



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

In the Matter of

██████████ ██████████
c/o Atty Jerome Mercer

DECISION

MLL/153945

PRELIMINARY RECITALS

Pursuant to a petition filed December 04, 2013, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability in regard to Medical Assistance, a hearing was held on February 03, 2014, at Baraboo, Wisconsin.

The issue for determination is whether the Department erred in denying petitioner's request for an estate recovery hardship waiver.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

██████████ ██████████
c/o Atty Jerome Mercer

Petitioner's Representative:

Attorney Jerome P. Mercer

████████████████████
PO Box 556

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Tina Bartosch

Division of Health Care Access and Accountability

Madison, WI

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Sauk County.
2. Petitioner is a disabled veteran.

3. Petitioner received Social Security Disability benefits. He has received such benefits since 1987.
4. On August 15, 2013, the Department filed a claim to recover Medicaid funds from the estate of ██████████ in the amount of \$99,043.32. Petitioner is the heir of the deceased ██████████.
5. Petitioner filed a request for hardship waiver on 9/3/13. After the Department requested additional supporting information, petitioner submitted additional information to the Department on October 24, 2013.
6. On 10/30/13, the Department issued a denial letter to petitioner.
7. Petitioner filed a timely appeal.

DISCUSSION

In this case, the Department applied the hardship waiver criteria found in Wis. Admin. Code DHS § 108.02(12) with the interpretation that the listed criteria are the only situations under which a waiver can be granted. Petitioner argues that the listed criteria are merely illustrative examples of a general concept of “hardship,” and that other types of proven hardship would also qualify for the hardship waiver. Petitioner argued at hearing that the Department erroneously exercised its discretion in denying the requested waiver because petitioner receives SS Disability benefits and would suffer hardship by the Department’s recovery.

According to the Administrative Code at DHS 108.02(12)(b):

(b)Hardship waiver criteria.

1. A beneficiary or heir of a decedent may apply to the department for a waiver of an estate claim filed by the department. The department shall review an application for a waiver under this subsection and shall determine whether the applicant meets the criterion under subd. [2. a.](#), [b.](#) or [c.](#) If the department determines that the criterion under subd. [2. a.](#), [b.](#) or [c.](#) is met, the department shall waive its claim as to that applicant.

2. Any of the following situations constitutes an undue hardship on the waiver applicant:

a. The waiver applicant would become or remain eligible for supplemental security income (SSI), food stamps under [7 USC 2011 to 2029](#), aid to families with dependent children (AFDC), or medical assistance if the department pursued its claim;

b. A decedent's real property is used as part of the waiver applicant's business, which may be a working farm, and recovery by the department would affect the property and would result in the waiver applicant losing his or her means of livelihood; or

c. The waiver applicant is receiving general relief, relief to needy Indian persons (RNIP) or veterans benefits based on need under s. [45.40 \(1m\)](#), Stats.

I do not interpret this section with the flexibility that petitioner contends it expresses. I do not see an articulation of authority allowing for discretion by the Department. The section states that the Department “shall review an application [for a waiver] under this subsection and shall determine whether the applicant meets the criterion under subd. 2. a., b., or c.” That seems clear to me. And, it appears that the Department engaged in that process and determined that none of the three criteria were met. Furthermore, Petitioner does not contend that petitioner meets any of those three criteria.

Instead, petitioner argues that those are only the situations under which the Department shall or must grant the waiver. Petitioner suggests that the Department may grant the waiver is other hardship situations. But, there is no such language in the section above, or anywhere else in the Code that I was able to find. At hearing, petitioner’s counsel did not point to such a provision in the Code or statute for such discretion. Petitioner also did not identify any definition of “hardship” that would allow for inclusion of petitioner’s circumstances

within the “hardship” waiver language. It is possible that a Circuit Court judge would disagree. I, however, must apply the Code as it is written. I do not interpret the plain language of the Code in agreement with petitioner’s counsel. Instead, I find such an interpretation to be, at best, a creative effort at throwing the idea at the proverbial wall to see if it might stick.

CONCLUSIONS OF LAW

The Department did not err in denying the hardship waiver.

THEREFORE, it is **ORDERED**

That this appeal 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, 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 18th day of February, 2014

\sJohn P. Tedesco
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 18, 2014.

Division of Health Care Access and Accountability
Attorney Jerome Mercer