



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MOP/158333

PRELIMINARY RECITALS

Pursuant to a petition filed June 16, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Rock County Department of Social Services in regard to Medical Assistance (MA), a hearing was held on July 29, 2014, by telephone. The hearing record was held open for two days for a brief from the petitioner.

The issue for determination is whether the Department may recover an overpayment of MA benefits for the September 1, 2013 through October 31, 2013 period.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Laura Middleton, Overpayment Specialist
Rock County Department of Social Services
1900 Center Avenue
PO Box 1649
Janesville, WI 53546

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]), age 32, is a resident of Rock County. She is diagnosed with congenital thrombotic thrombocytopenic purpura (CFFP), a serious condition.

2. In March 2013, the petitioner was certified as presumptively disabled and applied for MA benefits as a person eligible for the Medicaid Purchase Program (MAPP), per Wis. Stat. § 49.472.
3. On August 1, 2013, the Wisconsin Disability Determination Bureau (DDB) issued a determination finding that the petitioner did not meet the Social Security disability criteria for qualify for MAPP.
4. On August 5, 2013, the Department of Health Services (Department) issued written notice to the petitioner advising that her MA benefits would be discontinued effective September 1, 2013.
5. The petitioner requested a fair hearing to assert that she is disabled for MAPP purposes. She requested that her MA benefits be continued during the pendency of the hearing process.
6. On October 7, 2013, a fair hearing was held by Administrative Law Judge Tedesco. The petitioner argued at that hearing that the judge should rule on the merits as to whether she was sufficiently disabled, because the DDB determination had the effect of terminating her MAPP coverage.
7. On October 10, 2013, Judge Tedesco issued his decision in DHA case no. MGE/151761. He concluded that the petitioner's hearing request "should [have] properly been interpreted as a timely request for reconsideration" and remanded the matter to the DDB with directions to initiate the reconsideration process. He did not rule on the petitioner's disability status.
8. In its summary position letter for the instant hearing, the county agency incorrectly characterized the remand to DDB as a finding that the petitioner was not disabled.
9. On October 11, 2013, the county agency made an internal overpayment referral for recovery of the incorrectly paid benefits paid during the pendency of the appeal. The agency discontinued the petitioner's MAPP coverage effective October 31, 2013.
10. On November 8, 2013, the petitioner filed a petition for judicial review of Decision #151761.
11. On November 27, 2013, DDB performed its reconsideration and concluded that the petitioner is not sufficiently disabled. The petitioner then requested a fair hearing to contest that conclusion. A fair hearing was held by Administrative Law Judge Schneider on February 26, 2014.
12. On March 4, 2014, Judge Schneider issued a final decision in DHA case no. MAP/153792. He concluded that the petitioner was not disabled for MAPP purposes. His decision relied heavily on his interpretation of a 2002 decision by Administrative Law Judge Maloney in DHA case no. MAP-71/53891.
13. On March 18, 2014, the petitioner filed a rehearing request in #153792, asserting that Judge Schneider misinterpreted the earlier Decision no. #53891.
14. On April 2, 2014, Judge Schneider issued his rehearing decision in #153792. He again concluded that the petitioner was not disabled for MAPP purposes. However, he issued the rehearing decision as a proposed decision because his analysis was in apparent conflict with decision #53891 from 2002.
15. On April 22, 2014, the county agency issued a *Wisconsin Medicaid and BadgerCare Plus Overpayment Notice* to the petitioner. The Notice identifies an overpayment of \$4,575.43 for the September 1 through October 31, 2013 timeframe. The overpayment is further broken down as \$2,409.82 (\$3.34 capitation + \$2,406.48 MA-paid charges) for September and \$2,165.61 (\$16.86 capitation + \$2,148.75 MA-paid charges) for October.
16. On May 2, 2014, the Department issued a *Notice and Repayment Agreement for MA/BadgerCare/BadgerCare Plus Overpayment* to the petitioner. It also identified a \$4,575.43 overpayment for the September 1 through October 31, 2014 period.

17. On July 10, 2014, the Department Secretary's designee issued a final decision for case #153792. It upheld Judge Schneider's decision that the petitioner was not disabled for MAPP purposes.

DISCUSSION

The parties are in agreement as to the material facts above. The distillation is that the petitioner was notified that her benefits were ending. She timely appealed and requested that aid be continued during the pendency of the appeal. The aid was continued for two months. She ultimately lost the appeal, and the Department seeks to recover the two months of aid for which the petitioner was not eligible.

