



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

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In the Matter of

██████████  
██████████████████  
██████████████████

DECISION

FCP/147305

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**PRELIMINARY RECITALS**

Pursuant to a petition filed January 28, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the iCare in regard to Medical Assistance, a hearing was held on April 30, 2013, at Milwaukee, Wisconsin.

The record was held open until Tuesday, May 7, 2013, to give iCare an opportunity to respond to Exhibit 5, which Petitioner did not provide to iCare prior to the hearing. No response was received by iCare by the designated deadline.

The issue for determination is whether iCare correctly determined that Petitioner no longer qualifies for 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: Elizabeth Bartlett, General Counsel  
iCare  
1555 N. River Center Drive  
Suite 206  
Milwaukee, WI 53212

**ADMINISTRATIVE LAW JUDGE:**

Mayumi M. Ishii  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Milwaukee County.

2. On October 31, 2012, Angela Bernard, Petitioner's RN Case Manager, went to Petitioner's home to complete an annual review. Ms. Bernard spoke only to Petitioner, who reported that she needed some assistance with bathing, but was able to independently complete most other activities of daily living (ADLs) - dressing, eating, mobility in the home, toileting, and transferring, although she uses a cane in the home. At this time, Petitioner reported to Ms. Bernard that she needed assistance with some Instrumental Activities of Daily Living (IADLs), such as meal preparation, money management, laundry/chores and transportation. (Testimony of Ms. Bernard; Exhibit 4, attachment 1)
3. On December 28, 2012, Ms. Bernard entered into the Long Term Care Functional Screen report, the information she obtained from Petitioner, two months earlier. The Long Term Care Functional Screen generated a result indicating Petitioner was eligible for Family Care at a Non-Nursing Home level of care. (Testimony of Ms. Bernard; Exhibit 4, attachment 1)
4. On January 2, 2013, iCare sent Petitioner a notice indicating that her level of care changed and that she no longer met the nursing home level of care. The notice further advised Petitioner that this change in level of care might cause a change in her eligibility for Medicaid and Family Care benefits. (Exhibit 4; attachment 2)
5. Petitioner requested a rescreen and on January 16, 2013, Ms. Bernard went to Petitioner's home and again spoke only to Petitioner. At this time, Petitioner reported that she was independent in all ADLs. This time, Petitioner reported that she uses a cane and a walker in her home, although Ms. Bernard observed Petitioner ambulating in her home without assistance of her cane or walker. With regard to IADLs, Petitioner reported needing assistance with meal preparation, laundry/chores and transportation, but this time, Petitioner reported being independent with money management. (Testimony of Ms. Bernard; Exhibit 4, attachment 3)
6. Ms. Bernard entered in the information into the Long Term Care Functional Screen on January 18, 2013, which generated a result indicating Petitioner was eligible for Family Care benefits at a Non-Nursing Home level of care. (Testimony of Ms. Bernard; Exhibit 4, attachment 3)
7. Petitioner filed a request for fair hearing that was received by the Division of Hearings and Appeals on January 28, 2013. (Exhibit 1)
8. Petitioner is diagnosed with diabetes, dehydration/fluid & electrolyte imbalance, digestive disorders, arthritis, chronic pain, a respiratory condition, bipolar/manic-depressive disorder, Crohn's disease, and dumping syndrome associated with bypass surgery. (Exhibit 4, attachments 1 and 3)

### DISCUSSION

Functional eligibility for the Family Care program is described in Wis. Admin. Code §10.33(2):

- (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.
  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.
- (d) *Intermediate functional capacity level.* A person is functionally eligible at the intermediate level if the person is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others, as is evidenced by a finding from application of the functional screening that the person needs assistance to safely or appropriately perform either of the following:
  1. One or more ADL.
  2. One or more of the following critical IADLs:
    - a. Management of medications and treatments.
    - b. Meal preparation and nutrition.
    - c. Money management.

In discussing functional eligibility for the Family Care program, Wis. Stats. §46.286 uses the terms “nursing home level of care” and “non-nursing home level of care” in place of “comprehensive functional capacity” and “intermediate functional capacity”:

- (1) **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.

The services available to Family Care participants varies depending upon their functional level of care. The differences in services are described in article VII, Section B and addendum XII, sections A and B of the standard MCO contract executed by the Department of Health Services. The contract can be viewed on-line at:

<http://www.dhs.wisconsin.gov/mltc/2013/2013Contract.htm>

Petitioner filed a request for fair hearing, because iCare determined her functional level of care to be “non-nursing home level of care” and concluded that she was no longer eligible for the Family Care Program.

There may have been some confusion on Petitioner’s part. The notice sent by iCare on January 2, 2013, indicated that only her level of care changed. There is no Notice of Decision, nor any assertion by Petitioner that she received a notice terminating her from the Family Care program. There is also no Notice of Decision, nor any assertion by Petitioner that any services that she previously received were terminated. The issue for this hearing is only whether iCare correctly determined Petitioner’s level of care.

If Petitioner has received notices either terminating services or her participation in Family Care and she disagrees with either, she must file a NEW request for fair hearing.

With regard to whether iCare correctly determined Petitioner's level of care, iCare was not able to explain what changed between Petitioner's prior evaluation in October 2011 and her more recent evaluation in October 2012, that would cause her level of care to change. For various reasons, the October 2011 evaluation was provided, but without that evaluation, there is no way to know if the 2011 evaluation was done inaccurately or whether anything changed to increase Petitioner's independence.

Petitioner's brother/representative argues that iCare's current determination of Petitioner's level of care is inaccurate, because Petitioner did not provide accurate information regarding her abilities, exaggerating her level of independence.

There is certainly a reason to question the accuracy of the information provided by Petitioner, given that between the two interviews in October 2012 and January 2013, she reported having developed more independence in the areas of bathing and money management. In addition, Petitioner, in her request for fair hearing indicated that her sisters help her down the stairs to, "help me down the stairs with laundry because I cannot go by myself", which is somewhat contrary to the testimony of her other brother, Spencer, indicating that the sisters do laundry for her. I also note, again, that Ms. Bernard testified that she had not seen any change in Petitioner's condition and could not provide an explanation for why Petitioner's level of care would change.

Petitioner's other brother, Spencer, testified that he lives with Petitioner and that he assists her with getting out of bed in the morning and that their sister, Bonnie, helps Petitioner in the bathroom. Spencer further testified that he carries Petitioner's laundry down to the washing machine and that Bonnie does Petitioner's laundry. Spencer testified that Petitioner is able to microwave meals, but the family does not trust her to operate the stove/oven safely. Spencer also testified that Petitioner is susceptible to falls and that she might fall four times a month, even when using her cane or walker.

Based upon the foregoing, it is found that that the Long Term Care Functional Screen Report was based upon inaccurate information and that a reassessment that includes Petitioner's family in the conversation, is warranted. If Petitioner is not satisfied with the outcome of the reassessment, she must file a NEW request for fair hearing.

The parties might wish to have Petitioner evaluated by an occupational therapist and/or psychologist.

### **CONCLUSIONS OF LAW**

iCare incorrectly determined Petitioner's functional level of care.

**THEREFORE, it is**

**ORDERED**

That iCare reassess Petitioner's level of care, including in the interview, those family members who live with and provide assistance to Petitioner and that any eligibility determinations be stayed until the reassessment is complete. iCare shall take all administrative steps necessary to have a final determination, in writing, of Petitioner's level of care, within 15-days 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 9th day of May, 2013.

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\sMayumi M. Ishii  
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 May 9, 2013.

iCare  
Office of Family Care Expansion  
[ts@spencer-law.net](mailto:ts@spencer-law.net)