

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



APPEAL NO. 10F-06988

PETITIONER,

Vs.

CASE NO. 1220907651

FLORIDA DEPT OF CHILDREN AND FAMILIES
CIRCUIT: 06 Pinellas
UNIT: 88605

FILED
Feb 3, 2011
OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN AND FAMILIES

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on November 2, 2010 at 11:16 p.m.

APPEARANCES

For the Petitioner: [REDACTED] the petitioner's wife

For the Respondent: Jim Robson, ACCESS senior worker

STATEMENT OF ISSUE

The petitioner is requesting an increase in the amount of the community spouse diversion from the patient responsibility for the petitioner's Institutional Care Program (ICP) benefits effective the month of application, August 2010.

PRELIMINARY STATEMENT

By notice dated August 13, 2010, the respondent informed the petitioner that the petitioner's patient responsibility would be \$1,030.07 and there was \$2,353.12 spousal diversion. On October 6, 2010, the petitioner timely requested a hearing. On November 17, 2010, the respondent informed the petitioner that the petitioner's patient responsibility would be \$993.59 and there was \$2,389.60 spousal diversion.

The petitioner did not appear. The petitioner's representative and the respondent's representative appeared in person.

FINDINGS OF FACT

1. The petitioner reapplied for ICP benefits in August 2010. The household is the petitioner and the petitioner's wife. The petitioner resides in a nursing home. The petitioner's wife resides in the community (hereafter the wife is referred to as the community spouse). The community spouse is 63 years old.

2. The petitioner's reported gross monthly income was \$3,418.19. The community spouse's reported gross monthly income is \$ 0.

3. The reported shelter expenses per year were of \$100 for maintenance fee, home insurance of \$2,134 to October 24, 2010 and \$3,331 for the year starting October 24, 2010, \$355 for flood insurance, \$5,838.21 for the 2009 taxes and \$5,103.77 for 2010 taxes. The couple has no mortgage or rent.

4. The respondent reviewed the application. The respondent verified that the petitioner's gross monthly income was \$3,418.19. The respondent divided the yearly shelter cost by 12 to calculation a monthly shelter cost for maintenance fee of \$8.33,

home insurance of \$266.27 and \$500 for taxes. The respondent determined that the monthly shelter cost was \$774.60. The monthly shelter cost of \$774.60 plus the Utility Standard of \$317 equaled \$1,114.60. The respondent determined that the petitioner could retain \$35 of his income for personal needs and his patient responsibility would be \$993.59.

5. The community spouse's reported gross monthly income is \$0. The respondent determined that the spousal diversion would be \$2,353.12. The respondent sent the petitioner a Notice of Case Action on August 3, 2010.

6. In October 2010, the Utility Standard increased to \$340. The respondent determined that the spousal diversion would be \$2,389.60. The respondent sent the petitioner a Notice of Case Action on November 17, 2010.

7. The community spouse asserted as follows. They have lived in the home for 16 years. The mortgage was paid off. The home is getting older and in need of repairs. In the last five years, she has replaced refrigerator; replaced the deep well pump for irrigation to water the grass; paid for repairs for home repairs of re-plumbing, wall removal and door replacement due to water damage and mold; replaced hot water heater, and paid for clean-up of four rooms on two occasions due to flooding. The flooding was once from ruptured the hot water heater and another time for broken water pipes. The money that she would have used to pay the taxes was used for home repairs and to pay her monthly healthcare insurance. She has used all her savings. She is unable to pay the taxes. An individual has already assumed the tax liability from the county for her home. She has to pay that individual. If she does not make pay the

taxes for their home by March 2012, the home will be auctioned off. She considered an equity loan for \$500 a month; however, she has no income to pay the equity loan.

8. The respondent asserted that if the petitioner would incur the expense of an equity loan and provide proof of the equity loan, the respondent would consider that equity loan as a shelter cost. That increase shelter cost would be considered for an increase the diversion to the community spouse. That increase could not exceed the current maximum maintenance income allowance of \$2,789.

9. The petitioner does not dispute the income, expenses or calculation used by the respondent. The petitioner is requesting an increase of \$900 a month of spousal diversion. The petitioner asserted that the increase in the spousal diversion is necessary based on the exceptional home repair and health insurance expenses of the community spouse and would be used to pay the taxes on the home.

CONCLUSIONS OF LAW

10. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to § 409.285, Fla. Stat. This order is the final administrative decision of the Department of Children and Families under Fla. Stat. § 409.285.

11. This proceeding is a de novo proceeding pursuant to Florida Administrative Code § 65-2.056.

12. In accordance with Florida Administrative Code § 65-2.060(1) the burden of proof was assigned to the petitioner.

13. The petitioner has requested an increase in the spousal diversion. The Florida Administrative Code at 65A-1.712 sets forth for spousal impoverishment for income attribution:

- (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.

14. The Florida Administrative Code at 65A-1.716(5) sets forth the calculation for community spouse income allowance:

- (c) Spousal Impoverishment Standards
 1. State's Resource Allocation Standard. The amount of the couple's total countable resources which may be allocated to the community spouse is equal to the maximum allowed by 42 U.S.C. § 1396r-5.
 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: MMIA

× 30% = Excess Shelter Expense Standard. This standard changes July 1 of each year.

4. Food Stamp Standard Utility Allowance: \$198.

5. Cap of Community Spouse Income Allowance. The MMMIA plus excess shelter allowance cannot exceed the maximum amount allowed under 42 U.S.C. § 1396r-5. This standard changes January 1 of each year.

15. The Utility Standard was \$317 for August and September 2010 and \$340 effective October 2010. The respondent used a total monthly shelter costs of \$1,114.60. The MMMIA is \$1,882. Thirty percent (30%) of the MMMIA is \$547. The shelter costs of \$1,114.60 plus the 30% of MMIA of \$547 equals an excess shelter costs of \$567.60. The MMMIA of \$1,882 plus the excess shelter of \$567.60 equals \$2,389.60. The petitioner is requesting an additional \$900 a month in spousal diversion. The state's MMMIA plus excess shelter cost cannot exceed the current maximum maintenance income allowance of \$2,789. For the hearing officer to increase the income allowance up to or beyond the maximum income allowance allowed and include an expense, the expense must pass the two-part test indicated in rule.

16. First, the expense must be an exceptional circumstance and, second, the expense must create significant financial duress. Expenses that are expected and are incurred in the normal course of everyday living are not exceptional circumstances. The rule indicates that an exceptional circumstance that results in extreme financial duress is when a community spouse incurs unavoidable expenses for medical, remedial and other support services. Food is considered in the maintenance needs standard in the MMMIA amount of \$1,822. The calculation for the diversion takes into consideration the shelter expenses such as rent, utilities, insurance and taxes.

17. The community spouse asserted that she needs the increase is to pay her taxes as she used the money she would have used to pay the taxes to pay for home repairs for the last five years and to pay her monthly health insurance. The community spouse's expenses for home repair and appliances were probably unexpected expenses for the community spouse at the time they occurred. However, there is an expectation that any older home would need repairs and appliances may need to be replaced. Therefore, these expense are part of everyday living and do not meet the criteria of exceptional circumstances. Having insufficient funds to pay the taxes on one's home would place the individual in financial duress. However, an amount of \$500 a month was already considered in the community spouse income allowance budget for the tax expense.

18. The community spouse pays health insurance each month. Although it is a medical expense, this expense is expected and not a sudden unavoidable expense.

19. The hearing officer concludes that the petitioner has not met their burden of proof that the couple has demonstrated expenses that are exceptional circumstances resulting in significant inadequacy of the allowance to meet their needs.

20. The community spouse asserted that she had explored the possibility of an equity loan. The respondent asserted that if the petitioner would provide proof of the equity loan, the respondent would consider that \$500 loan as a shelter cost to be considered for an increase the diversion to the community spouse. The current spousal diversion is \$2,389.60. An increase in spousal diversion based on increase in shelter cost could not exceed the current maximum maintenance income allowance of \$2,789.

DECISION

Based upon the foregoing Findings of Fact and Conclusion of Law, the appeal is denied.

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 _____ day of _____, 2011,
in Tallahassee, Florida.

Linda Jo Nicholson
Hearing Officer
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