



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MOP/142644

PRELIMINARY RECITALS

Pursuant to a petition filed July 25, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Brown County Human Services in regard to Medical Assistance, a hearing was held on October 10, 2012, at the Division of Hearings and Appeals (DHA) in Madison, Wisconsin. At the request of petitioner, a hearing set for August 28, 2012 was rescheduled. Attorney Hooker sent an October 26, 2012 letter to DHA confirming that Attorney Flanigan had stipulated to the accuracy of the “dollar amounts” for the Medical Assistance, FoodShare, and Child Cared Overpayments to be respectively **\$29,342.49 (MA)**, \$16,287 (FS), and \$51,693.92 (CC). At the request of the parties, the record was held open for the Department’s initial brief, the Petitioner’s Responsive brief and the Department’s Reply brief to be submitted to DHA and the other party. Both parties timely submitted both of their briefs to DHA which are received into the hearing record. At the end of the hearing, both parties stipulated that all Department and Petitioner Exhibits are received into the hearing record without any objection.

The issue for determination is whether the county agency was correctly seeking recovery of BadgerCare (BC) Plus overpayments to the petitioner during the total period of April 1, 2006 through May 31, 2012 in the total amount of \$29,342.49, due to petitioner’s failure to timely report to the county agency her accurate household composition ([REDACTED] [REDACTED]) and Mr. [REDACTED]’s earned income which resulted in household income above the BC income eligibility limits for that entire period.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Elizabeth Kremer Flanigan
345 South Jefferson Street
[REDACTED] 54301-4522

Respondent:

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

By: Attorney [REDACTED] M. Hooker, corporation counsel
 Brown County Human Services
 Economic Support-2nd Floor
 111 N. Jefferson St.
 [REDACTED] 54301

ADMINISTRATIVE LAW JUDGE:
 Gary M. Wolkstein
 Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Brown County who resides with her two children.
2. The petitioner has two children in common with her boyfriend, [REDACTED].
3. Prior to April, 2006, petitioner applied for Medical Assistance, FoodShare, and Child Care benefits as a single parent with her two children.
4. The petitioner received BadgerCare (BC) Plus benefits for the entire period of April, 2006 through May, 2012.
5. During the initial application process and during every biannual review between April, 2006 and March, 2012, petitioner maintained both orally and in writing that she lived alone with her two minor children and claimed that their father, [REDACTED] [REDACTED], resided with his mother, [REDACTED] [REDACTED]. See Exhibits 4.
6. During the overpayment period, [REDACTED] [REDACTED] paid no monthly rent to his mother and has no lease or any other contract with his mother as a rental agreement. Testimony of [REDACTED] [REDACTED].
7. During his hearing testimony, [REDACTED] [REDACTED] admitted that he drives without a license and admits that he know that such driving is illegal. He also admitted that he lied to Sargent Jossart both verbally and in his Statement. See Exhibit 2A.
8. The petitioner met [REDACTED] in 2002, she confirmed that from September, 2003 to September, 2004 she lived with Mr. [REDACTED] in Green Bay during which time their first child was born.
9. Petitioner alleged that due to "incompatibility" with [REDACTED] [REDACTED], he moved back in with his mother ([REDACTED] [REDACTED]) at [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. Despite the alleged incompatibility, petitioner and Mr. [REDACTED] had a second child together during 2005.
10. During 2008, Mr. [REDACTED] signed as co-applicant petitioner's application for a rental lease at [REDACTED] [REDACTED]. The landlord was Larry Wetzel.
11. During an April 22, 2012 interview, Mr. Wetzel told officer Jossart that petitioner lived with her boyfriend ([REDACTED] [REDACTED]) at [REDACTED] [REDACTED].
12. In his April 19, 2012 signed Statement to Brown County Sheriff's Department Sargent Jossart, [REDACTED] [REDACTED] stated the following in pertinent part: ". . . I drive a green Dodge Caravan which is registered to my fiancé [REDACTED] [REDACTED]. I work at [REDACTED] [REDACTED] out in Oneida and have been there 6 1/2 years. [REDACTED] and I have been together almost 9 years. **We've lived together the whole time we've been together and we have a daughter whose 8 years old and a son whose 4. . . .**" (Emphasis added) See Exhibit 1, page 9.

