FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION
Case #: MOP - 197486

PRELIMINARY RECITALS

Pursuant to a petition filed on January 7, 2020, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Burnett County Department of Social Services regarding Medical Assistance (MA), a hearing was held on February 5, 2020, by telephone.

The issue for determination is whether the petitioner must repay an alleged overpayment of medical assistance.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By: [redacted]
Burnett County Department of Social Services
7410 County Road K, #280
Siren, WI 54872

ADMINISTRATIVE LAW JUDGE:
Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [redacted]) is a resident of Burnett County.
2. The department seeks to recover $3,949.27 the petitioner received in medical assistance benefits from November 1, 2017, through August 31, 2019.

3. The petitioner lived alone from November 1, 2017, through August 31, 2019.

DISCUSSION

This is one of three cases heard on February 5, 2019, involving whether the petitioner's husband, [redacted], lived with her. The other two pertained to a FoodShare overpayment and a FoodShare disqualification for an intentional program violation. *See DHA Decision Nos. FOP-197485 and FOF-196352.* This matter pertains a medical assistance overpayment. Part or all of the overpayment pertains to the petitioner's benefits under the Medicare Savings Program. I cannot tell whether there are any other benefits involved because the department did not discuss them in its summary statement and the worksheet it included among its exhibits is unreadably small. Regardless, neither party disagrees that if [redacted] lived with her, she ineligible for the benefits because her household income would have been too high and if he did not live with her, she was eligible because her income was within the program's limits.

The department "may" recover any overpayment of medical assistance that occurs because of the "failure of a … recipient or any other person responsible for giving information on the recipient's behalf to report the receipt of income … in an amount that would have affected the recipient's eligibility for benefits." Wis. Stat. § 49.497(1)(a)2. The department contends that by not reporting her husband in the house, she failed to report his income, which would have left her ineligible. She contends that he did not live with her.

The department began investigating the matter after the petitioner and [redacted]'s 33-year-old daughter applied for FoodShare for herself and her two daughters in August 2019. When interviewed for those benefits, she indicated that she lived with her children and both of her parents and that they all purchased and prepared food together. Court documents from November 21, 2016, and June 12, 2017, indicated that the petitioner's daughter listed the petitioner's address as hers on those dates.

The department's investigator, who was looking primarily for a FoodShare intentional program violation, went to the petitioner's house on September 5, 2019. [redacted] was there but the petitioner was not. The investigator interviewed him. She testified that he told her that he had always lived there and that she saw tools in the garage. That night, the petitioner called the investigator and denied that [redacted] lived with her but, according to the investigator, said he stayed there a few nights a week.

The investigator went back to the house on September 10, 2019. Again [redacted] was there and the petitioner was not. The investigator recorded this conversation. [redacted] said he was confused before and, despite repeated efforts by the investigator, did not repeat that they had lived together for the past two years. During this interview, the worker's tone was friendly, but her questioning was aggressive. She pointed out that misstating the household composition was a felony. She also indicated that the petitioner had reported that she and [redacted] had divorced, which she hadn't. And the investigator told [redacted] that because they were married, even if they stayed together one night a week, they would be considered part of the same household for FoodShare.

This last assertion is not necessarily true. FoodShare rules do not define what the term *live together* mean, and the time two people spend together is not the sole determining factor. Home for long-distance truck driver or certain construction workers is the place their belongings are and they return to after being on the road, even if they are seldom at that place. But a young adult child who rents an apartment that he stays in most nights and leaves for work from would not be considered to live with his parents if he stopped over for a meal and stayed overnight a day or two a week on weekends. Medical assistance also does not have a clear definition of what makes someone a member of someone else's household.

The petitioner talked to the investigator again on September 11, 2019. According to the investigator, she said that [redacted] had just moved in, but in a later call that night she said he moved in sometime in November 2017.

Besides statements attributed to the petitioner and [redacted], the department presented evidence that [redacted]'s vehicle is registered to the petitioner's house. He used that address to vote on November 6, 2016, August 14, 2018, November 6, 2018, and April 2, 2019. The voting location for that address is different than the voting location for the address he contends he was living. Facebook posts from 2018 and 2019 show them together near his pickup truck. His Senior Care applications for 2017, 2018, and 2019, all list the petitioner's address as his, although he did not include her income on the first two applications.

The petitioner contends that she and [redacted] separated in 2013 and that [redacted] took care of and stayed with a long-time friend until 2019. That friend's wife sent a statement supporting this position. According to the petitioner, the only time [redacted] stayed with her was when she needed help with her serious medical issues. She also points out that he had important documents and at least one driver's license renewal that listed his friend's address. [redacted] claims that he used the petitioner's address for voting because he still owned property there. According to the petitioner, [redacted] stayed with her somewhere between 1% and 7% of the time, depending on how it was calculated. The petitioner also contends that although her daughter used the petitioner's address she stayed with a friend.

Much of this evidence is hearsay, which is admissible because the rules of evidence do not apply to administrative hearings. But although hearsay is admissible, it cannot be the sole basis for a finding of fact. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987). In this matter it means that the department cannot rely solely on hearsay to prove that the petitioner and [redacted] lived together. This is not a big problem. The petitioner's statements, even if they were made outside the hearing, are not hearsay because Wisconsin law explicitly states that an admission by an opposing party, which the petitioner is in relation to the department, is not hearsay. Wis. Stat. § 908.01(4)(b). Statements by [redacted] are also admissible as admissions because if he and the petitioner are found to have lived together he would be an adult member of her FoodShare household, which would make him jointly liable for any FoodShare overpayment. *See* 7 CFR § 273.18(a)(4)(i). His liability for FoodShare is relevant because the hearing also involved that alleged overpayment.

