



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

In the Matter of

[REDACTED] [REDACTED]
c/o Atty. Thomas LaFave

DECISION

MGE/153650

PRELIMINARY RECITALS

Pursuant to a petition filed November 25, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waupaca County Department of Social Services in regard to Medical Assistance (MA), a hearing was held on January 23, 2014, by telephone. The hearing record was extended for 14 days for post-hearing submissions, which were received.

The issue for determination is whether the agency correctly denied the petitioner’s Institutional/Long-Term Care MA application for failure to verify assets.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED] [REDACTED]
c/o Atty Thomas LaFave
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Thomas W. LaFave
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Pamela Kolb, ES Spec.
Waupaca County Department of Social Services
811 Harding Street
Waupaca, WI 54981-2087

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waupaca County. He was admitted to a nursing home in June 2013.

2. An Institutional/Long-Term Care MA application was filed on the petitioner's behalf by Attorney Thomas LaFave on September 16, 2013. Backdated eligibility was sought retroactive to July 1, 2013.
3. The petitioner's community spouse refused to sign the application, so the application was treated like that of a single person. All application documents were signed by Attorney LaFave. Included was an Authorized Representative form naming LaFave as the representative, signed by [REDACTED] [REDACTED], POA, but with no witness to [REDACTED]'s signature. The application was accompanied by a cover letter from LaFave on his law office letterhead, and 19 pages of anticipatory verification documents. Other existing documentation includes a Durable Power of Attorney (2008), granting attorney-in-fact powers to [REDACTED] [REDACTED], and an Order for Temporary Guardianship, dated August 5, 2013, listing spouse [REDACTED] [REDACTED] [REDACTED] as guardian of the person only, for 60 days.
4. The supplementary materials enclosed with the petitioner's September 16 application included verification of his income, which totaled \$2,922.96 monthly. Also included was verification of the assessed value (\$91,700) of the petitioner's residence at [REDACTED] [REDACTED], Town of [REDACTED], Waupaca County, the amount in the [REDACTED] [REDACTED] checking account (\$42.67 as of 7/23/13, for the date range of 7/23/13 through 8/21/13), the amount in the credit union account (\$2,095.47 as of 7/31, for the date range of 7/1/13 through 7/31/13), the amount in the credit union account at the end of May 2013 (\$134.09), and an adequate accounting of deposits and withdrawals from the Malm & LaFave client trust account for the period from May 31 through August 6, 2013.
5. On September 27, 2013, the agency issued a written verification request to [REDACTED] [REDACTED] (POA) only, with demands that:
 - (1) the petitioner sign the application, and that he
 - (2) verify the petitioner's place of residence,
 - (3) verify the value of the petitioner's [REDACTED] [REDACTED] Bank checking account,
 - (4) verify the value of a credit union account,
 - (5) verify the amount and nature of the asset of petitioner's account in the Malm & LaFave law firm trust account, and
 - (6) verify the value of petitioner's residence.

A notation was added that specified that the account statements were needed for July and August. The notation also called for either proof of real estate listing on the house, or a statement that the petitioner had an intent to return home. A second verification request for the same items was sent to [REDACTED] only on October 7, 2013, with a due date of October 16, 2013. *See*, Exhibits 8 & 10. [REDACTED] forwarded the October 7 notice to Attorney LaFave on October 7. Verification was not received by the agency by October 16, 2013.
6. On October 17, 2013, the agency issued written notice to [REDACTED] advising that the petitioner's application had been denied due to failure to supply requested verification.
7. On October 3, 2013, the petitioner was discharged from the nursing home to his residence. Also, his wife served him with divorce papers on that date, and her guardianship was terminated.
8. Attorney LaFave's office attempted to send additional requested verification via fax on October 15, 2013, to an incorrect fax number ([REDACTED]). The verification included the July and August account statements for [REDACTED] [REDACTED] and the credit union. It also included a statement that the petitioner had returned to his residence.

DISCUSSION

To qualify for MA, a person must meet both non-financial and financial requirements. Wis. Stat. §49.47(4). At application, the agency must request income and asset verification. *Medicaid Eligibility Handbook, (MEH)*, §20.3.8, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>. The agency must give the client at least 10 days to supply requested verification. *Id.*, §20.7.1.1. The responsibility for supplying verification then rests on the recipient. However, if the applicant promptly advises the agency that he cannot obtain the verification, the responsibility for obtaining verification shifts to the agency.

This case got off on the wrong foot by a misunderstanding on the agency's end as to who should be notified of the needed verification. The misunderstanding began in connection with the application being filed by an attorney. Of course, any attorney may file an MA application, because any person may file an MA application. Wis. Admin. Code § DHS 102.01(1). The application is to be signed by the patient, or an authorized representative, or "someone acting responsibly for the applicant" for an incompetent person. Two witness signatures are required if the applicant signs with a mark; a mark was not used here, so that requirement was not applicable.

The attorney-in-fact, [REDACTED], is statutorily authorized to engage an attorney on the petitioner's behalf, and to communicate with any "employee of a ... governmental subdivision... on behalf of the principal (petitioner). Wis. Stat. § 244.43. He may also "enroll in, apply for ... , on the principal's behalf, a benefit or program." *Id.*, § 244.54(2) [Medicaid specifically mentioned]. Finally, his POA document specifically allows him to apply for MA on the petitioner's behalf and to exercise statutorily granted powers (such as to hire an attorney). Consistent with his powers, [REDACTED] engaged LaFave to file and handle the petitioner's MA application.

After reviewing Wisconsin Statute § 49.47, Wisconsin Administrative Code chapters DHS 101 – 104, and 42 C.F.R. § 435.907-908, I can find no requirement that an attorney-in-fact's (POA) signature on an application's Authorized Representative form must be witnessed before the agency can treat the named representative as the person to whom application-related notices should be sent. The agency relies on *MEH*, § 2.5.1, which says that if an applicant wishes to authorize someone to represent him when applying by mail, the applicant should complete the authorized representative section of the application form. It also says, "when appointing an authorized representative, someone other than the authorized representative must witness the applicant's signature." However, § 2.5.1 goes on to say, "or, the applicant's durable power of attorney ... signs the application." (Witness not required). The agency found the representative designation defective because [REDACTED]'s signature was not witnessed. Policy does not say what, if any, witness requirements apply to an attorney-in-fact signing an Authorized Representative form, naming an attorney.

Again, I can find no legal authority that requires the witnessing of an attorney-in-fact's signature to an Authorized Representative form, which names an attorney as the representative on the application. The *MEH* instruction appears unclear. It is also noteworthy that it would be unethical for the attorney to hold himself out as representing the petitioner if he was not actually doing so. Supreme Court Rule 20:1.2(a) and 20:1.4. Therefore, I agree with the petitioner's attorney that copies of the verification request letters of September 27 and October 7, 2013, plus the October 17, denial notice, should have been sent to the attorney because the attorney was the person filing the application. I will remand this case back to the agency with instructions to issue a new verification request letter identifying whatever remaining verification is needed to process the September 16 application. Attorney LaFave will be given 10 days to respond, and the agency shall then process the application.

As an aside, if the county agency had correctly sent the verification request letters to Attorney LaFave, and if his staff had sent the verification to an incorrect fax number, I would have upheld the agency's denial for failure to submit verification. Administrative Law Judge Schneider has ruled in a prior decision that submission of needed verification to an incorrect fax number is still a failure to supply verification to the agency, and an adequate basis for denial. The petitioner is only saved here by the fact that the agency did not send the verification letters to the attorney representative.

CONCLUSIONS OF LAW

1. The county agency incorrectly failed to send verification request letters to the petitioner's authorized representative, an attorney retained/authorized by the petitioner's attorney-in-fact.
2. The county agency's application denial on the basis of failure to supply requested verification cannot stand where the petitioner's representative was not given notice of needed verification.

THEREFORE, it is

ORDERED

That the petition is *remanded* to the county agency with instructions to notify Attorney LaFave in writing of the needed verification for the petitioner's 9/16/2013 application within **10** days of the date of this Decision.

If Attorney LaFave supplies the requested verification within **20** days of this Decision's date, the agency shall complete the processing of the application within **30** days of the date of this decision.

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, Room 651, 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 27th day of February, 2014

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on February 27, 2014.

Waupaca County Department of Social Services
Division of Health Care Access and Accountability
Attorney Thomas Lafave