

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

[REDACTED]

APPEAL NO. 11F-03223

PETITIONER,

Vs.

CASE NO. 1027166563

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

RESPONDENT.

_____ /

FILED
Jul 29, 2011
OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN AND FAMILIES

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on July 12, 2011, at 1:48 p.m.

APPEARANCES

For the Petitioner: [REDACTED], the petitioner's step daughter-in-law

For the Respondent: [REDACTED], ACCESS supervisor

STATEMENT OF ISSUE

The petitioner is requesting a \$500 a month increase in the amount of the community spouse income allowance from the patient responsibility for the petitioner's Institutional Care Program (ICP) benefits.

PRELIMINARY STATEMENT

By notice dated April 26, 2011, the respondent informed the petitioner that the petitioner's patient responsibility would be \$1,604.92 and there was \$1,274 for the

community spouse income allowance. On May 13, 2011, the petitioner timely requested a hearing.

The petitioner did not appear. The petitioner's representative and the respondent's representative appeared in person. Witness for the petitioner appearing in person was the petitioner's step son-in-law, [REDACTED].

FINDINGS OF FACT

1. The petitioner applied for ICP benefits on February 28, 2011. Retroactive benefits were requested for January 2011. The household is the petitioner and the petitioner's wife, [REDACTED]. The petitioner resides in a nursing home. The petitioner's wife resides in the community in an assisted living facility. Hereafter, the spouse is referred to as the community spouse.

2. The petitioner's reported gross monthly income was \$2,913.92. The community spouse's reported gross monthly income is \$1,465.70. The community spouse pays the assisted living facility \$2,200 a month. The room cost with or without food is \$1,550. The assisted living facility provides food; however, the community spouse chooses not to eat the food. The additional \$650 paid by the petitioner to the assisted living facility is a monthly fee for personal care services.

3. The respondent determined that the petitioner could retain \$35 of his income for personal needs and his patient responsibility would be \$1,604.92. The respondent determined that the community spouse income allowance would be \$1,274. The respondent sent the petitioner a Notice of Case Action on April 26, 2011.

4. The petitioner does not dispute the income used by the respondent. The petitioner is requesting an increase in the community spouse income allowance, as is

necessary to pay for the petitioner and the community spouse's care. The daughter provided receipts that she is paying bills for the petitioner for food, outings, transportation, and clothing. The daughter provided receipts that she is paying bills for the community spouse for the assisted living facility, clothing, groceries, travel, gas for the car, car maintenance, car repairs, car insurance, outings, hair appointments, manicures, pedicures, swimming therapy at the pool, a companion, Medigap payment, Medicare Part N, medication co-payments, prescriptions, new television, cigarettes, newspapers, loans, crafts, coffee, and personal items (shampoo, diapers, etc). The daughter asserted that the petitioner has the expenses for hair appointments, manicures, pedicures, a companion, new television, cigarettes, newspapers, crafts, coffee, and personal items as the assisted living facility does not provide these items for the petitioner. She asserted that the only service the assisted living facility provides is to give the petitioner her prepackaged medication. The daughter estimates that the couple's expenses, not including the patient responsibility to the nursing home, are \$4,450.04 a month. The daughter uses the petitioner's and the community spouse's net income of \$2,658 each month to pay these expenses. The daughter asserts that the couple's expense exceed the available net income. The petitioner is requesting an increase of \$500 a month of additional spousal diversion for expenses incurred by the petitioner and the community spouse.

5. The community spouse had additional medical expenses. She needed to have her remaining teeth removed and dentures in September 2010. She underwent a hysterectomy due to cervical cancer in January 2011. Due to the surgery, the petitioner incurred additional doctor and medical expenses. She fell and broke seven bones

including her hip in February 2011. She was in rehabilitation and needed additional care due to the fall for the months of February, March and April 2011. She needed a hearing aid, which was quoted an amount for \$2,400 on June 21, 2011.

CONCLUSIONS OF LAW

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

8. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code § 65-2.056.

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

10. The Florida Administrative Code at 65A-1.7141 SSI-Related Medicaid Post Eligibility Treatment of Income.

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.

(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.

11. The Florida Administrative Code at 65A-1.716 sets forth the Program standards and the calculation for community spouse income allowance:

(5) SSI-Related Program Standards.

(a) SSI (42 U.S.C. §§ 1382 – 1383c) Resource Limits:

1. \$2000 per individual.

2. \$3000 per eligible couple or eligible individual with an ineligible spouse who are living together.

(b) The income standard which applies to an individual under the HCBS waiver programs, ICP and Hospice is 300 percent of the SSI FBR for an individual.

(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: $MMMIA \times 30\% = \text{Excess Shelter Expense Standard}$. This standard changes July 1 of each year.

4. Food Assistance Program 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.

12. The Utility Standard is 340. The total monthly shelter costs for the community spouse is \$1,550. The MMMIA is \$1,882. Thirty percent (30%) of the MMMIA is \$547. The shelter costs of \$1,550 less the 30% of MMIA of \$547 equals an excess shelter cost of \$1,003. The MMMIA of \$1,882 plus the excess shelter of \$1,003 equals \$2,825. The petitioner is requesting an additional \$500 a month in spousal. The

state's MMMIA plus excess shelter cost cannot exceed the current maximum maintenance income allowance of \$2,739. The petitioner excess shelter exceeds the maximum maintenance income allowance of \$2,739. Therefore, the amount of \$2,739 was used to calculate the community spouse income allowance. The maximum maintenance income allowance of \$2,739 less the community spouse's income of \$1,465 would equal a community spouse income allowance of \$1,274. Based on the income and allowable expenses, the respondent determinations that the patient responsibility would be \$1,604.92 and the spousal diversion would be \$1,274 were within the rules of the Program.

13. The petitioner has requested a \$500 a month 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 calculation for the community spouse income allowance takes into consideration the shelter expenses. Food is considered in the maintenance needs standard in the MMMIA amount of \$1,822. For the hearing officer to increase the maximum maintenance income allowance beyond the maximum income allowance allowed and include an expense, the expense must pass the two-part test indicated in rule. 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.

15. In review of the rules, clothing, groceries, travel, gas for the car, car maintenance, car repairs, car insurance, outings, hair appointments, manicures, pedicures, swimming therapy at the pool, a companion, Medigap payment, Medicare Part N, medication co-payments, prescriptions, new television, cigarettes, newspapers, loans, crafts, coffee, and personal items do not meet the criteria of exceptional expenses as they are expenses of everyday living. Therefore as set forth in rule, the request for additional community income allowance is denied for these expenses.

16. The community spouse pays \$650 a month for personal care services to the assisted living facility. This is a medical expense; however, no evidence was submitted into record that the petitioner's medical condition would require personal care to meet a medical need. The daughter asserted that the petitioner has additional expenses for

her care as the assisted living facility does not provide these items for the petitioner and the only service the assisted living facility provides is to give the petitioner her prepackaged medication. Therefore based on evidence received, the \$650 personal care expense is expected and not a sudden unavoidable expenses. As set forth in rule, the request for additional community income allowance is denied for this expense.

17. The community spouse did have additional unexpected medical expenses. Due to the surgery, fractures, and hearing aid, the petitioner incurred additional doctor and medical expenses. The petitioner submitted bills supporting these expenses. These expenses demonstrate exceptional circumstances that could create significant financial duress.

18. The hearing officer concludes that the petitioner has 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. The rule sets forth that 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. Therefore, the hearing officer is granting the \$500 a month increase in the community spouse allowance for the period of January 2011 through July 2011.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is granted to the extent that the in the community spouse allowance is increased by \$500 each month for the period of January 2011 through July 2011.

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
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
Office: 850-488-1429
Fax: 850-487-0662
Email: Appeal_Hearings@dcf.state.fl.us

Copies Furnished To: [REDACTED], Petitioner
[REDACTED], Suncoast Region
[REDACTED], for the petitioner