



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FCP/172060

PRELIMINARY RECITALS

Pursuant to a petition filed February 17, 2016, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee Cty Dept on Aging-ARC in regard to Medical Assistance (MA), a hearing was held on March 08, 2016, at Milwaukee, Wisconsin.

The issue for determination is whether the agency properly enrolled the Petitioner in the Family Care program with an enrollment date of January 25, 2016.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: [Redacted]
Milwaukee Cty Dept on Aging-ARC
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Milwaukee County.
2. On December 17, 2015, the Petitioner moved to [Redacted] adult family home.

3. On December 21, 2015, the Petitioner contacted Milwaukee County regarding [REDACTED]. The Petitioner was provided the name of a worker. The Petitioner attempted to contact the worker and left a message.
4. On December 22, 2015, a referral was made for [REDACTED].
5. On December 23, 2015, a worker was assigned to the Petitioner's case. The Petitioner attempted to contact the worker and left a message.
6. On December 28, 29 and 30, 2015, the Petitioner attempted to contact the worker and her supervisor.
7. On December 30, 2015, the worker reviewed the Petitioner's case and called the Petitioner. A home visit was scheduled for January 13, 2016.
8. On December 31, 2016, the worker was able to do a home visit with the Petitioner due to a change in schedule. [REDACTED] was provided to the Petitioner for all long-term care programs. The Petitioner chose [REDACTED] ([REDACTED]). He completed and signed the enrollment forms. The worker completed a long-term care functional screen and determined the Petitioner was functionally eligible. The worker advised the Petitioner that a home visit would be scheduled for a worker to assist him with his Title XIX MA application. The Medicaid Application Referral for Long Term Care was signed by the Petitioner.
9. On January 4, 2016, a referral was made for a worker to assist the Petitioner with completing the MA application. The Petitioner attempted to contact his worker on January 4 and 5, 2016 regarding the status of his enrollment.
10. On January 7, 2016, a support worker was assigned to the Petitioner's case and a home visit was completed. The MA application was completed and submitted to the Income Maintenance agency.
11. On January 8, 2016, the worker contacted the Petitioner who stated that the Petitioner's enrollment had not been approved because the Petitioner did not have valid insurance. The Petitioner contacted his insurance and verified that his insurance was current. The Petitioner left a message for the worker with this information.
12. On January 11, 2016, the worker returned the Petitioner's phone call and indicated that she would verify his insurance.
13. On January 13, 2016, a second home visit was made to have the Petitioner sign the enrollment forms and Medical Remedial form due to the previous forms being misplaced by the agency. The enrollment date of January 21, 2016 was confirmed.
14. On January 14, 2016, the agency noted that the Petitioner is on SSI-MA.
15. On January 21, 2016, the case notes indicate that the Petitioner's case file was submitted to the wrong MCO (My Choice) with a January 21, 2016 enrollment date. The case file was submitted to [REDACTED]. A new enrollment date of January 25, 2016 was established.
16. On January 25, 2016, the Petitioner was enrolled in [REDACTED] program.
17. On February 17, 2016, the Petitioner filed a request for a hearing with the Division of Hearings and Appeals.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized in

the Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10.

Wis. Admin Code, § DHS 10.31(6) Eligibility determination.

(a) Decision date. Except as provided in par. (b), as soon as practicable, but not later than 30 days from the date the agency receives an application that includes at least the applicant's name, address, unless the applicant is homeless, and signature, the agency shall determine the applicant's eligibility and cost sharing requirements for the family care benefit, using a functional screening and a financial eligibility and cost-sharing screening prescribed by the department. If the applicant is a family care spouse, the agency shall notify both spouses in accordance with the requirements of s. 49.455 (7), Stats.

(b) Notice. The agency shall notify the applicant in writing of its determination. If a delay in processing the application occurs because of a delay in securing necessary information, the agency shall notify the applicant in writing that there is a delay in processing the application, specify the reason for the delay, and inform the applicant of his or her right to appeal the delay by requesting a fair hearing under s. DHS 10.55.

