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

In the Matter of



DECISION

MOP/143805

PRELIMINARY RECITALS

Pursuant to a petition filed September 12, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Winnebago County Department of Human Services in regard to Medical Assistance, a hearing was scheduled for April 24, 2012, and the petitioner failed to appear. The appeal was dismissed, but the petitioner timely requested rehearing. The rehearing request was granted, and a hearing was held on January 03, 2013, at Fond Du Lac, Wisconsin. Post-hearing the record was held open to allow petitioner time to collect and submit additional documentation. That documentation was received. The instant hearing was held in conjunction with hearings regarding FOP/143804 and CCO/143803, as the overpayments were based upon the same allegations, documentation, and conclusions.

The issue for determination is whether the county agency correctly determined that the petitioner is liable for \$7,276.82 in Medical Assistance (MA) benefits, pursuant to the following claims:

- | | | | | | | | |
|----|-----------|--|------------|----|-----------|--|------------|
| a. | Claim No. | | \$ 135.00 | d. | Claim No. | | \$1,512.24 |
| b. | Claim No. | | \$1,894.82 | e. | Claim No. | | \$ 121.00 |
| c. | Claim No. | | \$3,208.76 | f. | Claim No. | | \$ 405.00 |

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: Julie Fink

Winnebago County Department of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903 -2187

ADMINISTRATIVE LAW JUDGE:
 Peter McCombs (telephonically)
 Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Fond Du Lac County.
2. During at least the months of December, 2009, through May, 2012, Petitioner 's minor children and their mother, SM, resided at [REDACTED]
3. Petitioner owns the home located at [REDACTED] and has been responsible for paying child support to SM.
4. On August 2, 2012, SM filed an appeal with the Division of Hearings & Appeals in DHA Case No. MOP/142832, contesting respondent's establishment of an overpayment of \$7,276.82 in Medical Assistance (MA) benefits, as identified by the following claims:

a.	Claim No. [REDACTED]	\$ 135.00	d.	Claim No. [REDACTED]	\$1,512.24
b.	Claim No. [REDACTED]	\$1,894.82	e.	Claim No. [REDACTED]	\$ 121.00
c.	Claim No. [REDACTED]	\$3,208.76	f.	Claim No. [REDACTED]	\$ 405.00
5. On August 28, 2012, DHA administrative law judge Sean Maloney held a hearing in DHA Case No. MOP/142832, concluding that the county agency had correctly established the FS overpayment, and that SM resided with petitioner. He issued a final Decision on September 19, 2012, dismissing the petitioner's appeal in DHA Case No. MOP/142832.
6. Petitioner participated in the August 28, 2012, hearing with Judge Maloney on behalf of SM, the petitioner in that matter.

DISCUSSION

I. Legal Standards

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. ...

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.wisconsin.gov/bcplus/bcplus.htm> :

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.

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. ...

An overpayment occurs if the change would have adversely affected eligibility, the benefit plan or the premium amount.

2. Fraud. ...

BCPEH, §28.1 – 28.2.

For administrative hearings, the standard of proof is '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.

II. Issue Preclusion

Respondent argues that this exact matter has already been addressed by the Division of Hearings and Appeals via the decision in SM's appeal, DHA Case No. MOP/142832. Issue preclusion (formerly known as collateral estoppel) requires that the issue of law or fact to be precluded must have been actually litigated and decided in a prior action. See, *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 550-551, 525 N.W.2d 723 (1995).

Courts may consider some or all of the following five criteria in determining whether issue preclusion applies:

(1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between two courts warrant relitigation of the issues; (4) have the burdens of persuasion shifted such that the parties seeking preclusion had a lower burden of persuasion in the first trial than in the second; and (5) are matters of public policy and individual circumstances involved that would render the application of [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

State v. Terry, 2000 WI App 250, ¶10, 239 Wis.2d 519, 620 N.W.2d 217.

The most important factor is whether the first hearing considered the same issue to which preclusion would be applied in the second hearing. There is no question that the overpayment issue applicable in the instant case is the same as that addressed by Judge Maloney in DHA Case No. MOP/142832, i.e., whether the petitioner received an overpayment in the amount of \$7,276.82 during the period of December, 2009, through May, 2012, due to failure to report that petitioner was residing with SM. The question of petitioner's residence was essential to the judgment in DHA Case No. MOP/142832. I conclude that the factual issue of the overpayment presented in the instant appeal is not distinct from the issue in the first appeal.

However, it is notable that petitioner was not a party to the initial hearing on this overpayment; only SM was identified by respondent as a liable party at that time. As such, petitioner would not have had standing to appeal the Decision of Judge Maloney. While the present set of circumstances would appear to give the liable parties, SM and petitioner, a 'second kick at the can,' the respondent seeks to hold both SM and petitioner *individually* liable. As such, I conclude that the petitioner is entitled to pursue this appeal, though the issue regarding petitioner's residence during the overpayment period was considered and decided in the prior proceedings. The petitioner's obligation in the instant hearing, then, is to demonstrate by probative evidence that he did not live with SM during the overpayment period, and further that said evidence was unavailable or not presented in the prior hearing.

