FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FCP/144423

PRELIMINARY RECITALS

Pursuant to a petition filed October 11, 2012, under Wis. Admin. Code § DHS 10.55, to review a decision by the Wisconsin Department of Health Services' agent in regard to Family Care Program (FCP) benefits , a hearing was held on December 19, 2012, by telephone. A hearing set for November 15, 2012, was rescheduled at the petitioner's request.

The issue for determination is whether the agency correctly denied the petitioner's request for additional SHC hours, a mattress, and a padded sling.

There appeared at that time the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: Lillian Alford, QI Coordinator
Milwaukee, WI

ADMINISTRATIVE LAW JUDGE:
Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County.
2. The petitioner, age 66, has diagnoses of diabetes, recurrent UTIs, obesity (approximately 300 pounds), congestive heart failure, degenerative joint disease, renal calculi, depression, and a history of knee and hip replacement. She requires assistance with all activities of daily living (ADLs) and transfers; she does not ambulate. Her cognition, vision, speech and hearing are not

impaired. The petitioner resides alone in a lower floor duplex owned by her daughter, and her daughter and granddaughter live in the upper unit. They cannot be counted on to provide services to the petitioner.

3. The petitioner is enrolled in the FC program and has had an individualized service plan (Plan) for over a year. Her current Plan includes 56 hours weekly of combined personal care and supportive home care (SHC). On August 7, 2012, the petitioner requested increased SHC. The CMO denied this request on August 8, 2012. *See*, Exhibit A. Following an unsuccessful local grievance, the petitioner appealed the CMO denial to the Department's reviewer, MetaStar. MetaStar upheld the denial, and the petitioner filed this appeal.

4. The petitioner requested more SHC hours because she would like someone to be present for more hours to assist her with unanticipated bowel movements.

5. The petitioner's current, 56 hour weekly service level is divvied up to have a worker present in the petitioner's residence from 8:00 – 10:00 a.m., 1:00 – 3:00 p.m., and 5:00 – 9:00 p.m., Monday – Friday. On weekends, the service hours are 8:00 a.m. – noon, and 5:00 – 9:00 p.m. She is free to change the timing of her service schedule. The petitioner has a wheelchair-accessible bathroom. She also has a bedpan and is capable of using it. The petitioner has incontinence supplies, and is receiving therapy to increase her ability to transfer. The CMO advised the petitioner that it is willing to fund residential placement for her (*e.g.*, a residential care apartment complex unit). She declined this offer, citing her desire to continue residing in the same structure as her daughter.

6. On August 24, 2012, the petitioner requested a new, softer mattress. The CMO denied this request in a notice dated August 24, 2012. Following an unsuccessful local grievance, the petitioner appealed the CMO denial to the Department's reviewer, MetaStar. MetaStar upheld the denial.

7. The petitioner has a bariatric bed (designed for persons over 350 pounds) purchased by the CMO approximately two years ago. This bed has a standard mattress. The petitioner does not currently suffer from skin breakdown, so a different mattress is not needed to heal skin ulcers. Further, a softer mattress could negatively affect in-bed mobility.

8. On September 26, 2012, the petitioner requested a padded sit-to-stand sling. The CMO denied this request in a notice dated October 3, 2012.

9. The petitioner already has an unpadded sit-to-stand sling. Because the petitioner has a torn left rotator cuff, putting pressure on and under that shoulder is painful. Her physician will not operate to repair that shoulder. The CMO's physical therapist recommended that the patient place a towel under the sling arms to reduce pain when transferring. The petitioner tried using a towel for this purpose, and the result was unsatisfactory. The source or brand name of a suitable padded sit-to-stand sling is not in this hearing record.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. A dis-satisfied FC client may file a grievance with his CMO under Wis. Admin. Code §DHS 10.53, request a state-level review by the Wisconsin Department of Health Services under § DHS 10.54, and/or request a fair hearing under § DHS 10.55.

The state code language on the scope of permissible services for the FC reads as follows:

DHS 10.41 Family care services . …

(**2**) SERVICES. Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department's contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under 42 USC 1396n(c) and ss.46.275, 46.277 and 46.278, Stat., the long-term support services and support items under the state's plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and meet the needs of enrollees as identified through the individual assessment and service plan.

Note: **The services that typically will be required to be available include *adaptive aids*; adult day care; assessment and case planning; case management; communication aids and interpreter services; counseling and therapeutic resources; daily living skills training; day services and treatment; home health services; home modification; home delivered and congregate meal services; nursing services; nursing home services, including care in an intermediate care facility for the mentally retarded or in an institution for mental diseases; personal care services; personal emergency response system services; prevocational services; protective payment and guardianship services; residential services in an RCAC, CBRF or AFH; respite care; *durable medical equipment* and specialized medical supplies; outpatient speech; physical and occupational therapy; supported employment; *supportive home care;* transportation services; mental health and alcohol or other drug abuse services; and community support program services.**

[*emphasis added*]

Wis. Admin. Code §DHS 10.41(2) (June, 2009). SHC and durable medical equipment are specifically included in the list of covered services in the statutory note above. Given that SHC is a covered service, the next question is whether the petitioner is receiving enough hours to meet her needs. The burden of proof for the increase rests with the petitioner, and she has not met it. The petitioner offered no documentation or testimony from a medical provider to support her position. Under the current, rather high level of SHC hours, the petitioner is only left alone for a three hour increment and a two hour increment during her weekday waking hours. If the petitioner truly requires a staff person to be available for all of her waking hours, she would then appear to be someone who can no longer live in a non-institutional setting. Adding SHC hours is not a cost-effective solution here, as the available staff person would have nothing to do most of the time, thereby wasting program funds.

