



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWA/145216

PRELIMINARY RECITALS

Pursuant to a petition filed November 13, 2012, under Wis. Admin. Code § HA 3.03, to review a decision by the Community Ling Alliance ["CLA"] in regard to Medical Assistance ["MA"], a Hearing was held on January 29, 2013, at the Dane County Department of Human Services ["County"] in Madison, Wisconsin. At petitioner's request Hearings scheduled for January 15, 2013 and December 18, 2012 were rescheduled.

The issue for determination is whether CLA may reduce petitioner's Supportive Home Care ["SCH"] hours from 180 hours per month to 20 hours per month effective November 19, 2012.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Susan Tess
Disability Rights Wisconsin
131 West Wilson St., Suite 700
Madison, WI 53703

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: Theresa Fishler, Director of Intake & Waiver Services
Gregg Kronberg, Service Coordinator
Community Living Alliance
1414 MacArthur Road
P.O. Box 8028
Madison, Wisconsin 53708-8028

OTHER PERSON PRESENT:

[REDACTED] [REDACTED], petitioner's son & caregiver

ADMINISTRATIVE LAW JUDGE:
Sean P. Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]; age 55 years) is a resident of Dane County and is receiving benefits from the MA waivers Community Integration Program II ["CIP II"].
2. Petitioner has diagnosis of ischemic cardiomyopathy, morbid obesity, asthma, tobacco abuse, coronary artery disease, hypertension, type 2 diabetes, sleep apnea, chronic kidney disease stage III, fibromyalgia, GERD, insomnia, chronic lower back pain, Congestive Heart Failure ["CHF"], diabetic neuropathy, osteopenia, and depression; she takes numerous medications. Exhibit #3 (pp. 11, 26, 27, & 29-31).
3. A prior *Decision* of the Division of Hearings and Appeals ["DHA"] dated March 9, 2012 found that petitioner was independent in dressing, eating, mobility in the home, transfers, medication management, money management, and using the telephone; that she needs assistance with bathing and showering (supervision and studying herself), laundry, meal preparation transportation; that she utilizes assistance in toileting (wiping after bowl movement; she is incontinent daily) and grocery shopping, that "she become[s] short of breath with minimal activity and that simple activities of daily living can leave the petitioner breathless and fatigued for several hours;" that her co-morbid conditions "impose significant limitations on the petitioner's physical ability to perform even simple routine physical activities on a regular and daily basis;" the March 29, 2012 discussed that "two doctors have reported that the interplay of her CHF, COPD, CAD, morbid obesity and diabetes render her prone to great exhaustion for extended periods of hours after very simple exertions, as well as respiratory distress. . . . An individual with this panoply of serious heart and respiratory problems, with a body mass index of approximately 42.3, may certainly be able to physically perform individual tasks, like doing a load of laundry, or preparing a meal, or driving to an appointment. But the combined effects of these serious debilitating conditions means that such a person cannot consistently perform all of the sundry activities of daily living and instrumental activities of daily living on a regular and daily basis. Rather, the performance of only *one or two* of these tasks is reported by the petitioner's specialists to result in debilitating effects that last for several hours. Mere anecdotal snapshots that the petitioner seemed to be doing a load of laundry, or could complete a meal prep task if she sits down, or can on some occasions transport herself to a location by car, simply does not encompass the full nature of the disabling conditions presented here. She can physically, mechanically perform such tasks on occasions, but cannot do so on the daily basis that such activities are required to provide meaningful self-cares on a consistent basis. The simple fact is that even though this recipient presents with some tendency to over-report, be non-compliant, and engage in some harmful habits, these 'bad' behaviors do not obviate the clear need for assistance with ADLs and IADLs that she also has." (*italics* in original) The March 9, 2012 *Decision* concluded that CLA incorrectly discontinued petitioner's MA Waiver eligibility and that petitioner continued to meet the Intermediate Care Facility – 2 level of care. At the time of the March 9, 2012 *Decision* petitioner was receiving 180 SHC hours per month. DHA Case No. CWA/136483 (Wis. Div. Hearings and Appeals March 9, 2012) (DHS); Exhibit #3 (pp. 29-31 & 33-34).
4. Since April 2012 petitioner's condition has worsened; she has been hospitalized 6 times since that time; her treating providers state: that her symptoms can be triggered by "minimal activity;" that she feels weak and is unable to walk for any distance; that she now uses a wheelchair and needs help in her home for basic things such as meals, laundry, errands, personal cares, and cleaning; and , that she necessitates assistance with most of her basic needs due to shortness of breath and the recovery needed with most activities. Exhibit #3 (pp.26-27).

