

FILED

JUL 22 2009

STATE OF FLORIDA  
DEPARTMENT OF CHILDREN AND FAMILIES  
OFFICE OF APPEAL HEARINGS

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DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-02369

PETITIONER,

Vs.

CASE NO. 1300942762

FLORIDA DEPARTMENT OF  
CHILDREN AND FAMILIES  
DISTRICT: 03 Suwannee  
UNIT: 88674

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on June 22, 2009, at 11:38 a.m., in Live Oak, Florida. The petitioner was not present. The petitioner was represented by her husband,

The Department was represented by Norman Crawford, ACCESS supervisor and Ernestine Randolph, economic self sufficiency specialist.

**ISSUE**

At issue is termination of the community spouse income allowance and increase in the petitioner's patient responsibility under the Medicaid Institutional Care Program (ICP). The Department held the burden of proof.

**FINDINGS OF FACT**

1. The petitioner (age 75) has been living in a skilled nursing facility since November 2008. The petitioner is married; her husband (age 77) lives in the community (for Institutional Care Program purposes, he is known as the community spouse).
2. In February 2009, an application for ICP Medicaid was submitted on the petitioner's behalf. In the determination of patient responsibility (amount the petitioner must pay the nursing home) and community spousal allowance (the amount of the petitioner's income that the community spouse may keep), the Department budgeted \$612 monthly social security income for the petitioner and \$520.27 monthly pension income for the petitioner's husband. The Department determined that the petitioner was eligible for ICP Medicaid with \$0 patient responsibility and \$577 community spousal allowance. The following budget calculations were used during the initial processing: \$0 mortgage (owns home), average monthly property tax and insurance of \$50 (\$600 yearly/12) and standard utility allowance of \$198, total allowable shelter costs equaled \$248; 30% (or \$525) of the \$1750 Minimum Monthly Maintenance Income Allowance (MMMIA) was deducted from the community spouse's shelter costs (\$248) to determine an excess shelter cost amount of \$0. The excess shelter amount was then added to the MMMIA ( $\$0 + \$1750 = \$1750$ ) for a beginning figure to determine the community spouse allowance. The community spouse's gross income of \$520.27 pension was then subtracted from that figure (\$1750) to determine the maximum community spouse's income allowance of \$1229.73. The community spouse income allowance, \$35 personal needs allowance and \$35.10 monthly unreimbursed medical expenses were subtracted from the petitioner's income of \$612 resulting in \$0 patient responsibility; all

of the petitioner's income minus the personal needs allowance was allotted to her husband as the community spousal allowance ( $\$612 - \$35 = \$577$ ). Later in March 2009, the Department realized that the husband's monthly social security income of  $\$1295$  was (known to the Department, but) not included during the budget calculations. (The petitioner's husband admitted that his monthly income consists of  $\$1295$  social security and  $\$520.27$  social security.) The Department recalculated both the patient responsibility and community spousal allowance and determined that the petitioner's corrected patient responsibility was  $\$541.90$  monthly and the corrected spousal allowance was  $\$0$ ; the changes were budgeted effective April 2009. The Department explained that its revised figures were calculated as follows:  $\$0$  mortgage,  $\$50$  average monthly property tax and insurance; the Department used the standard utility allowance of  $\$198$ ; total allowable shelter costs totaled  $\$248$ . Thirty percent of the MMMIA ( $30\% \times \$1750$ ), or  $\$525$ , was deducted from the community spouse's shelter costs ( $\$248$ ) to determine an excess shelter cost amount of  $\$0$ . The excess shelter amount was then added to the MMMIA ( $\$0 + \$1750 = \$1750$ ) for a beginning figure to determine the community spouse allowance. The community spouse's gross income of  $\$1815.27$  ( $\$520.27$  pension +  $\$1295$  social security) was then subtracted from that figure ( $\$1750$ ) to determine the community spouse's income allowance of  $\$0$ . The community spouse allowance ( $\$0$ ),  $\$35$  personal needs allowance and  $\$35.10$  monthly unreimbursed medical expenses were subtracted from the petitioner's income of  $\$612$ ; the balance of  $\$541.90$  was the petitioner's revised patient responsibility.

