



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

FCP-40/65345

PRELIMINARY RECITALS

Pursuant to a petition filed September 2, 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, a hearing was held on November 2, 2004, at Milwaukee, Wisconsin.

The issue for determination is whether petitioner's appeal was timely.

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

Nora Gomez, Quality Improvement Coordinator
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 June 28, 2004, the Milwaukee County CMO sent a written notice of negative action to the petitioner at (address) in Milwaukee.
3. The negative action in this case was the reduction of hours of supportive home care (SHC) services effective July 13, 2004.

3. The petitioner filed a grievance with the Milwaukee County CMO on September 2, 2004. The CMO found that the grievance request was untimely and forwarded the request to DHA so that it could be reviewed.
4. The petitioner lived at (address) in Milwaukee until sometime in June, 2004. She then moved in with her daughter at (daughter's address) in Milwaukee. The petitioner had the mail that was sent to the 60th Street address forwarded to a PO Box. The petitioner did receive that mail.

DISCUSSION

The petitioner is contesting the number of hours of SHC she is to get each week. 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). In the alternative, the client can file a grievance within 45 days of the effective date of the action. In both cases, the petitioner's appeal was filed 66 days after the date of the action. Thus, it was untimely, and no jurisdiction exists for considering the merits of the case.

The petitioner stated that she never got the CMO Notice of Action as it was sent to her old address on 60th Street. However, the petitioner also admitted that she had all of her mail sent to 60th Street forwarded to a PO Box when she moved to her new address on 75th Street. She also stated that she got her mail, although she sometimes did not go to post office to get it on a daily basis.

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.

This interpretation is confirmed by Wisconsin case law.

It is well established that the mailing of a letter creates a presumption that the letter was delivered and received. See, Nack v. State, 189 Wis. 633, 636, 208 N.W. 487(1926), (citing Wigmore, Evidence2d. ed.) § 2153; 1 Wigmore, Evidence (2nd ed.) § 95) Mullen v. Braatz, 179 Wis. 2d 749, 753, 508 N.W.2d 446(Ct.App.1993); Solberg v. Sec. Of Dept of Health & Human Services, 583 F.Supp. 1095, 1097 (E.D.Wis.1984); Hagner v. United States, 285 U.S. 427, 430, 52. S.Ct. 417, 418(1932).

***(Portions of discussion not relevant here omitted).

This evidence raises a rebuttable presumption which merely shifts to the challenging party the burden of presenting credible evidence of non-receipt. United States v. Freeman, 402 F.Supp. 1080, 1082(E.D.Wis.1975). Such a presumption may not, however, be given conclusive effect without violating the due process clause. United States v. Bowen, 414 F.2nd 1268, 1273(3d.Cir.1969); Mullen v. Braatz, 179 Wis. 2d at 453. If the defendant denies receipt of the mailing, the presumption is spent and a question of fact is raised. (Examiner note: Citations omitted here.) The issue is then one of credibility for the factfinder. The factfinder may believe the denial of receipt, or the factfinder may disbelieve the denial of receipt.

State ex. Rel. Flores v. State, 183 Wis.2d 587, at 612-3 ((1994).

The mere assertion of a lack of recollection of receiving a notice is not sufficient to overcome the presumption of receipt of a mailed document. This is particularly so when, as here, the petitioner admits that she got the mail sent to her old address on 60th street via her PO Box. Based on that, I find that there is no reason why the petitioner should not have received the CMO Notice of Action.

In dicta, I will say that even if this appeal was timely, I would dismiss it. When a person enrolls in FC and is eligible, the agency must perform an assessment to identify the person's needs, strengths, and long term outcomes. See Wis. Adm. Code, §HFS 10.44(2)(e). The agency then must develop an individual service plan (ISP) for the enrollee that addresses those needs, services, and outcomes. See §HFS 10.44(2)(f). If the enrollee and the agency do not agree with the ISP, the enrollee may file a grievance with the agency, request a department review, or request a fair hearing. §HFS 10.44(2)(f)5.

The agency completed the required assessment. The determination that the petitioner needed 3 hours of SHC and 1.5 hours of personal care appears to be reasonable given the documentation and the testimony at the hearing. Should the petitioner's needs changed, she should contact her case manager and request more services.

CONCLUSIONS OF LAW

There is no jurisdiction as the appeal is untimely.

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 5th day of
November, 2004

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

cc: Ann Blewett - Milw. Cty - e-mail
Nora Gomez - Milw. Co. - e-mail
Lois Greene For Jackson -Milw. Cty - e-mail
Jenifer Harrison-Metastar - e-mail
April Hays-DHFS/Metastar - e-mail
Ruby Jackson-Milw Cty - e-mail
Charles Jones, OSF/CSDS - e-mail
Chester Kuzminski-MilwCty-DEPT AGING - e-mail
Cheryl McIlquham - BHCE
Ann Marie Ott - DHFS - e-mail
Felice Riley-MILWCNTY ADMINISTRATOR
Teresa Smith-MILW.CO-QI/AGING - e-mail
Lydia Torres-Community/Milw Cty - e-mail