



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

In the Matter of

██████ ██████
██████████████████
████████████████████

DECISION

MPA/150324

PRELIMINARY RECITALS

Pursuant to a petition filed June 26, 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 August 28, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether the Department erred in its modification of the PA request for PCW or HHA hours.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

██████ ██████
██████████████████
████████████████████

Petitioner's Representative:

Attorney ██████ ██████ ██████
██
████████████████████

Respondent:

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

By: Kelly Townsend, RN (in writing)
Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County. He has diagnoses including Multiple Sclerosis, Schizophrenia, and Chorea Dementia.

2. On 3/28/13, the Department received the PA request # [REDACTED] from LS Professional Comfort Homes, Inc. The PA requested 6 PWN skilled nursing visits per year for change in condition, 7 Home Health Aide (HHA) visits per day, and PCW services at 154 units (38.5 hours) per week, and 14 hours of PCW travel time per week. The PA request also requested daily skilled nursing visits. The PA sought approval for services effective 4/17/13.
3. As part of the PA request, LS Comfort Homes submitted a personal care screening tool indicating a need for 40.5 hours of PCW services per week. The PA requested additional time for behaviors including agitation, dementia, and hallucinations.
4. On April 29, 2013, the Department returned the PA to the provider indicating that it did not understand the medical necessity of the daily skilled nursing visit that had been requested. The Department also explained that PCW services were only appropriate after HHA visits had been maximized.
5. On May 7, the provider sent a letter to the Department indicating that it agreed that a daily skilled nursing visit was not necessary. The letter stated that the provider was now seeking 1 initial 4 hour HHA visit per day, and 6 additional 3 hour HHA visits per day. The provider explained that this would "support 24 hours needed for this client." The provider did not submit a new PA despite the changes in what was then actually being sought.
6. The Department approved 3 HHA visits per day (one 4-hour visit and two 3-hour visits), plus an additional 14 hours of PCW time per week (2 hours per day).
7. The parties conferred prior to hearing. Following that discussion between the parties, the Department increased the amount of time it would approve either 16 hours of PCW services or five HHA visits per day (one 4-hour visit and four 3-hour visits) totaling 16 hours of HHA services per day.

DISCUSSION

MA coverage of PCW services is described in the Wis. Adm. Code, §DHS 107.112. Covered services are specified in subsection (1), and are defined generally as "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." Examples of covered services are assistance with bathing, with getting in and out of bed, with mobility and ambulating, with dressing and undressing, and meal preparation. The Code also provides that, "No more than one-third of the time spent by a personal care worker may be in performing housekeeping activities." Wis. Adm. Code, § DHS 107.112(3)(e).

In determining the number of PCW hours to authorize, the OIG uses the standard above along with the general medical necessity standard found at Wis. Adm. Code, § DHS 101.03(96m). Essentially the medical necessity standard requires a service to be basic and necessary for treatment of an illness, not necessarily the best service possible, and not just for convenience. To determine the number of PCW hours to authorize the OIG uses the Personal Care Screening Tool (PCST), a computer program it believes will allow it to consistently determine the number of hours required by each recipient. The PCST allots a specific amount of time in each area the recipient requires help, which the OIG's reviewer can then adjust to account for variables missing from the screening tool's calculations.

In the case of PCW services, MA pays only for medically-oriented activities related to assisting a recipient with activities of daily living necessary to maintain the recipient in his place of residence in the community. Wis. Admin. Code § DHS 107.112(1)(a). Covered PCW services include only 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. Admin. Code § DHS 107.112(1)(b). Similar services can be covered as Home Health Aide Services as well:

(b) Home health aide services are:

1. Medically oriented tasks which cannot be safely delegated by an RN as determined and documented by the RN to a personal care worker who has not received special training in performing tasks for the specific individual, and which may include, but are not limited to, medically oriented activities directly supportive of skilled nursing services provided to the recipient. These may include assistance with and administration of oral, rectal and topical medications ordinarily self-administered and supervised by an RN according to [42 CFR 483.36 \(d\)](#), chs. [DHS 133](#) and [N 6](#), and assistance with activities directly supportive of current and active skilled therapy and speech pathology services and further described in the Wisconsin medical assistance home health agency provider handbook;

2. Assistance with the recipient's activities of daily living only when provided on conjunction with a medically oriented task that cannot be safely delegated to a personal care worker as determined and documented by the delegating RN. Assistance with the recipient's activities of daily living consists of medically oriented tasks when a reasonable probability exists that the recipient's medical condition will worsen during the period when assistance is provided, as documented by the delegating RN. A recipient whose medical condition has exacerbated during care activities sometime in the past 6 months is considered to have a condition which may worsen when assistance is provided. Activities of daily living include, but are not limited to, bathing, dressing, grooming and personal hygiene activities, skin, foot and ear care, eating, elimination, ambulation, and changing bed positions; and

3. Household tasks incidental to direct care activities described in subs. [1.](#) and [2.](#)

Wis. Admin. Code § DHS 107.11(2)(b).

The critical question here is not whether the tasks should be PCW tasks or HHA covered tasks. The question on appeal is only the correct number of hours as the Department has agreed to offer coverage of 16 hours of services per day to be designated as either HHA or PCW hours. Petitioner maintains that 24-hours per day is the necessary amount of care hours.