13. During about April, 2009, petitioner moved to [REDACTED] [REDACTED] in [REDACTED]. Mr. [REDACTED] again signed as co-applicant petitioner's application for a rental lease at that location. Her new landlord was Mr. [REDACTED].
14. Mr. [REDACTED] told Sargent Monica Jossart that "Ms. [REDACTED] requested to be the only one listed on the lease even though her boyfriend would be staying with her too." See Incident Report, p5.
15. Mr. [REDACTED] lived with the petitioner during the period she resided at [REDACTED] [REDACTED].
16. In October, 2010, petitioner purchased her own home at [REDACTED] with a \$3,000 loan from her father. Mr. [REDACTED] performed yard work, spent time with their children, and did off jobs around the house.
17. Mr. [REDACTED]'s Dodge minivan vehicle was registered at the petitioner's address.
18. In his April 19, 2012 statement to Officer Jossart, he confided that he earlier lied to the officer due to his criminal past and his fear of being wrongfully accused of theft.
19. Due to a 2012 county fraud hotline tip, the county agency began investigating that the father of petitioner's two children ([REDACTED] [REDACTED]) had been residing with petitioner for the past six years, and that his income had not been timely reported to the county agency.
20. On July 12, 2012, the county agency sent a written Notification of Medicaid Overissuance to petitioner informing that she was overissued a total of \$29,342.49 in BC benefits and HMO capitation fees from April 1, 2006 to May 31, 2012, due to petitioner's failure to report accurate household members (her boyfriend, [REDACTED] [REDACTED] in the home) and Mr. [REDACTED]'s earned income which resulted in household income above the BC income eligibility limits. See Exhibit 5. The overpayment worksheets and Exhibits explained in detail how the \$29,342.49 in BC benefits and HMO capitation fees from April 1, 2006 to May 31, 2012 had been calculated. See Exhibit 5.
21. [REDACTED] [REDACTED] has been employed by [REDACTED] [REDACTED], Inc. since March 1, 2006. He has worked 40 hours per week and his current pay rate is \$16 per hour.
22. State wage records confirmed [REDACTED] [REDACTED]'s earned income for [REDACTED] [REDACTED], Inc. during the entire BC overpayment period of April 1, 2006 through May 31, 2012.
23. [REDACTED] [REDACTED]'s earned income was not included in determining petitioner's BC eligibility for the entire BC overpayment period of April 1, 2006 through May 31, 2012 creating petitioner's BC overpayment.
24. The county agency paid BadgerCare Plus benefits for the petitioner and her children during the BC overpayment period when petitioner was financially ineligible for BC. See Exhibit 5.
25. The petitioner's household's income was above the BadgerCare income eligibility limit for a household of three or four during the entire April, 2006 through May 31, 2012 period.
26. The basis for the overpayment was that petitioner failed to timely report that [REDACTED] [REDACTED] resided in petitioner's home and his earned income which resulted in household income which exceeded 200% of the Federal Poverty level for the entire overpayment period.
27. The county agency sent a May 4, 2012 notice to the petitioner stating that her BC benefits would discontinue effective June 1, 2012, but BC Benchmark benefits would continue for her children with a monthly premium.

DISCUSSION

The Department of Health Services (Department) is legally required to seek recovery of incorrect BCP payments when a recipient engages in a misstatement or omission of fact on a BCP application, or fails to report income information, which in turn gives rise to a BCP overpayment:

49.497 Recovery of incorrect medical assistance payments. (1) (a) The department may recover any payment made incorrectly for benefits provided under this subchapter or s.49.665 if the incorrect payment results from any of the following:

1. A misstatement or omission of fact by a person supplying information in an application for benefits *under this subchapter* or s.49.665.

