



FH

[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MOP/147744

PRELIMINARY RECITALS

Pursuant to a petition filed February 28, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waupaca County Department of Social Services in regard to Medical Assistance, a hearing was held on April 09, 2013, at Waupaca, Wisconsin.

The issue for determination is whether the Department met its burden of establishing a medical assistance overpayment in the amount of \$48,457.80 for the period from February 2009 to October 2010, and from March 2011 to December 2012 in the following claim numbers: [REDACTED]

[REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED].

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Judy Deschler

Waupaca County Department of Social Services
811 Harding Street
Waupaca, WI 54981-2087

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waupaca County.

2. Petitioner received medical assistance benefits during the periods from February 2009 to October 2010, and from March 2011 to December 2012.
3. O'Brien and Associates conducted an investigation. The investigator spoke with petitioner, petitioner's mother, petitioner's two sons, and their father.
4. On January 26, 2013, the Department issued a Medicaid/Badgercare Overpayment Notice indicating an overpayment in the amount of \$48,457.80 for the period from February 2009 to October 2010, and from March 2011 to December 2012.
5. Petitioner filed a timely appeal.

DISCUSSION

MA overpayment recovery is authorized by Wis. Stat., §49.497(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.

See also the department's BC+ Handbook, Appendix 28.2. The overpayment must be caused by the client's error. Overpayments caused by agency error are not recoverable.

To be eligible for BadgerCare, a person must be under age 19, a custodial parent living with a child, or the spouse of a custodial parent. Wis. Adm. Code, §DHS 103.03(1)(f)1. The BC Plus Handbook, Appendix 2.2.1.2, provides as follows:

When the natural or adoptive parents of a child do not live together, and have joint placement arrangements for the child (through a mutually agreed upon arrangement or court order), only one parent can be determined eligible at a time unless there is reasonably equivalent placement. Reasonably equivalent placement means that the child is residing with each parent at least 40% of the time during a month.

If the child is not residing with both parents at least 40% of the time, only the parent with the greater percentage of the placement time may apply on behalf of the child and/or for him or herself as the caretaker relative of that child.

The county determined that during the periods at issue, petitioner received benefits for herself and her son, though he was not living with her 40% of the time she was overpaid BC+ because there was no eligibility.

The overpayment allegation is founded upon an investigation conducted by Greg Thiele of O'Brien & Associates, a contracted private investigation firm. Mr. Thiele spoke with the child, his brother, and his father as well as petitioner and her mother. The report indicates that each of them stated that the boy lived with his grandmother since he was 14 years old. The overpayment period would have been included within the time period. The boy, brother and father did not testify. The petitioner and her mother did testify.

The written report on which the Department relies is hearsay. I am unable to assess the credibility or biases of those who the investigator claims he spoke with aside from petitioner and her mother as the others did appear. I am also unable to provide clarity to any ambiguous statements in the report that are more accurately the investigator's words paraphrasing what he was purportedly told. The petitioner's sons and their father did not appear and could not be cross-examined. Does each have reason to lie? Did the investigator get it wrong or miss some important details? I have no idea and could not explore that.

In circumstances such as these, when the reliability and probative force of hearsay evidence is suspect and that 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 a finding of fact. *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. I cannot make a finding of fact that the son did not live with petitioner based solely on the hearsay investigative report. I must have other nonhearsay corroboration in order to make such a finding of fact.

But, petitioner and her mother both disputed the conclusions of the agency and the statements in the investigative report indicating that the son did not live with petitioner. The petitioner's mother testified that the boys and their father were correct that the son lived with her and her husband; but, she also explained that the petitioner lived with them for the vast majority of that time as well. The petitioner's mother explained that any periods during which the petitioner was away were only temporary absences. The mother's testimony appeared to take the agency by surprise. But, I note that it was not entirely inconsistent with the statements recorded by the O'Brien investigator. The report indicates that the mother told the investigator that the child lived with her since he was 14 and that petitioner "would move in and out of the home." The child told the investigator that petitioner "lived on and off with them" for all those years.

I do question the veracity of both the petitioner and the mother. As the hearing wore on, each offered more and more detail that seemed contradictory to what had been stated earlier in the hearing. For example, the mother first stated that petitioner lived with her for nearly all of the time from 2008 to 2012. Fifteen minutes later, however, the mother admitted that petitioner had her own apartment for six months of this time. But, the period of that residence was not established by the Department or by petitioner. But it does give rise to much doubt on my part. Similarly, petitioner and her mother ambiguously discussed petitioner living with friends and caring for an elderly man. But, no dates could be established with any specificity.

A finding of fact must be based on substantial evidence. Even if I do not believe a word of the petitioner's testimony, or her mother's, I cannot make a finding that her son did not live with her during the pertinent periods based only on that. The agency must offer me something. And that something cannot be hearsay alone as the investigative report is. That is all I have in this case that could lead me to such a finding. For that reason, the agency has not met its burden.

Should the Department develop new or additional evidence establishing a MA overpayment, it may pursue that recovery in a new and separate action.

CONCLUSIONS OF LAW

The Department did not establish that petitioner was overpaid MA because it did not establish that the son did not live with petitioner during the pertinent periods.

THEREFORE, it is

ORDERED

That this matter is remanded to the Department and its county agent with instructions to reverse the finding of a medical assistance overpayment in the amount of \$48,457.80 for the period from February 2009 to October 2010, and from March 2011 to December 2012 in the following claim numbers: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED]. This Department shall cease any related collection efforts. These actions shall be completed within 10 days.

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 April, 2013

\sJohn P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

David H. Schwarz
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on April 18, 2013.

Waupaca County Department of Social Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability