



FH
[REDACTED]

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

In the Matter of

[REDACTED] and [REDACTED]
[REDACTED]

DECISION

MOP/145505 and MOP/145436

PRELIMINARY RECITALS

Pursuant to petitions filed November 21, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review decisions by the Waushara County Human Services in regard to Medical Assistance, a telephonic hearing was held on January 14, 2013, at Wautoma, Wisconsin. At the request of the parties, the hearings for [REDACTED] and [REDACTED] were consolidated into this one hearing with agreement that only one decision would be issued for the two appeals listed above.

The issues for determination are: a) whether issue preclusion generally applies to the above appeals as DHA already issued a prior decision in Case No. MOP/142580 which addressed the petitioner's MA overpayment from the period of August, 2011 through June, 2012; and b) whether the county agency is correctly pursuing joint and several liability against [REDACTED] for the petitioner's BC overpayments.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

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

By: Libby Mertens, ESS
Waushara County Human Services
213 W. Park Street
PO Box 1230
Wautoma, WI 54982-1230

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waushara County.
2. BCP is a variant of Medical Assistance in Wisconsin for low-income families with children. The petitioner had an ongoing BCP case from at least May 2011 through June 2012. In May 2011, she gave birth to a child, and stopped working.
3. The father of the child, [REDACTED] lived with petitioner during all periods pertinent to the MA overpayment issues. [REDACTED] had employment from at least the date of the child's birth through June 2012, and was earning income exceeding 200% FPL for three persons from July 2011 through June 2012.
4. The petitioner did not report having household income exceeding 200% FPL from at least July 2012 into June 2012.
5. The petitioner ([REDACTED] did not request BCP) was not eligible for BCP from August 2011 through June, 2012.
6. On July 3, 2012, the county agency issued a *Medicaid Overpayment Notice* to the petitioner, stating that she had been overpaid \$8,971.64 for the August 1, 2011 through June 30, 2012, period, due to petitioner's failure to report increased income which would have affected her BC eligibility. The petitioner received the July 3, 2012 MA overpayment. The BCP program paid fees and other charges totaling \$8,971.64 on petitioner's behalf during these months.
7. Petitioner appealed to the Division of Hearings and Appeals (DHA) on July 24, 2012 that July 3, 2012 MA overpayment in petitioner's prior MA appeal in MOP/142580.
8. In her October 9, 2012 decision in MOP/142580, ALJ Gagnon concluded that: a) the petitioner failed to timely report her increased household income in July, 2011 resulting in the creation of a BCP overpayment beginning in August, 2012; and b) the county agency correctly determined that the petitioner was overpaid \$8,971.64 in BCP fees during the August 2011 through June, 2012 period.
9. The petitioner did not file any timely rehearing or circuit court appeal regarding the October 9, 2012 decision for Case No. MOP/142580.
10. The petitioner and [REDACTED] filed again appeals in Case Nos. MOP/145505 and MOP/145436 on November 21, 2012 regarding the same MA overpayment issues addressed by Judge Gagnon in her decision in MOP/142580, but also questioned whether the county agency is correctly pursuing joint and several liability against [REDACTED] for the petitioner's BC overpayments. Those appeals were incorrectly determined to be "new" appeals, when actually the November 21, 2012 appeal issues had already been addressed in the October 9, 2012 decision except [REDACTED] joint and several liability issue.

DISCUSSION

JOINT and SEVERAL LIABILITY

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.wisconsin.gov/bcplus/bcplus.htm>. The BCP Handbook further provides: "Except for minors, collect overpayments **from the BC Plus member**, even if the member has authorized a representative to complete the application or review for him/her." (Emphasis added). §28.4.4, "Determining Liable Individual."

In the instant case, [REDACTED] was not a MA recipient during the MA overpayment period at issue in this appeal. See Finding of Fact #5 above. The county agency did not provide any legal or policy authority which established that [REDACTED] as a non-MA recipient was jointly and severally liable for MA overpayment which the petitioner received as a BC+ recipient. As a result, the MA overpayment against petitioner, [REDACTED] is upheld, but the MA recovery against [REDACTED] is improper and must cease. He has no liability for petitioner's MA overpayment.

ISSUE PRECLUSION

Claim preclusion (formerly known as *res judicata*) requires a final judgment on the merits in a prior proceeding. **Issue preclusion** (formerly known as *collateral estoppel*) requires that the issue of law or fact to be precluded to have been actually litigated and decided in a prior action. See *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 550-551, and 525 N.W.2d 723 (1995). The petitioner alleged unconvincingly that the county agency sent a November 2, 2012 notice to petitioner which created a new appeal right for [REDACTED]. However, that notice was a November 2, 2012 Repayment Agreement NOT a new MA overpayment notice to the petitioner. That November 2, 2012 notice did not create a new appeal right. In the petitioner's BC overpayment cases, issue preclusion clearly applies.

The petitioner had her "day in court" on the merits of petitioner's BC overpayment cases, as explained in Findings of Fact #6 - #9 above. The legal doctrine of "issue preclusion" precludes the petitioner's attempt for a re-litigation in regard to pursuing the two overpayment cases against the petitioner. Accordingly, I confirm that ALJ Gagnon's decision in petitioner's previous case will be upheld as petitioner failed to file any timely rehearing request or circuit court appeal of that decision. As such, the October 9, 2012 decision was a final decision and cannot be re-litigated by petitioner attempting filing a new appeal on the same overpayment issues.

CONCLUSIONS OF LAW

1. The petitioner failed to timely report her increased household income in July, 2011, resulting in the creation of a BCP overpayment beginning in August 2011.
2. The county agency correctly determined that the petitioner was overpaid \$8,971.64 in BCP fees during the August 2011 through June, 2012, period.
3. The county agency is incorrectly pursuing joint and several liability against [REDACTED] for the petitioner's BC overpayments.

THEREFORE, it is

ORDERED

The matter is remanded to the county agency with instructions to cease any recovery action against [REDACTED] (and restore any funds already recovered from [REDACTED] regarding petitioner's MA overpayment from the period of August, 2011 through June, 2012 because he was not jointly and severally liable, within 10 days of the date of this Decision. In all other respects, the petitions for review are 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 11th day of February, 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 February 11, 2013.

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