2. The failure of a Medical Assistance or Badger Care recipient or any other person responsible for giving information on the recipient's behalf to report the receipt of income or assets in an amount that would have affected the recipient's eligibility for benefits.

3. **The failure of a Medical Assistance or Badger Care recipient or any other person responsible for giving information** on the recipient's behalf to report any change in the recipient's financial or *nonfinancial situation* or eligibility characteristics that would have affected the recipient's eligibility for benefits or the recipient's cost-sharing requirements.

(b) The department's right of recovery is against any medical assistance recipient to whom or on whose behalf the incorrect payment was made. The extent of recovery is limited to the amount of the benefits incorrectly granted. ...

(Emphasis added)

Wis. Stat. §49.497(1). BCP is in the same subchapter as §49.497. See also, *BCP Eligibility Handbook(BCPEH)*, §28.1, online at <http://www.emhandbooks.wi.gov/bcplus/> :

28.1 OVERPAYMENTS.

An "overpayment" occurs when BC+ benefits are paid for someone who was not eligible for them or when BC+ premium calculations are incorrect. The amount of recovery may not exceed the amount of the BC+ benefits incorrectly provided. Some examples of how overpayments occur are:

1. Concealing or not reporting income.
2. **Failure to report a change in income.**
3. Providing misinformation at the time of application regarding any information that would affect eligibility.

(Emphasis added).

28.2 RECOVERABLE OVERPAYMENTS.

Initiate recovery for a BC+ overpayment, if the incorrect payment resulted from one of the following:

1. Applicant /Member Error

Applicant/Member error exists when an applicant, member or any other person responsible for giving information on the member's behalf unintentionally misstates (financial or non-financial) facts, which results in the member receiving a benefit that s/he is not entitled to or more benefits than s/he is entitled to. Failure to report non-financial facts that impact eligibility or cost share amounts is a recoverable overpayment.

...

2. Fraud. ...

BCPEH, §28.1 – 28.2.

The overpayment must be caused by the client's error. Overpayments caused by agency error are not recoverable.

For administrative hearings, the standard of proof is the preponderance of the evidence. Also, in a hearing concerning the propriety of an overpayment determination, the county agency has the burden of proof to establish that the action taken by the county was proper given the facts of the case. The petitioner must then rebut the county agency's case and establish facts sufficient to overcome the county agency's evidence of correct action.

During the October 10, 2012 hearing, the county agency clearly established with its three credible witnesses and its extensive exhibits that the petitioner received FoodShare, Medical Assistance, and Child Care overpayments. The county's third and last witness was Sargent Monica Jossart. Ms. Jossart is an experienced investigator whose testimony at the hearing was very convincing. She testified in significant detail about her investigation and interviews, and demonstrated a very good memory for even small details of her investigation. See Exhibit 1, 8 page, detailed investigation report. Sargent Jossart testified in detail regarding the many documents and statements which established that [REDACTED] [REDACTED] had been residing with the petitioner during the entire BC overpayment period of April 1, 2006 through May 31, 2012. See Exhibits 1 and 2.

In his statement to Sargent Jossart, [REDACTED] [REDACTED] admitted that he did reside with the petitioner during the entire overpayment period of April 1, 2006 through May 31, 2012. See Finding of Fact #12 and Exhibit 2A. He also admitted that he had read his statement and that he signed it. However, during the hearing, [REDACTED] attempted with almost complete lack of credibility to "explain" why he had signed the Exhibit 2A Statement. In fact, [REDACTED] admitted that he knew that lying to a police officer was a crime, but nevertheless contended that his signed statement (Ex 2A) was a lie because he was only attempting to establish an alibi for himself regarding a possible criminal charge.

During the hearing, the petitioner testified with many explanations and allegations for why she contended [REDACTED] did not live with her during the overpayment periods in question. Her testimony was not credible, and she was unable to provide any reliable evidence to refute the county's case. During the testimony of Mr. [REDACTED] and his mother, they both at first alleged that [REDACTED] had made some \$200 payments as rent payments. However, such testimony appeared entirely unconvincing as both admitted they had no receipts or documents whatsoever to confirm any rent payment by [REDACTED] to his mother. Moreover, [REDACTED]'s mother admitted her bias under cross examination that she would do or say what was necessary to protect [REDACTED] or the petitioner.

During the hearing and in her brief, Attorney Flanigan made a zealous effort to undermine the county's case, and to attempt to establish some basis for why the county agency was incorrectly seeking recovery of the overpayments. In her brief, Ms. Flanigan inaccurately asserted that the county agency has a "clear and convincing" burden of proof to establish its overpayments against the petitioner. However, she failed to provide any legal authority for such incorrect assertion. Attorney Hooker correctly responded that the accurate standard of proof in overpayment cases is preponderance of the evidence. Hagerstein V. Wisconsin Department of Health and Family Services, 292 Wis. 2d 697,709, 715 N.W.2d 645, 651 (Ct. App. 2006). It appears that Ms. Flanigan mistakenly confused the standard of proof for these overpayment case with the higher standard of proof required in intentional program violation (IPV) cases.

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases. It is used in civil cases where a higher standard is required because the outcome could result in serious social consequences for, or harsh effects on an individual. See 32A C.J.S., Evidence §1023. While the terminology for this intermediate standard of proof varies from state to state, it

is clear that it is what is required by the BC regulations. See Jackson v. State, 546 So.2d 745 (Fla. App. 2 Dist. 1989). However, the instant case is not an IPV case but an overpayment case. Therefore, the correct burden of proof is preponderance of the evidence.

Despite her attorney's efforts, the petitioner's case and witnesses failed to undermine the county's overpayment cases. During the October 10, 2012 hearing, petitioner was unable to present any reliable evidence to refute or undermine in any significant way the county's witnesses and substantial, reliable testimony or evidence that [REDACTED] [REDACTED] resided with the petitioner and their children during the entire BC overpayment period. Therefore, Mr. [REDACTED]'s earned income must be budgeted as income in determining petitioner's BC eligibility. The petitioner's corrected household's total income was above the BC gross income limit for a household of three for the entire BC overpayment period thereby creating the BC overpayment during the entire period of April 1, 2006 through May 31, 2012, pursuant to the *BCP Eligibility Handbook (BCPEH)*, §28.1.

The BadgerCare Eligibility Handbook provides that "the income and/or needs of all BC+ members will be used to determine financial eligibility for all member of the BC+ Test Group (Mr. [REDACTED] is the father of petitioner's children and thus a member of petitioner's BC group. All members in the BC+ Test Group will be counted when determining the BC+ test Group size **even when there is no health care request for a member**. The income of all counted adults and children in the BC+ Test group is used when determining the financial eligibility for all Test Group members . ." BadgerCare Eligibility Handbook, secs. 2.6, "Test Group Financial Rules" and 2.2, "BC+ Test Group." Accordingly, for the above reasons, I conclude that the county agency was correctly seeking recovery of BadgerCare (BC) Plus overpayments to the petitioner during the total period of April 1, 2006 through May 31, 2012 in the total amount of \$29,342.49, due to petitioner's failure to timely report to the county agency her accurate household composition ([REDACTED] [REDACTED]) and Mr. [REDACTED]'s earned income which resulted in household income above the BC income eligibility limits for that entire period.

CONCLUSIONS OF LAW

The county agency was correctly seeking recovery of BadgerCare (BC) Plus overpayments to the petitioner during the total period of April 1, 2006 through May 31, 2012 in the total amount of \$29,342.49, due to petitioner's failure to timely report to the county agency her accurate household composition ([REDACTED] [REDACTED]) and Mr. [REDACTED]'s earned income which resulted in household income above the BC income eligibility limits for that entire period.

THEREFORE, it is

ORDERED

The petition for review herein be and the same is hereby Dismissed.

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 served and 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, 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 Madison,
Wisconsin, this 17th day of April, 2013

\sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on April 17, 2013.

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