



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

BCS/151271

PRELIMINARY RECITALS

Pursuant to a petition filed August 12, 2013, under Wis. Stat. § 49.45(5)(a), to review a decision by the Milwaukee Enrollment Services in regard to Medical Assistance, a hearing was held on September 04, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether petitioner’s request for hearing is timely.

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: Belinda Bridges
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.
2. On April 5, 2013 the agency mailed to petitioner a notice indicating that she would need to pay a premium for her Badgercare Plus benefits. Exhibit 4. The notice was issued in Spanish, and was mailed to petitioner at [REDACTED]. Petitioner continues to reside at this address.

3. The April 5, 2013, notice indicated that if petitioner wished to appeal the premium requirement, she needed to do so on or before June 17, 2013.
4. On May 17, 2013, the agency mailed a letter to petitioner indicating that the BadgerCare Plus premium for May, 2013, had not been paid and that if the premium is not paid by the end of next month she would not be able to enroll in BadgerCare Plus for the next twelve months. This notice was issued in Spanish, and was mailed to petitioner at [REDACTED].
5. The May 17, 2013, notice indicated that if petitioner wished to appeal the negative action identified therein, she needed to do so on or before July 17, 2013.
6. On August 12, 2013, petitioner filed a Request for Fair Hearing with the Division of Hearings and Appeals.

DISCUSSION

Petitioner asserts that she was adversely affected because she was placed in restrictive reenrollment due to her failure to pay her BadgerCare premium. However, she argues that this was not her fault, since she never received notice of the premium. The respondent counters that notices were sent to petitioner's correct address, and that no mail was returned as undeliverable.

Petitioner testified that she did not receive either notice. She testified that at the time that the notices were sent, she was having mail delivery issues. She stated that her building has 6 apartments, and that the post office receptacle in her office had been damaged. The failure to receive the mailed notices was further complicated by an emergency that resulted in her being away from her apartment for a period of time in late June/early July. Petitioner testified that while she did not receive the April or May notices, she did receive correspondence from the Division of Hearings and Appeals regarding the instant matter.

There is no question that both notices were sent to the petitioner's correct address. Where the evidence presented demonstrates that a notice was correctly mailed, this fact creates a rebuttable presumption of delivery that a petitioner must overcome with evidence demonstrating that the notice was not actually received.

This interpretation is confirmed by Wisconsin case law.

It is well established that the mailing of a letter creates a presumption that the letter was delivered and received. See, Nack v. State, 189 Wis. 633, 636, 208 N.W. 487(1926), (citing Wigmore, *Evidence*) 2d. ed.) § 2153; 1 Wigmore, *Evidence* (2nd ed.) § 95) Mullen v. Braatz, 179 Wis. 2d 749, 753, 508 N.W.2d 446(Ct.App.1993); Solberg v. Sec. Of Dept of Health & Human Services, 583 F.Supp. 1095, 1097 (E.D.Wis.1984); Hagner v. United States, 285 U.S. 427, 430, 52. S.Ct. 417, 418(1932).

***(Portions of discussion not relevant here omitted).

This evidence raises a rebuttable presumption which merely shifts to the challenging party the burden of presenting credible evidence of non-receipt. United States v. Freeman, 402 F.Supp. 1080, 1082(E.D.Wis.1975). Such a presumption may not, however, be given conclusive effect without violating the due process clause. United States v. Bowen, 414 F.2nd 1268, 1273(3d.Cir.1969); Mullen v. Braatz, 179 Wis. 2d at 453. If the defendant denies receipt of the mailing, the presumption is spent and a question of fact is raised. (Examiner note: Citations omitted here.) The issue is then one of credibility for the factfinder. The factfinder may believe the denial of receipt, or the factfinder may disbelieve the denial of receipt.

See State ex. Rel. Flores v. State, 183 Wis.2d 587, at 612-3 ((1994)). The assertion that both notices were not received particularly when petitioner received other notices is not sufficient to overcome the presumption of receipt of a mailed document. Based on the record before me, I conclude that the respondent has established that petitioner received the April and May, 2013, notices. The deadlines for filing an appeal for each negative action were June 17, 2013, and July 17, 2013, respectively. The appeal was filed on August 12, 2013.

A hearing officer can only hear cases on the merits if there is jurisdiction to do so. There is no jurisdiction if a hearing request is untimely. An appeal of a negative action by a county agency concerning MA must be filed within **45** days of the date of the action. Wisconsin Stat. § 49.45(5); Income Maintenance Manual § 3.3.1. A negative action can be the denial of an application or the reduction or termination of an ongoing case. The petitioner's appeal was filed after the 45 day deadlines. Thus, it was untimely, and no jurisdiction exists for considering the merits of the case.

CONCLUSIONS OF LAW

Petitioner's appeal is untimely, and no jurisdiction exists for consideration the merits of the case.

THEREFORE, it is

ORDERED

That the petition 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 1st day of November, 2013

\sPeter McCombs
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
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 November 1, 2013.

Milwaukee Enrollment Services
Division of Health Care Access and Accountability