



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FTI/161278

PRELIMINARY RECITALS

Pursuant to a petition filed October 14, 2014, under Wis. Stat., §49.85(4), and Wis. Admin. Code, §§HA 3.03(1), (3), to review a decision by the Oconto County Dept. of Health and Human Services to recover FoodShare benefits (FS), a hearing was held on November 11, 2014, by telephone.

The issues for determination are (1) whether petitioner had a prior opportunity for a hearing on an FS overpayment, and if not, (2) whether petitioner is liable for an FS overpayment.

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: Gail Retzlaff
Oconto County Dept. of Health and Human Services
501 Park Avenue
Oconto, WI 54153-1612

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 FS as a one-person household in Oconto County in 2012. In the spring, 2012, he was incarcerated, and he remained in jail until September, 2014. He did not report his incarceration to the FS agency.
3. Petitioner's FS Electronic Benefit Transfer (EBT) card was stolen by an acquaintance after petitioner was incarcerated. The person used petitioner's FS benefits from May until September,

2012. The thief was able to change the card's PIN without petitioner's input. Petitioner reported the stolen card to the Milwaukee County District Attorney in late 2012.
4. The county eventually discovered that petitioner was incarcerated and terminated the FS. By a notice dated February 28, 2013, the agency informed petitioner that he was overpaid FS totaling \$810 during the period May 1 through September 30, 2012 because he failed to report his incarceration, claim no. [REDACTED].
 5. Petitioner did not receive the original notice or the dunning notices; they were returned to the agency by the postal service.
 6. On July 12, 2013, the Public Assistance Collection Unit (PACU) notified petitioner that his income tax refund would be intercepted to recover the overpayment. The notice was sent to the same address at which earlier notices were returned by the postal service.

DISCUSSION

Wis. Stat., §49.85(2)(a), provides that the department shall, at least annually, certify to the Department of Revenue the amounts that it has determined that it may recover resulting from overpayment of general relief benefits, overissuance of FS, and Medical Assistance payments made incorrectly.

The Department of Health Services must notify the person that it intends to certify the overpayment to the Department of Revenue for setoff from his/her state income tax refund and must inform the person that he/she may appeal the decision by requesting a hearing. *Id.* at §49.85(3)(a).

The hearing right is described in Wis. Stat., §49.85(4)(a), as follows:

If a person has requested a hearing under this subsection, the department ... shall hold a contested case hearing under s. 227.44, except that the department ... may limit the scope of the hearing to exclude issues that were presented at a prior hearing or that could have been presented at a prior opportunity for hearing.

The Department is required to recover all overpayments of public assistance benefits. An overpayment occurs when an FS household receives more FS than it is entitled to receive. 7 C.F.R. §273.18(a). The federal FS regulations provide that the agency shall establish a claim against an FS household that was overpaid, even if the overpayment was caused by agency error. 7 C.F.R. §273.18(a)(2).

The federal regulation concerning FS overpayments begins: "The State agency shall take action to establish a claim against any household that received an overissuance due to an inadvertent household or administrative error...." 7 C.F.R. §273.18(b). Once timely and adequate notice is given to the household, the household must appeal within 90 days of the negative action. 7 C.F.R. §273.15(g); see also Wis. Admin. Code, §HA 3.05(3)(b).

The first issue is whether petitioner had a prior opportunity for a hearing. I conclude that he did not. Petitioner testified that he was unaware of the overpayment until he applied for FS in October, 2014. His testimony is verified by case notes from 2013 stating that the notices were returned to the agency. As this is the first petitioner heard about the overpayment claim, he is entitled to a hearing on the merits.

The second issue is whether petitioner is liable for an overpayment. An incarcerated person is ineligible for FS. 7 C.F.R. §273.1(b)(7)(vi). A person has a duty to report changes that affect his eligibility. 7 C.F.R. §273.12(a)(1).

Petitioner did not report that he was incarcerated. It is clear, however, that he did not use the FS at issue. Petitioner filed a report of theft with the District Attorney in Milwaukee County, where he was incarcerated. His debit card also was stolen, and the card company later refunded money that the thief used from the debit card.

I conclude that petitioner is liable for the overpayment claim. The simple fact is that petitioner received FS for five months when he was incarcerated and thus not eligible to receive them. Had petitioner reported the incarceration, the FS would not have been issued. It is true that the card was stolen and someone else used the benefits, but the standard for an overpayment claim is not whether the FS recipient used the benefits, it is whether he received them. It is unfortunate, but ultimately petitioner is the one responsible for the FS being issued incorrectly.

There are many instances in which an FS recipient is liable for an overpayment even when not responsible, in particular when the overpayment results from agency error. The agency nevertheless must collect the overpayment from the recipient even though the recipient did not cause the overpayment.

This situation is akin to where an FS recipient's EBT card is stolen but the person does not report the loss to the FS agency for a number of days. Under FS rules, only the benefits used after the report of the stolen card are reissued. Benefits used before the report are lost to the FS recipient. See Wis. Admin. Code, §DHS 252.18. Petitioner never reported the lost EBT card to the FS agency, and thus the benefits would not have been replaced even if he had been eligible to receive them.

CONCLUSIONS OF LAW

1. Petitioner did not have a prior opportunity for a hearing on an FS overpayment claim because he did not receive the overpayment notice or dunning notices.
2. On the merits, petitioner is liable for an overpayment of FS for five months in 2012 resulting from his failure to report being incarcerated; he is liable for the overpayment even though the benefits were stolen from him because of his failure to report the change to the FS agency.

THEREFORE, it is

ORDERED

That 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 13th day of November, 2014

\sBrian C. Schneider
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 13, 2014.

Oconto County Department of Health And Human Services
Public Assistance Collection Unit