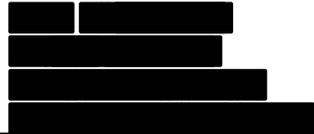




STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MGE/157268

PRELIMINARY RECITALS

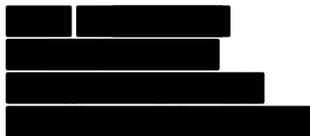
Pursuant to a petition filed April 30, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Douglas County Department of Human Services in regard to Medical Assistance, a hearing was held on June 09, 2014, at Superior, Wisconsin. The record was left open for 30 days at the petitioner's request.

The issue for determination is whether the petitioner's appeal is timely.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By: Tom Ostrander

Douglas County Department of Human Services
1316 North 14Th Street
Suite 400
Superior, WI 54880

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. The petitioner (CARES # [redacted]) is a resident of a nursing home in Douglas County. Her spouse lives in the community.

2. The petitioner was an ongoing recipient whose annual review was due in January 2014. The county agency notified her February 11, 2014, that her eligibility would end as of January 31, 2014, because her husband had refused to sign her application and verify his assets. The petitioner appealed that denial on April 30, 2014.
3. The petitioner reapplied on April 9, 2014. She has not verified her husband's assets.

DISCUSSION

Medical assistance is supposed to pay for "health care services for qualified persons whose financial resources are inadequate to provide for their health care needs." Wis. Admin. Code, § DHS 101.01. Generally, a person cannot be eligible if her assets exceed \$2,000 or, if married, her and her spouse's combined assets exceeded \$3,000. Wis. Admin. Code, § DHS 103.06(1)(a); Wis. Stat. §§ 49.46(1) and 49.47(4). When one spouse went into a nursing home and the other remained in the community, this asset limit often created a hardship on the community spouse because he would have to pay for his spouse's nursing home care until their assets were almost entirely depleted. In response, the state and federal governments enacted laws that increased the asset limit for couples in this situation. These rules allow the institutionalized spouse to allocate assets to the community spouse. The amounts amount of assets that a couple can hold and allocate are not unlimited. In general, after considering the \$2,000 asset limit for an individual, a couple is eligible if their combined assets do not exceed \$52,000. If their assets are between \$100,000 and \$234,480, the institutionalized spouse can assign half of the assets to the community spouse. But their combined assets, including the \$2,000 individual limit, cannot exceed \$119,240. Wis. Stat. § 49.455(6)(b); *Medicaid Eligibility Handbook*, § 18,4.3. If the assets do exceed this amount, the institutionalized spouse is ineligible for full medical assistance benefits until the assets are spent down to this level.

Medical assistance rules require recipients to verify various information, including assets. Wis. Admin. Code, § DHS 102.03(3). Agencies may deny applications if an applicant "is able to produce required verifications but refuses or fails to do so." within 10 days of the date they are requested..." *Medicaid Eligibility Handbook*, § 20.7.1.1. *see also* Wis. Admin. Code § DHS 102.03(1). Because spousal impoverishment eligibility depends upon the assets of both spouses, both spouses are expected to sign the application and verify assets. Occasionally, a belligerent community spouse would refuse to cooperate and sign the application. In order to protect an institutionalized spouse, who may have had no control over the other spouse's behavior, the Department allowed institutionalized spouses in this situation to have their eligibility determined without regard to their spouse's assets. *Medicaid Eligibility Handbook*, § 2.5.2. (Release 09 04) However, what was meant to be a rare occurrence began happening more frequently as recipients took advantage of this loophole and their spouses simply refused to sign the application. This undermined the legislature's intent by allowing an institutionalized person whose household held over \$52,000 in assets to become eligible immediately. In response, the Department changed its policy so that as of November 11, 2013, if the community spouse refused to sign an application and verify his assets or would not provide this information during the renewal, the agency had to deny the application. *Medicaid Eligibility Handbook*, § 2.5.3. The Department declared in *BEPS/DFS Operations Memo 13-38* that this "means that 'Just say no' is no longer a viable strategy for shielding assets." The authority for the agency's action is found in Wis. Stat. § 49.455(5)(e), which states: "The department may deny to the institutionalized spouse eligibility for Medical Assistance if, when requested by the department, the institutionalized spouse and the community spouse do not provide the total value of their assets and information on income and resources to the extent required under federal Medicaid law or sign the application for Medical Assistance."

The petitioner was an ongoing institutional medical assistance recipient who was first found eligible as of December 1, 2012, after applying on February 4, 2013. When she first applied, her husband refused to sign the application, and her eligibility was based solely upon her assets. The new rule was in effect when her matter was reviewed in January 2014. When her husband refused to provide his assets, the agency

notified her on February 11, 2014, that her benefits ended as of January 1, 2014. Her attorney, [REDACTED], argues that this is unfair because the Disability Determination Bureau had not processed a disability application at some point in 2013, when it should have, and the county agency did not immediately review the information sent to it as part of the review. I had trouble following all of the nuances of what action the Disability Determination Bureau and county agency failed to take, but the crux of Ms. [REDACTED]'s argument is that if these agencies had acted when they should have, the petitioner could have continued her eligibility under the old rules. Now, however, Ms. [REDACTED] concedes in an April 30, 2014, memorandum to the Division of Hearings and Appeals that the petitioner "would not likely be eligible now due to her husband's assets." When I asked Ms. [REDACTED] why the husband did not submit the husband's assets, she replied, "Because he doesn't have to." The petitioner reapplied in April but has not been found eligible.

The petitioner's claim fails first, and most importantly, because she did not to appeal the February 11, 2014, denial on time. Those challenging a negative medical assistance decision must do so within 45 days of the date of the decision or the date it takes effect, whichever is later. Wis. Admin. Code § HA 3.05(3). If an appeal is late, the Division of Hearings and Appeals loses its jurisdiction to consider it. The petitioner appealed on April 30, 2014, which is 47 days after the agency denied her benefits. When I asked why the appeal was late, Ms. [REDACTED] replied, "I thought we were working cooperatively." Whatever cooperation she engaged in with the agency before the hearing was not on display at the hearing where she continually interrupted the county workers. Regardless of why the appeal was late, the petitioner was notified of the agency's decision and should have been aware of the deadline. Because the appeal is late, I have no legal authority to consider it. She concedes that any appeal filed after this denial is covered by the new rules, so she cannot become eligible until her husband signs the application and verifies his assets.

As for her argument that the process is somehow unfair, I cannot consider it because the Division of Hearings and Appeals has no equitable powers. But even if I did have those powers, I would not exercise them here because there is nothing unfair about the result. The petitioner was eligible only because she manipulated a loophole that allowed her to receive benefits when her household assets undoubtedly exceeded the amount the legislature meant to be the program's asset limit. Moreover, the petitioner has no right to have her claim determined under the earlier version of the rule because the change was meant to correct a flaw in the previous rule. This made the statute that provided the basis for the new rule a remedial statute. Under *Steffen v. Little*, 2 Wis.2d 350 (1957), remedial statutes are applied retroactively.

CONCLUSIONS OF LAW

There is no jurisdiction to consider the petitioner's appeal because it is untimely.

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 11th day of July, 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 July 11, 2014.

Douglas County Department of Human Services
Division of Health Care Access and Accountability

