



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
[Redacted]
c/o [Redacted]
[Redacted]
[Redacted]

DECISION

MDV/170726

PRELIMINARY RECITALS

Pursuant to a petition filed December 14, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Brown County Human Services in regard to Medical Assistance (MA), a hearing was held on January 20, 2016, by telephone.

The issue for determination is whether the Department correctly chose to begin a 180-day EBD-MA divestment penalty period on August 1, 2015, rather than the petitioner-requested date of February 1, 2015.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted]
[Redacted]
c/o [Redacted]
[Redacted]
[Redacted]

Petitioner's Representative:

Attorney [Redacted]
[Redacted]
[Redacted]

Respondent:

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

By: [Redacted] ES Spec.
Brown County Human Services
Economic Support-2nd Floor
111 N. Jefferson St.
Green Bay, WI 54301

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]), age 86, is a resident of Brown County.

2. The petitioner permanently entered a nursing home in September 2014.
3. The petitioner's attorney filed a complete Institutional EBD MA application on February 27, 2015. The Department issued written notice of denial of the application on March 18, 2015. The basis for denial was excess assets. The petitioner did not timely appeal from that denial.
4. The petitioner completed her last divesting transaction in February 2015.
5. The petitioner filed a new EBD MA application on April 16, 2015; that submission included a signed signature page. In August, the agency requested verification, which was due by August 17, 2015. Verification was submitted via fax on August 17, although only 60 pages of the lengthy submission were filed by the Department.
6. After reviewing the material received, the agency mailed another verification request on September 3, 2015, with a 10-day compliance deadline. The petitioner faxed in the requested verification on the afternoon of September 14, 2015, missing the 10-day deadline. The Department denied the April 16, 2015 application by notice mailed on September 14, 2015.
7. The petitioner filed a new application on October 30, 2015, seeking coverage backdated to August 1, 2015. The petitioner was found to be eligible for Institutional/EBD MA at that time, subject to serving out a 180-day divestment penalty period. The agency began the divestment penalty period effective August 1, 2015 (ending January 27, 2016).
8. In December, the petitioner filed an appeal from the Department's denials of March 18 and September 14, 2015. In DHA Decision No. MGE/169731, this Judge concluded that the appeal was untimely as to the March 18, 2015 denial. Reaching the merits of the September 14 agency decision that denied the April 16 application, I concluded that denial for lack of verification was incorrect. On remand, the agency was instructed to determine whether the petitioner was asset-eligible for Institutional MA from April 2015 forward.

DISCUSSION

The non-exempt asset limit for a single person applying for/receiving Long Term Care MA, MA Waivers, or Family Care is \$2,000. A person cannot give their assets away to get under the asset limit.

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2), Wis. Stats.; *MA Eligibility Handbook, (MEH)*, 17.2.1. A divestment or divestments made after 2008, and within 60 months before an application/review for institutional MA, or while on these programs, may cause ineligibility for that type of Wisconsin MA. Sec. 49.453(1)(f), Stats.; *MEH*, 17.3. The ineligibility is only for nursing home care and community waivers services; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment. The penalty period is specified in sec. 49.453(3), Stats., to be the number of days determined by dividing the value of property divested by the average daily cost of nursing facility services. *MEH*, 17.5, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>; 42 U.S.C. § 1396p(c).

The parties agree that the petitioner divested \$45,536.97, resulting in a 180-day divestment penalty period. They disagree as to the date on which the penalty period should start running. The Department's policy instruction on the penalty period start date is as follows:

17.5.3 Penalty Period Begin Date for Applicants

For divestments that occurred on or after January 1, 2009, the penalty period for an applicant begins on the date **all** of the following have occurred:

- The person applies for Institutional LTC Medicaid ...

- The person enters an institution or meets the appropriate **LOC** and functional screen criteria.
- The person meets all other Medicaid nonfinancial and financial eligibility requirements...

