

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



APPEAL NO. 11F-02086

PETITIONER,

Vs.

CASE NO. 1356470815

FLORIDA DEPARTMENT OF
CHILDREN AND FAMILIES
CIRCUIT: 01 Escambia
UNIT: 88637

FILED

Jun 27, 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 May 17, 2011 at 11:10 a.m. in Pensacola, Florida.

APPEARANCES

For the Petitioner: [REDACTED] community spouse

For the Respondent: Sheila Rushing, ACCESS manager

STATEMENT OF ISSUE

The petitioner is seeking an increase in the community spousal allowance under ICP Medicaid.

PRELIMINARY STATEMENT

By notice dated February 2, 2011, the Department advised the petitioner and his wife, hereinafter, the community spouse, of his eligibility for Institutional Care Program (ICP) and Medicaid benefits, his patient responsibility and the amount of income the

community spouse may retain from the institutional spouse's income. On March 29, 2011, the petitioner timely requested a hearing to challenge the spousal allowance and patient responsibility.

The petitioner submitted into evidence Petitioner's Composite Exhibit 1.

Testifying on behalf of the Department was Jennifer, Brenson, ACCESS case processor. The Department submitted into evidence Respondent Exhibits 1-18.

FINDINGS OF FACT

1. On December 21, 2010, an application for Institutional Care Program (ICP) Medicaid was submitted to the Department. The petitioner (Date of Birth, November 7, 1919) was admitted into a long term nursing facility on November 15, 2010 for rehabilitation. The petitioner's wife (age 69) continues to reside in the community (she will be referred to as the community spouse).

2. The petitioner's income consists of Social Security (SSA) \$1,436 and an Aetna pension of \$127.16. His community spouse receives gross Social Security of \$1,092 and weekly unemployment compensation benefits of \$275 paid biweekly. This was converted to a monthly income of \$1,110. During the month of January 2011, the petitioner's wife also had wages from employment totaling \$800. There is no dispute regarding the income.

3. The community spouse reported a rental obligation of \$900 monthly, \$26.97 monthly homeowner's/renter's insurance premium and utilities to include electricity and telephone, cable.

4. The Department explained its spousal allowance and patient responsibility calculations. For the month of admission (November 2010), the petitioner's income was

protected as he incurred living expenses while in the community for that month. He had zero obligation to the nursing facility and the community spouse had access to the entire income for that month. November 2010 ICP coverage is not at issue.

5. The petitioner's total gross income was \$1,562.16. The community spouse had income from wages in December 2010. She lost her job on December 3, 2010 and received severance pay totaling \$2,870.86 in addition to her Social Security of \$1,092.30 and her first Unemployment Compensation Benefit (UCB) payment of \$275. The total income for the community spouse was \$4,237.86. Total shelter cost was \$1,266.97 which included the monthly rent, renters insurance and \$340 standard utility allowance. Thirty percent of the \$1,822 Minimum Monthly Maintenance Income Allowance (MMMIA) or \$547 was subtracted from the shelter cost of \$1,266.97. The balance of \$719.97 was the excess shelter. The MMMIA of \$1,822 was added to the excess shelter of \$719.97 to arrive at \$2,541.97. The community spouse's income of \$4,237.86 exceeded the allowable shelter deduction \$2,541.97 which left zero community spouse income allowance. After subtracting a personal needs allowance of \$35 from the petitioner income of \$1,562.16 and zero deduction for the community spouse allowance, the petitioner's patient responsibility was \$1,527.16 for December 2010.

6. The calculations for January 2011 are as follows: the petitioner's total gross income was \$1,562.16. The community spouse started work in another job on January 3, 2011 and last worked on January 13, 2011. She received gross wages of \$800 in January 2011 in addition to her Social Security of \$1,092 (after rounding) and \$1,100 UCB. The total income for the community spouse was \$2,992. Total shelter cost was

\$1,266.97 minus \$547 MMMIA resulting in \$719.97 excess shelter costs. The MMMIA of \$1,822 was added to the excess shelter of \$719.97 to arrive at \$2,541.97. The community spouse's income of \$2,992 exceeded the allowable shelter deduction \$2,541.97 which left zero community spouse income allowance. After subtracting a personal needs allowance of \$35 from the petitioner's income of \$1,562.16 and zero deduction for the community spouse allowance, the petitioner's patient responsibility was \$1,527.16 for January 2011.

