



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

In the Matter of

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

DECISION

MGE/156356

PRELIMINARY RECITALS

Pursuant to a petition filed March 27, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Polk County Department of Social Services in regard to Medical Assistance, a hearing was held on May 13, 2014, at Balsam Lake, Wisconsin. The record was left open for 28 days at the petitioner’s request.

The issue for determination is whether the agency correctly determined the petitioner’s patient liability.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Mary Jo Hacker

Polk County Department of Social Services
100 Polk County Plaza, Suite 50
Balsam Lake, WI 54810

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Polk County.
2. The county agency notified the petitioner on March 11, 2014, that she was eligible for institutional medical assistance as of March 1, 2014, and that she would have to contribute \$919

toward her share of her medical costs. It arrived at this amount by subtracting a \$45 personal allowance, \$79 health insurance premium, and \$150 guardianship fee each month from her \$1,193 social security payment.

3. The petitioner contends that she owes \$543.34 per month toward the cost of her medical care. In addition to the costs approved by the county agency, she seeks to deduct \$985 per year (\$82.08 per month) for self-employment loss and \$3,523 a year (\$293.58 per month) for other expenses. These other expense include \$199 for her current guardian ad litem fee, \$324 for tax preparation, and \$3,000 or \$3,500 for past court-ordered attorney fees.
4. On June 20, 2013, Polk County Circuit Court Judge ██████████ issued an order allowing the petitioner's guardian to set up a separate rental account and that the net amount received from this account is to "be included as the [petitioner's] farm income for purposes of Medicaid."
5. On January 29, 2014, Polk County Circuit Court Judge ██████████ ordered that guardian ad litem, court-appointed attorney, and guardian fees be paid from the petitioner's income and assets.
6. The petitioner pays \$79 for a health insurance premium and \$150 in court-ordered guardianship fees each month. She also paid \$196 in guardian ad litem fees in January 2014.
7. The count approved \$3,500 for the petitioner's attorney fees on December 21, 2012.
8. The county agency gave the petitioner credit for her \$196 guardian ad litem fee by deducting that amount from her January 2014 share of her medical care. The petitioner did not submit documentation of any other guardian ad litem fees incurred in 2014.

DISCUSSION

Medical assistance rules require nursing home residents to "apply their available income toward the cost of their care." Wis. Admin. Code § DHS 103.07(1)(d). Those rules allow some exemptions, including a \$45 personal needs allowance, the cost of health insurance, and necessary health or remedial care not covered by medical assistance. Wis. Admin. Code § DHS 103.07(1)(d)1, 3, and 4. In addition, medical assistance policy found at *Medicaid Eligibility Handbook*, § 15.7.2.3.2., excludes court ordered attorney and guardian fees paid directly from the recipient's monthly income and expenses paid to establish and maintain a protective placement for her.

The petitioner receives \$1,193 each month in social security. The county agency subtracted her \$45 personal allowance, \$79 health insurance premium, and \$150 guardianship fee from this income and determined that she must contribute \$919 per month toward her care. She contends that in addition to these amounts, the agency should also deduct \$82.08 per month for losses associated with farm land that she leases out and a total of \$293.58 per month for her current guardian ad litem fee, her 2013 tax preparation fee, and her past court-ordered attorney fees. This would reduce her share of her medical costs to \$543.34 per month. It appears that although she claims that she lost \$82 per month on her business she is also claiming many of the other requested expenses as business losses.

The petitioner owns a farm and leases out the land. A June 2013 court order requires the agency to count the net income from the rental property as part of her farm income. As noted, she claims that she lost money and seeks to have these losses deducted from her \$1,193 social security payment. The county agency contends that self-employment losses cannot be deducted from her other income. It relies upon *Medicaid Eligibility Handbook*, § 15.6.5.2, which states in part: "Losses from self-employment can't be used to offset other earned or unearned income." The petitioner contends that there is no legal authority for this policy. Her attorney cites Wis. Admin. Code, § DHS 103.07(2)(a), which pertains to self-employment income, to support her position. His statement submitted after the hearing quoted a portion

of the section in the following manner: “The total [income] shall be divided by 12 to get monthly earnings...to determine net earnings or loss.” (brackets and emphasis in original)

He argues that because the provision refers to “loss,” any loss must be deducted from other income. The full section reads:

Farm and self-employment income used in MA calculations shall be determined by adding back into the net earnings the following: depreciation, personal business and entertainment expenses, personal transportation, purchases of capital equipment, and payments on the principal of loans. The total shall be divided by 12 to get monthly earnings. If no tax return has been filed, the individual shall complete a 1040 form of the internal revenue service (IRS) to determine net earnings or loss, or to anticipate, in case of relatively new businesses, net earnings as required by the IRS.

The complete citation indicates that the “total” is divided by 12 to get monthly “earnings.” The reference to “loss” only appears in the portion of the section referring to situations when no tax return is filed. Still, because there is no logical reason to treat income differently depending upon whether a tax return has been filed, I assume that the agency can consider a loss. But this does not mean that the agency must count a loss in any situation against any type of income. The federal and state statutes and regulations pertaining to medical assistance are complex, and how they treat income depends upon the situation. A general—and fairly vague—reference to “loss” in an unartfully written administrative code provision does not mean a loss of self-employment income can always be deducted against any other income the recipient may have. It only means what it says: that the person has to complete a 1040 form to determine net income or loss. If a rule pertaining to a more specific circumstance allows deduction of the loss, then the loss can be deducted. Conversely, if a rule pertaining to a more specific circumstance does not allow deduction of the loss, it cannot be deducted.