III. Analysis of Petitioner's Evidence

The respondent, via an investigation conducted by O'Brien and Associates, concluded that petitioner was residing with SM and their children at the home located at [REDACTED]. Due to the failure by SM to report the alleged change to her household, it was determined that an overpayment had occurred. Following appeal to the Division of Hearings and Appeals by SM regarding the establishment of the overpayment, Administrative Law Judge Sean Maloney found that SM and petitioner did reside together during the time period of the alleged overpayment. See, Decision MOP/142832 (September 19, 2012). Petitioner's instant appeal was timely filed, though it was filed subsequent to the decision in SM's case.

Petitioner submitted approximately fifty pages of documents post-hearing, which were designated 'Exhibit 5.' I have reviewed the hearing testimony, as well as all documents submitted at hearing and post-hearing. Clearly, the county agency had reason to suspect that the petitioner was residing with SM and their children at the [REDACTED] home given that he identified the [REDACTED] address as his own, he owned the home at that location, he kept property at the home, and he was at that home on a frequent basis. Indeed, I find that through the evidence it presented, including the prior decision of Judge Maloney and the May 18, 2012, report from O'Brien & Associates, the county agency substantially met its initial burden of proof. However, I must also determine if the petitioner successfully rebutted the agency's case.

In testimony at hearing, petitioner conceded that he lived with petitioner for the month of December, 2009. Since that time, he stated that he sometimes spent four or five days per week at the house; at other times, he'd spend one day per week. He cuts the grass there, takes care of the kids, and attends to his dogs, which are maintained at the [REDACTED] property.

Petitioner submitted bank records dated October 2009, through November, 2012. See, Exhibit 5. Every statement references petitioner's address at [REDACTED]. While not conclusive evidence of a residence, it does corroborate petitioner's testimony to a certain extent. However, I find it notable that the bank records' addressing has never changed. This directly counters petitioner's testimony that he has, at times, lived with SM at the [REDACTED] home, which he owns, and further counters testimony that petitioner has lived at other locations. Additionally, petitioner submitted written statements from two friends, both of whom indicated that petitioner resided with them for months at a time. Exhibit 5, pp. 51 & 52. While the friends' statements credibility cannot be tested, I find it unreasonable that petitioner would not have ever changed his mailing address on file with his bank when he obviously was not residing at the [REDACTED] address.

Similarly inconclusive, Wisconsin Circuit Court Access (CCAP) documents submitted by respondent and petitioner referencing petitioner's address are contradictory, and indicate not only petitioner's address at [REDACTED], but also the [REDACTED] address. The [REDACTED] address is noted on a Paternity Acknowledgement matter.¹ Under the heading 'Address Updated On,' is listed "April 14, 2009." A second Paternity Acknowledgement matter² notes the [REDACTED] address as well, and indicates the 'address update' date as March 12, 2012. Notably, CCAP also indicates petitioner residing at [REDACTED] in 2011.³ The address provided by a defendant in a court matter does not constitute conclusive proof of residency, though it can provide corroboration of a claim. Unfortunately, the court records corroborate both the claims of the petitioner as well as those of the respondent.

I note that petitioner submitted a Dodge County Circuit Court Order dated February 10, 2012. The Order included in its findings a determination that SM had lived in Winnebago County for four years, and a determination that petitioner resides in Fond du Lac County. Exhibit 5, p. 8. No basis for the finding is included, and there is no indication as to whether or not petitioner's residence was even an issue in said Dodge County case.

Petitioner testified that SM was sentenced to probation for a period of 18 months in October of 2010, and was not permitted any contact with petitioner as a specific term of that probation. Petitioner indicated that the probation stemmed from a domestic incident, and submitted Wisconsin Circuit Court Access case information in corroboration of his testimony. Exhibit 5, p. 9. Unfortunately, the information submitted does not list the terms of SM's probation, nor the length of probation served, nor whether she successfully completed it. SM did not testify to provide corroboration or answer questions regarding the terms and/or conditions of her probation. After review of the vague documentation and testimony, I cannot find sufficient information to substantively rebut the respondent's findings regarding petitioner's residence.

Based on all of the above, I find that the petitioner has failed to rebut the county agency's establishment of an overpayment based upon its reasonable determination that petitioner resided with SM during the overpayment period. I fully recognize that the petitioner's complicated relationship with SM presents a scenario that makes it extremely difficult to establish petitioner's precise living situation. Despite this difficulty, however, the petitioner has a responsibility to provide accurate and timely information to the respondent regarding matters that may impact eligibility. That was not accomplished here. Based on the hearing record, the respondent has established by a preponderance of the evidence that petitioner resided at the [REDACTED] home from December, 2009, through May, 2012.

¹ See, Exhibit 5, p. 3.

² See, Exhibit 5, p. 5.

³ See, Exhibit 5, p. 9.

CONCLUSION OF LAW

Respondent has established petitioner’s liability for an overpay ment of \$7,276.82 in Medical Assistance (MA) benefits, identified as:

a.	Claim No.	██████████	\$ 135.00	d.	Claim No.	██████████	\$1,512.24
b.	Claim No.	██████████	\$1,894.82	e.	Claim No.	██████████	\$ 121.00
c.	Claim No.	██████████	\$3,208.76	f.	Claim No.	██████████	\$ 405.00

THEREFORE, it is ORDERED

That the petition for review be, and the same herby is, 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 4th day of February, 2013

\sPeter McCombs
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on February 4, 2013.

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