



FH

[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/155582

PRELIMINARY RECITALS

Pursuant to a petition filed February 18, 2014, 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, a telephonic hearing was held on April 07, 2014, at Fond Du Lac, Wisconsin. At the request of the parties, the record was held open for the submission of closing arguments to the Division of Hearing and Appeals (DHA) and the other party. Both parties timely submitted their arguments which are received into the hearing record.

The issue for determination is whether the county agency correctly refused to backdate the petitioner's MA Undue Hardship Waiver and resultant approved MA Nursing Home eligibility prior to February 18, 2014.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

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

Respondent:

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

By: [REDACTED], ESS
Fond Du Lac County Department of Social Services
87 Vincent Street
Fond Du Lac, WI 54935-4595

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is an 83 year old resident of Fond Du Lac County who has resided in the [REDACTED] Nursing Home since about March 1, 2013. Her husband, [REDACTED], who is also 83 years old, is the community spouse.
2. The petitioner's daughter, [REDACTED], was the power or attorney (POA), and attempted to assist her mother with applying for Institutional MA.
3. The petitioner filed her MA nursing home application at the county agency on or about September 5, 2013, and was processed by the agency on September 17, 2013.
4. The county agency requested verification of petitioner's usage of a check #3685 in the amount of \$1,772.93.
5. The county agency denied the petitioner's September 5, 2013 MA application due to failure to timely provide verification to the county agency and divestment of assets. Exhibit 8.
6. The following divestments were made during petitioner's 60 month MA lookback period: 1) the petitioner's home was given to her daughter, [REDACTED]; and 2) the petitioner's land was given to her son, [REDACTED].
7. The county agency sent an October 28, 2013 notice to the petitioner's husband stating that petitioner's MA application was denied due to divestment for the penalty period of September 1, 2013 to January 20, 2017. That notice provided an undue hardship waiver form which stated that form needed to be received by the agency within 20 days of the October 28, 2013 date of that notice.
8. On December 10, 2013, the agency received a Quit Claim deed from petitioner's daughter listing the house back in petitioner's husband's name. As a result, there was only the remaining divestment of the land given to petitioner's son.
9. The county agency received the petitioner's Undue Hardship request form on December 10, 2013, which was not within 20 days of the October 28, 2013 notice.
10. The county agency denied the petitioner's Undue Hardship request because the agency did not received two verifications required for approval: a) a letter from [REDACTED] Nursing home stating what date they would involuntarily discharge the petitioner from the nursing home due to non-payment; and b) a letter from petitioner's husband explaining when and how he tried to get the land back from his son and why he was unable to obtain that return.
11. The petitioner's representative did not verify all information regarding the Undue Hardship Request form, the letter from the nursing home, and proof of her son's sale of the land until February 18, 2014.
12. The county agency sent a February 25, 2014 Medicaid Undue Hardship Waiver Decision to the petitioner stating that her February 18, 2014 Waiver request had been approved and the divestment related penalty period has been waived effective February 18, 2014 per MEH 17.17.4.2. That notice stated that petitioner's Medicaid Long Term Care services would begin as of February 18, 2014. Exhibit 11. Petitioner provided verification of the sale of the divestment in land and debts paid from that sale.
13. The county agency sent a February 25, 2014 Positive Notice to the petitioner stating that her Medicaid was approved beginning February 18, 2014 and ending August 31, 2014.

DISCUSSION

A divestment occurs when an institutionalized individual, his spouse, or another person acting on his behalf, transfers assets for less than fair market value, on or after the individual's "look-back date." Wis. Stat. § 49.453(2)(a). "Fair market value" is an estimate of the prevailing price an asset would have had if it had been sold on the open market at the time it was transferred. Medicaid Eligibility Handbook (MEH) § 17.2.1.

If such a transfer occurs, the individual is ineligible for MA for nursing home services for a number of months determined by totaling the value of all assets transferred during the look-back period and dividing that amount by the average monthly cost to a private patient of nursing facility services at the time of the MA application. MEH § 17.5. The ineligibility period begins with the month of the first divesting transfer of assets.

The Medicaid rules regarding divestment changed November, 2013 per Operations Memo 13-38. Under prior policy, once an institutionalized person was determined eligible, the community spouse could divest assets without affecting the eligibility of the institutionalized spouse per MEH 17.4, #2. However, per Memo 13, 38, beginning November 11, 2013, transfers made by the community spouse on or after September 18, 2013 of non-exempt property for less than fair market value (FMV), within the first five years after the institutionalized spouse was determined to be eligible, would result in a divestment penalty period for the institutionalized spouse. In the instant case, the county agency correctly argued that the petitioner in this case fell within Operations Memo 13-38, and thus correctly established a divestment penalty.

A parallel divestment definition is found at Wis. Admin. Code § HFS 103.065(4), and states in the parts relevant here, as follows:

(4) DIVESTMENT. (a) Divestment resulting in ineligibility. An institutionalized individual or someone acting on behalf of that individual who disposes of resources at less than fair market value within 30 months . . . immediately before or at any time after the date the individual applies for MA while institutionalized, shall be determined to have divested. . . (Emphasis added).

A divestment is not a bar to MA eligibility where:

(d) Circumstances under which divestment is not a barrier to eligibility. An institutionalized individual who has been determined to have made a prohibited divestment under this section shall be found ineligible for MA as defined under s. DHS 101.03 (95) unless:

1. The transfer of property occurred as the result of a division of resources as part of a divorce or separation action, the loss of a resource due to foreclosure or the repossession of a resource due to failure to meet payments; or
2. It is shown to the satisfaction of the department that one of the following occurred:
 - a. The individual intended to dispose of the resource either at fair market value or for other valuable consideration;
 - b. The resource was transferred exclusively for some purpose other than to become eligible for MA;
 - c. The ownership of the divested property was returned to the individual who originally disposed of it; or

- d. The denial or termination of eligibility would work an undue hardship. In this subparagraph, “undue hardship” means that a serious impairment to the institutionalized individual’s immediate health status exists.

Wis. Adm. Code § DHS 103.065(4)(d).

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the agency, such as the denial of MA due to a divestment of assets was improper given the facts of the case. See 20 C.F.R. §§416.200-416.202; see also, 42 C.F.R. §435.721(d). The burden of proof is on the applicant or recipient to show that one of the above circumstances exists. While oral testimony concerning the intent of the applicant is important, great weight must be afforded by the actions taken by the applicant given the overall circumstances at the time. A divestment can still exist even if someone does the transfer of the nonexempt asset other than the individual. Such a person could be, for example, a guardian or attorney in fact.

During the April 7, 2014 hearing and in his closing argument, Attorney ██████ argued that the county agency incorrectly refused to backdate the petitioner’s MA Undue Hardship Waiver prior to February 18, 2014. Mr. ██████ explained that petitioner’s 83 year old husband found the entire process of applying for Medicaid for his spouse (petitioner) to be a very complicated and confusing process. In fact, ESS ██████ ██████ in her April 29, 2014 responsive argument agreed that: “We are sure that ██████ ██████ was overwhelmed and confused by the application process.” Ms. ██████ also acknowledged that many attempts were made by petitioner to file an Undue Hardship Claim. However, the county agency established with reliable evidence that the county agency did not receive the Hardship Claim form and the required letter from the Nursing Home until February 18, 2014. The petitioner’s representative was unable to refute that date of final verification of all requirements for approval of the Undue Hardship Waiver.

The county agency sent a February 25, 2014 Medicaid Undue Hardship Waiver approval and February 25, 2014 Positive Notice to the petitioner stating that her February 18, 2014 Waiver request had been approved and the divestment related penalty period has been waived effective February 18, 2014 per MEH 17.17.4.2. Those notices indicated that petitioner’s Medicaid Long Term Care services would begin as of February 18, 2014. Exhibit 11. The petitioner’s representative was unable to refute with any reliable evidence that the county agency incorrectly refused to backdate petitioner’s MA prior to February 18, 2014.

During the hearing and in his written closing argument, Attorney ██████ argued that it was unfair that petitioner’s MA would not be backdated prior to February 18, 2014 because petitioner’s husband made good faith efforts to complete the undue hardship form and complete the MA application process but was confused and overwhelmed. Mr. ██████’s argument is understandable, and I do believe that Mr. ██████ was confused by the MA application process. However, Administrative Law Judges (ALJs) do not have the authority to grant relief based upon claims of equitable estoppel. Administrative agencies only have those powers specifically delegated to them. See Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F. Supp. 540, 545 (D.C. Wis. 1977). There is no specific legislation delegating equitable powers to Department Administrative Law Judges, and it has been the longstanding position of the department that there has been no such delegation. As such, I cannot find for the petitioner based on this equitable claim and, accordingly, must limit my review to the law as set forth in the statutes and administrative code provisions.

The petitioner’s husband filed his request for a hardship waiver on December 10, 2013. However, that request was not within 20 days of the initial October 28, 2013 notice, and was thus untimely. The county

agency established that the petitioner did not verify all required information reading the Undue Hardship Request until February 18, 2014, when it began. Accordingly, based upon the above, I conclude that the county agency correctly refused to backdate the petitioner's MA Undue Hardship Waiver and resultant approved MA Nursing Home eligibility prior to February 18, 2014.

CONCLUSIONS OF LAW

The county agency correctly refused to backdate the petitioner's MA Undue Hardship Waiver and resultant approved MA Nursing Home eligibility prior to February 18, 2014.

THEREFORE, it is **ORDERED**

The petition for review herein be and the same is hereby Dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 24th day of June, 2014

\sGary M. Wolkstein
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 24, 2014.

Fond Du Lac County Department of Social Services
Division of Health Care Access and Accountability
Attorney Frank [REDACTED]