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**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION ON REHEARING

MKB/169769

PRELIMINARY RECITALS

Pursuant to a petition filed September 16, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision a decision by the Disability Determination Bureau (DDB) in regard to Medical Assistance (MA), a telephonic hearing was held on January 11, 2016. The record was held open post-hearing to allow petitioner's attorney to submit additional information, and for DDB to review and comment, all of which occurred. A Decision was issued in the matter on May 4, 2016 dismissing the petition. On May 21, 2016 petitioner's mother requested a rehearing, which was granted with a subsequent review of the medical documentation submitted, which was again forwarded to DDB to review and comment, all of which occurred. As it is unclear that the DDB's response was also provided to the petitioner, a copy of that response is attached.

The issue for determination is whether petitioner is disabled for Katie Becket MA purposes.

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By written submittal of [REDACTED]
Disability Determination Bureau
722 Williamson St.
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Washington County. She lives at home with her parents.
2. Petitioner is now 17 years old. Her diagnoses include depression, anxiety, oppositional defiant disorder, reactive attachment disorder, conduct disorder and ADHD.
3. Petitioner has received MA under the Katie Beckett program since approximately 2011. On January 2, 2015, petitioner's mother filed an annual review application (recertification). The review was sent to the DDB for a determination of petitioner's current disability status.
4. By a letter dated August 3, 2015, the DDB informed petitioner that she no longer was considered to be disabled. Petitioner sought reconsideration, but the DDB affirmed its determination on or about October 28, 2015.
5. The recertification materials showed that at that time petitioner was in 10th grade and at a 10th grade reading and written language level, but at an 8th grade level in math. Her school reports no behavior issues other than on occasion when petitioner misses her medication(s).
6. Petitioner works part-time at a restaurant where she does some hostessing, bussing and waiting on tables. Her employer provides petitioner with breaks and cueing as needed.
7. Petitioner sees a psychiatrist monthly for medication management and receives therapy from a county social worker approximately once per week.
8. Petitioner is independent in all her activities of daily living. Petitioner's physical health is good. The petitioner has no limitations in her ability to move about and moves objects without limitation.
9. Petitioner frequently loses her temper at home.
10. Petitioner has demonstrated suicidal thinking, has physically and verbally threatened her mother, and has engaged in cutting behaviors.
11. Petitioner has had problems socially interacting and relating to others.
12. From April 29, 2016-May 5, 2015 petitioner was hospitalized at [REDACTED] Hospital. The hospital records indicate that petitioner was voluntarily admitted due to suicidal ideation and cutting behaviors. The records show that she was stabilized with new medication and discharged. She reported having few friends but enjoyed hanging out and talking with the few she has, that they deescalate her suicidal ideation, and she had a boyfriend.

DISCUSSION

I provide the analysis again:

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting children under age 18, who are totally and permanently disabled under Social Security criteria, to receive MA while living at home with their parents. Wis. Stats. §49.47(4)(c)1m. The agency is required to review "Katie Beckett" waiver applications in a five-step process. The first step is to determine whether the child is age 18 or younger and disabled. The disability determination is made by the Disability Determination Bureau (DDB). If the child clears this hurdle, the second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child. It is the first step, where petitioner was determined to no longer be disabled, that brings us to the instant appeal.

“Disability” is defined as an impairment or combination of impairments that substantially reduces a child’s ability to function independently, appropriately, and effectively in an age-appropriate manner, for a continuous period of at least 12 months. Katie Beckett Program Policies and Procedures Manual, page 32. Current standards for childhood disability were enacted following the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The current definition of a disabling impairment for children is as follows:

If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments:

- (1) Must meet or medically or functionally equal the requirements of a listing in the Listing of Impairments in appendix 1 of Subpart P of part 404 of this chapter, or
- (2) Would result in a finding that you are disabled under § 416.994a.

20 C.F.R. §416.911(b). §416.994a referenced in number (2) describes disability reviews for children found disabled under the prior law. Since the past favorable decision arose on a date after 1996, the petitioner must be found to meet or equal a listing described in number (1). See, Personal Responsibility and Work Opportunity Reconciliation Act of 1996; and see, Pub.L. No. 104-193 § 211 , 110 Stat. 2189(1996).

The process of determining whether an individual meets this definition is sequential. See 20 C.F.R. §416.924. First, if the claimant is doing "substantial gainful activity" (SGA), she is not disabled and the evaluation stops. A person who is earning more than a certain monthly amount (net of impairment-related work expenses) is ordinarily considered to be engaging in SGA. The amount of monthly earnings considered as SGA depends on the nature of a person's disability; for non-blind individuals the monthly earnings for 2015 was \$1090, and for 2016 is \$1130. There is no evidence to suggest that petitioner is earning that amount, so she passes this step.

Second, physical and mental impairments are considered to see if the claimant has an impairment or combination of impairments that is severe. If the impairment is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, it will not be found to be severe. 20 C.F.R. §416.924(c). Petitioner was determined to meet this step. She has a severe impairment.

Next, the review must determine if the claimant has an impairment(s) that meets, medically equals or functionally equals in severity any impairment that is listed in Appendix 1 of subpart P of Part 404 of the regulations. DDB determined that the petitioner did not does not meet the Listings, and that she is therefore no longer disabled for Katie Beckett purposes.

The purpose of the Listing of Impairments is to describe impairments that are considered severe enough to result in "marked and severe" functional limitations. This is a term of art in the disability rules for children, and "severe", when coupled with "marked" in this phrase, has a different meaning than "severe" as used in the second step above. In general, a child's impairment(s) is of "listing-level severity" if it results in marked limitations in two broad areas of functioning, or extreme limitations in one such area. 42 C.F.R. §416.925(b)(2).

"Marked" limitation and "extreme" limitation are defined in the regulations at 20 C.F.R. §§416.926a(e)(2), (3). Marked limitation means, when standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations below the norm for the test (but less than three standard deviations). For children from ages three to age eighteen, it means "more than moderate" and "less than extreme". The regulation provides that a marked limitation “may arise when several activities or functions are limited or even when only one is limited as long as the degree of limitation is such as to interfere seriously with the child's functioning.” In comparison, "extreme" limitation means a score three standard

deviations below the norm or, for children ages three to age eighteen, no meaningful function in a given area.

I have reviewed the information in the file and compared that information to the Listings. I must agree with the DDB determination that petitioner does not meet or medically equal any of the Listings.

Petitioner has no significant physical impairments. Petitioner's major impairments relate to her mood and behaviors, which has improved over time and with proper medication. The relevant Listings, at section 112, include mood disorders, anxiety disorders, personality disorders, attention deficit hyperactivity disorders. See, Listings §112.04, .06, .08, .10 and .12. To be found to meet any of those listings for a child of petitioner's age, *the disorders must result in two of the following areas* (set out in Listing §112.00(C) and par. B2 of §112.02), summarized as follows:

- a. marked impairment in age-appropriate cognitive/communicative function;
- b. marked impairment in age-appropriate social functioning;
- c. marked impairment in age-appropriate personal functioning;
- d. deficiencies of concentration, persistence, or pace resulting in frequent failure to complete tasks in a timely manner.

Additionally, the regulations provide for consideration of the effects of medication:

Effects of Medication: Attention must be given to the effect of medication on the child's signs, symptoms, and ability to function. While drugs used to modify psychological functions and mental states may control certain primary manifestations of a mental disorder, e.g., hallucinations, impaired attention, restlessness, or hyperactivity, such treatment may not affect all functional limitations imposed by the mental disorder. In cases where overt symptomatology is attenuated by the use of such drugs, particular attention must be focused on the functional limitations that may persist. These functional limitations must be considered in assessing impairment severity.

Listing §112.00(F).

Petitioner has age-appropriate cognitive/communicative functions based on the evidence presented. It is clear this is a bright young girl with some challenges in math, but not to the extent that they meet the marked standard.

Similarly, the evidence does not support a finding of a marked impairment in social functioning, as she appears to function appropriately in school and at work, as long as she takes her medication. She struggles in her relationship with her mother however. She described having few friends but enjoyed hanging out and talking with the few she has, that they deescalate her suicidal ideation, and she had a boyfriend. The evidence does not show that this impairment interferes seriously with her ability to maintain day-to-day functioning.

Personal functioning is the ability or inability to help oneself in taking care of personal needs, health, and safety. Petitioner cares for herself, and grooming and hygiene are generally appropriate. While she has anger outbursts, they are generally directed outwardly, and do not appear to impact her personal care and safety on a marked level. Petitioner's attorney provided post-hearing a picture of petitioner asserting that she was engaged in cutting behaviors as of March 2016. At hearing the testimony was that she had not engaged in such behavior since May of 2015. The records on rehearing show that she engages in this behavior monthly. This behavior, although serious and concerning, does not appear to impact petitioner to the degree so as to interfere seriously with her personal functioning

There is little in this record to show that her ability to attend to and complete tasks is a problem, especially given her reports from school, and her continued employment at the restaurant. Thus, I cannot conclude that she has a marked limitation in concentration, persistence, and pace with frequent failure to complete work. I must agree that she does not meet or equal the Listings under these standards.

If a child does not meet or equal the Listings, the last step of the analysis is the assessment of functional limitations as described in sec. 416.926a of the regulations. This means looking at what the child cannot do because of the impairments in order to determine if the impairments are functionally equivalent in severity to any listed impairment. To be found disabled, the child must have “marked” limitations in two of the six domain areas, or an “extreme” limitation in one of the areas. 20 C.F.R. §416.926a(b)(2). These areas are: (1) "Acquiring and Using Information"; (2) "Attending and Completing Tasks"; (3) "Interacting and Relating With Others"; (4) "Moving About and Manipulating Objects "; (5)"Caring For Yourself"; and (6), "Health and Physical Well-Being”.

The DDB found that petitioner has “no limitations” or “less than marked” limitations in five of the six domains. With the information submitted post-hearing on rehearing, the DDB conceded she might warrant a rating of “marked” in the Caring For Yourself Domain. I agree, but the evidence in this record still supports the finding that she is “no longer disabled” without having “marked” limitations in two of the six domain areas and therefore no longer eligible for the Katie Beckett Program. I provide the following explanations for the domains as found in 20 CFR §416.926a:

1. *Acquiring and using information.* In this domain, the DDB considers how well someone acquires or learns information, and how well s/he use the information learned. For adolescents they should continue to demonstrate what is learned in academic assignments, should also be able to use what is learned in daily living situations without assistance, should be able to comprehend and express both simple and complex ideas, and should also learn to apply these skills in practical ways that will help them enter the workplace after finishing school. Petitioner has age-appropriate cognitive/communicative functions based on the evidence presented. It is clear this is a bright young girl with some challenges in math, but not to the extent that they meet the marked standard.

2. *Attending and completing tasks.* In this domain, DDB considers how well a child is able to focus and maintain attention, and how well s/he begins, carries through, and finishes activities, including the pace at which activities are performed and the ease with which s/he changes them. For adolescents this means they should be able to pay attention to increasingly longer presentations and discussions, maintain concentration while reading textbooks, independently plan and complete long-range academic projects, be able to organize materials and to plan his/her time in order to complete school tasks and assignments. In anticipation of entering the workplace, an adolescent should be able to maintain his/her attention on a task for extended periods of time, and not be unduly distracted by peers or unduly distracting to them in a school or work setting. She appears to function appropriately in school and at work so long as she takes her medications, albeit with some cueing from her employer and some breaks allowed in school. I do not find that she has a marked limitation in this Domain.

3. *Interacting and relating with others.* In this domain, DDB considers how well someone initiates and sustains emotional connections with others, develops and uses the language of his/her community, cooperates with others, complies with rules, responds to criticism, and respects and take cares of the possessions of others. Interacting means initiating and responding to exchanges with other people, for practical or social purposes. Relating to other people means forming intimate relationships with family members and with friends who are of the same age, and sustaining them over time. For adolescents, s/he should be able to: 1) initiate and develop friendships with kids of similar age and relate appropriately to other children and adults, both individually and in groups, 2) begin to be able to solve conflicts between with peers or family members or adults outside of the family, 3) recognize that there are different social rules for the adolescent and his/her friends and for acquaintances or adults, 4) intelligibly express feelings, ask for assistance in getting needs met, seek information, describe events, and tell stories, in all

kinds of environments (e.g., home, classroom, sports, extra-curricular activities, or part-time job), and with all types of people (e.g., parents, siblings, friends, classmates, teachers, employers, and strangers). According to the evidence, petitioner has made a few friends at work and a boyfriend, had been involved to some extent with organized soccer, can use her verbal and nonverbal skills to express herself, carry on a conversation, or ask others for assistance, and has no difficulty speaking intelligibly or with adequate fluency. Again, she has been able to maintain her employment and interacts with customers appropriately. It is clear she has issues with her mother, yet she identifies her mother as her support system. Accordingly, I do not find a marked limitation here.

4. *Moving about and manipulating objects.* In this domain DDB considers how someone moves his/her body from one place to another and how s/he moves and manipulates things. These are called gross and fine motor skills. For adolescents, they should be able to use motor skills freely and easily to get about in school, the neighborhood, and the community, be able to participate in a full range of individual and group physical fitness activities, and should show mature skills in activities requiring eye-hand coordination, and should have the fine motor skills needed to write efficiently or type on a keyboard. There is no evidence that petitioner has any limitation in this Domain.

5. *Caring for yourself.* In this domain, DDB considers how well someone maintains a healthy emotional and physical state, including how well someone gets physical and emotional wants and needs met in appropriate ways; how they cope with stress and changes in environment; and whether they take care of your own health, possessions, and living area. The DDB somewhat conceded that she had a marked limitation in this domain, and I agree that she does given the evidence of her suicidal thoughts, self-inflicted injury, that she seems to prefer to spend time alone in her room, and not spontaneously pursue enjoyable activities or interests, as well as her reported disturbance in eating and/or sleeping patterns.

6. *Health and physical well-being.* In this domain, DDB considers the cumulative physical effects of physical or mental impairments and their associated treatments or therapies on someone's functioning that was not considered in the *Moving about and manipulating objects* domain. Again, the evidence does not show that petitioner has physical effects from her impairments that limit her markedly.

I do not mean to minimize petitioner's challenges, but no behaviors rose to Marked levels of limitations in other than Domain #5. I certainly understand petitioner's representatives concerns for her well-being if she does not take her medications. However, for purposes here, focus is on the functional limitations that may persist when medications are taken. If the petitioner's condition were to worsen or if she has different clinical evidence, she would be well-advised to re-apply and provide new clinical documentation. She may also apply for Medicaid generally, not specific to the Katie Beckett program.

I add, assuming petitioner finds this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

CONCLUSIONS OF LAW

The preponderance of the evidence shows that petitioner is no longer disabled for Katie Beckett MA purposes.

THEREFORE, it is

ORDERED

The petition for review herein is dismissed.

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 27th day of June, 2016

\sKelly Cochrane
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 June 27, 2016.

Washington County Department of Social Services
Bureau of Long-Term Support
Division of Health Care Access and Accountability