7. The calculations for February 2011 and following were explained. The petitioner's total gross income was \$1,562.16. The community spouse received Social Security of \$1,092 (after rounding) and \$1,100 UCB. The total income for the community spouse was \$2,192. Total shelter cost was \$1,266.97 minus \$547 MMMIA resulting in \$719.97 excess shelter costs. The MMMIA of \$1,822 was added to the excess shelter of \$719.97 to arrive at \$2,541.97. The community spouse's income of \$2,192 was subtracted from the allowable shelter deduction' the resulting figure, \$349.97 is the community spousal allowance. After subtracting a personal needs allowance of \$35 from the petitioner's income of \$1,562.16 and 349.97 for the community spousal allowance, the petitioner's patient responsibility was \$1,177.19 effective February 2011. See all calculations Respondent Exhibit 6.

8. The community spouse does not dispute the correctness of the gross income figures used by the Department. However, the community spouse believes she should be allowed to keep a larger portion of her husband's income to maintain herself in the community. Including the spousal allowance from the petitioner, her total gross monthly income is \$2,541.97 (349.97 spousal allowance + \$1092 Social Security + \$1,100

UCB). Beginning in April 2011, the community spouse testified that her rental obligation will be reduced to \$700 from the previously calculated \$900 as her current landlord reduced the rental obligation for a few months to help her out). Her monthly expenses are approximately \$2,850 (effective February 2011 and March 2011) and \$2,650 (effective April 2011) and include:

Rent	700.00 (effective April 2011)
Renter's Insurance	28.00
Electricity	200.00
Cable/telephone/internet	110.00
Cell phone	52.00
Car payment	336.61
Car Insurance	72.97
Gasoline	100.00
Part D Humana	87.00
Medicare	115.60
Food	200.00
Cigarettes	160.00
Life insurance	28.00
Life insurance	193.92 (██████████ for her institutionalized spouse)
Prescriptions co-pay	100.00
Personal items	100.00
Back taxes to IRS	50.00

9. The community spouse asserted she has approximately \$100 in checking and no other resources on which to rely. She has not been able to pay the patient responsibility and as a result, the nursing facility has advised her that the institutional spouse faces possible discharge for failure to make payments. She is requesting modification of the spousal allowance and a reduction in the patient responsibility.

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 Fla. Admin. Code § 65-2.056.

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

13. The Florida Administrative Code at 65A-1.713 sets forth the SSI-Related Medicaid Income and budgeting criteria and states in part:

(1)(d) For ICP, gross income cannot exceed 300 percent of the SSI federal benefit rate after consideration of allowable deductions set forth in subsection 65A-1.713(2), F.A.C. Individuals with income over this limit may qualify for institutional care services by establishing an income trust which meets criteria set forth in subsection 65A-1.702(15), F.A.C. ...

(4) Income Budgeting Methodologies. To determine eligibility SSI budgeting methodologies are applied except where expressly prohibited by 42 U.S.C. § 1396 (2000 Ed., Sup. IV) (incorporated by reference), or another less restrictive option is elected by the state under 42 U.S.C. § 1396a(r)(2) (2000 Ed., Sup. IV) (incorporated by reference). When averaging income, all income from the most recent consecutive four weeks shall be used if it is representative of future earnings. A longer period of past time may be used if necessary to provide a more accurate indication of anticipated fluctuations in future income...

(b) For institutional care, hospice, and HCBS waiver programs the department applies the following methodology in determining eligibility:

1. To determine if the individual meets the income eligibility standard the client's total gross income, excluding income placed in qualified income trusts, is counted in the month received. The total gross income must be less than the institutional care income standard for the individual to be eligible for that month.

14. The rule cited above explains that the Department must use gross income during the eligibility computations, both for the institutionalized spouse and for the community spouse.

