



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/172839

PRELIMINARY RECITALS

Pursuant to a petition filed March 14, 2016, under Wis. Admin. Code § DHS 10.55, to review a decision by the MY Choice Family Care in regard to Medical Assistance (MA), a telephonic hearing was held on May 05, 2016, from Milwaukee, Wisconsin. The record was held open 10 days post-hearing to allow petitioner to submit additional information, which was received, and to allow the agency to respond to that information, which occurred.

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]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: [REDACTED], Care Manager
MY Choice Family Care
901 N 9th St
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.
2. The petitioner is a 61-year-old woman. She lives alone. Her diagnoses include COPD – oxygen dependent/dyspnea at rest, hypertension, diabetes mellitus, congestive heart failure, arthritis, obesity, and fibromyalgia.
3. Petitioner currently has a power scooter but it is in need of repair at a cost that exceeds a replacement scooter. She has had a power scooter for approximately 10 years. She also uses a rollator walker.
4. On January 20, 2016 petitioner requested that the FCP replace her power scooter.
5. On February 1, 2016 the FCP assessed petitioner’s need for the power scooter by performing a Resource Allocation Decision (RAD). See Exhibit 1.
6. On February 4, 2016 the FCP sent the petitioner a notice stating that her request for a power scooter had been denied. See Exhibit 1.
7. At some point thereafter, petitioner was prescribed continuous oxygen.
8. On March 29, 2016 the FCP performed another RAD for the petitioner due to the change in condition with the oxygen use. The RAD again determined that the FCP would not fund a power scooter. See Exhibit 3.
9. On April 27, 2016 petitioner underwent an occupational therapy (OT) assessment to assess her for a replacement scooter. According to the OT report, petitioner was found to be able to ambulate for short distances (10-20 feet) without an assistive device, and could use the rollator walker for longer distances in her apartment (room to room). It also found the petitioner’s independent access to the community would be decreased without the scooter. See Exhibit 8.
10. On May 6, 2016 the petitioner’s primary care doctor provided a letter stating that petitioner “would benefit from the scooter due to her dyspnea and it would be difficult for her to propel a wheelchair. She would also have difficulty managing a walker with her oxygen tanks.”

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 within her home and that there are services in place to provide her access to the community, including rides for medical and non-medical appointments, a companion if needed, that petitioner can use available scooters or wheelchairs in places such a grocery stores and hospitals, that she has a paid in-home caregiver who can assist her with shopping, laundry and getting her mail, and a bariatric wheelchair would be made available to her if she desired. It further contends that if she used a scooter instead of ambulation with the rollator walker, that she would become further deconditioned, causing increased dependence on outside help. The agency argues such a situation would be against her Member Centered Plan (MCP) which has her goal of remaining as independent as possible.

I disagree with the agency's arguments. First, the petitioner's testimony was that she can use the scooter in her home on her bad days, when she is in too much pain to use the walker all day. This occurs about 3 times per week. The scooter accommodates her oxygen tanks more easily than the walker as well. There has been no assessment of petitioner's ability to manage two oxygen tanks with her walker, but I can see how the added weight of the tanks would challenge petitioner's already deconditioned state even further. And while she has a caregiver, there was nothing to suggest that the caregiver is there all day, every day. In fact, the FCP summary statement indicates that the caregiver assists her twice weekly. Thus, there may be times when no caregiver is present to help her with mobility, or other tasks, such as getting her mail, which gives petitioner some sense of independence.

Second, the FCP nurse testified that she spoke with petitioner's pulmonologist about the scooter request, and that he said she should not use a scooter in the home and should ambulate as much as possible. While this seems reasonable, it is hearsay. Also troubling and undermining those statements is a letter that the petitioner provided from that pulmonologist which states that he never spoke with anyone from the FCP team. I want to add that there was much discussion about who the nurse spoke to, because her notes identified a [REDACTED], and the letter from petitioner was signed by a [REDACTED]. A quick check on the internet reveals that the doctor is listed as "[REDACTED]". Further, petitioner also provided a letter from her primary doctor ([REDACTED]) that states that petitioner "would benefit from the scooter due to her dyspnea and it would be difficult for her to propel a wheelchair. She would also have difficulty managing a walker with her oxygen tanks." I note that the OT evaluation also agreed that petitioner could not use a wheelchair throughout her home due to size of doorways and the like.

Thirdly, petitioner is involved in community activities. Her access to the community under the FCP's preferred methods would include arranging rides and/or companions and using available community resources (wheelchairs or scooters) in locations that provide them. As described by petitioner, not every location has wheelchairs or scooters available. Also, the OT also found that petitioner's independent access to the community would be decreased without the scooter. See Exhibit 8.

The Wisconsin Administrative Code provides that the FCP CMO's performance standards include:

...developing an individual service plan for each enrollee, with the full participation of the enrollee and any family members or other representatives that the enrollee wishes to participate. The CMO shall provide support, as needed, to enable the enrollee, family members or other representatives to make informed service plan decisions, and for the enrollee to participate as a full partner in the entire assessment and individual service plan development process. The service plan shall meet all of the following conditions:

1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e) 1.

2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment under par. (e) 2. and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.

3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes.

4. Is agreed to by the enrollee, except as provided in subd. 5.

5. If the enrollee and the CMO do not agree on a service plan, provide a method for the enrollee to file a grievance under s. [DHS 10.53](#), request department review under s. [DHS 10.54](#), or request a fair hearing under s. [DHS 10.55](#). Pending the outcome of the grievance, review or fair hearing, the CMO shall offer its service plan for the enrollee, continue negotiating with the enrollee and document that the service plan meets all of the following conditions:

a. Meets the conditions specified under subds. 1. to 3.

b. Would not have a significant, long-term negative impact on the enrollee's long-term care outcomes identified under par. (e) 2.

c. Balances the needs and outcomes identified by the comprehensive assessment with reasonable cost, immediate availability of services and ability of the CMO to develop alternative services and living arrangements.

d. Was developed after active negotiation between the CMO and the enrollee, during which the CMO offered to find or develop alternatives that would be more acceptable to both parties.

Wis. Adm. Code §DHS 10.44(2)(f).

There has been no evidence as to the cost effectiveness of the scooter versus the services the FCP believes meet her needs. However, my best guess based on a review of scooter costs on the internet show a price range of \$1200-3000 for a heavy duty power scooter. This one-time cost spread out over 5 years would seem cost-effective as opposed to paying for rides to and from her residence with a paid companion. It would also meet the standard to assist the petitioner "to be as self-reliant and autonomous as possible and desired by the enrollee," especially when going to places where scooters or wheelchairs are unavailable.

I understand the FCP's concerns that if petitioner uses the scooter only instead of ambulating that her conditioning would likely decline. However, that is not the intent for use as petitioner testified. It is to be used in home only on her bad days and for access to the community. Her primary doctor is supportive of that. She has already been using a scooter for 10 years. The OT evaluation concedes that she is significantly deconditioned and her potential for improved functional mobility is not known. Thus, I am not swayed to think that if petitioner is only ambulating with her walker in her home, that her conditioning would improve or at least be maintained. She is on continuous oxygen and I have no evidence to suggest that using the oxygen while using the walker is something that she can accommodate, especially on the 'bad days'.

At this point in time, I cannot sustain the agency's determination that the scooter is not medically necessary, that there are less expensive alternatives, and even if all were available, these alternatives would not allow the petitioner to be as self-reliant and autonomous as possible. Accordingly, I am remanding this case back to the MCO with the instructions that a power scooter is medically necessary for this petitioner, and that they now need to determine which power scooter would best fit the petitioner's needs. I must assume the agency cannot provide a power scooter within 10 days of my Decision, however, the process of determining which scooter best meets her needs can be started within 10 days.

CONCLUSIONS OF LAW

The agency has not met its burden to show that it correctly denied petitioner's request for a power scooter under the FCP.

THEREFORE, it is

ORDERED

That the matter be remanded to the MCO, My Choice Family Care, with instructions to process petitioner's request for a power scooter within 10 days of the date of this Decision. In all other respects, 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, 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 23rd day of June, 2016

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on June 23, 2016.

MY Choice Family Care
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Health Care Access and Accountability
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