



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MPA/150222

PRELIMINARY RECITALS

Pursuant to a petition filed June 24, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability in regard to Medical Assistance, a hearing was held on July 23, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether Petitioner has submitted evidence sufficient to demonstrate that personal care worker hours may be paid for by the Medicaid program.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Sharon Bailey, RH, BSN

Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. A prior authorization request seeking Medicaid payment for 23.5 hours (or 94 units with each unit = 15 minutes) per week of personal care services plus one hour per day for transportation plus 1 unit per day for a Day Life Activity visit was filed on behalf of Petitioner on or about March 12 2013. The

total cost was noted to be \$31,813.75. The requesting provider is Visiting Angels Living Assistance Services.

3. Petitioner's mother is the proposed personal care worker. In mid-April the travel time was removed from the request as the provider reported that Petitioner and her mother had moved into the same residence.
4. The prior authorization was denied.
5. Petitioner is 28 years of age (DOB 01/24/1985). Her diagnosis is morbid obesity. She is 5'3" and weighs just over 400 pounds as of a January 23, 2013 medical visit. She has sought gastric bypass surgery but it was denied. She does not have or use any adaptive equipment.

DISCUSSION

When determining whether to approve any medical service, the OIG must consider the generic prior authorization review criteria listed at *Wis. Admin. Code, § DHS 107.02(3) (e)*:

(e) *Departmental review criteria.* In determining whether to approve or disapprove a request for prior authorization, the department shall consider:

1. The medical necessity of the service;
2. The appropriateness of the service;
3. The cost of the service;
4. The frequency of furnishing the service;
5. The quality and timeliness of the service;
6. The extent to which less expensive alternative services are available;
7. The effective and appropriate use of available services;
8. The misutilization practices of providers and recipients;
9. The limitations imposed by pertinent federal or state statutes, rules, regulations or interpretations, including medicare, or private insurance guidelines;
10. The need to ensure that there is closer professional scrutiny for care which is of unacceptable quality;
11. The flagrant or continuing disregard of established state and federal policies, standards, fees or procedures; and
12. The professional acceptability of unproven or experimental care, as determined by consultants to the department.

“Medically necessary” means a medical assistance service under ch. DHS 107 that is:

- (a) Required to prevent, identify or treat a recipient's illness, injury or disability; and
- (b) Meets the following standards:
 1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
 2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider, and the setting in which the service is provided;
 3. Is appropriate with regard to generally accepted standards of medical practice;
 4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
 5. Is of proven medical value or usefulness and, consistent with s. DHS 107.035, is not experimental in nature;
 6. Is not duplicative with respect to other services being provided to the recipient;
 7. Is not solely for the convenience of the recipient, the recipient's family, or a provider;

8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Admin. Code, §DHS 101.03(96m).

Also, the following Administrative Code provision is relevant here:

DHS 107.112 Personal care services. (1) COVERED SERVICES. (a) 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. These services shall be provided upon written orders of a physician by a provider certified under s. DHS 105.17 and by a personal care worker employed by the provider or under contract to the provider who is supervised by a registered nurse according to a written plan of care. The personal care worker shall be assigned by the supervising registered nurse to specific recipients to do specific tasks for those recipients for which the personal care worker has been trained. The personal care worker's training for these specific tasks shall be assured by the supervising registered nurse. The personal care worker is limited to performing only those tasks and services as assigned for each recipient and for which he or she has been specifically trained.

(b) Covered personal care services are:

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. Admin. Code, §DHS 107.112(1)(a) and (b).

I note at this point that the Petitioner has the burden of proving that the requested therapy meets the approval criteria and that the standard level of proof applicable is a "preponderance of the evidence". This legal standard of review means, simply, that "it is more likely than not" that Petitioner and/or his/her representatives have demonstrated that the requested day treatment meets the criteria necessary for payment by the Wisconsin Medicaid program. It is the lowest legal standard in use in courts or tribunals.

The agency denied this request maintaining that Medicaid standards require that personal care services cannot be substituted for alternative techniques and assistive devices that person can use to maintain their independence. The Department's July 17, 2013, 7 page letter (Ex #3) detailing the rationale for the denial need not be reproduced here but in a nutshell indicates that the Department suggests a shower chair, a hand-held shower wand, long handled sponges, grab bars, hygiene mitts and notes that there are specialized assistive devices specially designed for individuals who are overweight. The Department notes that Petitioner is oriented, able to verbally communicate her needs and does not have any hearing or visual deficits. It further notes that neurological exams have been found to be normal, that she has limited

knee joint movement related to the obesity and mildly impaired lumber range of motion and mildly impaired ankle range of motion.

Petitioner testified that she requires assistance with the following activities of daily living: bathing, grooming (especially for powdering hard to reach areas to prevent skin breakdown), dressing – upper and lower, meal prep, toileting (for hygiene assistance), transfers, laundry, grocery shopping and child care. She also indicated that she has sleep apnea and, at the time of the hearing, was soon to have a CPAP (continuous positive airway pressure) machine set up. She also indicated that her mother does not live with her but that she (Petitioner) does live with her children.

I am sustaining the Department's denial. All prior authorization requests must meet the requirement that the request be cost effective and the most appropriate level of service or equipment that can be provided. Here there is no adaptive equipment being used by Petitioner. Those devices must be tried first. Nonetheless, this is a difficult case as Petitioner is certainly facing hardships and medical complications. Between the lines of the Department's July 17, 2013 letter (Ex. #3) there is also the concern that the less active Petitioner becomes the more hardship Petitioner will face as her medical condition is likely to worsen. I respectfully suggest to Petitioner that she keep some sort of diary or log so as to document how well those adaptive devices work and a diary or log of what other assistance she might still require along with the time needed. A new prior authorization request may always be made. Finally, at the time of the hearing Petitioner did not yet have use of the CPAP machine but should note that this could have an effect on her request for bariatric surgery and should ask her medical team about that.

I note for Petitioner that her provider will not receive a copy of this Decision. If Petitioner wishes the provider to have had a copy of this Decision she must give a copy to the provider.

CONCLUSIONS OF LAW

That the evidence offered on behalf of Petitioner is not sufficient to demonstrate that requested personal care services meet the standards necessary for Medicaid payment at this time.

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 Milwaukee,
Wisconsin, this 11th day of September, 2013

\sDavid D. Fleming
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 September 11, 2013.

Division of Health Care Access And Accountability