



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FCP/147942

PRELIMINARY RECITALS

Pursuant to a petition filed March 08, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care of Central Wisconsin in regard to Medical Assistance, a hearing was held on May 13, 2013, at Stevens Point, Wisconsin.

The issue for determination is whether the Family Care agency, CCCW, erred in its denial of the requested lightweight power wheelchair.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Attorney Colleen Bero-Lehmann
6502 Grand Teton Plaza
Madison, WI 53719

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Evelyn Heikenen

Community Care of Central Wisconsin
3349 Church St., Suite 1
Stevens Point, WI 54467

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [redacted]) is a resident of Portage County.
2. Petitioner has a diagnosis of scleroderma. Petitioner is limited in her mobility. She lives in a two-story home.

3. Petitioner requested a lightweight power wheelchair with removable wheels. Petitioner has demonstrated (in February 2013) her ability to remove the wheels and transfer the chair into her car overcoming an initial objection by CCCW. This task required great effort by petitioner, however.
4. While petitioner’s home does not presently have ramps, such ramps would be facilitated if she is able to acquire a chair as requested.
5. Petitioner requested a lightweight power wheelchair on January 31, 2013 at a total cost of 7,044.91.
6. CCCW denied the lightweight wheelchair requested by petitioner by notice dated February 20, 2013 on the basis that (1) petitioner does not need this service to support her outcome; (2) CCCW is already supporting her outcome in another way; and, (3) the service is not cost-effective.
7. Petitioner appealed.

DISCUSSION

The Family Care (FC) program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. Whenever the local Family Care program decides that a person is ineligible for the program, or when the CMO denies a requested service, the client is allowed to file a local grievance and/or a fair hearing request.

The state code language on the scope of permissible services for 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; ...home modification; ... personal care services; ...durable medical equipment...and community support program services.

Wis. Admin. Code §DHS 10.41(2).

The general legal guidance that pertains to determining the type and quantity of care services that must be placed in an individualized service plan (ISP) is as follows:

DHS 10.44 Standards for performance by CMOs.

...
(2) CASE MANAGEMENT STANDARDS. The CMO shall provide case management services that meet all of the following standards:

...
(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.

...

Wis. Admin. Code §DHS 10.44(2)(f).

A power wheelchair is an item of durable medical equipment which is covered under the state's plan for medical assistance if the criteria for the equipment is met. The state's plan for medical assistances addresses durable medical equipment, including wheelchairs, at Wis. Admin. Code §DHS 107.24. Criteria which must be met in order to have a wheelchair approved by the state medical assistance plan include a cost-benefit analysis and other criteria noted at DHS 107.24(4). The state plan further notes that durable medical equipment is not covered by the state plan if the requested equipment does not meet the criteria in DHS 107.24(5) including:

(b) Services not covered by medicare for lack of medical necessity; . . .

(d) Items not appropriate for home usage; . . .

Wis. Admin. Code § DHS 107.24(5).

Medicare regulations indicate that a power wheelchair will be found to be medically necessary for beneficiaries who are non-ambulatory, have severe weakness of upper extremities due to neurologic or muscular condition, and who cannot perform activities of daily living using other mobility assistance equipment. See CMS, US DHHS, Medicare coverage of Power Mobility Devices (PMDs): Power Wheelchairs and Power Operated Vehicles (POVs) (2009), available at http://www.cms.hhs.gov/MLNProducts/downloads/PMDFactSheet07_Quark19.pdf (detailing the requirements for obtaining Medicare coverage for an item of DME); and CMS, US DHHS Pub. 100-03 Medicare National Coverage Determinations, Transmittal 37, §280.3, available at <http://www.cms.gov/transmittals/downloads/R37NCD.pdf>; and Social Security Act §1819(b)(j)(2)(B), 42 USC §1395m(j)(2)(B)(2006), CMS US DHHS, Medicare Benefit Policy Manual, ch. 15 §110 (2010), available at <http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/bp102c15.pdf>

In its Notice of Action denying the power wheelchair, the agency noted that its decision was based on a determination that the Petitioner does not need the item to support the outcomes in her service plan and it is not the most cost-effective way to support her outcomes.

The objections of CCCW to this chair were confusing. Initially, CCCW objected to the chair on the basis that the chair has removable wheels and petitioner would not be able to accomplish the task of removing the wheels. In an actual demonstration, petitioner was able to do this and also to get the chair into her trunk. At hearing, the representatives from CCCW offered a new twist on the argument noting that petitioner had to take rest breaks while doing this demonstration. It followed, they offered, that this was

impractical in an actual real-world setting, and that petitioner would be so tired after doing this task that the usefulness of the chair would be limited as she would be too tired after doing this to then use the chair to go shopping or visit friends. I was also struck by the fluid nature of the objections by CCCW. At one point they argued that petitioner is just too weak to use the chair, assemble the chair, or even go outside her home on any regular basis. But, the arguments were also put forth that petitioner is strong enough to negotiate her stairs, and get herself to the toilets on both floors of her home. CCCW asserted that the observations of its personnel conflicted with the claims of weakness and immobility made by petitioner and her physician. As recently as February, around the time of the request, CCCW case notes record observations, consistent with testimony at hearing, that CCCW personnel observed petitioner mobile in her home without much difficulty.

Petitioner testified that she spends much of the day in her bed. In part, this seems to be because she is closer to the bathroom when she is on the second floor. She suggests that the bathroom on the first floor is 45 feet from her living room which would be the only comfortable place to spend time on her first floor. Petitioner says she simply cannot walk 45 feet in her home. I question how realistic it is then for petitioner to transfer to a wheelchair from the couch and then off the wheelchair to the toilet and then back again. Petitioner also made arguments that were without merit such as that she needs the wheelchair in the event she someday has an appointment at the Mayo Clinic and needs the added independence. Hypotheticals do not establish medical necessity. Frankly, the petitioner's arguments all come clouded by the fact that they are based on petitioner's own testimony. There was no physician who testified. Petitioner's physician wrote a letter, but he did not testify. He was unavailable to be cross-examined or to simply answer the many questions that exist in this case. No other clinical expert testified to convince me that what petitioner said was accurate or that the chair will actually meet her needs. I do not understand why a witness from the DME provider could not have appeared to answer questions about the chair and petitioner's expectations. I also note that petitioner's testimony reflected her unwillingness to try other options. It seemed that petitioner wanted this chair and no other option would be acceptable. For example, she asserted that she could not go to the Mayo Clinic without this chair. It was clear, however, that she had not explored other options should that event come such as the use of volunteers, or loaner services, or charitable efforts.

This is a difficult case. On one hand, there is an imprecision as to the agency's denial. It is not clear to me what the position is. On the other hand is the petitioner, who no one wishes to be more limited than is necessary due to her condition. But, this is a question of medical necessity in which the petitioner has the burden to establish the need for the equipment. Based on the record in this case, I cannot find that the wheelchair is medically necessary. While petitioner's position was relatively clear and consistent, it also conflicts with other testimony. I also am not convinced that this chair will be a practical and workable solution for petitioner to address her interest in getting around outside her home. We had no testimony that it would be so. I understand that this is a possible solution petitioner would like to try, and that it may provide some convenience in some areas, I simply cannot find that the chair is *medically necessary* for this petitioner's circumstances based on this limited record.

If petitioner's circumstances have changed since February, she may certainly file a new request for the wheelchair based on the change in her circumstances.

CONCLUSIONS OF LAW

CCCW did not err in denying the request for the requested lightweight power wheelchair.

THEREFORE, it is

ORDERED

That this appeal 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 26th day of June, 2013

\sJohn P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Wayne J. Wiedenhoef, Acting Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on June 26, 2013.

Community Care of Central Wisconsin
Office of Family Care Expansion
clehmann@ehlkelaw.com