



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted case name]

DECISION

FCP/151104

PRELIMINARY RECITALS

Pursuant to a petition filed August 01, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee County Department of Family Care ["County"] , a Managed Care Organization ["MCO], in regard to Medical Assistance ["MA"], a Hearing was held on September 17, 2013 at the office of the Division of Hearings and Appeals ["DHA"] in Madison, Wisconsin. The County appeared via telephone. With petitioner's agreement the record of the September 17th Hearing was held open until October 21, 2013.

The issue for determination is whether petitioner's paid MA Family Care Program ["FCP"] Supportive Home Care ["SHC"] hours may be reduced from 45 hours per week to 31.5 hours per week.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted petitioner name]

Petitioner's Representative:

Elizabeth Mamerow (not present at September 17, 2013 Hearing)
Family Care & IRIS Ombudsman
Disability Rights Wisconsin
Suite 3230
6737 West Washington Street
Milwaukee, WI 53214

Respondent:

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

By: Lillain Alford, Quality Improvement Coordinator, MCO (appeared via telephone)

Milwaukee County Department of Family Care, MCO
Milwaukee County Courthouse
Room 307c
901 North 9th Street
Milwaukee, WI 53233

OTHER PERSONS PRESENT:

Jennifer Froemming, FCP Supervisor
 Kelsey Kerslake, FCP Care Manager
 Denise Roth, petitioner's Respite Care Worker
 Anne Schwantes, FCP Registered Nurse ["RN"]
 Christine [REDACTED], petitioner's sister & guardian

ADMINISTRATIVE LAW JUDGE:

Sean P. Maloney
 Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]; 53 years old) is a resident of Rock County, Wisconsin.
2. Petitioner has diagnosis of epilepsy, Cerebral Palsy ["CP"], mental retardation, unsteady gait (due to spinal stenosis), occasional bladder and bowel incontinence (although he can toilet himself; he is subject to nocturnal accidents), muscular spasticity, seizure disorder (although he has not had a seizure since 1993), and is legally blind; he uses a wheelchair (although he can walk and transfer independently). Exhibits A-12, A:16-23, B-C, B-D1, B-D2, B-D3, B-D4, B-D5, B-D6, B-E & C.
3. By a *Notice of Action* letter dated May 30, 2013 the County reduced petitioner's paid SHC hours from 45 hours per week to 31.5 hours per week effective June 14, 2013. Exhibits A-4 & A-8.
4. Petitioner lives with his sister in a duplex owned by his sister; his sister is also his legal guardian and his representative payee; she is paid to provide his FCP cares; petitioner receives about \$1,382 per month in Social Security and about \$1,200 per month of that is used to pay for expenses of the household where he and his sister live. Exhibits A-12, B-C, B-D1, B-D2, B-D3, B-D5 & B-D6.
5. Petitioner is away from his home for approximately 35 hours per week at Kandu Industries (a day program) and, in addition, receives approximately 12.5 hours of respite care per week; during these times his sister does not provide cares for him. Exhibit AA, A-12, A:34-35, B-C, B-D6 & B-E.
6. Petitioner's sister claims that she provides cares for him for at least 100 hours per week; she prepared a detailed task tracker spreadsheet, covering 2½ weeks' time, in support of her claim. Exhibits B-D1, B-D2, B-D3 & C.
7. The evaluation completed by the County, including an *SHC Assessment*, a *Supportive Home Care Homemaking Assessment*, the *Resource Allocation Decision (RAD)* method, and an analysis of the detailed task tracker spreadsheet provided by petitioner's sister, shows that 31.5 hours per week of paid SHC is adequate to meet petitioner's needs. Exhibits A:13-31, B-G, B-H, C & DD.

DISCUSSION

FCP is available to eligible persons only through enrollment in a Care Management Organization ["CMO"] under contract with the Wisconsin Department of Health Services ["DHS"]. Wis. Admin. Code § DHS 10.41(1) (November 2009). A person may be eligible for FCP, but yet not entitled to enroll in a CMO. Wis. Admin. Code § DHS 10.36(1) (November 2009). A person who is found eligible for FCP but who does not meet certain conditions is not entitled to FCP benefits. Wis. Admin. Code § DHS

10.36(3) (November 2009). Such persons may pay privately for CMO services. Wis. Admin. Code §§ DHS 10.36(3) & 10.37 (November 2009).

In this case petitioner is eligible for FCP¹, is enrolled in a CMO, and is receiving FCP benefits. Petitioner appeals because he was notified that his SHC hours would be reduced from 45 hours per week to 31.5 hours per week.

There is no doubt that petitioner required extensive care, including very substantial paid SCH hours. That is not in question. The question here, however, is how many paid SCH hours he requires. The evidence in the record of this matter is that petitioner's sister provides many, many hours of excellent care to petitioner each and every week and that she does so willingly and in loving manner. See, Exhibit B-D:1-3 & 6.

