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DISTRICT III

December 22, 2020

To:

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You are hereby notified that the Court has entered the following opinion and order:

2019AP446

Ann Lamphere v. Department of Health Services
(L. C. No. 2018CV268)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Ann and Daniel Lamphere, pro se, appeal from a circuit court order affirming a decision of the Wisconsin Department of Health Services (the Department) regarding an overpayment of medical assistance funds. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2017-18).¹

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

The Barron County Department of Human Services (Barron County) determined that the Lampheres received an overpayment of \$15,350.09 in medical assistance funds due to the incorrect reporting of Daniel's income. A notice of the overpayment was sent to the Lampheres on October 5, 2017, informing them that they could appeal the decision within forty-five days—and expressly stating a deadline of November 20, 2017. The Lampheres did not file an appeal until February 7, 2018.

An administrative law judge (ALJ) found that the Lampheres' appeal was untimely because it was not filed within forty-five days of the overpayment determination, and dismissed the appeal. Daniel requested a rehearing, alleging a portion of the overpayment was incorrectly calculated because Ann was receiving Supplemental Social Security Income (SSI). The ALJ denied the request for rehearing because the Lampheres provided no evidence of Ann's receipt of the SSI payments during the time period of the overpayments.

Daniel submitted a second request for rehearing, together with documentation showing that the Social Security Administration had granted Ann retroactive SSI payments for certain months, thus making her eligible for medical assistance for a number of months covered by the overpayment at issue. Based on this new information, the ALJ granted the request for rehearing and remanded the case to Barron County for the sole purpose of recalculating the amount of medical assistance overpaid on Ann's behalf. The ALJ made clear, however, that his original overpayment determination was broken down into medical assistance payments made on Ann's behalf and those made on Daniel's behalf separately, so "[t]his result has no effect on the overpayment to [Daniel]." The ALJ modified the dismissal order, rather than reversing it in its entirety.

The Lampheres sought review in the circuit court. The Lampheres argued that the entire overpayment was erroneous, in part, because Daniel's employer was responsible for inaccurately reporting his income, and Barron County was responsible for verifying its income reporting. After the Lampheres and the Department filed their opening and response briefs, the court requested that the Department supplement the record with the ALJ's dismissal order. The court also requested that the Lampheres' reply brief include legal authority authorizing the court to consider the underlying merits of their appeal given the fact that the Lampheres did not file their appeal with the Department within forty-five days of Barron County's overpayment determination, as required by statute. The court also stated it was "providing the petitioners with 15 days within which to file their Reply to the respondent's Brief."

The Department responded with a letter showing the dismissal order was already part of the record. Prior to the expiration of the fifteen-day period for filing of the Lampheres' reply brief, the circuit court concluded the forty-five day appeal deadline was mandatory and affirmed the ALJ's decision. This appeal follows.

On appeal, the Lampheres appear to argue they are entitled to a de novo review of the entire overpayment determination. However, the rehearing order made clear that it modified the dismissal order rather than reversing it in its entirety. Quite simply, it remanded the case for the limited purpose of recalculating the medical assistance overpayment, taking into account the new

evidence of Ann’s retroactive receipt of SSI income.² This modification did not entitle the Lampheres to reargue their entire case de novo on judicial review when they had failed to timely file an administrative appeal of the overpayment determination in the first instance.

The Lampheres also argue the circuit court erred “in not adhering to the timeline he had set forth.” The Lampheres note that the court “had provided the petitioners with 15 days to respond, but ruled 9 days later” before giving the Lampheres the opportunity to file their reply brief. However, after reviewing the dismissal order and the statutory mandate requiring an appeal within forty-five days, the court apparently concluded there was no legal authority authorizing the court to consider the underlying merits of the Lampheres’ appeal—and therefore it had enough information to reach its decision notwithstanding the lack of a reply brief. Regardless, the court’s decision is not directly relevant to our review—when reviewing an agency’s decision under WIS. STAT. ch. 227, we review the decision of the agency, not the circuit court. *See Currie v. DILHR*, 210 Wis. 2d 380, 386, 565 N.W.2d 253 (Ct. App. 1997).

Here, Wisconsin law establishes strict requirements for appealing an overpayment determination. WISCONSIN STAT. § 49.45(5)(a) provides that any person who believes that the payments made on the person’s behalf have not been properly determined may file an appeal

² In essence, to be eligible for medical assistance as an SSI recipient, a person must receive or be eligible to receive SSI payments. Medical assistance payments made while Ann was eligible for SSI must therefore be removed from the overpayment calculation. *See* WIS. STAT. §§ 49.46(1)(a)4., 49.455(3)(b)1.c. The agency granted the Lampheres’ second rehearing request and modified the dismissal order in Ann’s favor to rescind the overpayment claims against Ann for a number of the months in question based on new evidence that Ann had been granted retroactive SSI payments. Because Ann was not eligible for medical assistance from January through March 2016, “the overpayment for those months would remain in place.” This modification was supported by substantial evidence in the record and constituted a proper exercise of agency discretion. As mentioned, however, the rehearing order did not affect the validity of the original decision to dismiss the administrative appeal as untimely.

with the Department, but “[r]eview is unavailable if the decision ... arose more than 45 days before submission of the petition for a hearing.” The overpayment notice in this case gave the precise date by which the request for a hearing was to be made—November 20, 2017. It is undisputed that the Lampheres sought review well past the mandatory deadline—on February 7, 2018. Because of this failure to timely appeal, review of the ALJ’s overpayment determination was “unavailable,”³ and the appeal was properly dismissed. *See* WIS. STAT. § 49.45(5)(a).

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

³ In their reply brief, the Lampheres argue they “reported the correct wage and when employer reported a different wage it was the program[’]s responsibility to further investigate the discrepancy in wages and request further verification such as pay stubs.” The Lampheres thus request that we remand this case for a new hearing in the interests of justice. We also note that during the administrative proceedings, Daniel provided an explanation for why the appeal was filed late. As the ALJ explained, however, nothing in the statutes allows the appeal deadline to be extended.