FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
c/o [redacted]
[redacted]
[redacted]

DECISION

MGE/148025

PRELIMINARY RECITALS

Pursuant to a petition filed March 13, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Fond du Lac County Department of Social Services in regard to Medical Assistance (MA), a hearing was held on April 18, 2013, by telephone.

The issue for determination is whether the county agency correctly determined that the petitioner's wife was institutionalized in June and July 2012, thereby precluding any "spousal impoverishment" income allocation to her for those months.

There appeared at that time the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]
By: [redacted]
[redacted]
[redacted]

Also present: Atty. Brian Purtell
DeWitt, Ross & Stevens
2 E. Mifflin St., Suite 600
Madison, WI 53703-2865

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: Deb Gohlke, ESS
Fond du Lac County Department of Social Services
87 Vincent Street
Fond du Lac, WI 54935-4595

ADMINISTRATIVE LAW JUDGE:
Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

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

2. The petitioner has resided in a nursing home since 2008. His wife began renting an apartment, in [redacted], which is near the nursing home, in September 2011. Due to petitioner's residence in a nursing home, and his wife's residence in the community, this is a so-called "spousal impoverishment" institutional MA case. The petitioner's case was due for an annual eligibility review in May 2012. On May 18, 2012, the Department issued written notice to the petitioner advising that his MA case was closing June 1, 2012, due to failure to file an annual review.

3. The review document was not turned into the agency until August 2012, and it requested a backdating of MA certification to June 1, 2012. This was essentially a new application. *MEH*, 2.9. The agency requested asset verification on August 6, with a due date of August 15.

4. On August 24, 2012, the Department issued written notice to the petitioner advising that his Institutional MA would resume effective August 1, 2012, with a $1,710 monthly patient liability expense. The notice also advised that he was not eligible for Institutional MA for June and July 2012. June eligibility was denied for failure to verify assets for that month. July was denied for being over the asset limit. The 45-day appeal deadline to contest these actions was October 9, 2013.

5. Additional asset verification relevant to June and July 2012 eligibility was submitted to the agency on August 28, 2012. The agency failed to act on that information in 2012. After the petitioner filed the instant hearing request in March 2013, the agency reviewed its actions and realized that it had not considered the August 28, 2012 information. After reviewing that information, the agency determined that the petitioner was not over the asset limit for June and July 2012. The agency therefore certified the petitioner as eligible for Institutional MA for June and July 2012. This action was taken in April 2013.

6. At hearing, the parties agreed that the MA certification of the petitioner for June and July 2013 was a satisfactory action. However, the petitioner now disagrees with the amount of his patient liability. The agency did not allow for allocation of a portion of the petitioner's income to his spouse for these two months, because the agency asserts that she was institutionalized during those months. Without such income allocation, the petitioner's patient liability amount is higher than it would be with an income allocation.

7. The wife was either in a hospital or nursing home from March 1, 2012, through July 18, 2012. She returned to her apartment on July 19, 2012.

DISCUSSION

Preliminarily, I note that the Wisconsin MA statute creates a 45-day appeal period for fair hearings. At first blush, this March 2013 filing appears to be late. However, the agency should have allowed the petitioner 30 days from his August 2012 re-application to provide requested verification. The agency jumped the gun and acted negatively on his June and July 2012 status on August 24, 2012. The petitioner did then provide the requested verification on August 28, which was within the 30 day application processing period. The agency should have acted on the August 28 submission, but did not (until April 2013). Therefore, I am taking jurisdiction over the current issue, based on the petitioner's ability to contest an agency's "failure to act." If the agency had issued another negative notice after August 28, 2012, I would have run the 45-day period from the date of such a post-August 28 notice.

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 and "spousal impoverishment" asset tests. *Medicaid Eligibility Handbook* (*MEH*), § 18.4, at http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm.

A unique feature of a spousal impoverishment case is that the institutionalized person can "allocate" a portion of his income to his community spouse to assist her in residing in the community. This allocated income causes the amount of the institutionalized person's patient liability to decrease (the amount of the nursing home's monthly charge above the patient liability amount is paid by MA).

Here, the agency argues that the petitioner's wife was institutionalized in June and July 2012, thereby precluding any income allocation to her for those months (which in turn raised his patient liability for those two months).

The spousal impoverishment provisions 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 the spouse resided in the community prior to March 1, 2012, and that she returned to her community residence on July 19, 2012.

The state policy definition of a community spouse is as follows:

> **18.2.1 Community Spouse**
>
> A " *community spouse* " is:
>
> 1. Married to an institutionalized person **and**
> 2. Not living in a nursing home or other medical institution for 30 or more consecutive days.
>
> As long as the community spouse is not an institutionalized person, his/her living arrangement can have no effect on his/her asset share (See 18.2.2 Community Spouse Asset Share below) or income allocation.

MEH, § 18.2.1. The petitioner's spouse was living in a nursing home or hospital for more than 30 days by June 2012, so this policy definition supports that agency's position. 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.

> ... If a person relocates from one institutional living arrangement to another, consider him/her to be in a continuous period of institutionalization, provided s/he does not live in a non-institutional living arrangement between the two periods of institutional living.

MEH, § 18.2.3. The policy language again supports the agency's position, as only the test of being in an institution for 30 days need be satisfied; the attestation by the medical institution is a requirement stated in the alternative, not the cumulative, conjunction.

Further, 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).
>
> [*emphasis added*]

Wis. Stat. § 49.455(d). The statute requires the community spouse to not be in a nursing facility or hospital; this spouse was in either a nursing home or hospital by June 1, 2012. Intent to return to the community is not an element of this definition. Identity of the payor for the institutional charges is not an element of the definition, either.

Finally, the matching federal law definition at 42 USC § 1396r-5(h)(1) does not look at the intent of the community spouse to return to the community, or at who is paying her care charges:

> **(h) Definitions**
>
> In this section:
>
> (1) The term "institutionalized spouse" means an individual who—
>
> (A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and
>
> (B) is married to a spouse who is not in a medical institution or nursing facility;
>
> but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

Based on the foregoing, I conclude that the agency acted correctly in declining to allow an income allocation to the "community spouse" for June and July 2012.

CONCLUSIONS OF LAW

1. Jurisdiction is present due to the agency's failure to act on verification submitted on August 28, 2012, which was within 30 days of the August 2012 application.
2. The agency acted correctly in declining to allow an income allocation to the "community spouse" for June and July 2012.

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 12th day of June, 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 June 12, 2013.

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