FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
c/o [redacted]

DECISION

MLL/162797

PRELIMINARY RECITALS

Pursuant to a petition filed December 19, 2014, 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 10, 2015, at Madison, Wisconsin. At the request of the parties, the record was held open for consecutive briefs to be submitted to the Division of Hearings and Appeals (DHA): a) initial petitioner brief by February 17, 2015; b) a Departmental responsive brief by February 25, 2015; and c) a petitioner's reply brief by March 4, 2015. The parties timely submitted their briefs to DHA which are received into the hearing record.

The issue for determination is whether the Department correctly denied the petitioner's November 17, 2014 Hardship Waiver Application Request because that application was untimely filed or was a 30 day extension granted by the Department.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]
c/o [redacted]

Petitioner's Representative:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Tina Bartosch, lead estate recovery specialist
Estate and Casualty Recovery Section
Bureau of Fiscal Management
Division of Health Care Access and Accountability
1 West Wilson Street
P.O. Box 309
Madison, WI 53701-0309

ADMINISTRATIVE LAW JUDGE:
Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner, [redacted], is a resident of Dane County.

2. [redacted]'s mother, [redacted], died on July 19, 2014.

3. On September 10, 2014, in La Crosse County Case No. 14-PR-107 regarding the Estate of [redacted], a special administration was opened in which petitioner's brother, [redacted], was appointed Special Administrator.

4. On September 19, 2014, the Wisconsin Department of Health Services (DHS) filed with the La Crosse County Register in Probate a claim against the Estate of [redacted] (Estate) pursuant to DHS 108.02(12)(c), Wis. Admin Code. Exhibit 1. DHS also included the Department's Notice to Heir or Beneficiary of Hardship Waiver Provisions which stated in pertinent part: "An heir or beneficiary **must request a hardship waiver in writing within 45 days of this notice**. (Emphasis added). In this case a request must be postmarked by November 3, 2014." Exhibit 1.

5. On September 19, 2014, DHS mailed to the Estate's counsel, [redacted], a copy of the claim filed with the La Crosse County Register in Probate. DHS also included the Department's Notice to Heir or Beneficiary of Hardship Waiver Provisions which stated in pertinent part: "An heir or beneficiary must request a hardship waiver in wiring within 45 days of this notice. In this case a request must be postmarked by November 3, 2014." Exhibit 1.

6. [redacted] is a beneficiary in the Estate of [redacted], and was a waiver applicant in that Estate.

7. [redacted] is a sister of [redacted], and is a beneficiary of the [redacted] Estate, However, she did not request a hardship waiver application regarding the Estate.

8. DHS Estate recovery specialist, Stacey Freitag, sent an October 31, 2014 letter to [redacted] ([redacted]'s sister) confirming that based upon a telephone conversation with [redacted], that Mr. [redacted] indicated documentation would be forthcoming. She further added in pertinent part: "We are now asking that you send any remaining estate funds or any required documentation within thirty days." Exhibit B.

9. [redacted] did not have any communication with any DHS staff during the period of September 19, 2014 through November 3, 2014. Exhibit 1.

10. On November 17, 2014, [redacted], through his counsel, Attorney [redacted], mailed his written request for a Hardship Waiver Application to DHS. Petitioner's Exhibit C. In that letter, Ms. [redacted] indicated that the Waiver request was for two of the children of Ms. [redacted]: [redacted] and [redacted]. Ms. [redacted] alleged that both children may be eligible for assistance through government problems, due to recent disabling events in their lives.

11. DHS estate recovery specialist, LaTanya Baldwin, sent a November 24, 2014 letter to Attorney [redacted] stating that Mr. [redacted]'s November 17, 2014 Application for a Hardship Waiver was denied as untimely because it was not filed within 45 days of the date of the September 19, 2014 notice (deadline of November 3, 2014).

12. The parties submitted post-hearing briefs to DHA. See above Preliminary Recitals.

DISCUSSION

A beneficiary of the deceased MA recipient's will, or an heir of the deceased MA recipient, may apply to the Department for a hardship waiver of the estate claim. Wis. Admin. Code § DHS 108.02(12)(b); See also, Wis. Stat. §§ 46.27(7g)(g) & 49.496(6m). If the Department determines that its estate claim would work an undue hardship in a particular case, the Department must waive its claim. *Id*. The authority for determination of a hardship waiver of the Department's claim in an estate is found under Wis. Stat. § 49.496(6m).

The Estate Recovery Hardship Waiver process is governed by Wis. Admin. Code § DHS 108.02(12), which indicates, in pertinent part, as follows:

> (12) HARDSHIP WAIVERS UNDER ESTATE RECOVERY.
>
> ….
>
> (c) Notice. 1. The department shall provide written notice of the hardship waiver provisions to the person handling the decedent's estate, if that person can be ascertained from the probate information provided to the department, or if that person cannot be ascertained, the department shall include the notice with the copy of the claim it files with the probate court.
>
> 2. The person handling the decedent's estate shall be responsible for notifying the decedent's beneficiaries and theirs of the hardship waiver provisions.
>
> 3. The department's notice shall include the following information:
>
> a. The individuals who are eligible to apply for a waiver.
> b. The criteria for granting a waiver as specified in par. (b)2.a, b, or c,
> c. The application and review process as specified in par. (d); and
> d. The waive applicant's right to a hearing as specified in par. (e).
>
> (d) **Application and Review Process.** 1. A waiver applicant **shall mail his or her application for a waiver in writing to the department <u>within 45 days</u> after the date the department mailed its claim or affidavit pursuant to s. 49.496 or 49.849, Stats., or its notice** under par. (c), whichever is later. The application shall include the following information.
>
> DHS 108.02(12)(c) and (d).

