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

In the Matter of



DECISION

FCP/143021

PRELIMINARY RECITALS

Pursuant to a petition filed August 09, 2012, under Wis. Admin. Code § DHS 10.55, to review a decision by the Care Wisconsin in regard to Medical Assistance/Family Care (FC), a hearing was held on October 18, 2012, at Waukesha, Wisconsin.

The issue for determination is whether the agency properly determined that the Petitioner does not meet the nursing home level of care.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: Carmen Lord
Care Wisconsin
2802 International Lane
Madison, WI 53708

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Waukesha County. Petitioner is enrolled as a Family Care member through Care Wisconsin.

2. Petitioner has been at a nursing home level of care in the FC program since August 1, 2008. He has met the Physical Disability target group for eligibility since August 1, 2008.
3. The last functional screen finding the Petitioner to meet the Physical Disability target group and finding the Petitioner to be at the nursing home level of care was July 11, 2011. On July 31, 2012, the functional screen found the Petitioner met the Physical Disability target group and placed the Petitioner at a non-nursing home level of care. On July 31, 2012, the agency issued a Notice to the Petitioner that he no longer meets the nursing home level of care.
4. On August 9, 2012, the Petitioner filed an appeal with the Division of Hearings and Appeals.
5. On August 24, 2012, the agency removed the Physical Disability target group due to the Petitioner's independence with all Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs) making the Petitioner ineligible for Family Care due to the lack of an eligible target group.
6. On November 2, 2012, the agency determined that the Petitioner meets the Developmental Disability target group and is eligible for Family Care at a non-nursing home level of care.
7. The Petitioner has diagnoses that include a hormonal/metabolic system disorder, osteoarthritis in his feet and back, sleep apnea, diabetes type II, hypertension and severe obesity. He wears a brace on his left foot. The Petitioner is also diagnosed with a depressive disorder and Pervasive Developmental Disorder NOS as well as mild cognitive/learning disabilities.

DISCUSSION

The Family Care (FC) program, which is supervised by the Department of Health Services (DHS), is designed to provide appropriate long-term care services for physically/developmentally disabled or elderly adults. See Wis. Stats. Section 46.286 and Wis. Admin. Code ch. DHS 10. Whenever the local Family Care program decides that a person is to be terminated from the program, the client is allowed to file a fair hearing request.

In order to qualify for FC services, with certain exceptions not applicable here, a person's functioning must be such that he/she would otherwise require institutional care.

Eligibility. A person is eligible for, but not necessarily entitled to, the family care benefit if the person is at least 18 years of age; has a physical disability, as defined in s. 15.197 (4) (a) 2., or a developmental disability, as defined in s. 51.01 (5) (a), or is a frail elder; and meets all of the following criteria:

(a) Functional eligibility. A person is functionally eligible if the person's level of care need, as determined by the department or its designee, is either of the following:

1m. The nursing home level, if the person has a long-term or irreversible condition, expected to last at least 90 days or result in death within one year of the date of application, and requires ongoing care, assistance or supervision.

2m. The non-nursing home level, if the person has a condition that is expected to last at least 90 days or result in death within 12 months after the date of application, and is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others.

Wis. Stats., Section 46.286(1)

Essentially, to meet the functional eligibility requirement, a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. To be found eligible, the applicant must undergo an assessment of his/her needs and functioning.

Since the Petitioner's enrollment in 2008, he was found to be eligible for Family Care because he has a physical disability as defined in s. 15.197.(4)(a)2. In July, 2012, the assessor found that the Petitioner continued to meet that criteria. However, on August 24, 2012, the agency reversed its determination and found that the Petitioner no longer met the criteria for Family Care eligibility because the Petitioner no longer had a physical disability as defined in s. 15.197(4)(a)2.

Subsequent to the hearing, on November 2, 2012, the agency determined that the Petitioner has a developmental disability so that he meets a target group for Family Care eligibility.

Though the agency now concedes that the Petitioner is eligible for Family Care, I conclude, based on the evidence, that the agency's August, 2012 determination that he does not meet the physical disability target group was not correct.

In order to meet the physical disability criteria for Family Care eligibility the member must have a physical disability that "significantly interferes with or significantly limits at least one major life activity." Wis. Stats. § 15.197(4)(a)2. A "major life activity" is defined as any of the following:

- a. Self-care.
- b. Performance of manual tasks unrelated to gainful employment.
- c. Walking.
- d. Receptive and expressive language.
- e. Breathing.
- f. Working.
- g. Participating in educational programs.
- h. Mobility, other than walking.
- i. Capacity for independent living.

Wis. Stats. § 15.197(4)(a)1.

The DHS has made efforts to improve the statewide efficacy of functional assessments by designing and implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a quality assurance screener who asks the applicant, or a recipient at an annual review, questions about his/her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits (as occurred here) the "Functional Screen Report" for the applicant to the DHS Division of Long -Term Care. The DHS then treats the Long Term Care Functional Screen data (or "tool") by computer programming to see if the applicant/recipient meets any of the nursing home levels of care.

The agency assessor made determinations on July 27, 2012 and August 24, 2012 that the Petitioner was able to perform all ADLs independently and all but one IADL independently. When the scores were entered into the algorithm of the computerized system, the result was a conclusion that the Petitioner's care needs are at a non-nursing home level of care. A determination was subsequently made that the Petitioner is not eligible for Family Care based on the physical disability criteria. A subsequent assessment in November, 2012 found him eligible for Family Care based on developmental disability criteria but, again, at a non-nursing home level.

With regard to eligibility, my conclusion is that the Petitioner meets the criteria for eligibility for Family Care under both the physical disability and developmental disability criteria. The decisions by the agency finding him ineligible for Family Care and then eligible again were made after the Petitioner filed the appeal. However, the decision finding him ineligible was made prior to the hearing and was based on the finding that Petitioner is independent with all ADLs and all but one IADL (transportation). The issue of eligibility based on physical disability was discussed at the hearing because the level of care determination would be moot if the Petitioner is not eligible for FC. The agency indicated that its determination regarding eligibility under the physical disability criteria was based on findings from the July, 2012 assessment that the Petitioner is independent with all ADLs and all but one IADL (transportation). Based on the evidence outlined below, I conclude that these findings are incorrect and that the Petitioner is not independent with all ADLs and most IADLs. Therefore, the evidence produced at the hearing supports a finding that the Petitioner meets the criteria for eligibility based on physical disability, particularly with regard to his diabetes, osteoarthritis and obesity. The agency determination that he is FC-eligible based on developmental disability was not specifically at issue at the time of the hearing and therefore is not addressed in this decision.

With regard to the Petitioner's level of care, the Wisconsin Administrative Code, independent of the DHS computerized system, contains the "comprehensive functional capacity level" standards. In the Code, the expressed standard, as opposed to the computer algorithm, for the requisite level of care is as follows:

DHS 10.33 Conditions of functional eligibility

(2) DETERMINATION OF FUNCTIONAL ELIGIBILITY. (a) *Determination.* Functional eligibility for the family care benefit shall be determined pursuant to s. 46.286(1), Stats., and this chapter, using a uniform functional screening prescribed by the department. To have functional eligibility for the family care benefit, the functional eligibility condition under par. (b) shall be met and, except as provided under sub. (3), the functional capacity level under par. (c) or (d) shall be met.

(b) *Long-term condition.* The person shall have a long-term or irreversible condition.

(c) *Comprehensive functional capacity level.* A person is functionally eligible at the comprehensive level *if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:*

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living (IADLs).
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
 - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or

unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.

- b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self-neglect or resistance to needed care.

Wis. Admin. Code Section DHS 10.33(1)(a)(c) (Emphasis added).

Based on the evidence presented, the Petitioner meets the criteria of at least (c)3, 4 and 5.

Specifically, with regard to IADLs, the evidence indicates that the Petitioner cannot safely or appropriately perform the following:

Meal preparation: The agency asserted that the Petitioner's mother reported that the Petitioner can make "simple meals like macaroni and cheese." The Petitioner's mother testified that he can make macaroni and cheese but only if she gives him specific step-by-step instructions and supervises him. She testified that he cannot remember or understand the steps necessary to make a meal and cannot operate a stove, oven or microwave safely or appropriately. There is insufficient evidence to conclude that the Petitioner can prepare a meal independently or in a safe and appropriate way or that he can do the necessary grocery shopping appropriately and without extensive assistance.

Money Management: The agency asserts that the Petitioner's mother manages the Petitioner's bank accounts but that the Petitioner is given small amounts of money to spend. The Petitioner's mother testified that she gives the Petitioner money when they are shopping but she must give him step-by-step instructions with regard to spending the money. He doesn't recall where his money is, what he needs to buy, how much to pay. There is insufficient evidence to conclude that the Petitioner can safely or appropriately handle any money transactions independently.

Medication: The agency asserts that the Petitioner told the assessor that he handles his medications himself. The agency notes that the pharmacy color codes the Petitioner's medication bottles. The Petitioner's mother testifies that she gets his medications and must assist him every week to place the medications in the weekly pill boxes. Every morning, she must tell him to take the medications in the box for that day. Also, the Petitioner's mother must do his blood checks. He is resistant to doing them and will not do them himself. The evidence is that the Petitioner cannot safely or appropriately manage or administer his medications independently.

Laundry/chores: The agency asserts the Petitioner can handle his own laundry but presented no evidence to support this assertion other than to say that because the Petitioner received an Associates Degree in computer programming in 1995, he must be able to do laundry and other chores. I don't find this to be sufficient evidence or even relevant or related to what the Petitioner can do in 2012. The Petitioner's mother testified that she must give him step-by-step instructions and supervise him when doing laundry or other chores. Based on the evidence, I conclude the Petitioner cannot safely or appropriately do laundry or other chores.

Transportation: The agency concedes that the Petitioner cannot drive. However, the agency asserts that it is not because he lacks the ability to do so but because he does not have a license. The Petitioner's mother testified that the Petitioner lacks the cognitive ability to safely drive a car. The

agency presented insufficient evidence to allow me to conclude that he has the ability to safely drive a car. Based on the totality of the evidence presented, I conclude that the Petitioner cannot safely operate a car.

Dressing/Bathing: the agency contends the Petitioner is able to dress and bathe himself. The Petitioner's mother concedes that the Petitioner can bathe himself *after* she prepares the items he will need to appropriately wash, including washcloths, soap and towel. She also testified that while he can wash himself, she needs to remind him to wash the different areas of his body. Also, with regard to dressing, the Petitioner's mother testified that he can dress himself after she gets out appropriate and necessary clothing for him. She stated that he will wear winter clothing in summer and vice versa. He does not understand how to dress appropriately for the weather and seasons. Based on the evidence, the Petitioner is unable to appropriately dress and bathe himself without assistance.

In addition to the Petitioner's mother's credible testimony, I found the October 3, 2012 report of the Petitioner's neuropsychologist, introduced by the Petitioner's mother, to be relevant, persuasive and supportive of the Petitioner's mother's testimony with regard to the Petitioner's capabilities. The neuropsychologist noted that Petitioner moved slowly and was slow to respond to questions. His responses to questions were blunted. His eye contact was marginal to poor. He initiated no spontaneous conversation. On mental status testing with three word memory task, he was unable to recall any of the three words after a delay. Perceptual reasoning was in the low average range. Tests of visual attention showed him to be "severely impaired." His overall academic achievement falls in the 5th – 6th grade equivalent. However, it was noted that, on a sequencing task involving numbers and letters requiring psychomotor speed, his performance is severely impaired. A depression screening tool found the Petitioner to have a severe degree of depression. The physician concluded that while the Petitioner has a basic capability to make simple decisions, he is unlikely to be able to independently manage changes in treatment, a more complicated medication regimen or complicated health care decision making. Further it was noted that he will likely always need some oversight and help with medication, health care and finances.

Also relevant is a report by the Petitioner's music therapists, introduced by the Petitioner's mother. The report, dated August 20, 2012, indicates that the Petitioner has strong interest and skill in computer function and simple repair and can talk at length about computers. However, the therapists note that this capability with regard to computers is limited. Their opinion is that he has sufficient knowledge to keep his own computer running effectively but it is questionable if he would be able to use his knowledge to assist others in a job setting. The therapists note that his capability with computers does not extend into other areas of functioning. Specifically, he rarely makes eye contact and is unable to answer questions with more than a 3 – 5 word answer. After years of weekly music therapy, he is unable to read or play music without special adaptations. The therapists opined:

"Given [Petitioner's] inability to learn the written language of music, it is questionable if he would be able to learn new and changing material beyond his current computer knowledge to be effective in a job setting. Given his mild cognitive disability which requires his music therapist to decode his music, he may also struggle with frequent updates in technology and the abstract thinking involved with making decision in applying new knowledge. [Petitioner]'s basic level of social skills may also inhibit his ability to request assistance in a job situation or independent living environment."

The agency's evidence consisted primarily of reports by the Petitioner and his parents as to the Petitioner's capabilities and the fact that the Petitioner obtained an Associate's Degree in computer function in 1995. The Petitioner's mother's testimony and evidence successfully rebutted that of the agency. I do not find that an Associate's Degree in computers obtained in 1995 is sufficient evidence to demonstrate the Petitioner's capabilities in ADLs and IADLs in 2012.

The evidence demonstrates that the Petitioner requires ongoing care, assistance and supervision from another person in order to accomplish some ADLs and most IADLs. He therefore meets the nursing home level of care.

CONCLUSIONS OF LAW

The agency did not properly determine that the Petitioner is not eligible for Family Care under the physical disability criteria and the agency did not properly determine that the Petitioner no longer meets the nursing home level of care.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency with instructions to continue Petitioner's nursing home level of care eligibility based on physical disability and developmental disability for purposes of FC effective July 31, 2012. The agency shall take this action within 10 days of the date of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 20th day of November, 2012

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

David H. Schwarz
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 November 20, 2012.

Care Wisconsin
Office of Family Care Expansion