The policy stating that losses from self-employment cannot be used to offset other earned or unearned income is more specific than Wis. Admin. Code, § DHS 103.07(2)(a), but as a policy it is an interpretation of the law and cannot override a statute or administrative code provision. I have not found any state statute or administrative code provision that specifically supports the policy. When there is no state provision, one can look for guidance in the federal statutes and administrative code because state medical assistance laws generally derive their authority from federal laws. In the petitioner’s case, the relevant federal laws pertain to eligibility for the elderly, blind, and disabled. Section DHS 103.07(2)(g) of the Wisconsin administrative code reflects this. It states that “[i]ncome disregards of ... the SSI program under 20 CFR 416.1112 and 416.1124 shall be used as appropriate.” Using the SSI standards is appropriate for elderly, blind, and disabled applicants because the SSI program provides benefits to persons in those categories. Section 416.1112(1) of the federal administrative code states: “We never reduce your earned income below zero or apply any unused earned income exclusion to unearned income.” This provision is consistent with that found in 20 CFR § 416.1111(b), which states: “If you have net losses from self-employment, we divide them over the taxable year in the same way, and we deduct them *only from your other earned income.*” (emphasis added) Although these sections of federal law do not support the Department’s policy to offset self-employment losses only against self-employment earnings, it does support the agency’s action in the petitioner’s matter, which is to refuse to allow her to deduct her self-employment losses, which are losses of earned income, from her social security income, which is unearned. This means that she cannot deduct any business related expense from her total earned income beyond the expenses needed to reduce that income to zero.

Her attorney argues that such an interpretation is a “thinly disguised attempt” by the county to recoup part of a refund she received through a decision issued last year. He is referring to *DHA Decision No. MGE/148648*. The petitioner applied for benefits in February 2013 and sought benefits retroactive to January 2, 2013. The county agency did not allow retroactive benefits because it contends that if she had

been eligible in January she would not have had to pay her nursing home bill, which would have put her over the program's \$2,000 asset limit. The Division of Hearings and Appeals rejected this argument, finding that the agency made the same type of argument as that made by applicants who seek retroactive eligibility for months in which they had unpaid bills. Those arguments fail because "countable assets are based upon the amount of resources one actually has at any given time." *Id.*, p.2. The petitioner was eligible in January because her assets were below \$2,000 that month.

But that decision did not guarantee, as the petitioner seems to suggest, that she would never have to account for any refund she received from the nursing home care provided to her in January 2013. Instead that decision noted that her assets might exceed \$2,000 in the month the nursing home refunded her January payment as a result of being reimbursed by the medical assistance program. Her attorney, the same attorney who currently represents her, agreed on the record that any refund would be a change of circumstances that must be reported and that to remain eligible she must establish that she legitimately brought her assets below \$2,000. When she received the refund, she used it to repair a roof. She remained eligible because this was considered a legitimate expense that kept her assets below \$2,000. Income and assets are two different matters, and how the roof repair affects her countable income depends upon the legal points already discussed. She cannot deduct a repair from her income unless the repair is a business expense. If it is a business expense, it increases the business loss she has already suffered. Because she cannot not deduct self-employment losses from unearned income, she cannot deduct this additional loss from her contribution toward her medical care. This interpretation does not undermine last year's decision.

Medical assistance rules pertaining to income do not, in general, allow a deduction for the cost of preparing a tax return. This means that she can claim this cost only if it is a business expense. Again, because she already is reporting a loss on her business, she is not entitled to claim any further loss. Therefore, she cannot deduct the cost of preparing her tax return from her share of her medical expenses.

Her next requested deduction is for past attorney fees. I cannot determine exactly how much she requests because at one point she states that this amount is \$3,000 and at another \$3,500. Her attorney claims that the agency has completely ignored this amount. As far as I can tell, the court approved these expenses on December 21, 2012. It is unclear when the petitioner paid them, but I assume it was late in 2012 or early in 2013. If she paid it in 2013, she could argue that the cost should be prorated throughout that year. The matter now before me affects benefits from March 1, 2014, forward. Unless this is an ongoing expense—and she presents no proof of this—it does not affect her current income; because it does not affect her current income, it does not affect her current benefits, which are based on her current income. This cost may have affected her 2013 benefits, but if the agency did not allow her to deduct it then, it is well past the 45 days she has to appeal an adverse decision affecting those benefits. *See Wis. Admin. Code § HA 3.05(3)*.

The last requested deduction is for a \$199 guardian ad litem fee. In a letter sent the day after the hearing, the petitioner's attorney indicated that the only guardian ad litem fees incurred in 2013 were for \$196 and were approved by the court on January 29, 2014. The agency reduced the petitioner's January 2014 share of her care by that amount. Because her medical contribution has already been reduced by the full amount of this bill, if she is now allowed to deduct a prorated amount each month, as she requests, she would be given a deduction for twice what she paid for the service. She is not entitled to this.

CONCLUSIONS OF LAW

1. The agency correctly denied the petitioner's request to deduct her self-employment losses from her unearned income when determining her contribution to her medical care.
2. The county agency correctly determined the petitioner's contribution to her medical care.

THEREFORE, it is

ORDERED

The petitioner's appeal is 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

\sMichael D. O'Brien
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.

Polk County Department of Social Services
Division of Health Care Access and Accountability
Attorney Peter Grosskopf