FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

AMENDED DECISION

MOP/161259

PRELIMINARY RECITALS

Pursuant to a petition filed October 14, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on December 09, 2014, at Waukesha, Wisconsin.

A decision in this matter was issued on December 16, 2014. On December 30, 2014, the Public Assistance Collections Unit, on behalf of the Department of Health Services, timely submitted a rehearing request. On January 7, 2014, a decision was issued granting the rehearing. This decision is issued in conformity with that rehearing decision.

NOTE: the record was held open to receive a copy of an April 14, 2013 notice advising the Petitioner's wife of their continued BadgerCare+ coverage. The notice has been marked as Exhibit 37 and entered into the record.

The issue for determination is whether Waukesha County Health and Human Services (the agency) correctly determined that the Petitioner was overpaid BadgerCare+ benefits between July 1, 2012 and January 31, 2014.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Kathy Jones, Economic Support Specialist
Waukesha County Health and Human Services
514 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Waukesha County.
2. On May 4, 2012, the agency sent the Petitioner's wife a notice indicating that all five people in her household were enrolled in BadgerCare+, including the Petitioner. (Exhibit 9)
3. That same notice indicated that the income that the agency was counting was Petitioner's self-employment income of $107.00 per month and his wife's unemployment insurance benefits of $350.00 per week. (Id.)
4. The May 4, 2012 notice also advised the Petitioner's wife that she needed to report when there is a change in health insurance coverage or when the household income goes over $2,836.00. (Exhibit 9)
5. On May 14, 2012, the Petitioner began working full time for a pharmacy and to date he has continued to work in that capacity. (Testimony of Petitioner; Exhibit 10)
6. In September 2012, the Petitioner and his family enrolled in his employer's healthcare plan. (Testimony of Petitioner)
7. Neither the Petitioner, nor his wife, ever reported the employment or change in insurance. (Testimony of the Petitioner)
8. On April 15, 2013, the agency sent the Petitioner's wife a notice advising her that the agency's records showed their household income to be below $1292.00 per month and that her household did not have health insurance through a job. The notice stated that the BadgerCare+ coverage would continue, but Petitioner's wife needed to report changes in household income and whether she signs up for other health insurance. (Exhibit 37)
9. On May 28, 2013, the Petitioner's wife obtained part-time employment with a real estate firm and she has continued to work there, to date. (Exhibit 11)
10. The agency became aware of a possible overpayment/ income discrepancy in December 2013. (Testimony of Ms. Jones)
11. On August 28, 2014, the agency sent the Petitioner four Medical Assistance/BadgerCare/BadgerCare Plus Overpayment Notices:

    Claim #[redacted], for the period of July 1, 2012 through August 31, 2012 for $396.00. This was for the premium owed.

    Claim #[redacted], for the period of September 1, 2013 through January 1, 2014, for $2,557.33. This was based upon a combination of the capitation rate and the services used.

    Claim #[redacted] for the period of September 1, 2012 to August 31, 2013, for $3,832.00. This was based upon the premium owed.

    Claim #[redacted] for the period of September 1, 2013 to January 31, 2014 for $150.00. This was for the premium owed for Petitioner's children. (Exhibit 6; Testimony of Ms. Jones)
12. The Petitioner filed a request for fair hearing that was received by the Division of Hearings and Appeals on October 14, 2014. (Exhibit 1)

DISCUSSION

An "overpayment" occurs when BadgerCare+ benefits are paid for someone who was not eligible for them, or when BadgerCare+ payments are made in an incorrect amount. Some examples of how overpayments occur are concealing or not reporting income, failure to report a change in income, and/or providing misinformation at the time of application regarding any information that would affect eligibility. *Wis. Stat. § 49.497; BadgerCare+ Eligibility Handbook (BEH) § 28.1.*

The agency is required to initiate recovery of BC+ overpayments, if the incorrect payment resulted from applicant/member error; fraud/intentional program violation or member loss of an appeal. *BEH+ §28.2*

Per BEH+ §28.3, overpayments may not be recovered under the following circumstances:

1. The member reported the change timely, but the case could not be closed or the benefit reduced due to the 10-day notice requirement.
2. Agency error (keying error, math error, failure to act on a reported change, etc).
3. Normal prospective budgeting projections based on best available information.

In a Fair Hearing concerning the propriety of an overpayment of benefits, such as this, the agency has the burden of proof to establish that the action taken by the county was proper. Petitioner must then rebut the agency's case and establish facts sufficient to overcome the evidence of correct action by the agency.

In the case at hand, Petitioner did not dispute that he and his family received BadgerCare+ benefits during the time in question.

By July 1, 2012, BadgerCare+ members had to report changes in income that exceeded 100% FPL, 133% FPL, 150% FPL, 185% of FPL, 200% FPL, 250% FPL, 300% FPL, 350% FPL and 400% FPL. (*BEH §27.03 – release 12-02)* The change needed to be reported by the 10th of the month following the change in income. *Id.*

Prior to this, the reporting thresholds were 100%, FPL, 150% FPL, 200% FPL, 250% FPL and 300% FPL. (*BEH §27.03 – release 07-01)*

In 2012, 100% of FPL for a household of five was $27,010 annually or $2251.00 per month. *aspe.hhs.gov/**poverty**/12**poverty**.shtml*

In May 2012, Petitioner's reported household income was:

+$1400.00 Petitioner's wife unemployment income
($350 per week x 4 weeks per month =$1505 per month)
+$107.00 Self Employment Income

$1507.00, which is 67% of FPL

Petitioner's actual household income for May 2012 was:

$1997.89 Petitioner's first paycheck (See Exhibit 10)
+$1400.00 Petitioner's wife unemployment income
($350 per week x 4 weeks per month =$1505 per month)
+$107.00 Self Employment Income

$3504.89 Total income for May 2012

$3504.89 is 156% of FPL. This surpassed the 100% FPL, 133% FPL and 150% FPL reporting thresholds. So, Petitioner needed to report this change in income by June 10, 2012, which would have affected benefits in July 2012, but neither he nor his wife did so.