3. The petitioner's husband believes a portion of her income should be allotted to him as the community spouse to meet his monthly living expenses. When questioned

about monthly living expenses, the petitioner's husband asserted that his average weekly living costs (food, electricity, telephone, car insurance, gas) total \$350 weekly (or approximately \$1500 monthly using the Department's internal 4.3 conversion factor).

### CONCLUSIONS OF LAW

Florida Administrative Code 65A-1.712, *SSI-Related Medicaid Resource*

*Eligibility Criteria*, states in part:

(4) Spousal Impoverishment. The department follows 42 U.S.C. § 1396r-5 for resource allocation and income attribution and protection when an institutionalized individual, including a hospice recipient residing in a nursing facility, has a community spouse... (d) After the institutionalized spouse is determined eligible, the department allows deductions from the eligible spouse's income for the community spouse and other family members according to 42 U.S.C. § 1396r-5 and paragraph 65A-1.716(4)(c), F.A.C... (f) Either spouse may appeal the post-eligibility amount of the income allowance through the fair hearing process and the allowance may be adjusted by the hearing officer if the couple presents proof that exceptional circumstances resulting in significant inadequacy of the allowance to meet their needs exist. Exceptional circumstances that result in extreme financial duress include circumstances other than those taken into account in establishing maintenance standards for spouses. An example is when a community spouse incurs unavoidable expenses for medical, remedial and other support services which impact the community spouse's ability to maintain themselves in the community and in amounts that they could not be expected to be paid from amounts already recognized for maintenance and/or amounts held in resources. Effective November 1, 2007, the hearing officers must consider all of the community spouse's income and all of the institutionalized spouse's income that could be made available to a community spouse. If the expense causing exceptional circumstances is a temporary expense, the increased income allowance must be adjusted to remove the expenses when no longer needed.

Florida Administrative Code 65A-1.7141, *SSI-Related Medicaid Post-Eligibility*

*Treatment of Income*, states in part:

After an individual satisfies all non-financial and financial eligibility criteria for Hospice, institutional care services or Assisted Living waiver (ALW/HCBS), the department determines the amount of the individual's

patient responsibility. This process is called "post eligibility treatment of income".

(1) For Hospice and institutional care services, the following deductions are applied to the individual's income to determine patient responsibility:

(a) Individuals residing in medical institutions shall have \$35 of their monthly income protected for their personal need allowance...

(d) The department applies the formula and policies in 42 U.S.C. section 1396r-5 to compute the community spouse income allowance after the institutionalized spouse is determined eligible for institutional care benefits. The standards used are found in subsection 65A-1.716(5), F.A.C. The current standard Food Stamp utility allowance is used to determine the community spouse's excess utility expenses...

(f) For ICP or institutionalized Hospice, income is protected for the month of admission and discharge, if the individual's income for that month is obligated to directly pay for their cost of food or shelter outside of the facility.

(g) Effective January 1, 2004, the department allows a deduction for the actual amount of health insurance premiums, deductibles, coinsurance charges and medical expenses, not subject to payment by a third party, incurred by a Medicaid recipient for programs involving post eligibility calculation of a patient responsibility, as authorized by the Medicaid State Plan and in accordance with 42 CFR 435.725.

Florida Administrative Code 65A-1.716, *Income and Resource Criteria*, states in part:

(c) Spousal Impoverishment Standards...

2. State's Minimum Monthly Maintenance Income Allowance (MMMIA). The minimum monthly income allowance the department recognizes for a community spouse is equal to 150 percent of the federal poverty level for a family of two.

3. Excess Shelter Expense Standard. The community spouse's shelter expenses must exceed 30 percent of the MMMIA to be considered excess shelter expenses to be included in the maximum income allowance:  $MMMIA \times 30\% = \text{Excess Shelter Expense Standard}$ . This standard changes July 1 of each year.

The Department's Policy Manual, 165-22, passage 2640.0117 in part states:

Patient Responsibility Computation (MSSI)

The following policy applies to ICP, institutionalized MEDS ...:  
After the individual is determined eligible, the amount of monthly income to be applied to the cost of care (patient responsibility) is computed as follows:

Step 1 - Deduct the personal needs allowance and one half of the gross therapeutic wages up to the maximum of \$111 if applicable, for adults in ICF/DDs. Refer to 2640.0118 for information regarding the personal needs allowance.

Step 2 - Deduct the community spouse income allowance, family member allowance, or the dependent's allowance, if applicable. ...

