



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of



DECISION

MOP/141915

PRELIMINARY RECITALS

Pursuant to a petition filed June 23, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Racine County Department of Human Services in regard to Medical Assistance, a hearing was held on July 24, 2012, at Racine, Wisconsin.

The issue for determination is whether petitioner is liable for a Medical assistance (MA) overpayment incurred in the name of his deceased wife.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Appearing with petitioner:

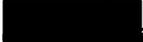
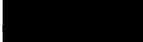
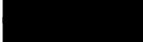
, petitioner's wife

Respondent:

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

By: Dean Landvatter, Fraud Coordinator
Jeff Demers, Fraud Investigator
Racine County Department of Human Services
1717 Taylor Ave
Racine, WI 53403-2497

Witnesses for respondent:

, petitioner's sister
, petitioner's sister
, petitioner's neighbor
, petitioner's former daughter-in-law

ADMINISTRATIVE LAW JUDGE:

Michael A. Greene
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Racine County.
2. Petitioner married [REDACTED] on December 12, 2006; the couple lived at [REDACTED] Apartment 4 in Racine.
3. On June 22, 2009, [REDACTED] applied for Medical Assistance stating that she was homeless or that she was living with her mother-in-law, [REDACTED] in an apartment on [REDACTED] [REDACTED] in Racine. The apartment is a two-bedroom apartment in a senior living complex; [REDACTED] was never added to the lease.
4. [REDACTED] received MA coverage until her death on November 21, 2010. During the period that she was covered by MA [REDACTED] occasionally returned to [REDACTED] for brief periods of time but never established a consistent residence there. For part of that period, petitioner declined to renew his relationship with [REDACTED] because he was involved with his neighbor's ex -wife.
5. On January 27, 2012, the agency received a fraud referral stating that petitioner and [REDACTED] had lived together through the entire course of their marriage, that petitioner's income had not been used to determine [REDACTED]'s eligibility for MA and that [REDACTED] and, by extension petitioner had been overpaid MA benefits. The agency investigated and on June 15, 2012 issued a Medicaid/BadgerCare Overpayment Notice against petitioner in the amount of \$8,973.21 covering the period from August 1, 2009 through November 30, 2010 (Exhibit 9).

DISCUSSION

The Department of Health Services is empowered to recover MA or BadgerCare benefit incorrectly paid to any person if the incorrect payment resulted from "A misstatement of fact by a person supplying information in an application for benefits," or by a person acting on the recipient's behalf, Wis. Stats. §49.497(1)(a). The key issue in this case is whether [REDACTED] was living with petitioner at the time that [REDACTED] received MA benefits. If so, petitioner was a member of [REDACTED]'s household and was liable for the overpayment. If not, [REDACTED] was, in all probability, entitled to the MA benefits that she received and no overpayment occurred. As this is an appeal of an overpayment action and not a request for a sanction for an intentional program disqualification, the determination of fact is based on a preponderance of the credible evidence, Wis. Admin. Code §HA 3.09(4). It is the agency's responsibility to establish its case in the first instance.

The evidence in this case produced considerably more heat than light. The agency submitted its investigative report (Exhibit 6) and bolstered it with live witnesses. Much of the evidence goes to prove where [REDACTED] was *not* living during the period when she received MA; it does not actually establish where she *was* living at this time. Two of the witnesses who appeared against petitioner are his sisters who are apparently embroiled in some other dispute with him; clearly the family relationship at the time of hearing was not a good one. A third witness was petitioner's former neighbor whose ex -wife is now married to petitioner. In addition, much of the evidence was hearsay. Hearsay is admissible in administrative hearings. Wis. Stat. § 227.45(1). However, as the Wisconsin Supreme Court has stated, "[P]roperly admitted evidence may not necessarily constitute substantial evidence." *Gehin v. Wisconsin Group Insurance Board*, 278 Wis. 2d 111, ¶ 52 (2005). In *Gehin*, the court held that uncorroborated medical records that were contradicted by the petitioner's sworn testimony was not substantial evidence to support a decision to deny the petitioner coverage. *Id.* at ¶¶ 80-82. In short, I am barred from deciding a contested matter of fact on the basis of uncorroborated hearsay.

Petitioner testified that after he and [REDACTED] married, she resumed drinking. He threw her out and refused to take her back, although there were some brief periods when she was in the house. He did not know

how many times [REDACTED] attempted to return or how long those periods were; he did state that she never returned on a permanent basis and never moved her belongings back into the home. According to the investigative report and the fraud complaint submitted by petitioner's sister, [REDACTED] [REDACTED] applied for MA benefits after petitioner threw her out, claiming to be homeless or to be living at her mother-in-law's apartment on [REDACTED]

The evidence of record clearly establishes that [REDACTED] did not live at [REDACTED]. Petitioner's sisters, [REDACTED] and [REDACTED] testified that the [REDACTED] apartment was two bedrooms one of which was furnished with a hide-a-bed. [REDACTED] in particular, spent considerable time there as petitioner's mother's health declined and would have known if anyone was frequently spending the night in the second bedroom. [REDACTED] also visited her mother at regular intervals; there were no indications that anyone else was living in the apartment or that anyone else had moved any belongings into the apartment. The fact that [REDACTED] was not living at [REDACTED] does not, however, establish that she was living with petitioner and there are several evidentiary issues that prevent me from making that finding.

First, [REDACTED] and [REDACTED] had a relatively distant relationship with their brother. They were not at his house frequently and would not have been in a position to observe whether [REDACTED] was regularly there or that her belongings were at his residence. [REDACTED] was at petitioner's home on only two or three occasions during his marriage to [REDACTED]. [REDACTED] testified that [REDACTED] was "there" when she visited, but the number of visits was small and her testimony is not inconsistent with petitioner's assertion that [REDACTED] kept trying to come back.

Second, the testimony from [REDACTED] was based on his observation of [REDACTED]'s comings and goings from his vantage point next door. But [REDACTED] interaction with petitioner (and with [REDACTED] for that matter) was very limited and he would not have known the circumstances behind petitioner's relationship with [REDACTED]; he would have only been able to observe, on an episodic basis, when [REDACTED] came to or left from [REDACTED]. Further, there was evidence of some personal and legal animus between [REDACTED] and petitioner, involving a lawsuit and petitioner's involvement with [REDACTED] wife that cannot help but color the testimony.

Third, [REDACTED] and [REDACTED] testified as to conversations held with their mother in which [REDACTED] purportedly admitted that [REDACTED] was using her address to obtain FoodShare benefits and MA coverage; [REDACTED] and [REDACTED] both expressed concern that [REDACTED] was committing welfare fraud and could go to jail and [REDACTED] apparently laughed off the idea. These conversations are hearsay, even more so since [REDACTED] is deceased. We have no way of knowing whether [REDACTED] knew where [REDACTED] was living during this period or whether [REDACTED] used [REDACTED]'s address because it was the most stable address she could find. There is nothing that establishes any knowledge on [REDACTED]'s behalf as to whether [REDACTED] was actually living with petitioner on [REDACTED]. As noted above, a contested matter of fact may not be resolved on the basis of uncorroborated hearsay and the current situation involves conversations and knowledge held between two people, both of whom are now deceased. It is not a reliable basis for a finding.

Finally, the agency investigator noted that [REDACTED] still used the [REDACTED] address on her driver's license, that [REDACTED] was still listed on the lease at [REDACTED] and that at least one of petitioner's vehicles was registered in [REDACTED]'s name at the time of the investigation in 2012. These facts represent circumstances that clearly existed at the time that [REDACTED] did reside at [REDACTED] once the relationship went south it would not have been surprising to find some of these listings continuing; it is much easier to register a vehicle in someone's name than to get their cooperation to un-register it later. There is simply not enough evidence on this record to allow for a finding that [REDACTED] continued to live on [REDACTED] or that she maintained her affairs in a way that would make people expect to find her there.

CONCLUSIONS OF LAW

The agency has not established by a preponderance of the evidence that [REDACTED] lived with petitioner at [REDACTED] during the period in which she received MA coverage. The agency has therefore not established that petitioner is liable for an overpayment of MA benefits between August 2009 and November 2010.

THEREFORE, it is

ORDERED

That the matter be remanded to the agency with instructions to rescind the notice of MA overissuance sent to petitioner with respect to MA benefits paid to [REDACTED] [REDACTED] between August 2009 and November 2010. This action shall be taken within ten (10) days of the date of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 19th day of September, 2012

Michael A. Greene
Administrative Law Judge
Division of Hearings and Appeals

c: Racine County Department of Human Services - email
Department of Health Services - email



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The preceding decision was sent to the following parties on September 19, 2012.

Racine County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability