



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

CWA/144389

PRELIMINARY RECITALS

Pursuant to a petition filed October 05, 2012, under Wis. Admin. Code § HA 3.03, to review a decision by the Kewaunee County Department of Social Services in regard to Medical Assistance, a telephonic hearing was held on November 28, 2012, at Kewaunee, Wisconsin. At the request of the parties, the record was held open for written closing arguments to be sent to the Division of Hearings and Appeals (DHA). The Kewaunee county agency submitted its closing argument, but the petitioner did not submit any closing argument to DHA.

The issue for determination is whether the agency correctly discontinued the petitioner's MA Community Waivers benefits effective November 1, 2012, due to no longer meeting the level of care based upon her functional screens.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

Department of Health Services

1 West Wilson Street

Madison, Wisconsin 53703

By: Carol Stuebs, Long term care manager

Kewaunee County Department of Social Services

510 Kilbourn Street

Kewaunee, WI 54216

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a 65 year old resident of Kewaunee County.
2. The petitioner is diagnosed with multiple sclerosis, thrombocytopenic purpura, and diabetes.
3. The petitioner has received Community Options Program (COP)/CIPII benefits through the MA Community Waivers program.
4. In her June 26, 2012 functional screen, the screener (long term support care manager Carol Stuebs) determined that petitioner met the Nursing Home Intermediate Care Level of Care for continued participation in the Community Waivers Program. See Exhibit 3.
5. In her September 13, 2012 functional screen, screener Carol Stuebs determined that petitioner no longer met the Nursing Home Intermediate Level of Care or any other level of care. See Exhibit 2.
6. Both parties agreed that the primary basis for the decision that petitioner no longer meeting the functional screen was the change that petitioner was determined to need "Medication Administration and Medication Management" on p 5 of her June 26, 2012 screen (needs reminders to take her medication), but petitioner was determined "independent" in her September 13, 2012 functional screen. See Exhibits 2 and 3.
7. The county agency sent September 24, 2012 Notice of Decision to the petitioner stating that effective November 1, 2012, her Community Waivers program eligibility would discontinued because she no longer met the level of care requirement. See Exhibit 1.

DISCUSSION

The MA Community Waiver Programs (e.g., Community Integration Program, Community Options Program - Waiver) are partially funded by the federal government through the Medical Assistance (MA) program. These Waiver programs must meet federal requirements, including MA regulations when applicable. To receive services through the Waiver programs, a person must be currently eligible for MA, have institutional-level care needs, and be elderly or disabled. *Medicaid Eligibility Handbook (MEH)*, §28.1, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/>, and the *MA Waivers Manual (Manual)*, at http://dhfs.wisconsin.gov/ltc_cop/waivermanual/index.htm.

To meet the functional eligibility requirement (*i.e.*, to have institutional-level care needs), a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. *Manual*, §2.07; 42 C.F.R. §§ 435.217 & 435.441.301(b). To be found or remain eligible, the applicant must undergo an assessment of his/her needs and functioning.

I. THE DHS COMPUTERIZED SCREENING TOOL DETERMINED THAT THE PETITIONER IS NOT FUNCTIONALLY ELIGIBLE AT THE "NURSING HOME INTERMEDIATE CARE LEVEL."

The Wisconsin Department of Health Services has made efforts to improve the statewide efficacy of functional/LOC assessments by implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained quality assurance screener who has experience working with long term care consumers. This screener asks the applicant, or a recipient at a periodic review, many 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 the "Functional Screen Report" for the applicant to the Department's Division of Long Term Care. The

Department then runs the Long Term Functional Screen data (or “tool”) through a computer program to see if the applicant/recipient meets any of the nursing levels of care.

Initially, the Department employed a statistical consultant to test the use of the “tool” (or "LOC" form) and the reliability of the outcomes obtained in using the tool and the computer analysis program. The consultant concluded that the use of the functional screen resulted in a high degree of reliability and consistency. The LOC form is available at <http://www.dhs.wisconsin.gov/forms/F0/f00366.pdf> and it is designed to incorporate the skeletal definitions from the federal Medicaid rules for Nursing Care and institutional Developmental Disability facilities.

The petitioner’s diagnoses are not in dispute. The agency assessor determined in June, 2012, that the petitioner needed assistance with medication administration and management in addition to assistance with bathing. When the petitioner’s functional ability scores were entered into the DHS algorithm, the result was a DHS conclusion that the petitioner does have care needs at the nursing home intermediate level of care. Thus, the petitioner was found to be eligible going forward, consistent with the DHS-directed result. However, as explained in Findings of Fact #4 and #5 above, during the September 13, 2012 functional screen petitioner was determined not eligible for that level of care because she was determined independent with the medication management.

