



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION
Case #: FCP - 174590

PRELIMINARY RECITALS

Pursuant to a petition filed May 23, 2016, under Wis. Admin. Code, §DHS 10.55, to review a decision by iCare to discontinue eligibility under the Wisconsin Partnership Program (WPP), a hearing was held on August 23, 2016, by telephone. Hearings set for July 5 and July 27, 2016 were rescheduled at the petitioner's request.

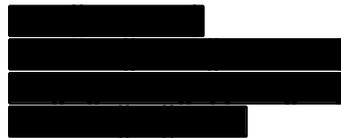
The issue for determination is whether the agency correctly determined that petitioner does not meet a nursing home level of care for WPP eligibility.

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By: [Redacted]
iCare
1555 N. Rivercenter Drive, Suite 206
Milwaukee, WI 53212

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Dane County.
2. Petitioner is diagnosed with blindness/low vision and epilepsy. She had no epileptic seizures in over one year prior to the functional screening at issue in this appeal.

3. Petitioner has received services under the WPP, which requires as one eligibility criterion that the recipient meet a nursing home level of care. Petitioner met the physical disability target group and the appropriate level of care prior to the action appealed in this case. In December, 2015, a functional screen done by petitioner's former Partnership organization found that she met the nursing home level of care.
4. In spring, 2016, petitioner's Partnership organization changed to iCare. iCare conducted a reassessment of eligibility, and a new Long Term Care Functional Screen was prepared by the agency in April, 2016. Following the completion of the screen the agency informed petitioner, by a letter dated May 6, 2016, that WPP eligibility would end May 31, 2016 because petitioner no longer met the level of care requirement. Petitioner appealed and services have continued pending the appeal.
5. The screener found that petitioner needed no assistance with activities of daily living (ADLs). The screener noted that petitioner could bath herself with assistance of grab bars, and that she was independent in dressing, eating, and toileting. The screener noted that petitioner was able to move about her apartment, and that she was able to transfer independently (it was noted that petitioner was able to transfer from multiple surfaces during the visit). She needed assistance with four instrumental activities of daily living (IADLs) because of her blindness.

DISCUSSION

The Wisconsin Partnership Program is a demonstration project authorized by the United States Department of Health & Human Services under a waiver of the Social Security Act. See 42 U.S.C. §§ 1396n(a), (b). The project is designed to save money for the federal and state governments by integrating long-term care and acute care services under one roof. In essence, the Department of Health Services will pre-pay a uniform fee per person served by the WPP organization, and the organization will provide all Medicaid and Medicare covered medical services each individual is determined to need. It is also designed to maximize the ability of enrolled members to live in a setting of their own choice, to participate in community life, and to participate in making decisions regarding their own care.

The department, operating under a federal waiver, must provide or arrange for all Medicaid *and* Medicare covered services required by participating recipients, i.e., "*members*," including nursing facility, primary, acute, and long-term care services utilizing Medicaid and Medicare certified providers. See 42 U.S.C. §1315. The target group for such members is the "frail elderly" and persons "under 65 years of age with disabilities". Wisconsin Partnership Program Waiver, Section IV, B, effective January, 1999. The department performs this task by delegating the responsibility of service delivery to a private provider known as the "partnership organization." Petitioner's current organization is iCare as of April, 2016.

The WPP is a sub-program of Medical Assistance (MA). MA and WPP reimburse the partnership organization for the costs of otherwise eligible persons who require one of several defined "levels of [nursing] care." The department has made efforts to improve the state-wide efficacy of level of care assessments by designing and implementing a computerized functional assessment screening system. The system relies upon a face-to-face interview with a quality assurance screener who has at least a bachelor of science degree in a health or human services related field, with at least one year of experience working with the target populations (or, if not, an individual otherwise specifically approved by the department based upon like combination of education and experience), who has been trained and met all requirements to do so by completing a department sanctioned web-based training program, and has experience working with long term care consumers.

The screener asks the applicant, or a recipient at a periodic review, a multitude of questions about his or her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The screener then submits the "Functional Screen Report" for the applicant to the department's Division of Disability and Elder Services. The department then reviews the Long Term Functional Screen data (or "tool") by computer programming to see if the applicant meets any of the nursing levels of care, as outlined above in detail.

The department's computer program in this case found that petitioner did not meet a level of care, based upon the entries on the form. The definition of the level of care requirement is found in the Wisconsin Administrative Code, §DHS 10.33(2)(c). It is agreed by both parties that the criterion under which petitioner could be eligible is number 2: "The person cannot safely or appropriately perform 2 or more ADLs and one or more [IADLs]." Petitioner does not have a cognitive impairment and she does not meet the criterion of being unable to perform five IADLs.

Her iCare screener found that petitioner needs assistance with no ADLs. Petitioner argues that her need for grab bars for bathing means that she in essence needs assistance. At one time the Department's Functional Screen Instructions provided that needing adaptive equipment was the equivalent of needing assistance. However, the current instructions, labeled as Exhibit 1, do not say that anymore. Beginning with §4.2 of the instructions the screener is supposed to note a score depending on whether the person needs hands-on assistance of another person. If the person is independent the screener should note a score of zero, but the screener also should note what, if any, adaptive equipment the person needs. That is what the screener did in this instance; she noted a zero for bathing for petitioner but also noted use of grab bars. Unanswered is whether the need for adaptive equipment amounts to needing assistance under the Administrative Code provision.

In a prior final fair hearing decision, the Department's Deputy Secretary concluded that the use of adaptive equipment without the need for hands-on assistance did not amount to assistance under the definition. That decision was reversed in Circuit Court, and three other decisions that relied on it also were reversed by Circuit Court judges. See petitioner's exhibit, page 42 (affidavit of Atty. Hagopian), and page 61, (the Circuit Court decision following the initial final decision). At this point the issue is in flux. It is clear that the Circuit Courts were relying on the old functional screen instructions, but the new instructions do not address the issue directly. While common sense suggests that a person who can bath independently with use of adaptive equipment would not require the equivalent of nursing home level of care, I would have to rely on the Circuit Court determinations without clearer policy from the Department.

If petitioner requires assistance with bathing, then she still would require assistance with another ADL to meet the level of care definition in the Wisconsin Administrative Code. Petitioner argues that she needs assistance with transfers. The agency points out that petitioner showed no sign whatsoever of needing such assistance, that she transferred onto and off of the toilet, and then off of different surfaces during the assessment.

Petitioner testified that on bad days she cannot get out of bed and has problems transferring. She also provided evidence from her doctor that when she is horizontal for more than two hours she needs assistance with transfers. See §1.8 of the functional screen instructions relating to fluctuating abilities of the individual.

Atty. ██████ pointed to Exhibit 2, page 3 where the December, 2015 assessment by petitioner's former Partnership organization noted that petitioner told the assessor that on bad days she would require more time to transfer out of bed but that she could still do so, and scored transfer assistance as a "0." Because the scores for ADLs were essentially the same in December, 2015 and in April, 2016, I looked for the

difference that led to the changed result from meeting the level of care to failing the level of care. The only real difference between the December, 2015 functional screen that found petitioner to be at the nursing home level and the April, 2016 screen that found the opposite, is the level of risk, which was a "2" in December and a "0" in April. A later change to "1" for level of risk in June did not change the iCare conclusion that petitioner failed to meet the level of care. See agency exhibit 2, page 7 for the December, 2015 risk score, exhibit 3, page 9 for the April, 2016 risk score, and exhibit 11, page 10 for the June, 2016 risk score.

In the end I have to make a credibility determination. I reviewed the assessment notes by the iCare screener and transfers are barely mentioned. If petitioner truly needed assistance with transfers on bad days or when she is horizontal for long periods of time I would think that the issue would have come up during the assessment. In addition, the assessment done in December, 2015, by petitioner's prior Partnership organization, also noted independence with transfers while mentioning petitioner's description about getting out of bed on bad days. It thus is evident to me that petitioner's claim of a need for transfer assistance on bad days arose only after it became necessary to assert a second ADL for which assistance is needed. Petitioner, and the screener who met with her, would have a better idea of petitioner's transfer ability than the doctor who sees her occasionally and who bases his opinion on the general limitations of her type of disability.

I conclude that the iCare assessment correctly noted that petitioner is independent with transfers, and further that she does not need assistance with two ADLs. From an overall view, it is evident that petitioner would not require nursing home care if not for agency intervention, and thus the agency determination is upheld.

CONCLUSIONS OF LAW

The agency correctly determined that petitioner does not meet the required nursing home level of care for WPP eligibility.

THEREFORE, it is **ORDERED**

That the petition for review is hereby 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 Madison,
Wisconsin, this 7th day of September, 2016

\s _____
Brian C. Schneider
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 September 7, 2016.

iCare
Office of Family Care Expansion
Health Care Access and Accountability

