



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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

DECISION
Case #: MGE - 209474

PRELIMINARY RECITALS

Pursuant to a petition filed on July 21, 2023, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services regarding Medical Assistance (MA), a hearing was held on December 12, 2023, by telephone.

The issue for determination is whether the Petitioner's [REDACTED] trust is a counted asset in determining his eligibility for community waivers.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Petitioner's Representative:

Attorney Michael J. Rosolino
Galanis, Pollack, Jacobs, & Johnson, S.C.
413 N. 2nd Street, Suite 150
Milwaukee, WI 53202

Respondent:

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

By: Princeton Perry
Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. On February 7, 2023, the agency received a Wisconsin EBD Long Term Care application for the Petitioner. It reported the Petitioner was residing in a long-term care facility and he had a community spouse. It reported he did not have a disability determination from the Social Security Administration. His reported assets included a checking and savings account, a brokerage account, a trust, and an IRA. It reported his monthly social security income of \$1256 and a pension. A three month backdate was requested.
3. On April 27, 2023, a Medicaid Disability Application (MADA) and Authorization to Disclose Information to Disability Determination Bureau (ADDD) was filed with the agency for the Petitioner.
4. On July 21, 2023, an appeal was filed with the Division of Hearings and Appeals.
5. On July 28, 2023, the agency issued a notice of decision to the petitioner informing him that his application was denied due to income and assets exceeding the program limit. The agency counted assets in the Petitioner's [REDACTED] trust.
6. On August 1, 2023, the Petitioner's case was updated and the [REDACTED] trust was noted to be unavailable pending a disability determination from the DDB.
7. On August 25, 2023, the agency sent the Petitioner's MADA to the DDB.

DISCUSSION

A person cannot receive institutional medical assistance if his assets exceed \$2,000. Wis. Admin. Code, § DHS 103.06(1)(a); Wis. Stat., §49.47(4). When determining eligibility, only those assets “actually available” are considered. Wis. Admin. Code, § DHS 103.06(1)(a). Eligibility begins “on the date on which all eligibility requirements were met, but no earlier than the first day of the month 3 months prior to the month of application.” Wis. Admin. Code, §103.08(1).

A [REDACTED] Trust allows disabled persons to place certain assets in a pooled trust. Because funds in these trusts are exempt from the medical assistance asset limit, the Medicaid Eligibility Handbook (MEH) §16.6.6 instructs workers to “[d]isregard pooled trusts for disabled persons managed by ... [REDACTED] Trust I.” Id.

In this case, it is undisputed that the Petitioner's [REDACTED] trust will be an exempt asset if the Petitioner is determined to be disabled. The case has been pending for a disability determination with DDB since August 2023. It is undisputed that the Petitioner filed the MADA by April 2023 and the income maintenance agency erred in not submitting the MADA to the DDB until August 2023. This appeal was held open from the first hearing on August 24, 2023 through the second hearing on December 12, 2023, awaiting a determination from the DDB.

To date, there is no determination from the DDB. The Petitioner is seeking an order from DHA that the income maintenance agency enter a presumptive disability finding, resulting in an additional finding that the Petitioner is financially eligible for MA/community waivers. The Petitioner desires to establish a start date for eligibility because he concedes there is a divestment in this matter and wants the divestment penalty

period to be established. The Petitioner asserts that the divestment penalty period should start on January 11, 2023 when the [REDACTED] trust was funded.

Presumptive disability is a method for temporarily determining that an individual is disabled while a formal disability determination is being reviewed by the DDB. Presumptive disability is usually determined by DDB but can, in some circumstances, be determined by the income maintenance (IM) agency. MEH § 5.9.1. The regular disability application process must still be completed for persons with a presumptive disability. A presumptive disability decision stands until DDB makes its final disability determination. Id.

For the IM agency to make a determination that an individual is presumptively disabled, a medical professional must submit a written form (F-10130) attesting that:

- The person has an urgent need for medical services.
- The person has one of a certain set of impairments.

MEH § 5.9.2.

To be considered to have an urgent need, a person must be in one of the following situations due to a physical or mental health condition:

- The attending physician (defined as a doctor who has completed residency and is responsible for providing care for the patient in a hospital or clinic) attests that applicant has one or more medically determinable physical or mental impairments that cause severe functional limitations and/or inability to work, and that have lasted or can be expected to last for at least 12 months or are expected to result in death.
- The applicant is a patient in a hospital or other medical institution.
- The applicant will be admitted to a hospital or other medical institution without immediate health care treatment.
- The applicant needs long-term care, and the nursing home will not admit the applicant until Medicaid benefits are in effect.
- The applicant is unable to return home from a nursing home unless in-home service or equipment is available, and this cannot be obtained without Medicaid benefits.

MEH § 5.9.2.1.

When an urgent need for medical services has been identified, the IM agency can certify the person as presumptively disabled if they have one of the following impairments, as attested to in writing by a medical professional.

- Amputation of a leg at the hip
- Total deafness
- Total blindness
- Bed confinement or immobility without a wheelchair, walker, or crutches due to a longstanding condition, excluding recent accident and recent surgery
- Stroke (cerebral vascular accident) more than three months in the past and marked difficulty in walking or using a hand or arm
- Cerebral palsy, muscular dystrophy, or muscle atrophy and marked difficulty in walking (for example, the use of braces), speaking, or coordination of the hands or arms
- A physician confirms that the person has a terminal illness with a life expectancy of six months or less; or a physician or hospice official (hospice coordinator, staff nurse, social worker, or

medical records custodian) confirms that the person is receiving hospice services because of a terminal illness.

MEH § 5.9.2.2.

If an individual has an impairment but not an urgent need, the normal disability application process must be followed. MEH § 5.9.3. If an individual has an urgent need but does not have one of the listed impairments, the IM agency must ask DDB to make a presumptive disability determination. Id.

Medicaid coverage based on a presumptive disability determination begins on the date the person is found presumptively disabled by DDB or the IM worker. MEH § 5.9.5. If the presumptive disability determination is made by the IM worker, Medicaid coverage should begin the date the complete Medicaid Presumptive Disability form is received by the IM agency, if all other eligibility requirements are met. Id. Eligibility cannot be granted prior to the date the presumptive disability was determined until DDB makes a formal disability determination. Id.

In this case, the IM agency asserts that it cannot make a presumptive disability finding because the criteria in MEH § 5.9.2 have not been met. Specifically, there is no MA Presumptive Disability form signed by a medical professional attesting that the Petitioner has an urgent need for medical services and one of a certain set of impairments.

The Petitioner's representative argues that it would be very difficult to get a MA Presumptive Disability form from a medical professional because the Petitioner cannot be transported at this time. In addition, he asserts that most medical professionals are not willing to execute a Presumptive Disability form because it will result in a lower rate. Given the agency errors that have resulted in an unusually long delay in processing the Petitioner's MA and disability applications, the Petitioner requests that DHA order the IM agency to make a presumptive disability finding.

I must conclude that DHA does not have the authority to order the relief sought by the Petitioner. Administrative law judges do not have authority to provide equitable relief from regulations. See *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977). An administrative law judge's review is limited to determining whether the agency correctly applied the law. In this case, the Petitioner concedes that there is no written attestation from a medical professional that the Petitioner has an urgent need for medical services and has a listed impairment. The IM agency does not have the authority to make a presumptive disability determination without such written attestation. Further, if the IM agency did have such authority, the start date for MA would be the date the IM agency received the written attestation. Neither DHA nor the IM agency have the authority to backdate a presumptive disability determination.

The IM agency will issue a new notice to the Petitioner upon receipt of a disability determination by DDB. That notice will advise the Petitioner of his eligibility start date as well as any divestment penalty period. The notice will also give the Petitioner new appeal rights if he disagrees with the agency's final determination.

CONCLUSIONS OF LAW

The IM agency cannot make a presumptive disability finding without the required written attestation from a medical professional. A final determination of the Petitioner's financial eligibility for MA and community waivers cannot be made until the DDB makes a finding regarding the disability application. The IM agency

must send a notice of Petitioner’s financial eligibility upon receipt of the DDB finding and give the Petitioner new appeal rights.

THEREFORE, it is

ORDERED

That 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, 4822 Madison Yards Way, 5th Floor North, 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.

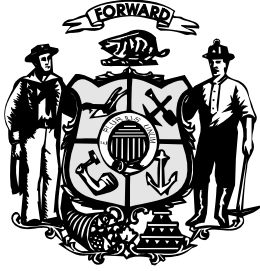
APPEAL TO COURT

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, **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 Milwaukee,
Wisconsin, this 5th day of January, 2024

\s _____
Debra Bursinger
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 January 5, 2024.

Milwaukee Enrollment Services
Division of Health Care Access and Accountability
Attorney Michael Rosolino