



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MOP/159872

PRELIMINARY RECITALS

Pursuant to a petition filed August 12, 2014, under Wis. Stat., §49.45(5), to review a decision by Milwaukee Enrollment Services to recover Medical Assistance (MA), a hearing was held on September 16, 2014, by telephone. The record was held open two weeks at the petitioner's request for filing of a legal argument.

The issue for determination is whether the agency correctly determined petitioner's self-employment income in determining an MA overpayment.

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Pang Thao-Xiong
Milwaukee Enrollment Services
1220 W. Vliet Street
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

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

2. Petitioner received MA under the BadgerCare Plus (BC+) Core Plan for childless adults as a single person since some time prior to 2012. During the period she received BC+ Core Plan MA she never reported receipt of income.
3. In 2014 the agency discovered that petitioner owned and operated a child care center that received payments through the Wisconsin Shares program. The agency obtained records of Shares payments to the child care center back to 2009. An agency overpayment specialist requested information about petitioner's income but received no response.
4. Using the Shares payments as indicators of petitioner's income, the agency determined that petitioner was overpaid MA back to November, 2012. Income from Shares put petitioner over the Core Plan limit for every month thereafter.
5. By notices dated July 24, 2014, the agency informed petitioner that she was overpaid a total of \$7,661 in MA from November 1, 2012 through June 30, 2014, claim nos. [REDACTED] and [REDACTED]. The claim was for all MA payments made on petitioner's behalf during those months.
6. The agency also sought to close petitioner's MA. Petitioner responded to the closure by informing the agency that she no longer operated the child care, and she presented a 2013 U.S. income tax return for her Subchapter S corporation. Following the hearing she also presented copies of the 2012 child care center tax return along with a second tax return for another subchapter S corporation.

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.

An MA recipient must report the receipt of income that could affect eligibility. Wis. Admin. Code, §103.04. An MA applicant/recipient has the duty to verify income. Admin. Code, §DHS 102.03(3)(a). If a person owns a Subchapter S corporation, net income from the corporation is counted as income to the person. BC+ Handbook, App. 16.4.3. Economic support agencies are told to use the businesses' federal income tax returns to determine net income. Id.

Two important factors weigh into this decision. First, the MA policy requires the owner of a Subchapter S corporation to report income from the corporation, and the income is used to determine the person's income for MA purposes. However, the net income of the corporation is not necessarily the only income from the business that might be attributed to the person. If the person also takes a salary or wage out of the business, the salary/wage also is income. Thus a business owner could be ascribed income from two sources out of the business: the salary/wage and the net yearly business income divided by twelve. The salary/wage would be deducted from gross business income as an expense, and thus the income would not be double counted.

Second, much of the hearing revolved around whether an agency worker ever told petitioner to report her income. The statute does not require an agency worker to tell the person to report income. From the original application to every review form thereafter, an MA recipient is asked if she has income. Furthermore, the overpayment statute says simply that an overpayment can be recovered if the BC+ recipient failed to report income that would affect eligibility. If petitioner had income that affected her eligibility, she is responsible for any overpayment that resulted whether an agency worker affirmatively told her to report or not. I thus am puzzled by the agency's decision to start the claim in November, 2012 when it is evident that petitioner's business was operating as far back as 2009.

It is clear that petitioner had income, and given that the overpayment specialist received no response when he requested information from petitioner, I do not fault him for using the best information available in calculating the overpayment. However, petitioner now has presented tax returns from both 2012 and 2013, and they show significant expenses that were not included in the overpayment calculation. I find that petitioner should be given the opportunity to have the overpayment recalculated using actual income from the tax returns. That means that, at very least, petitioner also will have to present 2011 tax returns as those returns would affect the calculations for 2012 benefits.

Petitioner's attorney argued in the post-hearing brief that the agency failed to prove that petitioner never reported her income. It is clear from the evidence, however, that no income ever was budgeted in determining petitioner's eligibility, and petitioner herself admitted during the hearing that she never reported her income.

On remand the agency should obtain the tax returns from the business. It also should obtain petitioner's personal tax returns. A striking entry on the tax returns petitioner provided is that both corporations took as business expenses "Compensation of Officers" (\$24,000 in 2012 and over \$31,000 in 2013). Given that petitioner likely was the chief officer, it is likely that much of that compensation was paid to her. In addition, she might have received income as an employee, depending on how she effectuated her own compensation.

I note finally that if petitioner does not provide the requested information, the overpayment as calculated should remain in effect as being based on the best information available.

CONCLUSIONS OF LAW

1. Petitioner failed to report the receipt of income that might have affected her eligibility for MA.
2. The agency should obtain petitioner's income tax information, both business and personal, to determine if she was overpaid during the period in question.

THEREFORE, it is

ORDERED

That the matter be remanded to the agency with instructions to re-determine whether petitioner was overpaid MA during the period November, 2012 through June, 2014 by obtaining her personal and

business tax information and comparing it to the BC+ Core Plan income limits. The agency shall do so within 10 days of this decision, subject to delays necessary to obtain the tax information.

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 23rd day of September, 2014

\sBrian C. Schneider
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 September 23, 2014.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Attorney [REDACTED] [REDACTED]