FH
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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FCP/146319

PRELIMINARY RECITALS

Pursuant to a petition filed January 3, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the NorthernBridges in regard to Medical Assistance, a hearing was held on February 20, 2013, at Balsam Lake, Wisconsin. A hearing scheduled for January 22, 2012, was rescheduled at the petitioner's request.

The issue for determination is whether NorthernBridges correctly seeks to reduce the petitioner's supportive home care hours.

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: Nancy Tischbein
NorthernBridges

ADMINISTRATIVE LAW JUDGE:
Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [redacted]) is a resident of Polk County. She lives with her parents and one of her siblings.
2. NorthernBridges seeks to reduce the hours of self-directed supports provided by her family from 53 to 26 hours per week. It proposes to do this by eliminating the 27 hours of care attributed to her father.

3. The petitioner is a 31-year-old woman who has been a quadriplegic since breaking her neck in an automobile accident about 11 years ago. She has limited use of one hand, no use of the other, and no feeling or control below her chest.

4. The petitioner's physical condition and needs did not change in the six months between this and NorthernBridges' previous determination concerning the number of hours she requires for her self-directed cares.

5. This care requires 56 hours per week of assistance for her activities of daily living.

6. The petitioner requires one hour a week of assistance with cleaning her laundry and bedroom and preparing her meals. This hour constitutes the additional time it takes her family members to perform these tasks as a result of her presence in the household.

DISCUSSION

The Family Care Program provides appropriate long-term care services for elderly or disabled adults. It is supervised by the Department of Health and Family Services, authorized by Wis. Stat. § 46.286, and comprehensively described in Chapter DHS 10 of the Wisconsin Administrative Code. The process contemplated for an applicant is to test functional eligibility, then financial eligibility, and if both standards are met, to certify eligibility. The applicant is then referred for enrollment in a care management organization (CMO), which drafts a service plan that meets the following criteria:

> (f) The CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee, with the full participation of the enrollee and any family members or other representatives that the enrollee wishes to participate. … The service plan shall meet all of the following conditions:
>
> 1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e)1.
> 2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment under par. (e)2 and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
> 3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes.
> 4. Is agreed to by the enrollee, except as provided in subd. 5.
> 5. If the enrollee and the CMO do not agree on a service plan, provide a method for the enrollee to file a grievance under s. DHS 10.53, request department review under s. DHS 10.54, or request a fair hearing under s. DHS 10.55. Pending the outcome of the grievance, review or fair hearing, the CMO shall offer its service plan for the enrollee, continue negotiating with the enrollee and document that the service plan meets all of the following conditions:
> a. Meets the conditions specified under subds. 1. to 3.
> b. Would not have a significant, long-term negative impact on the enrollee's long-term care outcomes identified under par. (e) 2.
> c. Balances the needs and outcomes identified by the comprehensive assessment with reasonable cost, immediate availability of services and ability of the CMO to develop alternative services and living arrangements.
> d. Was developed after active negotiation between the CMO and the enrollee, during which the CMO offered to find or develop alternatives that would be more acceptable to both parties.

Wis. Admin. Code § DHS 10.44(2)(f).

CMOs must "comply with all applicable statutes, all of the standards in this subchapter and all requirements of its contract with the department." Wis. Admin. Code, § 10.44(1)

The petitioner has been receiving medical assistance through the Family Care Program since June 1, 2009. Like all participants in this program, she has the right to use Self-Directed Supports. Self-Directed Supports allows the recipient to purchase certain long-term care benefits that are consistent with the outcomes identified in her service plan. *2013 Contract for Family Care Program between the Wisconsin Department of Health Services, Division of Long-Term Care and Northern Bridges,* p.74. The potential services include all of the home and community based waiver services listed in Addendum XII, Section A, of the *Contract* except for residential care services. Self-Directed Supports include Supportive Home Care, which is meant to "directly assist persons with daily activities and personal needs to meet their daily living needs and to insure adequate functioning in their home." Supportive Home Care includes:

> a. Hands-on assistance with activities of daily living such as dressing/undressing, bathing, feeding, toileting, assistance with ambulation (including the use of a walker, cane, etc.), care of hair and care of teeth or dentures. This can also include preparation and cleaning of areas used during personal care activities such as the bathroom and kitchen.
> b. Observation of the participant to assure safety, oversight direction of the participant to complete activities of daily living, instrumental activities of daily living, or companionship for the participant (excluding hands-on care).
> c. Routine housecleaning and housekeeping activities performed for a participant consisting of tasks that take place on a daily, weekly or other regular basis, including: washing dishes, laundry, dusting, vacuuming, meal preparation and shopping for food and similar activities that do not involve hands-on care of the participant.
> d. Intermittent major household tasks that must be performed seasonally or in response to some natural or other periodic event. They include: outdoor activities such as yard work and snow shoveling; indoor activities such as window washing, cleaning of attics and basements, cleaning of carpets, rugs and drapery, and refrigerator/freezer defrosting; and the necessary cleaning of vehicles, wheelchairs and other adaptive equipment and home modifications such as ramps.