All of the evidence can be considered because there is enough non-hearsay evidence to hang it on. But the fact that a piece of evidence can be considered does not determine how much weight it is entitled to. That is determination is up to the trier of fact, which is the administrative law judge.

This matter is difficult to sort out. The petitioner claims that [redacted] has trouble hearing, but never showed how this affected the answers he gave when interviewed by the department. I have listened to the second conversation the investigator had with him, and he did not seem confused. Instead, he seemed upset with the aggressive nature of the questioning and was unwilling to concede what the investigator wanted him to concede. I note that even the petitioner's representative points out that he never admitted giving the wrong information in the first interview. I am skeptical of his statements because they seemed to increasingly favor his wife as he became aware of the consequences of saying he lived with her.

The petitioner's claim that she paid rent to [redacted], who owns the house, is unsupported by any documentation such as a check, receipt, or a deposit of that money by him. The current claim that she can state the percentage of times he stayed there is the false precision of one searching for ways to support a concocted story. Other support for the department's claim includes the previously mentioned evidence placing [redacted] in her household. This includes his presence on the property both times the investigator was there, his vehicle being there and being registered there, the Facebook entries, and his voter registration.

Still there is evidence that [redacted] lived with a friend. It is undisputed that at some point around 2013 the petitioner and [redacted] separated and that around 2017 she developed serious health problems. He had some documents listing his friend's address as his, and he used that address for his driver's license and to receive at least a portion of his mail. His friend died, which supports [redacted]'s contention that he lived there to help him with his health problems. Finally, his friend's widow wrote a statement supporting [redacted]'s claim that he lived there, although I give little weight to such statements from people who do not testify because there is no way to judge their credibility. As for [redacted]'s voting record, people are supposed to vote

where they live and not where they own property, but they often don't get around to changing their address when they should. This is true of other documents such as vehicle registrations.

Finally, I note that [redacted] told the investigator that the petitioner was not receiving FoodShare. He seemed to believe this statement, even though it was false. If they were together most of the time, he almost certainly would have discovered that she was receiving FoodShare. Of course this belief also suggests that the petitioner lied to him about her benefits; if she was lying to him, there is no reason she wouldn't lie to the department.

The department's case is flawed. As noted, the investigator's questioning was aggressive and relied on inaccurate facts and questionable interpretations of FoodShare law. Her methods cast doubt on her claim that the petitioner eventually admitted that she and [redacted] had lived together since November 2017. After being told that a single night a week under the same roof establishes a common household in FoodShare matters and that failing to cooperate—which under these circumstances the petitioner likely interpreted as failing to concede guilt—could lead to a felony conviction, one will often say what the questioner wants to hear.

This also casts doubt on her summary of her initial, unrecorded statement with [redacted]. I understand that she may have been aggressive in her later interviews because she heard information that contradicted what she heard in her earlier interview. But I cannot verify this. If she alleges a divorce that never happened in the presence of the person allegedly divorced, and she tells that person that because of his marriage he is considered to live with his wife if he stays with her one night a week, it is also possible that she took his claim that he occasionally stayed with her to help with her health problems and turned it into an admission that they were living together.

To be clear, I doubt that the investigator intentionally misstated the evidence or law. A claim that a couple is separated can easily later be remembered as a divorce. Also, as noted, under some circumstances, such as those involving a long-haul trucker or construction worker, staying together once a week could be considered living together for both FoodShare and medical assistance. And, the investigator's version of the first conversation with [redacted] is as likely true as the petitioner's version.

But the department has the burden of proof, so its version of the conversation and other events cannot be *just* as likely to be true; it must be *more* likely to be true. An example of what makes this matter difficult to sort out is how the entire narrative seems to shift after the petitioner has a chance to talk to [redacted] and others involved in the case. Maybe this is because the investigator gave an inaccurate initial version of her interviews with the petitioner and [redacted]. Or maybe, and this is just as likely, it is because the petitioner actively manipulated the events by convincing [redacted] to change his statement and convinced the woman whose husband he helped care for to submit an exaggerated statement concerning how often he stayed there.

The department's burden of proof is by the preponderance of the evidence, which is not huge—it must merely show that it is more likely than not that its version of events occurred. But as much as I am skeptical of the petitioner's claims, I cannot find that the department has met this burden. When all the evidence is sifted and weighed it is just as likely that four years after separating from the petitioner, [redacted] moved in with a friend and occasionally helped his wife as it is that he moved back in with his wife and occasionally helped his friend. Because the department has not proved that it is more likely than not that its version of events occurred, it has not proved by the preponderance of the evidence that the petitioner received an overpayment of medical assistance.

CONCLUSIONS OF LAW

The department has not established by the preponderance of the evidence that the petitioner received more medical assistance than she was entitled to during the period discussed in this deicion.

THEREFORE, it is **ORDERED**

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it end its attempt to recover the overpayment of medical assistance discussed in this decision and that it take all steps necessary to remove the overpayment finding from his record.

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, 4822 Madison Yards Way, 5th Floor North, 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, **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 27th day of February, 2020

\s_____
Michael D. O'Brien
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 February 27, 2020.

Burnett County Department of Social Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability