



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MDV/117006

PRELIMINARY RECITALS

Pursuant to a petition filed January 19, 2011, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Kenosha County Human Service Department in regard to Medical Assistance, a hearing was held on February 16, 2011, at Kenosha, Wisconsin.

The issues for determination are (1) whether the agency properly determined that there was a divestment and (2) whether the agency correctly denied the petitioner's request for an undue hardship waiver.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: Roberta Bloner, ES Specialist; Lauren Fox, ES Supervisor; Karen Mayer,
Fair Hearing Coordinator

Kenosha County Human Service Department
8600 Sheridan Road
Kenosha, WI 53143

Also in appearance: Rachel Selking, Ombudsman; Rachel Schweitzer, Ombudsman; [REDACTED]
[REDACTED] Petitioner's Niece; and Jean Vancaster, Office Manager at Hospitality Nursing Home

ADMINISTRATIVE LAW JUDGE:

Catherine G. Demski
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED] is a resident of Kenosha County, though he was represented at the hearing by his niece, [REDACTED] who is also is Power of Attorney.
2. In November 2010, the petitioner applied for MA-Nursing Home. On December 15, 2010, the county agency issued a Notice of Decision to the petitioner, informing him that he is subject to a penalty period from November 1, 2010 through June 16, 2011, due to a divestment of his monetary assets in the amount of \$46,500, which occurred beginning in September of 2009. (Exhibit 3).
3. On January 12, 2011, the petitioner applied for an undue hardship waiver.
4. On January 12, 2011, the county agency issued another Notice of Decision, which informed the petitioner that his request for an undue hardship waiver was denied. (Exhibit 4).
5. The petitioner gave his niece \$46,500 between September 2009 and November 2010. The petitioner's niece testified that she used the money to pay toward her mortgage to avoid losing her home.
6. On January 19, 2011, the petitioner requested a fair hearing.

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. The "look-back date" is defined as 36 months before, or with respect to trusts, 60 months before, the first date the individual is both institutionalized and an MA applicant. MEH § 17.3.

If such a transfer occurs, the individual is ineligible for MA for nursing home services for a period of time 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 application (for divestments that occurred after January 2009). MEH, § 17.5.3.2.

A parallel divestment definition is found at Wis. Admin. Code § DHS 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.

Emphasis added. Wis. Admin. 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 county, 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.

In this case, the negative action was the agency’s determination that petitioner was not eligible for MA-Nursing Home from November 1, 2010 through June 16, 2011, because a divestment penalty had been established for this period. The notice explained that petitioner had divested assets in the amount of \$46,500/\$204.35 (daily care rate of nursing home) = 227 penalty days. Petitioner did not contest that a transfer of money occurred, nor did she contest the agency’s calculations.

If anything, the petitioner’s representative presented argument that the petitioner did not intend to divest the money in order to qualify for MA. The petitioner’s representative testified that the petitioner, her uncle, intended to stay in his own home, though he is 99-years old, and she had no thoughts of removing him from his home until an incident occurred in October 2010, when it became apparent to her that the petitioner was no longer able to care for himself, even with home services in place. While it is true that a transfer of assets that is done without intent to qualify for Medicaid may be an exception to the divestment penalty rule, there are requirements in place with respect to proving such an intent. The policy states:

The person must present evidence that shows the specific purpose and reason for making the transfer, and establish that the resource was transferred for a purpose other than to qualify for Medicaid. Verbal assurances that s/he was not trying to become financially eligible for Medicaid are not sufficient. Take into consideration statements from physicians, insurance agents, insurance documents, and bank records that confirm the person's statements.

MEH, § 17.4. The petitioner’s representative did not satisfy this burden. There is no evidence other than the petitioner’s representative’s verbal assurances that the transfer of money was without any intent to qualify for MA. As such, I must find that there was, indeed, a divestment of assets.

The next question is thus, whether petitioner is eligible for an undue hardship waiver. To prove that an “undue hardship” exists, the applicant must submit the following verification of hardship:

1. A statement signed by the individual (or his/her representative) which describes whether the assets are recoverable, and if so, the attempts that were made to recover the divested assets, **and**
2. Proof that an undue hardship would exist if the penalty period is applied (as follows).
 - If the *member is currently institutionalized*, s/he must submit a copy of the notification sent from the LTC facility which states both the date of involuntary discharge and alternative placement location or other proof that if the hardship waiver is not granted, the individual will be deprived of medical care such that the individual’s health or life would be endangered; or deprived of food, clothing, shelter, or other necessities of life.

MEH, § 17.17.5.

The petitioner's representative testified that the petitioner gifted the money to her so that she could avoid foreclosure on her home. She presented a note with her request for an undue hardship waiver, which stated that she is unable to recover the money because it was put toward her mortgage, per her uncle's request. There is no documentation of any requests to recover the money, nor is there any evidence, other than the petitioner's representative's assurances, that the money was used for her mortgage.

The second requirement is that the petitioner must present proof that if the waiver is not granted, the individual will be deprived of necessary medical care. This requirement has not been satisfied. Even though the nursing home issued an Involuntary Discharge Notice to the petitioner's representative in December 2010, the representative for the nursing home testified that the nursing home is unable to discharge the petitioner at this time because there is no "safe" place to send him. Therefore, the nursing home has agreed that the petitioner cannot be discharged at this time. As such, the petitioner's health is not in jeopardy, and the requirements for the undue hardship waiver have not been met.

If circumstances change, then the petitioner is encouraged to re-apply for the hardship waiver.

CONCLUSIONS OF LAW

1. The county agency correctly determined that there was a divestment of petitioner's assets, which resulted in the imposition of a divestment penalty from November 1, 2010 through June 16, 2011.
2. The petitioner is not eligible for an Undue Hardship Waiver because there was insufficient evidence to demonstrate that a serious impairment to the institutionalized individual's immediate health status exists.

THEREFORE, it is

ORDERED

The petition for review is hereby dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Department of Health Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53

Given under my hand at the City of Milwaukee,
Wisconsin, this 13th day of April, 2011

/sCatherine G. Demski
Administrative Law Judge
Division of Hearings and Appeals

c: , Kenosha County Human Service Department - email
, Department of Health Services - email