The petitioner did not disagree with the assessor’s characterization of being independent with her medication management needs. During the hearing, petitioner was unable to refute the testimony of the county’s representative, Carol Stuebs. Based on the proffered testimony, I conclude that the assessor made the correct entries into the LOC form, which in turn resulted in the computer program’s determination that the petitioner does not currently have care needs at an institutional level.

II. INDEPENDENTLY OF THE DHS LOC ALGORITHM, I CONCLUDE THAT THE PETITIONER DOES NOT MEET THE INSTITUTIONAL LEVEL OF CARE REQUIREMENT AT THIS TIME.

The petitioner was unable to present any persuasive argument which makes the continuation of MA Waiver program benefits necessary for her. Looking at legal definitions, rather than the computer program result, federal law requires that a person have care needs at an institutional level (hospital, nursing home) as a condition of adult MA Waiver eligibility. The petitioner does not appear to be arguing that she has regular care needs that require hospitalization. Federal law defines a nursing facility as follows:

(a) *Nursing Facility Defined.*—In this title, the term “nursing facility” means an institution (or a distinct part of an institution) which —

(1) is primarily engaged in providing to residents —

(A) skilled nursing care and related services for residents who require medical or nursing care,

(B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons, or

(C) on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities, and is not primarily for the care and treatment of mental diseases;

42 U.S.C. 1396r(a). Of particular note is the requirement that a resident must need a health-related service above the level of room and board. Because housekeeping services are a “room and board” item,

rather than a health-related service, the need for housekeeping services alone cannot qualify a person for the CIP II Waiver. Rehabilitation services (*e.g.*, physical therapy) are not being regularly received in this case, per the record before me.

Turning to the provision of skilled nursing care, the Wisconsin Administrative Code defines levels of nursing care as follows:

(31) "Skilled nursing facility" means a nursing home which is licensed by the department to provide skilled nursing services.

(32)

(a) "Skilled nursing services" means those services furnished pursuant to a physician's orders which:

1. Require the skills of professional personnel such as registered or licensed practical nurses; and

2. Are provided either directly by or under the supervision of these personnel.

(b) In determining whether a service is skilled, the following criteria shall be used:

1. The service would constitute a skilled service where the inherent complexity of a service prescribed for a resident is such that it can be safely and effectively performed only by or under the supervision of professional personnel;

2. The restoration potential of a resident is not the deciding factor in determining whether a service is to be considered skilled or unskilled. Even where full recovery or medical improvement is not possible, skilled care may be needed to prevent, to the extent possible, deterioration of the condition or to sustain current capacities; and

3. A service that is generally unskilled would be considered skilled where, because of special medical complications, its performance or supervision or the observation of the resident necessitates the use of skilled nursing personnel.

...

(10) "Intermediate nursing care" means basic care consisting of physical, emotional, social and other rehabilitative services under periodic medical supervision. This nursing care requires the skill of a registered nurse for observation and recording of reactions and symptoms, and for supervision of nursing care. Most of the residents have long-term illnesses or disabilities which may have reached a relatively stable plateau. Other residents whose conditions are stabilized may need medical and nursing services to maintain stability. Essential supportive consultant services are provided.

Wis. Admin. Code § DHS 132.13(10), (31),(32).

The petitioner in her June 26, 2012 functional screen was "independent" in "toileting," however, in her September 13, 2012 most recent screen, petitioner determined that regarding toileting, petitioner needed some help (1) (supervision, cueing, hands-on assistance needed). See Exhibits 2 and 3. However, even with the increase in her needs for assistance with toileting, her September 13, 2012 functional screen nevertheless confirmed that petitioner did not meet any level of care. The petitioner was unable to present any evidence to establish any error in the calculations or determinations of her September, 2012 functional screen.

The petitioner is not receiving, and does not require, skilled nursing services, because she does not require a service that must be provided by, or under the supervision of, a registered or licensed practical nurse. She also does not require continued intermediate nursing care services. That is because the type of help that she needs can be provided without use of a registered nurse for observation and recording of

reactions/symptoms. Therefore, the petitioner does not require nursing services, as defined under the MA rules above, and she thus does not qualify for COP/CIP II services.

CONCLUSIONS OF LAW

1. The Department correctly determined that the petitioner is no longer eligible for COP/CIP II services, due to her failure to require institutional level care.
2. The agency correctly discontinued the petitioner's MA Community Waivers benefits effective November 1, 2012, due to no longer meeting any level of care based upon her September, 2012 functional screen.

THEREFORE, it is

ORDERED

The petition for review herein be and the same is hereby Dismissed.

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 Madison,
Wisconsin, this 15th day of January, 2013

\sGary M. Wolkstein
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 January 15, 2013.

Kewaunee County Department of Social Services
Bureau of Long-Term Support