



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

FCP-40/64625

PRELIMINARY RECITALS

Pursuant to a petition filed July 30, 2004, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Office of Strategic Finance (OSF) in regard to Family Care program (FCP), a hearing was held on November 2, 2004, at Milwaukee, Wisconsin. A hearing set for September 15, 2004, was rescheduled at the petitioner's request.

The issue for determination is whether petitioner's appeal was timely and if eligibility can be backdated.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:
(petitioner)

Wisconsin Department of Health and Family Services (Department)
Division of Supportive Living
Bureau on Aging & Long Term Care Resources
Long Term Support Unit
1 West Wilson Street, Room 472
Madison, WI 53702

Karla Fajembola, ES Supervisor
Milwaukee County Dept Of Human Services
Department on Aging
235 W. Galena Street, Suite 180
Milwaukee, WI 53212-3948

ADMINISTRATIVE LAW JUDGE:

Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Milwaukee County.
2. On May 19, 2004, the county agency sent a written notice of negative action to the petitioner. The negative action in this case was the discontinuance of Family Care effective June 1, 2004.
3. The petitioner filed a hearing request with the department on July 30, 2004.

4. PER the CARES computer system, on March 8, 2004, the FCP agency sent a notice to the petitioner at her correct address stating that a review must be completed by April 30, 2004, or her case would be closed. The petitioner was sent the review packet as is customary in these cases. No review was submitted to the FCP agency.

DISCUSSION

The sole issue is the failure of the petitioner to do a timely case review, which led to the termination of her participation in the FCP. A hearing officer can only hear cases on the merits if there is jurisdiction to do so. There is no jurisdiction if a hearing request is untimely. An appeal of a negative action by a county agency concerning general MA must be filed within 45 days of the date of the action. Sections 49.45(5) and 49.21(1), Wis. Stats.; Income Maintenance Manual, II-G-3.4.0. A negative action can be the denial of an application or the reduction or termination of an ongoing case. An appeal concerning MA-Family Care must also be filed within 45 days of the effective date of a negative action. See, WI Admin Code §§ HA 3.03(1)(k) & (2); WI Admin Code § HA 3.05(3) see also, WI Admin Code § HFS 10.55(3). The petitioner's appeal was filed 72 days after the date of the action. Thus, it would normally be untimely, and there would be no jurisdiction for considering the merits of the case.

The petitioner testified that she did not get the notice with the review booklet or the notice of discontinuance. Where the evidence presented demonstrates that a notice was correctly mailed, this fact creates a rebuttable presumption of delivery that a petitioner must overcome with evidence demonstrating that the notice was not actually received. I have reviewed the hearing testimony. I must admit that I am somewhat skeptical that two pieces of mail sent to the correct address would get lost. However, based on the sworn testimony of the many witnesses at the hearing, I will find that the petitioner did not receive the notices. Thus, there is jurisdiction to hear the case on the merits.

However, that is of no real benefit to the petitioner given the rules regarding backdating in the Family Care program. The petitioner seeks FCP coverage as of June 1st. Almost every ALJ has found that eligibility for the Family Care program cannot be "backdated" as individuals are only eligible from the date they are both eligible *and* enrolled (services begin to be provided pursuant to an agreement with the Case Management Organization (CMO)) in the program. The only possible exception can be found in Decision FCP-40/50288. In that case, I contacted Jim Jones at the Department to see if there was a way that backdating would be possible. In essence, he stated that there was an unwritten policy of the Department is that if a delay is due to agency error, then the applicant is entitled to be made whole. Thus, the applicant would not be penalized by mistakes caused by the FCP agency. However, that is not applicable here. A search of the CARES computer system shows that the required notices were timely mailed to the correct address. Thus, the agency is not at fault for the failure of the petitioner to get those notices. I cannot find agency error so there can be no backdating.

CONCLUSIONS OF LAW

1. The FCP agency did not error as it timely provided the correct notices concerning the petitioner's case review.
2. There can be no backdating of the FCP for the petitioner in this case.

NOW, THEREFORE, it is

ORDERED

That the petition for review be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new

evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found 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 no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Family Care Program must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent. The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 11th day of
November, 2004

/s/ Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
426/JAN