



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

MOP/145772

PRELIMINARY RECITALS

Pursuant to a petition filed December 07, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services in regard to Medical Assistance, a hearing was scheduled for January 3, 2013. Following the granting of petitioner's request to reschedule, a hearing was held on January 17, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether the Department erred in finding that petitioner is liable for an overissuance of Medical Assistance (MA) benefits due to her failure to report that her husband, JS, was living with her.

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: Katherine May
Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Peter McCombs (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County. Petitioner resides with her minor children, and holds title to her home in her name alone.

2. The agency seeks to recover \$5,805.05 in MA benefits provided to the petitioner because it contends that she was residing with her husband during the overpayment period. The alleged overpayment consists of three claims:
 - a. [REDACTED] April, 2010 – January, 2011 \$ 574.04
 - b. [REDACTED] October, 2010 – October, 2010 \$ 165.36
 - c. [REDACTED] January, 2011 – February, 2011 \$1,295.36
 - d. [REDACTED] February, 2011 – January 2012 \$3,770.02
3. Petitioner did not reside with her husband during the alleged overpayment periods identified at Finding of Fact 2, above.
4. Respondent notified petitioner of the alleged overpayment via written notice dated December 4, 2012. Exhibit 4. Petitioner filed a timely request for hearing on December 7, 2012. Exhibit 1.

DISCUSSION

The Department of Health Services (Department) is legally required to seek recovery of incorrect MA payments when a recipient engages in a misstatement or omission of fact on a MA application, or fails to report income information, which in turn gives rise to a MA 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). See also, *BadgerCare Plus Eligibility Handbook (BCPEH)*, §28.1, online at <http://www.emhandbooks.wisconsin.gov/bcplus/bcplus.htm>.

Department policy then instructs the agency, in a "no eligibility" case, to base the overpayment determination on the actual MA charges paid, plus any premiums that would have been owed. *BCPEH*, §28.1 – 28.2. MA statutes require the recipient to report changes that might affect eligibility. Wis. Stat. §49.471(6)(h). See in accord, *BCPEH*, §27.2. The combination of JS's income plus the petitioner's income, would have caused her income to exceed program limits and impacted her eligibility. See, Wis. Stat. §49.471(4)(a).

Petitioner contests that her husband lived with her during any of the overpayment periods, though she concedes that he has continued to use her address for mailing purposes during the last six years. She described a very tumultuous relationship, and testified that they have separated and reunited several times since moving to the Milwaukee area in 2006. She further indicated that she had not previously reported the times that her husband returned to the home because she never received benefits during the times that he resided in her home.

At hearing, the respondent presented an investigative report prepared by O'Brien and Associates, a private investigation company. The primary non-documentary evidence therein consists of a statement from a neighbor indicating that the petitioner and her children lived with JS at the [REDACTED] for "about 5 or 6 years now." Exhibit 4. No one from O'Brien and Associates appeared at hearing to testify regarding the report, and the respondent conceded that it would not rely on the investigative report in proving its case.

Instead, the respondent testified that it determined that petitioner and JS were living together based upon documents from the Wisconsin Circuit Court Access (CCAP) website, Wisconsin Voter Public Access website, White Pages website, Wisconsin Department of Transportation website, and the City of Milwaukee Municipal Court website. Each of these sites indicates that JS was using petitioner's [REDACTED]. Unfortunately, only one website includes date information that corresponds with an overpayment period identified at Finding of Fact 2, above. The CCAP website printouts provided by respondent show JS using the [REDACTED] on October 29, 2010, and December 4, 2010.¹ This would at least coincide with the overpayment claims identified at Findings of Fact 2(a) and 2(b), though it only addresses a few months out of a nine month period. The remaining documents either contain no address, or reference dates falling outside of the alleged overpayment periods. Arguably, these documents actually corroborate petitioner's testimony that she did not seek benefits during the periods that she and JS were reconciled and living together.

In a Fair 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. Having opted to not rely upon the investigative report prepared by O'Brien and Associates,² and rely solely on documentation gleaned from the Internet, I conclude that the respondent has failed to meet its burden in establishing the overpayments identified at Findings of Fact 2(a) and 2(c).

While it has only barely established a basis for the claims identified at Findings of Fact 2(a) and 2(b), I am persuaded that petitioner has successfully rebutted these claims. Petitioner testified credibly that her husband and some of his family members continue to use her address for their mail, despite her objections. While corroboration of petitioner's statement would be helpful, I do not find it unreasonable for JS to have continued using petitioner's mailing address during the past several years when he has been living in multiple locations, including, at times, petitioner's home. Petitioner's fluid living situation may have raised the suspicions of the respondent, but, based upon the evidence before me I cannot find that the respondent has established that JS and petitioner lived together during the overpayment periods claimed by respondent.

¹ The dates that I note are taken from the "Address Updated On" field. See, Exhibit 4.

² Where hearsay evidence is to form the sole basis for a finding of fact, the Wisconsin Supreme Court has held that uncorroborated hearsay does not constitute substantial evidence upon which to base such a finding. *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶¶ 53-56 & 58, 278 Wis. 2d 111, 692 N.W.2d 572; See also, *Williams v. Housing Auth. of City of Milwaukee*, 2010 WI App 14, ¶¶ 14 & 19, 323 Wis. 2d 179, 187 & 189, 779 N.W.2d 185 ("[u]ncorroborated hearsay evidence, even if admissible, does not by itself constitute substantial evidence."). In these circumstances the Wisconsin Supreme Court has held that hearsay must be corroborated by nonhearsay evidence. *Gehin*, ¶¶ 82 & 92.

CONCLUSIONS OF LAW

The county agency has not proven by the preponderance of the credible admissible evidence that the petitioner received an overissuance of MA benefits, because it has not established that she lived with JS during the alleged overpayment periods.

THEREFORE, it is

ORDERED

That this matter is remanded to the county agency with instructions that, within 10 days of the date of this decision, it rescind any liability of the petitioner pertaining to the Medical Assistance Overissuance claims identified as follows:

a.	██████████	April, 2010 – January, 2011	\$ 574.04
b.	██████████	October, 2010 – October, 2010	\$ 165.36
c.	██████████	January, 2011 – February, 2011	\$1,295.36
d.	██████████	February, 2011 – January 2012	\$3,770.02

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 18th day of February, 2013

\sPeter McCombs
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 18, 2013.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability