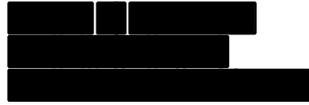


STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MOP/152754

PRELIMINARY RECITALS

Pursuant to a petition filed October 08, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Door County Department of Social Services in regard to Medical Assistance, a telephonic hearing was held on April 03, 2014, at Sturgeon Bay, Wisconsin. At the request of petitioner, hearings scheduled for December 3, 2013, January 13, 2014, and February 5, 2014 were rescheduled. At the request of the parties, the record was held open for additional documentation and consecutive briefs to the Division of Hearings and Appeals (DHA) by both parties. Each party's brief and documents are received into the hearing record.

The issue for determination is whether the county agency is correctly seeking recovery of MA overpayments totaling \$27,479.49 during the period of February 1, 2009 to May 31, 2013, due to: a) petitioner not residing in Wisconsin, but instead residing in Texas since December, 2008 resulting in her MA non-financial ineligibility during that period; and b) petitioner's failure to report her share of ownership in two real estate properties resulting in MA asset ineligibility.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney [Redacted] G. [Redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Attorney David Hemery,
Assistant Corporation Counsel
Door County Department of Social Services
Door County Government Center
[Redacted]
[Redacted] 54235-0670

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED])(f/k/a [REDACTED]) was a resident of Door County in the past who resided with her mother, [REDACTED], at 421 Nebraska Street, Sturgeon Bay, WI.
2. Petitioner is a 52 year old who has been diagnosed by a neurologist with right lower extremity pain and complex regional pain syndrome. She experiences more pain with cold weather, and her symptoms have exacerbated with more swelling during periods of cold weather. The petitioner did not provide any current medical record for the past 6 years, but only provided medical reports from 2008 or earlier than 2008. See Exhibit 3. Some of petitioner's submitted medical reports are from 2004.
3. The petitioner received Medical Assistance (MA) for a household of one from the State of Wisconsin Medicaid program during the period of February 1, 2009 to May 31, 2013.
4. The petitioner failed to report to the county agency her change of address and residence from Wisconsin to Texas during any of her reviews or re-applications during the period 2009 through May 31, 2013.
5. The petitioner moved to Texas and began residing basically full-time at the address of [REDACTED], [REDACTED], [REDACTED] as of December, 2008. During that period, petitioner lived with her boyfriend, [REDACTED], who is a Texas lawyer. Exhibit 2.
6. The petitioner occasionally visited her mother in Sturgeon Bay, WI during the period of February, 2009 through May, 2013.
7. The petitioner did not provide any specific dates and reliable documentation to establish that her time spent in Wisconsin during the period of February, 2009 through May, 2013 was more than occasional visits to her mother, and to obtain some medical appointments with Wisconsin medical providers.
8. On April 23, 2013, the Office of the Inspector General (OIG) received a fraud tip alleging that petitioner has lived in [REDACTED], Texas for about 10 years with her boyfriend while she continued to improperly receive Medicaid through the State of Wisconsin.
9. During a May 9, 2013 telephone interview with agency fraud investigator, [REDACTED], the petitioner admitted: "OK, you caught me." During that same interview, petitioner admitted she moved to Texas during December, 2008, and only came to Wisconsin for visits. Petitioner explained that she needed the Medicaid because she has many health problems which was why she continued to claim that she lived in Wisconsin. During that interview, petitioner continuously apologized to Ms. [REDACTED] indicating that she didn't mean to cause so much trouble but that she just needed the Medical coverage and didn't want to go to jail. Hearings Testimony of Investigator [REDACTED]. See Exhibit 2.
10. During the overpayment period in question, [REDACTED] [REDACTED] in Sturgeon Bay, WI sent petitioner's prescriptions to her at her [REDACTED], Texas address.
11. The petitioner's mother (and her deceased father) transferred two properties to petitioner and her brother ([REDACTED]) but her mother retained a life estate in those properties: 1) [REDACTED], [REDACTED], Sturgeon Bay, WI 54235; and 2) [REDACTED] in Sturgeon Bay WI. The petitioner's share of the fair market property value (even after considering her mother's life estate) was significantly above the \$2,000 MA asset eligibility limit for each of those two properties.
12. Petitioner failed to report to the county agency her partial ownership in those two properties as assets in determining her MA asset eligibility. See Finding of Fact #11 above.

