FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FCP/149418

PRELIMINARY RECITALS

Pursuant to a petition filed May 16, 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 June 20, 2013, at Ashland, Wisconsin. The record was left open for 14 days at the petitioner's request.

The issue for determination is whether NorthernBridges correctly determined the number of personal care worker hours the petitioner is entitled to.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

[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 is a resident of Ashland County.
2. The petitioner receives Family Care Medical Assistance through her care maintenance organization, NorthernBridges.

3. The petitioner seeks 24 personal care worker hours per week. NorthernBridges has agreed to provide 18 hours per week.

4. The petitioner is a quadriplegic because of an accident. She is 65 year old. She requires assistance with all of her activities and instrumental activities of daily living. She has some movement in her upper limbs and can drive a modified vehicle. She also can operate a grasping tool to pick items off from the floor but is inconsistent in her success in doing so.

5. The petitioner requires 24 personal care worker hours a week to meet her medically necessary needs.

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 to a Care Management Organization (CMO) for enrollment in the 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. …

Wis. Adm. Code § DHS 10.44(2)(f).

Personal care services are "medically oriented activities related to assisting a recipient with activities of daily living necessary to maintain the recipient in his or her place of residence in the community." Wis. Adm. Code § DHS 107.112(1)(a). Covered services include the following:

1. Assistance with bathing;
2. Assistance with getting in and out of bed;
3. Teeth, mouth, denture and hair care;
4. Assistance with mobility and ambulation including use of walker, cane or crutches;
5. Changing the recipient's bed and laundering the bed linens and the recipient's personal clothing;
6. Skin care excluding wound care;
7. Care of eyeglasses and hearing aids;
8. Assistance with dressing and undressing;
9. Toileting, including use and care of bedpan, urinal, commode or toilet;
10. Light cleaning in essential areas of the home used during personal care service activities;
11. Meal preparation, food purchasing and meal serving;
12. Simple transfers including bed to chair or wheelchair and reverse; and
13. Accompanying the recipient to obtain medical diagnosis and treatment.

Wis. Adm. Code § DHS 107.112(b).

Personal care workers can spend no more than one-third of their time performing housekeeping activities. Like all medical assistance services, personal care worker services must be medically necessary and cost effective. Wis. Adm. Code § DHS 107.02(3)(e)1 and 3.

The petitioner is a 65-year-old quadriplegic woman who requires some help with almost every activity and instrumental activity of daily living. She requests 24 personal care worker hours per week. NorthernBridges has agreed to provide 18 hours per week

NorthernBridges presented little testimony supporting its position at the hearing. Several times I tried to get it to explain how it arrived at the result it did, and each time it merely stated that it followed the results found in the In-Home Assessment Tool. It did submit an exhibit that provided the time the tool allotted for each task, but none of NorthernBridges' four witness could provide any further explanation of the allotted times. Any CMO seeking to justify the level of services it is offering should be ready to identify the recipient's specific limitations, explain what particular services are needed to meet those limitations, explain how long it takes to perform each service, and explain the basis for determining why a task would take as long as it does. The assessment tool provides a starting point, but each person is unique, meaning that the time might vary from what the tool indicates. The document containing the times allotted for each task did occasionally deviate from the standard times allowed by the assessment tool, but NorthernBridges' representatives never explained why they did.

The petitioner and her representatives testified that they used a stopwatch to time each task. They had asked a NorthernBridges representative to come and view the tasks being performed, but NorthernBridges declined to do so. At the end of the hearing, NorthernBridges requested for the first time that it be allowed to time the tasks. The petitioner agreed to this. NorthernBridges states that it used a stopwatch "to time the actual time used by the [redacted] employees to complete the named tasks found on the NorthernBridges In Home Assessment Tool (IHAP)." It paused the watch if an employee was "interrupted or no longer providing hands on assistance with the given task." It spent more than 20 hours over seven days observing the workers. Because the tasks were timed after the hearing and I was not there, I could not ask questions about the timing. Supportive and personal care workers should work diligently and efficiently, but regardless of a worker's diligence and efficiency, each workday has some dead space, and it takes time to move from one task to another. Moreover, helping a quadriplegic who seeks to maintain some independence involves a good deal of standby time. It appears that NorthernBridges has excluded this type of time even though its contract with the Department specifically requires it to cover observation. NorthernBridges' timing of various tasks has little probative value. I find that the times previously determined by the petitioner's representatives are more credible.

In general, the petitioner and her representatives provided more detailed information and better arguments for its position than NorthernBridges did. A registered nurse reviewed the bowel care provided to the petitioner in the previous six months. Using these figures, which are documented in the file, the petitioner demonstrated that she requires an average of 3.5 rather than 2.5 hours for this task each week. She also pointed out that she was not allotted any time to eat supper three nights a week, that at age 65 and after decades of quadriplegia she requires more standby assistance to remain safe when getting ready to go out, and that the 30 minutes of monitoring after she takes her bowel medication has been eliminated despite the threat to safety this elimination poses. Although she did a better job of explaining her position than NorthernBridges did, I have spent two days reviewing the evidence she presented and simply cannot follow how she determined the total number of hours she requires in either supportive home care or personal care. (Supportive care worker hours were considered at the same hearing, but are decided separately in *Decision No. FCP/149419.*)

But, as suggested earlier, NorthernBridges' arguments are even more difficult to follow. 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, NorthernBridges is the moving party and must prove by a preponderance of evidence that the reduction is justified. Despite the petitioner's advancing years and physical deterioration, she has agreed to some reduction in her care. This means that even if her position is upheld, she will get less care than she has been getting, even though her condition has not improved. Each party should have presented a clearer picture of its position, but they did not. I must make a decision based upon the evidence before me. I find that to meet her medically necessary needs the petitioner requires the 24 hours a week of personal care she requests.

CONCLUSIONS OF LAW

The petitioner requires the 24 of personal care worker hours a week to meet her medically necessary 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 certify that it is providing 24 personal care worker hours to the petitioner each 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 18th 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 18, 2013.

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