Written Policy is that a member of a person's family may be paid for providing care if, among other things, the family member provides an amount of service that exceeds normal family caregiving responsibilities for a person in a similar family relationship who does not have a disability. *Memorandum: Guidelines for Paying Family Caregivers*, August 30, 2007 & November 2003; and, Contract; Exhibits B-A(4.i. & I.B.3.a.) & B-B(VIII.P.2.e.). There is no doubt that petitioner's sister fits this description -- but this does not resolve the issue of how many SHC hours are appropriate in petitioner's case. The County has approved 31.5 hours per week and petitioner requests 45 hours per week.

Written Policy states that services that are typically assumed to be the responsibility of family members are routine laundry, meal preparation, shopping, usual cleaning, general supervision, non-medical supervision, assisting with mobility, companionship, and transportation/escorting.² Services that are considered to exceed the typical caregiving /support responsibilities of a family member are toileting, bathing (other than set-up), other personal care a person is unable to do for himself or herself, frequent laundry due to incontinence/illness, complete transfer assist, or other unique services. *Guidelines for Paying Family Caregivers*, November 2003; and *Preferred Caregiver Guidelines*; Exhibits B-A(III.C.2.a. & c.) & A-32.

If the FCP member is paying into the household, that amount is considered as a contribution towards supportive home care services provided by the family caregiver. Further, supervision of the FCP member when the family caregiver is on the premises is generally not compensated unless the FCP member needs a level of supervision beyond stand-by supervision "in-case" something occurs. Finally, policy guidance is that consideration should be given to paying a single family member up to 40 hours per week³ for services provided. *Guidelines for Paying Family Caregivers*, November 2003; Exhibit B-A(III.C.2.c., 3.& 6.a.).

This matter must be decided by the preponderance of the credible evidence. Wis. Admin. Code § HA 3.09(4) (September 2001). The preponderance of the credible evidence in the record of this matter is that 31.5 hours per week of paid SHC is adequate to meet petitioner's needs. This is primarily because the claim of petitioner's sister that she provides cares for petitioner for at least 100 hours per week is not credible. There are 168 hours in a week (7 days X 24 hours/day). Petitioner is away from his home for approximately 35 hours per week at Kandu Industries (a day program) and, in addition, receives approximately 12.5 hours of respite care per week. This is a total of 47.5 hours per week during which time petitioner's sister does not provide cares for him. This leaves 120.5 hours per week (168 - 47.5). In addition, petitioner must sleep (although he is subject to nocturnal accidents). Even if only 6 hours per

¹ He enrolled in FCP on November 1, 2009. Exhibit A-12.

² Additionally, the law states that informal supports should be assessed, identified, and utilized. Wis. Admin. Code §§ DHS 10.44(2)(e)1.g. & (f)1. (November 2009).

³ The 45 hours per week requested by petitioner exceeds this amount.

night (42 hours per week)⁴ is allotted for sleep this still leaves only 78.5 hours per week (120.5 - 42) during which cares might be provided by petitioner's sister -- but the actual number of weekly hours of care provided by petitioner's sister must be less. It is not realistic that petitioner's sister provides cares for petitioner during every waking moment that he is at home (especially since general supervision by a family care is not to be paid for with FCP funds).

The credibility of petitioner's sister is also called into question by reports from Kandu Industries, not disputed by petitioner, that petitioner does not require as much care as she claims. Kandu Industries reports that petitioner experiences incontinence at the day program 1 to 2 times per week, that he does not spend a substantial amount of time in the bathroom, and that he toilets independently throughout the day. Exhibit CC. Kandu Industries also reports that petitioner eats a hot lunch provided at the day program (instead of bringing a lunch packed for him by his sister). Exhibit BB; See also, Exhibit EE.⁵

Finally, petitioner contributes about \$1,200 per month toward the expenses of the household where he and his sister live. Such a contribution must be considered as a contribution towards supportive home care services provided by his sister. *Guidelines for Paying Family Caregivers*, November 2003; Exhibit B-A(III.C.2.c., 3.& 6.a.).

CONCLUSIONS OF LAW

For the reasons discussed above, petitioner's paid FCP SHC hours may be reduced from 45 hours per week to 31.5 hours per week.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby 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.

⁴ Petitioner actually probably sleeps more -- but sleep time of only 6 hours per night accounts for night time cares required to address petitioner's nocturnal accidents and other occasional needs.

⁵ Petitioner objects to Exhibit EE because it is new evidence (generated after the September 17, 2013 Hearing) and because "it has no relevance to the legal issues at hand and serves only as a means to characterize [petitioner's sister] in hostile light." Petitioner's objection is OVERRULED. Exhibit EE is relevant to the credibility of petitioner's sister. Additionally, petitioner had an opportunity to respond, and did respond, to Exhibit EE. In any event, the result of this *Decision* would be the same even if Exhibit EE were excluded.

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 13th day of November, 2013

\sSean P. Maloney
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, 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 November 13, 2013.

Milw Cty Dept Family Care - MCO
Office of Family Care Expansion
elizabethm@drwi.org