13. The county agency sent five MA overpayment notices to the petitioner indicating that she received MA overpayments totaling \$27,479.49 during the period of February 1, 2009 to May 31, 2013, due to: a) petitioner not residing in Wisconsin, but instead residing in Texas resulting in her MA non-financial ineligibility during that period; and b) petitioner failed to timely report her share of ownership in two real estate properties with value above the MA asset ineligibility limit.

## DISCUSSION

The Medicaid Eligibility Handbook provides the following regarding Residency:

### **6.1 Residency Eligibility**

#### 6.1.1 Residency Eligibility Introduction

**A person must be a Wisconsin resident to be eligible for Medicaid. S/he must:**

1. **Be physically present in Wisconsin.** There is no required length of time the person has to have been physically present, **and**
2. Express intent to reside here (See [6.2 Intent to Reside](#)).

### **6.5 Absence**

#### 6.5.1 Absence Introduction

Once established, Wisconsin residence is retained until abandoned. Being out-of-state, in and of itself, is not abandoning residence. Residence is not abandoned when a Medicaid group or group member  is temporarily out-of-state.

#### 6.5.2 Temporary Absence

Temporary absence ends when another state determines the person is a resident there for Medicaid purposes.

The Department of Health Services (Department) is legally required to seek recovery of incorrect BadgerCare Plus (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.wi.gov/bcplus/> :

### 28.1 OVERPAYMENTS.

An “overpayment” occurs when BC+ benefits are paid for someone who was not eligible for them or when BC+ premium calculations are incorrect. The amount of recovery may not exceed the amount of the BC+ benefits incorrectly provided. Some examples of how overpayments occur are:

1. Concealing or not reporting income.
2. Failure to report a change in income.
3. Providing misinformation at the time of application regarding any information that would affect eligibility.

### 28.2 RECOVERABLE OVERPAYMENTS.

Initiate recovery for a BC+ overpayment, if the incorrect payment resulted from one of the following:

#### 1. Applicant /Member Error

Applicant/Member error exists when an applicant, member or any other person responsible for giving information on the member’s behalf unintentionally misstates (financial or non-financial) facts, which results in the member receiving a benefit that s/he is not entitled to or more benefits than s/he is entitled to. **Failure to report non-financial facts that impact eligibility** or cost share amounts **is a recoverable overpayment.**

...

*(Emphasis added).*

#### 2. **Fraud.** ...

*BCPEH*, §28.1 – 28.2.

The overpayment must be caused by the client’s error. Overpayments caused by agency error are not recoverable.

For administrative hearings, the standard of proof is the preponderance of the evidence. Also, in a 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.

During the April 3, 2014 hearing, the county agency representative, ES Manager [REDACTED] and the fraud investigator ([REDACTED]) presented persuasive testimony and evidence regarding the petitioner’s MA overpayment from the period of February 1, 2009 to May 31, 2013. The basic issue in this case was whether the petitioner moved to and resided in the State of Texas during the period of about February 1, 2009 to May 31, 2013. During that overpayment period, the petitioner did not report to the county agency that she moved to Texas, and began residing full-time at the address of [REDACTED].

██████████ as of December, 2008, a home owned by her boyfriend, ██████████ (a Texas lawyer). Exhibit 2.

The county agency investigator, ██████████, testified convincingly during the April 3, 2014 hearing. Ms. ██████████ testified in detail regarding her May 9, 2013 telephone conversation with the petitioner. She confirmed that petitioner admitted to her during that conversation: "OK, you caught me." During that same interview, petitioner admitted she moved to Texas during December, 2008, and only came to Wisconsin for visits. Petitioner explained that she needed the Medicaid because she has many health problems, and that was why she continued to claim that she lived in Wisconsin. During that interview, petitioner continuously apologized stating that she didn't mean to cause so much trouble but that she just needed the Medical coverage and that she didn't want to go to jail.