15. Florida Administrative Code 65A-1.712 includes the provision for either spouse to appeal the post-eligibility amount of the income allowance through the fair hearing process and states:

(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. Spousal impoverishment policies are not applied to individuals applying for, or receiving, HCBS waiver services, except for individuals in the Long-Term Care Community Diversion Program, the Assisted Living Facility waiver or the Cystic Fibrosis waiver... (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. (emphasis added)

16. Fla. Admin. Code 65A-1.7141 SSI-Related Medicaid Post Eligibility Treatment of Income, sets forth computation of the patient responsibility and community spousal allowance 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 Food Assistance Program standard utility allowance is used to determine the community spouse's excess utility expenses.

The above authority explains that the Standard Utility Allowance (SUA) is to be used when counting costs of utilities and the formula to be used in determining the spousal allowance is found in 42 U.S.C. 1396r-5.

17. Fla. Admin. Code 65A-1.716 Income and Resource Criteria subsection (5) states in relevant 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.

4. Food Stamp Standard Utility Allowance...

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.

18. The above authorities set forth the Minimum Monthly Maintenance Income Allowance (MMMIA) for the community spouse.

19. The Department's online 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.

20. The Department's Integrated 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.

21. The Department's Integrated Policy Manual, 165-22, 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 spouse's income allowance.

22. The Department's Integrated Policy Manual, 165-22, passage 2640.0119.04

in part states:

Determining Community Spouse's Excess Shelter Costs (MSSI)

The following steps are used to determine the community spouse's excess shelter costs:

Step 1 - Obtain verification of the community spouse's monthly assistance group expenses if questionable. Allowed expenses are limited to rent or mortgage payment (including principal and interest), taxes, insurance (homeowners or renters), maintenance charges if a condominium and mandatory homeowner's association fees. Do not include expenses paid by someone other than the community spouse. Add all of these expenses.

Step 2 - To the total obtained above, add the current food stamp standard utility disregard (refer to Appendix A-3.1) if the community spouse pays utility bills. Allowed utilities are limited to water, sewage, gas, and electric.

Step 3 - To determine what portion of the total shelter costs is excess, subtract 30% of the state's income allowance, from the total costs. The difference is the community spouse's excess shelter costs.

23. The Department's Transmittal P-09-12-0021 dated January 1, 2010 establishes the eligibility standards for SSI-Related Programs effective January 2010. The Minimum Monthly Maintenance Income Allowance (MMMIA) effective January 2010 was \$1,822, the excess shelter standard was \$547, and the maximum community spouse income allowance was \$2,739. The Minimum Monthly Maintenance Income Allowance (MMMIA) is subject to change in July of each year. However, there was no change in the MMMIA in July 2010. The Department's ACCESS Program Policy Manual at Appendix A-3.1 sets forth the food stamp standard utility allowance at \$340 effective October 1, 2010. The MMMIA standard is in accordance with federal law found in Section 1924 (d) of the Social Security Act.

24. The petitioner's community spouse would like to increase the amount of her husband's income that she may keep. The controlling authorities explain that the community spousal allowance may be adjusted by the hearing officer if the petitioner provides proof of exceptional circumstances that causes extreme financial duress resulting in significant inadequacy of the allowance to meet her needs in the community. The above rule gives **unavoidable expenses** for medical costs as an example which could impact the community spouse's ability to maintain herself in the community and in amounts that could not be expected to be paid from amounts already recognized for maintenance and/or amounts held in resources.

25. The standard for the undersigned to grant an increase in the income allowance to the community spouse is when the couple presents proof that exceptional circumstances resulting in significant inadequacy of the allowance to meet their needs exist. The undersigned concludes that exceptional circumstances are those that are more rare than those that occur in everyday life, such as accidents and illnesses that result in personal harm or property damage. Based on the testimony and evidence, the undersigned concludes that proof of exceptional circumstances resulting in significant inadequacy of the allowance to meet the community spouse's needs has not been shown. Therefore, according to the above authorities, the community spouse is not eligible for any further income diversion from the petitioner.

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 Garton
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