5. CLA reduced petitioner's SCH hours from 180 hours per month to 20 hours per month effective November 19, 2012 based on an October 25, 2012 *Long Term Care Functional Screen Report* and a November 8, 2012 *Private/Paid Family Worker Assessment Tool*; both the October 25, 2012 *Long Term Care Functional Screen Report* and a November 8, 2012 *Private/Paid Family Worker Assessment Tool* have at least some errors in them. Exhibits #1, #2 & #3 (pp. 1-10, 19-25 & 36-75).

DISCUSSION

CIP-II is run according to the terms of waivers that were granted to the State of Wisconsin by the United States government. The waivers allow the State of Wisconsin to operate CIP-II without following all of the rules that normally apply to MA. Wis. Stat. § 46.277 (2011-12); See also, 42 U.S.C.A. § 1396n(c); 42 C.F.R. §§ 435.217, 440.180 & 441.300 et. seq. (2011); and, *Medicaid Home & Community-Based Services Waivers Manual* (January 2010) ["Waivers Manual"] §§ 1.02. & 2.02.C.

CIP-II is a source of funding for long-term support for people who would otherwise face institutional care. The purpose of CIP-II is to provide funding for the option of community integration to people who are otherwise eligible for MA funded institutional care. In order to qualify for CIP-II services a person's functioning must be such that they would otherwise require institutional care. Wis. Stat. §§ 46.277(1) (2011-12); Waivers Manual, §§ 2.0.1.2 & 2.0.7.C.

This matter must be decided by a preponderance of the credible evidence. Wis. Admin. Code § HA 3.09(4) (September 2001). In this case petitioner was receiving 180 hours of SHC per month. CLA seeks to reduce that amount. However, the evidence in the record of this matter is that petitioner's condition has worsened -- not gotten better. CLA acknowledges this. Further, CLA also acknowledges that there were at least some errors in the documentation that was used to figure the reduction.¹ Thus, based on the evidence in the record of this matter CLA's reduction of petitioner's SHC hours cannot be sustained and must be reversed.

CLA argues that petitioner is independent in most of her activities and only needs substantial assistance when her condition becomes exacerbated. The CLA coordinator testified that has observed petitioner for 10 to 20 hours, that she is fairly stable, has little to no difficulty with ambulation (although she recently has needed a wheelchair) or with getting up and down, that petitioner told him she needs no help with bathing, and that her condition does vary but only over long periods of time. However, he also testified that he did not ask family members or doctors about petitioner's functioning and did not ask petitioner about what her functioning was like on a "bad" day.² Finally, and most importantly, the CLA coordinator's description of petitioner's functioning is not consistent with the other evidence in the record of this matter (DHA Decision CWA/136483; letters from petitioner's medical providers; petitioner's testimony; and, the testimony of petitioner's caregiver). Exhibit #3 (pp. 26-35).

¹ Based on some of these errors, in its post-Hearing submission dated February 12, 2013 CLA increased the amount of SHC hours it claims petitioner needs to "a total of 7 hours per week."

² The *Wisconsin Long Term Care Functional Screen Instructions* (September 18, 2012) [§ 1.12.D.; pp. 1-8 to 1-9] state that if a person's functional abilities vary day to day, select the answer that most accurately describes their needs on a "bad" day. Exhibit #3 (pp.41-42).

CONCLUSIONS OF LAW

For the reasons discussed above, CLA may not reduce petitioner's SCH hours from 180 hours per month to 20 hours per month effective November 19, 2012.

THEREFORE, it is

ORDERED

that this matter be REMANDED to CLA, that CLA not reduce petitioner's SCH hours from 180 hours per month to 20 hours per month effective November 19, 2012 and that, within 10 days of the date of this *Decision*, CLA issue all CIP II SCH benefits for which petitioner is otherwise eligible and which have not already been issued retroactive to November 19, 2012.

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 1st day of April, 2013

\sSean P. Maloney
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 April 1, 2013.

Bureau of Long-Term Support
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