Step 3 - Consider protection of income policies for the month of admission or the month of discharge, if appropriate (refer to 2640.0123) for the following programs:

1. Institutional Care Programs, (including institutionalized MEDS and institutionalized Hospice) - the month of admission to and discharge from a nursing facility,
2. Assisted Living Waiver - the month of admission to and discharge from an ALF,
3. PACE and Long-Term Care Diversion - the month of admission or discharge from a nursing home facility or from an assisted living facility.

Step 4 - Deduct uncovered medical expenses as discussed in passages 2640.0125.01 through 2640.0125.04.

The balance is the amount of the patient responsibility.

The Department's Policy Manual, 165-22, passage 2640.0119.01 in part states:

**Community Spouse Income Allowance (MSSI)**

The following policy applies to the ICP, institutionalized MEDS, institutionalized Hospice, Long Term Care Diversion, PACE, and the Assisted Living Waiver Programs. When an institutionalized individual has a community spouse whose gross income is less than the state's minimum monthly maintenance income allowance (MMMIA) plus the CS excess shelter expense costs, a portion of the individual's income may be allocated to meet the needs of his community spouse.

The Department's Policy Manual, 165-22, passage 2640.0119.02 in part states:

Community Spouse's Monthly Income Allowance (MSSI)

A community spouse's monthly income allowance depends on the amount of monthly income available to the community spouse and the amount of excess shelter costs the community spouse must pay.

The actual community spouse monthly income allowance is equal to how much the state's MMMIA plus the community spouse's excess shelter costs exceed the community spouse's income.

Note: The community spouse income allowance is included as income to the community spouse during the hearing process when determining if the community spouse qualifies for an increase in the community spouse resource allowance.

Fla. Integrated Pub. Policy Manual, passage 2640.0119.03 in part states:

Formula for Community Spouse Income Allowance (MSSI)

The following is the formula used to determine the community spouse's income allowance:

$(\text{State's MMMIA} + \text{community spouse's excess shelter costs}) - (\text{the community spouse's total gross income}) = (\text{the community spouse's income allowance.})$

The community spouse's income allowance is the total amount that can be allotted to the community spouse from the institutionalized individual.

The state's MMMIA plus CS excess shelter cost cannot exceed the state's cap on CS income allowance (see Appendix A-9).

The institutionalized individual's personal needs allowance and deduction for therapeutic wages is deducted prior to deducting the community.

The Department's Policy Manual, 165-22, Appendix A-9 establishes the Minimum Monthly Maintenance Income Allowance (MMMIA) of \$1,750 effective July 2008 and that was the figure used. The appendix also establishes the excess shelter standard at \$525, which was also correctly used. The appendix establishes the Maximum Community Spouse Income Allowance (MMMIA plus excess shelter costs) at \$2,739. These standards change July 1 of each year in accordance with federal law.

During the initial application process, the Department failed to budget \$1295 monthly social security for the petitioner's husband thus erroneously determining that the petitioner's husband was eligible for a community spousal allowance and that the petitioner had no patient responsibility. After the Department added the \$1295 social security income to the budget, the petitioner's husband was no longer eligible for a community spousal allowance and the petitioner's monthly patient responsibility was \$541.90. The undersigned carefully reviewed the revised calculations and determined that they accurately reflect the budgeting methodology set forth in the controlling legal authorities.

The petitioner's husband argued that he needs to keep some of her income in order to meet his community expenses. However, his asserted monthly expenses of \$1505 ( $\$350 \times 4.3$ ) are less than his \$1815.27 (\$520.27 pension and \$1295 social security) monthly income. The legal authorities which set forth eligibility criteria for spousal allowance permits possible adjustment to this methodology and the resulting spousal diversion amount, if proof is presented of exceptional circumstances that result in financial duress. An exceptional circumstance resulting in extreme financial duress is defined in the Florida Administrative Code as a circumstance other than one already considered in establishing the maintenance standards for spouses. The expenses detailed in the Findings of Fact are recurring expenses consistent with the every day maintenance of a household and do not meet the criteria of exceptional as required by the governing legal authorities.

#### **DECISION**

The appeal is denied and the Department's actions are affirmed.



**NOTICE OF RIGHT TO APPEAL**

This decision is final and binding on the part of the Department. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The Department has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this 22nd day of July, 2009,

in Tallahassee, Florida.



Leslie Green  
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