized test; or
  - (2) Other medical findings (see 112.00C); or
- b. Cognitive/communicative function at a level generally acquired by children no more than one-half the child's chronological age, documented by:
  - (1) An appropriate standardized test; or
  - (2) Other medical findings of equivalent cognitive/communicative abnormality, such as the inability to use simple verbal or nonverbal behavior to communicate basic needs or concepts; or
- c. Social function at a level generally acquired by children no more than one-half the child's chronological age, documented by:
  - (1) An appropriate standardized test; or
  - (2) Other medical findings of an equivalent abnormality of social functioning, exemplified by serious inability to achieve age-appropriate autonomy as manifested by excessive clinging or extreme separation anxiety; or

d. Attainment of development or function generally acquired by children no more than two-thirds of the child's chronological age in two or more areas covered by a., b., or c., as measured by an appropriate standardized test or other appropriate medical findings.

If a child does not meet or equal the Listings, the last step of the analysis is the assessment of functional limitations as described in sec. 416.926a of the regulations. This means looking at what the child cannot do because of the impairments in order to determine if the impairments are functionally equivalent in severity to any listed impairment. The child must have marked impairments in two of the following six domains, or an extreme limitation in one of the domains: (1) Acquiring and using information, (2) Attending and completing tasks, (3) Interacting and relating with others, (4) Moving about and manipulating objects, (5) Caring for yourself, and (6) Health and physical well-being. See 20 C.F.R. §416.926a(b)(1) and (2).

"Marked" limitation and "extreme" limitation are defined in the regulations at 20 C.F.R. §416.926a(e). Marked limitation means, when standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations below the norm for the test (but less than three standard deviations). However, if an individual has not attained age 3, a "marked" limitation would be found if s/he is functioning at a level that is more than one-half but not more than two-thirds of the child's chronological age when there are no standard scores from standardized tests in the case record. The regulation provides that a marked limitation "may arise when several activities or functions are limited or even when only one is limited as long as the degree of limitation is such as to interfere seriously with the child's functioning." In comparison, "extreme" limitation means a score three standard deviations below the norm or, for children not yet 3, "extreme" means the child is functioning at a level that is one-half of the child's chronological age or less when there are no standard scores from standardized tests in the case record.

The DDB found that petitioner has a marked impairment in the domain of interacting and relating with others, a "less than marked" impairment in domains for acquiring and using information, attending and completing tasks and caring for yourself, and no limitation in the domains for moving about and manipulating objects or health and physical well-being.

In the domain of acquiring and using information, I agree that the petitioner has a "less than marked" limitation. There was standardized testing done regarding this domain when petitioner was 2 years old, as he was at the time of the application here. The petitioner has a full scale IQ of 79 and when tested via the WPPSI, he had a verbal IQ of 79 and a performance IQ of 84. Other testing shows that his speech and language skills were impaired but he was functioning as an 18-21 month old for expressive language and pragmatics, and as a 21-24 month old child for receptive language. He is noted to have an extensive vocabulary, having approximately 102 spontaneous word utterances, and was able to answer routine, albeit rehearsed questions. He was also able to label colors and shapes. He is also noted to rarely initiate conversation and exhibits echolalia. He was noted to be able to take turns and use appropriate eye contact. I must agree that the facts do not show that he has a marked limitation in this domain.

In the domain of attending and completing tasks, I agree that the petitioner has a less than marked limitation. As stated above several tests were performed to measure his abilities. During those tests, which also included observations from his school/daycare, he was able to follow routine instructions and be generally cooperative. His mother testified to him needing redirection about 50% of the time when completing tasks, but that he also responded well to positive reinforcement. Given his age and abilities, he does show that he can complete tasks without distracting himself and others without significant problems to the degree required here.

In the domain of interacting and relating with others, the petitioner has a "marked" limitation. He has problems with maintaining friendships, and will shriek when he sees other children when he sees them while outside in his yard. He will play with his parents, but not other children. He is also noted to rarely initiate conversation and exhibits echolalia. He was however noted to be able to take turns, use appropriate eye contact, and exhibit joint attention. He will engage in conversation at school/daycare, but usually only after prompting by the teachers. No reports show that his limitations here involve extreme

limitations to the degree that he is running away, physically aggressive, or so shut down so as to avoid any eye contact or social interaction.

In the domain of moving about and manipulating objects, the DDB found that petitioner has no limitations. The evidence provided with the application here did not show that he had any serious limitations in this domain. When tested for motor skills he obtained a score of 90 and an age equivalent of 2 years, 2 months. His mother testified at hearing that a recent physical therapy and occupational therapy evaluation showed some delays in gross and fine motor skills. She described his functional status as having a “drunk walk”, that he cannot stand on one foot, and has a poor grasp for writing/drawing. While these limitations may impede him in certain respects, the evidence does not show that they interfere seriously with the child's functioning.

In the domain of caring for himself, the petitioner has a “less than marked” limitation. He can care for himself in an age-appropriate manner but may need some reminders and supervision. The evidence in the file shows him to be fine with teeth brushing, bathing/hair washing, and haircuts, but that he needs some help in dressing himself and has some resistance to nail clipping. He can feed himself with a spoon (with some spilling), help with simple household chores, and has appropriate behavior in the car. It shows that he did not have a selective diet and slept about 10 hours per night with a 2-3 hour daily nap. According to his mother at hearing, he is almost potty trained. Conversely from the evidence in the file, his mother testified that he is resistant to teeth brushing and washing up about 60-70% of the time, that he is particular about what he eats, and wakes up 1-2 times per night. While there may be changes in his functioning since the evaluations and testing done, the evidence still does not show that his degree of limitation is such as to interfere seriously with his functioning.

In the domain of health and physical well-being, the petitioner has no physical disabilities and no vision concerns have been noted. I agree that there is no limitation in this domain.

I have reviewed the extensive case file and I must concur with the DDB's determination. I do not mean to minimize petitioner's challenges, but no behaviors have demonstrated two Marked or one Extreme level of limitation. Under these facts, his conditions are not so severe as to functionally render him "disabled" as that term is defined in the Social Security regulations, or as used for MA and/or Katie Beckett purposes. The Bureau correctly determined that the petitioner is not disabled, and denied his MA- Katie Beckett application.

I add, assuming petitioner finds this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. If his conditions worsen or if he develops better evidence, he may reapply at any time.

### **CONCLUSIONS OF LAW**

That petitioner is not disabled as that term is defined for Katie Beckett MA purposes.

**THEREFORE, it is**

**ORDERED**

That the petition for review herein be and the same is hereby 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 Milwaukee,  
Wisconsin, this 30th day of April, 2013

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\sKelly Cochrane  
Administrative Law Judge  
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on April 30, 2013.

Waukesha County Health and Human Services  
Bureau of Long-Term Support  
Division of Health Care Access and Accountability