Contract, p.284.

The petitioner is a 31-year-old woman who has been a quadriplegic since breaking her neck in a car accident about 11 years ago. She has no feeling or mobility below her chest, has only limited movement in one of her hands, and has none in the other. She can do very little without assistance: she cannot cook, bathe, do laundry, cut her own food, drive, transfer herself, or use the toilet by herself. Her anus must be digitally massaged several times a day to ensure that she has a bowel movement. She has a diaper that must be changed at least once a day. She is catheterized, and this too must be changed frequently. Her lungs fill up with fluid easily and she requires a cough vest and nebulizer assistance. To help her with these needs, NorthernBridges has been compensating her family members for 53 hours of self-directed supportive home care hours. It now seeks to eliminate 27 hours of these hours because "Family Care does not pay family members for activities that relative/family member would normally provide for another family member as a matter of course in the usual relationship among members of a family."

NorthernBridges contends that it determined how much care was needed by asking family members what care she received and who provided it. According to NorthernBridges, the responses indicated that her mother and sister provided all of the care and her father provided none of it. Based upon this, it eliminated the 27 hours of funding for it had provided for her father.

As long as all caregivers are competent, it is mostly irrelevant who provides the care. What is relevant is that the petitioner receives an adequate amount of care. Her needs do not change merely because one of the persons assumed to provide the care now provides little or none of the care. Yet, without establishing

that her needs have changed, NorthernBridges appears to have cut over half of the petitioner's services because it now believes that the person who performed the portion of the work it seeks to cut does not in fact do so. An analogy to this would be if it took two hours to mow Mr. Smith's lawn, and John and Joe each spent one hour completing the task, reducing by half the amount paid to mow the lawn if Joe quit. Moreover, NorthernBridges' assumption that the father does not provide any care appears to be wrong. The testimony indicated that he performs several tasks, including transferring her several times a day and moving her at night.

NorthernBridges did use the home assessment tool to determine the hours the petitioner currently requires, but I do not find the results it received from the tool convincing. Her condition has not improved and her needs have not declined in the last year. Yet in June 2012, the previous time NorthernBridges assessed her needs, it determined, using the same tool it did in the most recent assessment, that she required 56.1 hours a week of help for her activities of daily living. Given the result provided by the tool, it is unclear why it only allowed 53 hours of care. It is also unclear why the previous determination did not allow any time for her instrumental activities of daily living such as cleaning her bedroom, doing her laundry, and preparing her meals. Regardless, it is undisputed that she still requires the 3½ hours of help per day with her bowel program allowed in June 2012; this alone takes up almost all of the 26 hours NorthernBridges now proposes. Her cough program still requires another 90 minutes a day. Reviewing the June 2012 Home Assessment Tool, I find nothing allowed then that she does not continue to require. Furthermore, her presence in the home does create extra work doing laundry, cleaning her room, and preparing meals for the other household members. NorthernBridges contends that all of this would have to be done anyway. It would, but anyone who has had a child move away knows it takes longer to cook and do laundry for four persons than for three and that beds that are not slept in rarely require making.

I find no basis for cutting the petitioner's hours. It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs. By seeking to reduce the petitioner's benefits, Northern Bridges is the moving party. The Department acknowledged the principle laid down in *Hanson* in *Final Decision ATI-40/87198* where Deputy Secretary Richard Lorang ruled on August 17, 1995, that in any fair hearing concerning the propriety of an agency action, the county or state agency has the burden of proof to establish that the action it took was proper given the facts of the case. NorthernBridges has taken on the role of the agency in this matter, and it has not met its burden of showing that the petitioner's needs have fallen by any amount, much less half.

NorthernBridges' expressed foundation of its case is that much of what the petitioner's family does is what families are expected to do for each other. This ignores that this is not a normal family situation. At 31, the petitioner is well past the age when a parent is expected to do anything for a child other send them birthday and Christmas cards and occasionally have them over for dinner or watch their children. Parents are not expected to clean up after their adult children, prepare all of their meals, or do all of their laundry. And they certainly are not expected to digitally stimulate their anuses four times a day, dress them, cut up their food, and bathe them. The petitioner requires all of these things.

Based upon the evidence before me, I find that the petitioner requires not only the 53 hours she has been receiving but the entire 56 hours justified in her June 2012 screen. In addition, she requires one hour of assistance for her instrumental activities of daily living. This hour constitutes the additional time it takes her family members to perform these tasks as a result of her presence in the household.

CONCLUSIONS OF LAW

The petitioner requires 57 hours per week of self-directed supportive home care to meet her needs.

THEREFORE, it is **ORDERED**

That this matter is remanded to NorthernBridges with instructions that within 10 days of the date of this decision it increase the self-directed supportive home care hours it funds for the petitioner to 57 per week. Payment for these services shall be divided among the petitioner's parents and sister as the petitioner directs.

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 4th day of April, 2013

_____

\sMichael D. O'Brien
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 4, 2013.

Northernbridges
Office of Family Care Expansion