The petitioner argued that due to petitioner's significant needs, the use of the PCST was not appropriate. But, petitioner did not explain with any clarity why this so. I do not know of a more appropriate mechanism to make such a determination and do not believe that a merely subjective or discretionary determination is appropriate. I asked petitioner's counsel to provide a cite to a statute, rule, or policy which supported his contention that a different instrument was appropriate to determine HHA services.

Petitioner did not provide such a citation following the hearing. I also note that the Department, in determining the appropriate number of HHA visits appears to have used the PCST as a determination of how many minutes would be dedicated to tasks and then rounded up to 16 hours per day in order to fit within the HHA visit structure. Thus, they appear to have negated the argument petitioner made at hearing implying that the PCST was inappropriate as the HHA visit times are structured by four hours for the initial and three hours for subsequent ones, rather than by units/minutes as the PCW time is calculated.

The Department offered a very detailed itemization of the time allotted for each individual task that petitioner requires (see ex. #5). The Department consultant explained that she reviewed the personal care screening tool and physician plan of treatment signed by petitioner's physician to arrive at the conclusion that 6,616 minutes of cares are required per week. The Department rounded this up to the benefit of petitioner and arrived at 16 hours per day.

Petitioner did not present any specifics as to where in the Department's calculation there exist errors or deficiencies. Petitioner's arguments are twofold: (1) that more time is necessary to perform cares; and, (2) that petitioner requires constant supervision as he is a risk to climb out of bed and otherwise injure or endanger himself.

Petitioner's provider LS Professional Comfort homes offered a letter that itemizes 6 tasks without specificity to time requires for each. The letter simply concludes "[w]e can settle for HHA: 1 initial = 4 hours, HHA: 6 subsequent = 18 hours." Another employee of LS Professional, [REDACTED], Director of Nursing, appeared at the hearing and testified. She confirmed that petitioner has good upper body strength and can be combative and move around risking injury.

Dr. [REDACTED], the physician of petitioner, did not appear at the hearing. He wrote a letter (ex. #10) which was submitted following the hearing while the record was left open at petitioner's request. I place significant weight in this letter as this is a physician who has treated petitioner directly and presumably knows him well. I found this letter to be unpersuasive in that he has so little to say and what he says lacks any detail on which I could base a finding of fact favorable to petitioner. Dr. [REDACTED]'s letter is non-specific as to the reasons that the Department's approval is in error. Interestingly, Dr. [REDACTED] refers to the reduction of caregiver hours though, as discussed below, the current approved 16 hours appears to be an increase over the 2012 approval. Dr. [REDACTED] states that 24-hour per day care is required due to the need of petitioner "to be monitored on a 24-hour basis." Dr. [REDACTED] also refers to past episodes in which petitioner has fallen out of his bed when left "unsupervised." He concludes by urging approval of 24-hour care due to risks "that will be brought about by having him unsupervised overnight." The Department repeatedly argues in its written submissions that supervision is not a covered service. My review of the covered services stated in the Administrative Code sections cited or quoted above also does not give rise to any indication that supervision is a task that is covered by either of these two care vehicles. Specific tasks must be defined in order to have coverage approved. Similarly, I fully understand that petitioner needs frequent repositioning in bed or in his chair. Petitioner's counsel referred to such a need every 15 or 20 minutes. While the task of repositioning would be an appropriate task for a PCW or HHA, and coverage would be appropriate, the time for that person to wait beside petitioner during that 15 or 20 minutes is not a covered service.

At hearing, petitioner argued that he had previously been approved for 24 hour care by the Department for more than the past two years. The Department, in a September 4, 2013 letter to this ALJ at my request, noted that a PA request filed with the Department on April 17, 2012 was approved for less time than the Department has agreed to in the instant case. I found the petitioner's argument potentially persuasive relating to the 2012 PA in that it gives rise to a relevant inquiry as to why the Department would have reduced the allotted time for cares. Petitioner consented to my contacting the Department to ask for clarification as to why 24-hour care was previously determined to be medically necessary but was now

determined otherwise. The Department responded by letter on September 4, 2013 (ex. #9). But, based on the record before me, specifically the Department's explanation of the specifics of the 2011 and 2012 PA approvals in the September 4, 2013 letter, this was apparently not the case. Petitioner concedes as much in his September 6, 2013 letter but states that he does not agree with the previously approved hours. But the significant fact is that petitioner is now offered more hours than he had for the past year. The prior 2011 PA that had been approved was different in nature due to the apparent need for, and approval of, various periods of skilled nursing services due to physical wound care. And, it preceded the 2012 PA. It is of little relevance here.

In a prior authorization appeal, it is the burden of the petitioner or provider to establish the medical necessity of what is being requested. Petitioner has failed to do that. On this record, I cannot find that there are more than 16 hours per day of specific tasks that are coverable under MA. That does not mean that supervision is not appropriate in the case of petitioner. But, under the Code and rules I cannot see how such additional supervision is coverable under the PCW or HHA vehicles. That is the only question before me.

CONCLUSIONS OF LAW

The Department has not erred in its determination that 16 hours of PCW or HHA care hours are appropriate.

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 16th day of October, 2013

\sJohn P. Tedesco
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 October 16, 2013.

Division of Health Care Access And Accountability

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