FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

CWA/147427

PRELIMINARY RECITALS

Pursuant to a petition filed February 13, 2013, under Wis. Admin. Code § HA 3.03, to review a decision by the Wood County Human Services - WI Rapids in regard to Medical Assistance, a hearing was held on March 20, 2013, at Medford, Wisconsin.

The issue for determination is whether the county agency correctly seeks to end the petitioner's MA-Waiver eligibility because she no longer meets the nursing home level of care.

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: Cheryl Kettlehut
Wood County Human Services - WI Rapids
320 West Grand Avenue
PO Box 8095
Wisconsin Rapids, WI 54495-8095

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

FINDINGS OF FACT

1. The petitioner (CARES # [redacted]) is a resident of Taylor County.
2. The petitioner has been receiving Long-Term Support Home and Community-Based Waiver services for 13 years.

3. The county agency seeks to end the petitioner's Waiver benefits because the Long-Term Care Functional Screen indicates that she no longer meets the nursing home level of care.

4. The petitioner's functional ability has not improved and her needs have not declined in the last year.

5. The petitioner suffered injuries to her brain and other parts of her body in an automobile accident in 1998. After the accident, she was in a nursing home for a year.

6. The petitioner takes a half hour to dress, receives Meals on Wheels five days a week; makes only sandwiches, microwavable food, or ready-to-eat food such as cottage cheese; puts her hands on the wall to move about; has grab-bars on her toilet; requires help from her daughter to do laundry; can stand for only about five minutes; cannot clean her house or dishes properly because she sees double; and requires help shopping.

DISCUSSION

The county agency seeks to end the petitioner's eligibility for MA-Waiver benefits because she no longer requires the level of care needed to remain in the program. See *Medicaid Eligibility Handbook,* Chapter 28, generally, or information on the various MA-Waiver programs. Eligibility depends upon a person's ability to function independently falling below a certain level. This is referred to as the person's functional capacity level. Depending upon the program, persons can be eligible at either the nursing home or non-nursing home level of care. Wis. Admin. Code, § DHS 10.33(2); Wis. Stat. § 46.286.(1)(a). The petitioner must meet the nursing home level of care to remain eligible for the benefits she has been receiving.

The nursing home level of care is described as follows at Wis. Admin. Code, § DHS 10.33(2)(c):

> 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 a 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.

Wis. Admin. Code, § DHS 10.33(2)(c).

A developmental disability is defined in Wis. Admin. Code, § 10.13(16), as follows:

> Developmental disability" means a disability attributable to brain injury, cerebral palsy, epilepsy, autism, Prader-Willi syndrome, mental retardation, or another neurological condition closely related to mental retardation or requiring treatment similar to that required for mental retardation, that has continued or can be expected to continue indefinitely and constitutes a substantial handicap to the afflicted individual. "Developmental disability" does not include senility that is primarily caused by the process of aging or the infirmities of aging.

Cognitive pertains to "conscious intellectual activity" such as "thinking, reasoning, remembering, imagining, or learning words." Definition found online at *http://www.merriam-webster.com/medical/cognitive.*

Activities of daily living, or ADLs, refers to "bathing, dressing, eating, mobility, transferring from one surface to another such as bed to chair and using the toilet." Wis. Admin. Code, § DHS 10.13(1m). Instrumental activities of daily living, or IADLs, refers to "management of medications and treatments, meal preparation and nutrition, money management, using the telephone, arranging and using transportation and the ability to function at a job site." Wis. Admin. Code, § 10.13(32)

Agencies must determine eligibility using a uniform functional screening tool prescribed by the Department. Wis. Admin. Code, § DHS 10.33(2)(a). The problem with this requirement is that the Department has changed the screening tool to better comply with the federal government's long-term waiver provisions, but it has not changed the administrative code to reflect these changes. *See DHA Decision No. FCP-44/*115906. Because the administrative code has the force of law, I must follow it rather than the screening tool.

The agency seeks to end the petitioner's Waiver benefits because the screening tool indicated that she no longer meets the nursing home level of care. The petitioner is a 51-year-old woman who suffered severe brain and body injuries in a car accident about 15 years ago. She takes a half hour to dress, receives Meals on Wheels five days a week; makes only sandwiches, microwavable food, or ready-to-eat food such as cottage cheese; puts her hands on the wall to move about; has grab-bars on her toilet; requires help from her daughter to do laundry; can stand for only about five minutes; cannot clean her house or dishes properly because she sees double; and requires help shopping.

The petitioner has been receiving these benefits for 13 years. Neither party contends that her condition has changed in the last year. Nor has the law concerning functional eligibility. There is no allegation that her functional capacity was incorrectly determined in the past. The agency indicated that the algorithms used in the functional screen have changed, but those are not available to me or the agency, so it is impossible to determine whether they more correctly correlate with the legal requirements of the program now or in the past. 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. 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. At the very least, the agency must present a prima facie case to go forward. Only after the agency presents a prima facie case must the petitioner submit enough evidence to rebut that case.

By seeking to discontinue the petitioner's benefits, the agency seeks to change the present state of affairs, making it the moving party. Yet, it did not present any evidence establishing that her condition has

improved since it last found her eligible or that the earlier screening process was flawed. Her benefits could continue on this basis alone. However, I also find that she cannot dress herself, move about, or prepare meals appropriately. Thus, she cannot perform two activities of daily living and one instrumental activity of daily living properly, which means that she remains eligible at the nursing home level of care.

CONCLUSIONS OF LAW

The petitioner meets the nursing home level of care.

THEREFORE, it is **ORDERED**

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it take all steps to reinstate the petitioner's MA-Waiver benefits retroactive to the date that those benefits ended. Those benefits shall be provided consistent with the petitioner's meeting the nursing home level of care.

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 10th 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 10, 2013.

Wood County Human Services - WI Rapids
Bureau of Long-Term Support