Wis. Admin. Code, §DHS 10.33(2) provides that an FCP applicant must have a functional capacity level of comprehensive or intermediate (also called nursing home and non-nursing home). The process contemplated for an applicant is to test his/her functional eligibility, then his/her financial eligibility, and if s/he meets both standards, to certify him/her as eligible. Then s/he is referred to a Managed Care Organization (MCO) for enrollment in the MCO. See Wis. Admin. Code, §§DHS 10.33 – 10.41. The MCO then drafts a service plan using MCO selected providers, designing a care system to meet the needs of the person, and the person executes the service plan. At that point the person's services may begin. With regard to the start date, Wis. Admin. Code, §DHS 10.36(1), provides that a person who meets all conditions of eligibility is entitled to enroll in an MCO. §DHS 10.36(2) provides that entitlement to the FC benefit first applies on the effective date of the contract between the MCO and the applicant:

...

(a) Effective date. Except as provided in pars. (b) and (c), within each county and for each CMO target population, entitlement to the family care benefit first applies on the effective date of a contract under which a CMO accepts a per person per month payment to provide services under the family care benefit to eligible persons in that target population in the county.

...

Wis. Admin Code, §DHS 10.36(2)(a).

The Division of Hearings and Appeals has long held that a person cannot receive Family Care services retroactively. See, e.g., DHA Decision No. FCP-32/71953. The basis of this finding is that Wis. Admin. Code, § DHS 10.41(1) states: "The family care benefit is available to eligible persons only through enrollment in a care management organization (CMO) under contract with the department." The Division of Hearings and Appeals has no equitable powers. Rather, like any administrative agency, it "has only those powers which are expressly conferred or can be fairly implied from the statutes under which it operates." *Oneida County v. Converse*, 180 Wis.2d 120, 125, 508 N.W.2d 416 (1993). This finding is consistent with the state supreme court's earlier statement that "[n]o proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or

necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds.” *American Brass Co. v. State Board of Health*, 245 Wis. 440, 448 (1944). Because there is no explicit basis in the law for granting retroactive benefits in a Family Care matter, I must deny the petitioner’s request.

During the hearing, the Petitioner and his representative argued that petitioner should be entitled to backdating of the FCP because the county agency did not handle the application process promptly and correctly, and that the Petitioner’s enrollment in the Family Care Program could have begun much earlier. The hearing record does indicate that there were some delays in the processing of petitioner’s FCP application. The agency conceded that paperwork was misplaced which caused a few days delay. Even so, the petitioner can only be eligible for Family Care earlier than the date of enrollment if there is a mechanism for me to order backdated FC. Wisconsin statutes and administrative rules do not allow for backdating of Family Care. In addition, even with the delays, the agency processed and made an eligibility determination within 30 days as required by the Administrative Code though the though the contract with the MCO started several days after the 30th day.

Based upon the above, I must conclude there is no remedy I can provide in this case for the reason that there is no place from which to secure funding to pay for petitioner’s services prior to his January 25, 2016 enrollment. The CMO would not receive a capitated payment before the enrollment date, because before accepting a payment for a client they must complete an assessment and authorize the services. The CMO must, in essence, say “yes, this is the service and we will begin case managing it as of this date.” This is managed care, not fee-for-service. Therefore, as the CMO would not receive funding for this case for the period prior to the enrollment date, there would be no entity from which to secure payment for any services prior to that date. See also, similar cases from the Division of Hearings and Appeals concurring in this result, as follows: DHA Case No. FCP-40/51904; DHA Case No. FCP-40/52227; DHA Case No. FCP-40/53292; DHA Case No. FCP-40/67871; DHA Case No. FCP-32/71953; and DHA Case No. FCP-40/72365.

Finally, as a matter of law, I am without authority to reach the decision that the petitioner seeks. I cannot grant the relief the petitioner seeks based on equity. It is the long-standing policy of the Division of Hearings & Appeals that the Department’s Administrative Law Judges do not possess equitable powers. 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 state statutes and administrative code provisions. I am without the power to grant the petitioner reimbursement for the costs he incurred prior to January 25, 2016. Because there is not an adequate remedy available under the state statutes, administrative code or Family Care policy for this circumstance, the petitioner’s request for retroactive Family Care coverage must be denied.

CONCLUSIONS OF LAW

Because there is not an adequate remedy available under the state statutes, administrative code or Family Care policy for this circumstance, the petitioner’s request for retroactive Family Care coverage must be denied.

THEREFORE, it is

ORDERED

That the Petitioner’s appeal is dismissed.

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, 5005 University Avenue, Suite 201, 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, 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 13th day of May, 2016

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on May 13, 2016.

Milwaukee Cty Dept on Aging-ARC
Office of Family Care Expansion
Health Care Access and Accountability
[REDACTED]@milwaukeecountywi.gov