Petitioner's income continued to be underreported. In April 2013, the agency had Petitioner's household income listed below $1292, when in fact, Petitioner's household income continued to be well above that. (See Exhibits 10 and 11) In addition, Petitioner and his wife failed to report that the whole household had access to and had signed up for other insurance through the Petitioner's employer, as of September 2012. As such, the overpayment of benefits continued until Petitioner's BadgerCare+ benefits were terminated at the end of January 2014.

Accordingly, it is found that the agency correctly determined the Petitioner was overpaid BadgerCare+ benefits between July 1, 2012 and January 31, 2014.

It was asserted that the right to recovery of an overpayment was limited to one year from the date of discovery based upon Wis. Admin. Code §DHS 2.04(1)(b), which states "The benefit recovery period for incorrectly paid benefits shall be limited to one year prior to the date that the overpayment is discovered."

The state legislature gave the Department of Health Services a general right to recover overpayments of Medical Assistance and Badger Care payments under Wis. Stats. §49.497 Recovery of incorrect Medical Assistance or Badger Care payments and of unpaid employer penalties. The language of the statute is permissive, not mandatory, and states that the department may recover any overpayment caused by a misstatement or omission of fact by the applicant, the failure of the recipient to report income that would affect the recipient's eligibility or the failure of the recipient to report information that would affect eligibility or cost share requirements. There is no provision in Wis. Stats. §49.497 that limits the right to recovery to one year.

Wis. Admin. Code DHS Chapter 2 is entitled, "Recoupment of Benefit Overpayments". The term "recoupment" is not defined in Chapter 2. "Recoupment" is a legal term of art, meaning, "to recover a loss by a subsequent gain…a keeping back something due, because there is an equitable reason to withhold it…" Black's Law Dictionary 1275 (6th ed. 1990)

This is different than a recovery, which is a more general term. The terms "recover" and "recovery" are not defined in DHS Chapter 2. To "recover" means, "to get or obtain again, to collect, to get renewed possession of; to win back. To regain…" Black's Law Dictionary 1275 (6th ed. 1990)

In other words, DHS Chapter 2 allows DHS to recover an overpayment of benefits through a recoupment, by withholding benefits to which a person is currently entitled. This interpretation is consistent with the language in Wis. Admin. Code DHS §2.04(1)(a), which states, in part, "The total amount recovered…shall be offset by any amounts that are owed the eligible individual…"

According to the holding in case MED-20/86354[1], Wis. Admin. Code DHS §2.04(1)(a) modifies Wis. Admin. Code DHS §2.04(1)(b). Consequently, when the Department of Health Services drafted Wis. Admin. Code DHS §2.04(1)(b), stating "The recovery period for incorrectly paid benefits shall be limited

[1] Case MED-20/86354, dealt specifically with an interpretation of Wis. Admin. Code DHS §2.04(1)(b). The decision was written by Division of Hearings and Appeals Assistant Administration Kenneth Duren and adopted by Karen Timberlake, Deputy Secretary of the Department of Health Services)

to one year prior to the date that the overpayment is discovered", what it actually meant to say is that the recoupment period for incorrectly paid benefits is limited to one-year prior to the date that the overpayment is discovered. Per case MED-20/86354, Wis. Admin. Code DHS §2.04(1)(b) does not limit DHS's right to the recovery of overpaid benefits to one year.

Based upon the decision in case MED-20/86354, it is found that PACU / DHS may recover an overpayment for the period of July 1, 2012 through January 31, 2014.

The Petitioner argues that he should not be held accountable for the overpayment, because his wife and he were not aware that they were continuing to receive BadgerCare+ benefits. The Petitioner testified that he thought the benefits would just run out. However, the agency sent Petitioner's wife notices in May 2012 and April 2013 advising her that the household had BadgerCare+ coverage, what the agency believed the household income to be and what their responsibilities were for reporting changes. (See Exhibits 9 and 37) As such, Petitioner and his wife were made aware of what information the agency had and they were made aware of their reporting instructions, but they still failed to report Petitioner's income from the pharmacy and they failed to report their family's enrollment in employer sponsored health insurance. Consequently, Petitioner's argument is without merit.

Even if Petitioner's argument had merit, his argument is equitable in nature, and so cannot be addressed. Administrative law judges do not possess any equitable powers but must apply the law as it is written. (See, *Final Decision*, OAH Case No. A-40/44630, [by Timothy F. Cullen, Secretary, DHSS] (Office of Administrative Hearings, n/k/a, Division of Hearings & Appeals- Work & Family Services Unit December 30, 1987)(DHSS); "An administrative agency has only those powers which are expressly conferred or can be fairly implied from the statutes under which it operates. [citation omitted]" *Oneida County v. Converse*, 180 Wis.2nd 120, 125, 508 N.W.2d 416 (1993). "No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds." *American Brass Co. v. State Board of Health*, 245 Wis. 440, 448 (1944

CONCLUSIONS OF LAW

The agency correctly determined that the Petitioner was overpaid BadgerCare+ benefits between July 1, 2012, and January 31, 2014.

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 Milwaukee,
Wisconsin, this 7th ___th day of January, 2015.

_____

\sMayumi M. Ishii
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 January 7, 2015.

Waukesha County Health and Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability