



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/148776

PRELIMINARY RECITALS

Pursuant to a petition filed April 17, 2013, under Wis. Admin. Code § DHS 1[REDACTED]55, to review a decision by the NorthernBridges in regard to Medical Assistance, a hearing was held on May 22, 2013, at Shell Lake, Wisconsin.

The issue for determination is whether NorthernBridges correctly seeks to reduce the petitioner's supportive home care hours from 6.5 to three per week.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Thomas O. Mulligan
902 River St
P O Box 457
Spooner, WI 54801-0457

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: Nancy Tischbein
NorthernBridges
Hayward, WI

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Washburn County.
2. The petitioner receives Family Care Medical Assistance through NorthernBridges.

3. NorthernBridges seeks to reduce the petitioner's supportive home care hours from 6.5 to 4.7 per week.
4. The petitioner is diagnosed with progressive multiple sclerosis.
5. The petitioner's needs have not decreased in the last year.
6. The petitioner's son lives with her but is incapable of contributing to the household's upkeep.

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's CMO, NorthernBridges, seeks to reduce the petitioner's supportive home care hours from 6.5 to 4.7 per week. 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 Between Department and NorthernBridges, p.284.

When making a decision about the amount of care a person needs, a CMO must look at the facts as they pertain to each specific situation. In general one would expect an adult child to share in the housework. But that does not mean that *every* adult child can contribute to the housework sufficiently to reduce the workload of the other members of the household. In the petitioner's case, her son is disabled himself. His disability does not mean that she is entitled to additional care—if he requires care, he must apply for it on his own behalf. But the petitioner is not asking for additional care for his needs or even, for that matter, her own needs. What she requests is that she continue to receive the level of care she has already been receiving. This is not an unreasonable request given that she has a progressive disease, and the record indicates that her condition has deteriorated rather than improved.

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 recover the petitioner's benefits, the agency 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. Here, the Division seeks to reduce the petitioner's benefits, so it has the burden of proving that she requires fewer hours than he previously did. To do this it must show either that the petitioner requires less care than she did before or that it incorrectly overstated the amount of care she needed before. As alluded to before, her condition has not improved, so there is no evidence that she needs less care.

The agency can demonstrate that it overstated her past needs either by showing that times it has been allotting to a task are too high or by showing that she never actually needed some part of the help she was receiving. NorthernBridges did not make either argument in this matter. Rather, it stated that because her son was living with her, he should be expected to do some of the work now being done by supportive home care workers. Although I would generally agree with such an argument, NorthernBridges has presented no evidence that the petitioner's son, who, as noted, is disabled, can perform any of this work. Rather, it states that this is its policy. NorthernBridges does have an obligation to follow its own policies, but this does not relieve it of its responsibility to comply with its contract with the State of Wisconsin or the laws pertaining to Family Care services. In particular, it must provide services that specifically meet her needs. It has previously found specifically that 6.5 hours of supportive home care per week meets her

needs. It has presented no evidence that her needs have decreased; given that she has a disease that causes physical and mental deterioration, they have probably increased. Nor has it shown that her disabled son can contribute to her household. Based upon this, I find that she continues to require 6.5 hours of supportive home care each week.

CONCLUSIONS OF LAW

The petitioner requires 6.5 hours of supportive home care each week to meet her basic 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 number of supportive home care hours received by the petitioner to 6.5 per week.

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 July, 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 July 1, 2013.

Northernbridges
Office of Family Care Expansion
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