Note: If a person who had excess assets divests those assets during the three-month backdated period of an application, he or she is ineligible for excess assets until the date that he or she divested those assets. The divestment penalty period as well as the potential eligibility for card services would begin on the date of the divestment.

...

MEH, § 17.5.3.

The relevant tortured statutory language calls for the penalty period to start on the first of the month in which the person is in the nursing home, and the person would have been “otherwise eligible” for MA per “an approved application for the care”:

(3) PERIOD OF INELIGIBILITY.

(a) The period of ineligibility under this subsection begins on either of the following for an applicant for Medical Assistance:

1. In the case of a transfer of assets made before February 8, 2006, ...
2. In the case of a transfer of assets made on or after February 8, 2006, the first day of a month ... during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance and would otherwise be receiving institutional level care described in sub. (2) (a) 1. to 3. based on an approved application for the care but for the application of the penalty period, whichever is later, and that does not occur during any other period of ineligibility under this subsection.

Wis. Stat. §49.453(3).

Applying this standard to the instant case as of the date of this writing is somewhat complicated. The complication is my remand to the agency in Decision #169731.

The petitioner urges a February 1, 2015 penalty start date based on a February 27 application. The petitioner’s February application was denied for excess assets, and the petitioner did not file an appeal in time to challenge that decision. There was no “approved application” in February. Thus, I cannot use the petitioner’s theory to start the penalty period effective February 1.

There was then an April 16 application. The exhibits show the April 16 application signature page, with no mention of a three-month backdating request. Based on what is in my record, I cannot assume that a three-month backdating request was made. Because I found that denial of the April 16 application for lack of verification was incorrect, the penalty period should begin April 1, 2016. However, that does not quite end the discussion. Decision #169731 was based on my belief that the petitioner’s attorney timely submitted all requested verification (August 5 verification letter) for the April application in August, and that the Department failed to store the entire submission in the Electronic Case File. Because the agency may be missing three verification items needed to confirm asset eligibility going back to April 1, 2015,

the remand for #169731 is somewhat elaborate. The remand calls for the agency to request the “lost” three items (*e.g.*, check #3394 for \$5,453.46) within 10 days of the Decision, followed by the petitioner’s response to the agency within 20 days of the Decision, followed by the agency’s eligibility determination for the April through July 2015 period within 30 days of the Decision.

Decision #169731 was issued on February 16, 2015, so the 30-day period for finalizing eligibility has not yet run out. As of the drafting date of the instant decision, the local agency has not yet certified the petitioner for MA for April, May, June or July, 2015. Thus, this Judge does not know if the agency has confirmed that the petitioner was asset-eligible in those months. The remand order for this Decision will unfortunately have to reflect this uncertainty.

CONCLUSIONS OF LAW

1. February 1, 2015 is not the correct beginning date for the petitioner’s 180-day divestment penalty period because the petitioner did not and does not have an “approved application” for Institutional/Long-Term Care MA in February 2015. For the same reason, the petitioner’s penalty period cannot begin in March 2015.
2. *If* the petitioner was asset-eligible in April, May, June, and/or July 2015, the appropriate portion of her divestment penalty can be served in those months. *E.g.*, if she was asset-eligible in all four of those months, her divestment penalty period shall begin effective April 1, 2015.
3. The petitioner’s asset eligibility for April through July 2015 is being determined via the remand in Decision #169731.

THEREFORE, it is

ORDERED

That the petition is remanded to the agency with instructions to begin the petitioner’s MA divestment penalty period effective April 1, 2015, if the agency determines that the petitioner was asset-eligible for MA as of April 2015. The agency shall also credit the petitioner for penalty days served in the months of May through July 2015, if she was asset-eligible. This action shall be taken within 21 days of the date of this Decision (to align with the Decision #169731 remand). In all other respects, the petition 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 26th day of February, 2016

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on February 26, 2016.

Brown County Human Services
Division of Health Care Access and Accountability
Attorney [REDACTED]