



FH

[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP- 172440

PRELIMINARY RECITALS

On March 1, 2016, the above petitioner filed a hearing request under Wis. Admin. Code §DHS 10.55, to challenge a decision by the Community Care Inc. regarding Medical Assistance (MA). The hearing was held on June 7, 2016, telephonically from Milwaukee, Wisconsin.

The issue for determination is whether the agency met its burden to show that it correctly denied petitioner's request for a power scooter under the Family Care Program (FCP).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: [REDACTED] RN
Community Care Inc.
205 Bishops Way
Brookfield, WI 53005

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.

2. The petitioner is a 60-year-old woman. She lives alone. Her diagnoses include hypertension, diabetes mellitus, arthritis and chronic fatigue.
3. Petitioner uses a rollator walker for ambulation and has a bed valet for assistance with getting in and out of bed. She also receives supportive home care assistance, personal care assistance, and transportation for medical appointments
4. On or about January 6, 2016 petitioner requested that the FCP provide her a power scooter.
5. On January 17, 2016 the FCP assessed petitioner's need for the power scooter by performing a Resource Allocation Decision (RAD). See Exhibit 1.
6. On January 17, 2016 the FCP sent the petitioner a notice stating that her request for a power scooter had been denied. See Exhibit 2.
7. In April and May 2016 petitioner received physical therapy.

DISCUSSION

The Family Care Program (FCP) is a subprogram of Medicaid which is supervised by the Department of Health Services (DHS) and is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized in the Wisconsin Statutes at §46.286, and is described in the Wisconsin Administrative Code, Chapter DHS 10.

The petitioner requests a power scooter from the FCP. When determining whether a service is necessary, the FCP must review, among other things, the medical necessity of the service, the appropriateness of the service, the cost of the service, the extent to which less expensive alternative services are available, and whether the service is an effective and appropriate use of available services. Wis. Adm. Code, § DHS 107.02(3)(e)1.,2.,3.,6. and 7. "Medically necessary" means a medical assistance service under ch. DHS 107 that is:

- (a) Required to prevent, identify or treat a recipient's illness, injury or disability; and
- (b) Meets the following standards:
 1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
 2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider, and the setting in which the service is provided;
 3. Is appropriate with regard to generally accepted standards of medical practice;
 4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
 5. Is of proven medical value or usefulness and, consistent with s. HFS 107.035, is not experimental in nature;
 6. Is not duplicative with respect to other services being provided to the recipient;
 7. Is not solely for the convenience of the recipient, the recipient's family, or a provider;
 8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
 9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Adm. Code, § DHS 101.03(96m).

The FCP denied the requested scooter because it contends that the petitioner can use her rollator walker for ambulation, and that it has a seat for her when she needs to rest. It further contends that if she used a scooter instead of ambulation with the rollator walker, that she would become further deconditioned and have further weakness in her legs. The testimony at hearing was that petitioner participated in physical

therapy (PT) from approximately April-May, from which she “graduated” as the therapist determined she no longer needed further therapy. According to her Member Centered Plan she also receives supportive home care assistance, personal care assistance, and transportation for medical appointments.

At hearing, petitioner testified that she has fallen almost every day since she ended PT on May 19, 2016. The agency responded that petitioner had not reported all of these falls, and she had been seen by the team about a week prior to the hearing.

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs. In this case, the agency has explained why they denied the request. The petitioner then has the burden to show that the power scooter is medically necessary.

Petitioner’s report of daily falls appeared to be news to the FCP team at hearing. After the hearing, she left me a telephone message requesting that I call her to discuss her case and to report that she could not use a wheelchair. I did not return the call because it would be unethical to discuss this matter without both sides present. I have not considered her voicemail message here because it is ex parte communication. Regardless, the preponderance of the evidence supports the agency’s decision to deny the scooter. If it is true that petitioner has fallen almost every day for almost a month, I cannot determine that a powered scooter would be of benefit to her as the most appropriate supply or level of service that can safely and effectively be provided to her. Nor can I be assured that a scooter is consistent with her disability. In other words, if she is falling that much, she may be at risk of injury trying to use, and get off and on a scooter. Petitioner may request the service again, however, she should get medical evidence to support that she medically needs one and that it would be safe for her to use. Given her reports of repeated, almost daily falls, she surely should be reassessed to determine the cause of them, especially when she had just successfully completed PT.

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 supports the agency’s decision to deny the power scooter.

THEREFORE, it is **ORDERED**

That the petition for review herein 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, **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 6th day of July, 2016

\s _____
Kelly 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 July 6, 2016.

Community Care Inc.
Office of Family Care Expansion
Health Care Access and Accountability