The petitioner was entirely unable to refute or undermine the credibility of Ms. ██████████'s testimony. The petitioner was unable to provide any reasonable or credible explanation for why she admitted during that May 9, 2013 interview with Ms. ██████████ that she was "caught," if she was not aware that she had improperly obtained MA benefits while not actually residing in the State of Wisconsin. During the hearing, it appeared that petitioner's basic strategy was to simply deny all accusations in the hope that the county agency was unable to establish its case of MA overpayment against her. Her strategy was unsuccessful.

In regard to the petitioner's unreported partial ownership of two Sturgeon Bay properties, petitioner alleged unconvincingly that she was not aware of those properties. ES Manager responded that even with her mother's life estate interest, the petitioner's remainder person interest in those two properties was required to be timely reported to the county agency. Petitioner failed to do so, and the value of each of those properties was substantially above the \$2,000 MA asset eligibility limit.

During the April 3, 2014, hearing petitioner explained that due to her health problems she had moved to Texas. Petitioner's attorney did submit some medical records regarding petitioner's medical problems and her difficulty with dealing with cold weather. However, the submitted medical records are outdated, and are at least 6 years old. In any case, if petitioner only resided in Texas to avoid the cold Wisconsin winters, then she could have resided on a regular basis in Wisconsin during the period of May through October of each year. There is no reliable evidence in the hearing record of any lengthy stay in Wisconsin during warm weather periods during the entire overpayment period of February, 2009 to June, 2013. Instead, the hearing record indicates that petitioner only "visited" about two weeks perhaps 3-4 times a year, and stayed with her mother in Sturgeon Bay, WI. However, petitioner was not even able to confirm those alleged visits, and did not establish with any specific dates her alleged visits to stay with her mother. While her mother did testify, her testimony was biased and was also rather vague. In fact, petitioner's mother testified that petitioner visited her less than the petitioner had alleged during her testimony.

Attorney ██████████ was a zealous advocate for the petitioner, and attempted to argue that petitioner was only "temporarily absent" per Medicaid Eligibility Handbook, 6.5.2. However, petitioner was unable to overcome her admission to the investigator on May 9, 2013 or to establish her Wisconsin residency during the overpayment period. See Finding of Fact #9 above. While the record was open until June 12, 2014, the county agency and Attorney ██████████ submitted consecutive briefs and documents to DHA. In his brief, Attorney ██████████ argued that petitioner had a Wisconsin driver's license that listed her address as ██████████. However, driver's licenses are granted for many years, and there is no requirement for updating of residence during that licensing period. He also argued that petitioner voted in Sturgeon Bay. However, even if that was true at some elections, that only indicates that once in a while during an election period, petitioner was visiting Sturgeon Bay and also voted. Mr. ██████████'s brief was unable to establish factually or legally that petitioner's residence was in Wisconsin during the overpayment period.

The petitioner did not contest that she had received BC benefits for a group of one during the BC overpayment period of February 1, 2009 to May 31, 2013. Furthermore, the petitioner did not offer any reliable evidence to refute the accuracy of the county agency's MA overpayment determinations or calculations. Overall, the petitioner's credibility was questionable due to inconsistencies and contradictions in her testimony, and for the reasons explained above. Accordingly, for the above reasons, the county agency is correctly seeking recovery of MA overpayments totaling \$27,479.49 during the period of February 1, 2009 to May 31, 2013, due to: a) petitioner not residing in Wisconsin, but instead residing in Texas since about December, 2008 resulting in her MA non-financial ineligibility during that period; and b) petitioner's failure to report her share of ownership in two real estate properties resulting in assets above the MA asset eligibility limits.

### **CONCLUSIONS OF LAW**

The county agency is correctly seeking recovery of MA overpayments totaling \$27,479.49 during the period of February 1, 2009 to May 31, 2013, due to: a) petitioner not residing in Wisconsin, but instead residing in Texas since December, 2008 resulting in her MA non-financial ineligibility during that period; and b) petitioner's failure to report her share of ownership in two real estate properties resulting in MA asset ineligibility.

**THEREFORE, it is**

**ORDERED**

The petition for review herein be and the same is hereby Dismissed.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 1st day of August, 2014

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\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 August 1, 2014.

Door County Department of Social Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
Attorney [REDACTED]