(Emphasis added).

The Department may waive a lien against the estate if it would cause undue hardship to an heir or beneficiary. Wis. Stat. § 49.496(6m). Under Wis. Admin. Code, § DHS 108.02(12), it must waive a lien against the estate if the heir or beneficiary (1) would become eligible for public benefits without the waiver; (2) required the decedent's real property to keep from losing a business that used the property; or (3) is receiving general relief, relief to needy Indian persons, or veteran's benefits based upon need. The Department must notify the person handling the estate of the availability of the hardship waiver and that person in turn must notify potential heirs who would qualify for the waiver. Wis. Admin. Code, § DHS 108.02(12)(c)2. A person seeking a hardship waiver must mail her claim to the Department within 45 days. That claim must (1) state her relationship to the decedent and document that relationship and (2) indicate for which of the three categories she is seeking the waiver.

In this case, the issue is whether the Department correctly denied the petitioner's Hardship Waiver Application Request because that application was untimely filed or was a 30 day extension granted by the Department.

During the hearing February 10, 2015 hearing and in its February 25, 2015 responsive brief, the Department established correctly that a waiver application has 45 days after the Department mailed its estate recovery claim to mail his/her request for a waiver application to the Department per DHS 108.02(12)(d)1, Wis. Admin. Code. In this case, the Department mailed its claim to the estate's counsel and on September 19, 2014. As a result, 45 days after that date was the deadline of November 3, 2014. The record is uncontested that [redacted]'s counsel, Attorney [redacted], mailed a request for a Hardship Waiver application to DHS on November 17, 2014. DHS argued that petitioner's November 17, 2014 Waiver request was untimely.

During the hearing and in its initial February 17, 2015 and March 4, 2015 reply briefs, petitioner asserted that the Department granted a 30 day extension for the filing of the Hardship Waiver. Specifically, petitioner argued that DHS extended the 45 day time limit waiver deadline by 30 days based upon a statement from the October 31, 2015 letter by DHS estate recovery specialist, Stacey Freitag. Exhibit B. In that letter, Ms. Freitag did state in pertinent part: "We are now asking that you send any remaining estate funds or any required documentation within thirty days."

However, DHS estate recovery specialist, Tina Bartosch, presented several persuasive arguments why DHS did not grant [redacted] a 30 day extension regarding petitioner's Hardship Waiver Application. First, [redacted] and [redacted] were the only two qualified applicants who were legally able to submit requests for a Hardship Waiver application to DHS. Mr. [redacted] did not submit his Waiver application until November 17, 2014 and Ms. [redacted] did not submit any waiver application. Second, if [redacted] was confused about whether the 30 day extension to [redacted] applied to the Hardship Waiver, he failed to have any communication whatsoever with any DHS staff to determine if that communication actually created an extension for him to submit his Waiver application. Third, the October 31, 2014 letter was sent only to Ms. [redacted] and did not mention in any way the Hardship Waiver application, but only referred to other documents specifically about other estate matters and need for documentation. Fourth, DHS properly sent the September 19, 2014 notice to the LaCrosse County Probate Court and the estate counsel, [redacted] which stated that the deadline to request a Waiver due to Hardship was the deadline of November 3, 2014. See Findings of Fact #4 and #5. Petitioner's counsel did not mail petitioner's Waiver application to DHS until November 17, 2014.

During the February 10, 2015 hearing, Mr. [redacted] testified that both he and [redacted] each interpreted the terms of the last paragraph, "any required documentation within thirty days," as providing an extension of time within which Mr. [redacted], as special administrator for the Estate, could apply for a hardship waiver. His testimony was credible that there might have been a misinterpretation of Ms. Freitag's October 31, 2014. However, neither [redacted] nor [redacted] communicated at all with any DHS staff to confirm whether their interpretation was correct or not. Unfortunately, their interpretation was incorrect for the reasons set forth in the above paragraph.

In her February 17, 2015 and March 4, 2015 briefs, Attorney [redacted] zealously attempted unsuccessfully to undermine the Department's case that petitioner's November 17, 2014 Waiver application was untimely. Attorney [redacted] attempted to argue that the 30 day extension was somehow established within the phrase "send any remaining estate funds or any required documentation to the Department within thirty days," and thus included the right to submit a Waiver application within that documentation. There is simply no factual evidence to establish such a broad interpretation of "documentation." Furthermore, a Waiver application is not "required documentation." Instead a Waiver application is an option that a party may or may not pursue with DHS.

Petitioner and his attorney basically assert that the denial of his November 17, 2015 hardship waivers application as untimely is unfair, and they request equitable relief. It is the longstanding rule of Wisconsin case law that the Division's Administrative Law Judges (ALJs) do not possess the powers of a

court of equity. Rather, the authority of an Administrative Law Judge is limited to the "four corners" of the applicable statute. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). Accordingly, based upon the above, I conclude that the Department correctly denied the petitioner's November 17, 2014 Hardship Waiver Application Request because that application was untimely filed.

CONCLUSIONS OF LAW

The Department correctly denied the petitioner's Hardship Waiver Application Request because that application was untimely filed, and thus DHA has no subject matter jurisdiction to address the merits of this case.

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 27th day of April, 2015

_____

\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 April 27, 2015.

Division of Health Care Access and Accountability
Attorney [redacted]