DHS is legally required to seek recovery of incorrect MA payments when a recipient engages in a misstatement or omission of fact to the MA program, which in turn gives rise to an MA overpayment:

49.497 Recovery of incorrect medical assistance pay-

ments. (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 BadgerCare 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* for the recipient's cost-sharing requirements.

(b) The department's right of recovery is against any Medical Assistance or Badger Care 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). The petitioner did none of the misdeeds identified in § 49.497(1). She argues that the above circumstances are the only ones that may lead to an overpayment recovery.

However, the petitioner overlooks this separate, specific authority:

2. If a recipient requests a hearing within the timely notice period specified in 42 CFR 431.231 (c), medical assistance coverage shall not be suspended, reduced, or discontinued until a decision is rendered after the hearing but medical assistance payments made pending the hearing decision may be recovered by the department if the contested decision or failure to act is upheld.

Wis. Stat. § 49.45(5)(b)2.

This directive comes from the federal MA rule:

§431.230 Maintaining services.

(a) If the agency sends the 10-day or 5-day notice as required under §431.211 or §431.214 of this subpart, and the beneficiary requests a hearing before the date of action, the

agency may not terminate or reduce services until a decision is rendered after the hearing unless—

(1) It is determined at the hearing that the sole issue is one of Federal or State law or policy; and

(2) [N/A].

(b) If the agency's action is sustained by the hearing decision, the agency may institute recovery procedures against the applicant or beneficiary to recoup the cost of any services furnished the beneficiary, to the extent they were furnished solely by reason of this section.

[44 FR 17932, Mar. 29, 1979, as amended at 45 FR 24882, Apr. 11, 1980; 78 FR 42302, July 15, 2013]

42 C.F.R. § 431.230(b). The directive is repeated in state administrative code and state policy. *See*, Wis. Admin. Code § DHS 108.02(1),(3)(a),(h), & *Medicaid Eligibility Handbook*, § 22.2, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>. Thus, the agency acted correctly by following state and federal law to pursue recovery of this overpayment.

The petitioner makes two secondary arguments. First, she argues that the April 22 and May 2, 2014 overpayment notices were premature, because the Department Secretary's final decision had not been issued. It is understandable that the agency would believe that it could proceed with recovery after Judge Schneider's March 4 final decision that found the petitioner "not disabled." He then received a rehearing request, and again concluded that the petitioner was "not disabled." That rehearing decision would not have given the agency pause in its recovery effort, because the result was the same. However, where the agency did err, in this case with its dizzying procedural back-and-forth, was in not realizing that the Department Secretary needed to weigh in with the last word. Awaiting the Secretary's decision was the only aspect of the situation that made the overpayment notices premature. If the Secretary's decision had not been issued by the date of hearing, I would have directed the agency to suspend recovery efforts until that final decision was issued. However, the Secretary's final decision was issued by the date of this hearing, and there is no practical reason to make the agency re-send the same overpayment notices to the petitioner at this time.

The petitioner's second argument is that "any benefits paid after the October 10 fair hearing decision were the result of agency error and cannot be subject to recovery." The record does not reflect that the petitioner asked the agency to stop benefits immediately upon her receipt of the October 10 decision. Medicaid certifications are generally done in one-month increments. The agency took a standard action of discontinuing coverage at the end of the month. *See*, Wis. Admin. Code § DHS 103.09(1). The federal rule says nothing about parsing responsibility for the aid continuation overpayment in the way that the petitioner suggests.

CONCLUSIONS OF LAW

1. The Department correctly seeks recovery of benefits overpaid to the petitioner as aid continuation during the pendency of her MAPP disability appeal, where she was not the prevailing party.
2. The Department's April 22, 2014 and May 2, 2014, overpayment notices do not need to be re-sent to the petitioner, because it is now known that the petitioner was not the prevailing party in Final Decision no. #153792.
3. Where the petitioner did not make a specific request to the county agency to immediately discontinue her benefits, the county agency correctly waited to discontinue her requested aid until the end of the month, in accord with Wis. Admin. Code § DHS 103.09(1).

THEREFORE, it is

ORDERED

That the petition is 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.

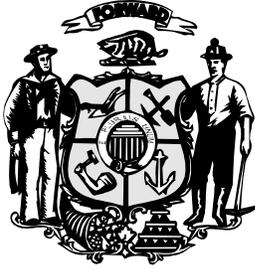
APPEAL TO COURT

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 28th day of August, 2014

\sNancy J. Gagnon
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 28, 2014.

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