FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MOP/151900

PRELIMINARY RECITALS

Pursuant to a petition filed September 4, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Wood County Human Services - WI Rapids in regard to Medical Assistance, a hearing was held on October 24, 2013, at Ashland, Wisconsin.

The issue for determination is whether the petitioner must repay an alleged overpayment of BadgerCare Plus.

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: Beulah Garcia
Wood County Human Services - WI Rapids
320 West Grand Avenue
PO Box 8095
Wisconsin Rapids, WI 54495-8095

ADMINISTRATIVE LAW JUDGE:
Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [redacted]) is a resident of Ashland County.

2. The county agency notified the petitioner on August 24, 2013, that it would seek to recover $16,662 in BadgerCare Plus benefits provided to him from January 1 through August 31, 2013, because his daughter allegedly did not live with him at least 40% of the time.

3. The petitioner's daughter lived primarily with her mother, but there is insufficient evidence to determine whether she lived with the petitioner less than 40% of the time.

DISCUSSION

The department may recover any overpayment of medical assistance that occurs because 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 [BadgerCare].
> 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.

Wis. Stat. § 49.497(1).

The petitioner has received BadgerCare Plus, which provides medical assistance coverage to children under 19 and their parents or caretakers, since at least January 1, 2013. Wis. Stat. § 49.471; *BadgerCare Plus Eligibility Handbook*, § 2.1. A parent must reside with a child under 19 to be eligible. Wis. Stat. § 49.471(4)(a)4.a. *BadgerCare Plus Handbook,* § 2.2. The following policy guides eligibility when parents have joint custody:

> 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.

BadgerCare Plus Eligibility Handbook, § 2.2.1.2.

The county agency contends that the petitioner should have been ineligible for BadgerCare Plus from January 1 through August 31, 2013, because his daughter did not live with him at least 40% of the time. It seeks to recover the $16,662 in benefits he received during this period. He does not challenge that he received this amount of benefits, so the only question is whether the agency has proved by the preponderance of the credible evidence that his child has not lived with him a sufficient amount of time.

The agency relies on a report by investigator Ken Kelly of O'Brien & Associates and the testimony of the mother of the petitioner's child. Her testimony, which the petitioner did not dispute, indicated that he had the child on Tuesday and Thursday nights, some weekends, and when she worked out of town. While this establishes that she had the child more than he did, it does not establish that she had him any particular amount of time. She appraises real estate for the federal government, which often requires travel, so it is plausible that the petitioner correctly asserts that he had the child at least 40% of the time. The Department could have reconstructed when she was out of town with her work calendar, but it did not. Her testimony alone does not establish that the petitioner received an overpayment of medical assistance because he had his child less than 40% of time.

The agency's only other evidence consists of Mr. Kelly's report. He interviewed four neighbors who claimed to be familiar with the amount of time the child spends with one or the other parent. Because none of them testified and was available for questioning, the evidence is hearsay; the report containing the statements does not meet the regularly kept records exception to the hearsay rule because it was made in anticipation of litigation. Wis. Stat. § 908.03(6). The rules of evidence generally do not apply to administrative hearings. Wis. Stat. § 227.45. Nevertheless, administrative decisions cannot be based solely upon uncorroborated hearsay. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987). Our state supreme court reinforced this principle in *Gehin v. Wisconsin Group Insurance Board*. 2005 WI 16, a decision that overturned a finding based upon untestified to medical records that were contradicted by petitioner's sworn testimony. The court's rationale is that "the purpose of allowing the admission of hearsay evidence is to free administrative agencies from technical evidentiary rules, but at the same time this flexibility does not go so far as to justify administrative findings that are not based on evidence having rational probative force." *Id*. at ¶54.

The issue is whether the rational probative force of the neighbors' statements sufficiently corroborates the testimony used to establish that the petitioner had the child less than 40% of the time. One could argue that these statements cannot corroborate this fact because the evidence corroborated—the mother's statement—does not establish it. Setting aside that objection, the neighbors' statements have little probative value. The persons giving the statements are listed only by their first names, and the reports do not include any signed statements, but rather only summaries. Mr. Kelly seemed to consider any attack on these statements an attack on his credibility. He has appeared in front of me before. I do not question his honesty. But the veracity of these statements does not depend upon his credibility but rather on the neighbors', and their credibility is impossible to determine. Without their presence, they could not be questioned about when they were home to see the petitioner, what their view of his property was, or what their relations with him were.

Moreover, even if the statements are accepted at face value, they are too vague to establish that the petitioner had the child less than 40% of the time. None of the statements indicate with any specificity how often the petitioner's daughter stayed with him. One says she lives with her mother "on a regular basis, but she does visit her father…" Another states that she comes to the petitioner's "home to visit on occasion, but not very often" and that she "lives the majority of the time" with her mother. For these statements to have any value, the persons making them must be available for additional questioning.

As noted earlier, the agency has the burden of establishing that an overpayment occurred. With more thorough questioning of the potential witnesses followed by their testimony at the hearing, it may have met this burden. But I cannot rely on such speculation but rather consider only the facts properly before me. Based upon those facts, the agency has not met its burden of proof. Therefore, it cannot recover the alleged overpayment.

CONCLUSIONS OF LAW

The agency has not established that the petitioner received an overpayment of BadgerCare Plus benefits because it has not established by the preponderance of the credible evidence that his child lived with him less than 40% of the time during the period in question.

THEREFORE, it is **ORDERED**

That this matter is remanded to the county agency with instruction that within 10 days of the date of this decision it take all steps necessary to end the collection of the alleged overpayment that is the basis of this decision and to remove the finding of an overpayment from his record.

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 31st day of October, 2013

_____

\sMichael D. O'Brien
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 October 31, 2013.

Wood County Human Services - WI Rapids
Public Assistance Collection Unit
Division of Health Care Access and Accountability