The petitioner has also failed to meet her burden of proving by a preponderance of the credible evidence that she requires a softer mattress with program funds. She complained of back pain, which she attributes to the mattress. Her proposed solution is the program's purchase of an alternating press ure mattress, similar to one that she enjoyed during a hospital stay. The program notes that her current mattress is only two years old, and that the program has already paid for a petitioner-requested bariatric bed, even though the petitioner did not meet the minimum weight requirements for such a purchase. The CMO has suggested an alternative of having the petitioner purchase a cushioned mattress topper/cover. The petitioner does not currently suffer from skin breakdown, so a different mattress is not needed to heal skin ulcers. Further, per the statement of the CMO's physical therapist, a softer mattress could negatively affect in-bed mobility for this patient. Thus, denial of the mattress is upheld.

The only close call in this appeal is as to whether the petitioner has proven that she requires a padded sit-to-stand sling. The CMO contract language does not provide me with additional direction on this request. The Department's 2012 CMO contracts may be viewed at http://dhs.wi.gov/ltcare/StateFedReqs/FC-RC-CMO-Contracts.htm. The standard contract allows for provision of "adaptive aids" and the 15 enumerated types of services:

A. Home and Community Based Waiver Services

The following services, defined in Wisconsin's s. 1915 (c) home and community -based waiver services waivers #0367.90 and #0368.90 required under s. 46.281(1)(c), Wis. Stats., and approved by the Centers for Medicare & Medicaid Services (CMS) are included in the Family Care, Partnership and PACE benefit packages:

1. Adaptive aids are controls or appliances that enable persons to increase their abilities to perform activities of daily living or control the environment in which they live (including patient lifts, control switches, etc.). Adaptive aids are also services and material benefits that enable individuals to access, participate and function in their community. These include the purchase of vehicle modifications (such as van lifts, hand controls, equipment modifications etc. that allow the vehicle to be used by the participant to access the community), or those costs associated with the maintenance of these items.

...

B. Medicaid State Plan Services: Family Care Benefit Package

The following Medicaid State Plan long-term care services defined in ch. DHS 107, Wis. Admin. Code, with specific service definitions as noted in the reference(s) following each service are included in the Family Care Benefit Package. MCOs will determine which services require prior authorization and use the member-centered planning process to define the service limitations, rather than using the requirements in DHS 107. For informational purposes, information about specific services is found in the BadgerCare Plus and Medicaid handbooks at: https://www.forwardhealth.wi.gov/WIPortal/Online%20Handbooks/Display/tabid/152/Default.aspx

1. AODA day treatment services as defined in DHS 107.13 (in all settings)
2. AODA services...
3. Case management ...
4. Community support program...
5. Durable medical equipment and medical supplies as defined in DHS 107.24 (except hearing aids, prosthetics and family planning supplies)
6. ...

CMO Contract, Addendum XII, Sections A and B.

The petitioner already has an unpadded sit-to-stand sling. Because the petitioner has an inoperable torn left rotator cuff, putting pressure on and under that shoulder is painful. The CMO's physical therapist recommended that the patient place a towel under the sling arms to reduce pain when transferring. The petitioner tried using a towel for this purpose, and the result was unsatisfactory, as the towel slips off the sling. The CMO has also offered the petitioner physical therapy to improve her ability to transfer.

I conclude that the petitioner has not met her burden of proving that a padded sling is a cost-effective option. The source or brand name and cost of a suitable padded sit-to-stand sling is not in this hearing record. The CMO asserts that it contacted several equipment providers, and they do not carry such a thing. The petitioner testified that she used a padded sling when a physical therapist "brought it over from the hospital" and that it was comfortable to use. However, the petitioner provided no testimony or documentation regarding the brand name or cost of such a sling. Without knowing the cost of the item, I

cannot determine whether it is a cost-effective alternative to additional physical therapy. Thus, the denial is upheld.

CONCLUSIONS OF LAW

1. The CMO correctly denied the petitioner's request for increased SHC hours to deal with toileting needs.
2. The CMO correctly denied the petitioner's request for a softer mattress.
3. The CMO correctly denied the petitioner's request for a padded sit -to-stand sling.

THEREFORE, it is **ORDERED**

That the petition is 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 31st day of January, 2013

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals

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The preceding decision was sent to the following parties on January 31, 2013.

Milw Cty Dept Family Care
Office of Family Care Expansion