FH
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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
c/o [redacted]
[redacted]
[redacted]

DECISION

FCP/152609

PRELIMINARY RECITALS

Pursuant to a petition filed October 04, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee County Department of Family Care in regard to Medical Assistance, a hearing was held on November 20, 2013, at Milwaukee, Wisconsin.

The issue for determination is whether the petitioner remains functionally eligible for the Family Care Program at the nursing home level of care.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]
c/o [redacted]
[redacted]
[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Lillian Alford
Milw Cty Dept Family Care - MCO
901 N 9th St
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:
Peter McCombs (telephonically)
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County.

2. The petitioner is 57 years old, and was found eligible to participate in the Family Care program pursuant to a Comprehensive, or Nursing Home, level of care. On August 1, 2013, petitioner moved into an apartment with a roommate.

3. Petitioner receives Family Care program assistance through Supportive Independent Living (SIL) services, which assists with meal preparation, medication management, grocery shopping and some household chores. Petitioner also receives Employment Services – Pre-Vocational assistance.

4. On September 11, 2013, a risk assessment was performed and petitioner demonstrated safe and independent handling of his medications with the addition of a pill organizer. Exhibit R1-3.

5. Subsequent to the risk assessment, a Long Term Care Functional Screen was performed, which resulted in a drop in level of care to the Non-Nursing Home level of care. *Id*.

6. On September 24, 2013, a re-screening was completed and the re-calculated level of care remained at the Non-Nursing Home level of care.

7. Notices of Action concerning the change in level of care (Exhibit R1-9), termination of SIL services (Exhibit R1-5), and termination of Employment Services – Pre-Vocational assistance (Exhibit R1-7) were sent to petitioner on September 25, 2013.

DISCUSSION

The petitioner receives Family Care Medical Assistance benefits at the nursing home level of care through his care maintenance organization (CMO), Curative. Curative contends that he no longer qualifies at this level of care. The Family Care Program is a health-service delivery system authorized by Wis. Stat. § 46.286 and comprehensively described in Wis. Admin. Code, Chapter DHS 10. It is designed to increase the ability of the frail elderly and those under 65 with disabilities to live where they want, participate in community life, and make decisions regarding their own care. It places a recipient under the roof of a single private provider that receives a uniform fee, called a capitation rate, for each person it serves. The provider is responsible for ensuring that the person receives all the Medicaid and Medicare services available to her. The theory behind the program is that it will save money by providing recipients with only the services they need rather than requiring that they enroll in several programs whose services may overlap. Each CMO signs a contract with the State of Wisconsin that sets forth exactly what services it must provide.

Eligibility for the Family Care Program depends upon a person's ability to function independently falling below a certain level. This is referred to as the person's functional capacity level. The nursing home level of care, which is also referred to as the comprehensive level of care, is described as follows at Wis. Admin. Code, § DHS 10.33(2)(c):

> A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:
>
> 1. The person cannot safely or appropriately perform 3 or more activities of daily living.
> 2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
> 3. The person cannot safely or appropriately perform 5 or more IADLs.
> 4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
> 5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.

6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:

a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.

b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self neglect or resistance to needed care.

Wis. Admin. Code, § DHS 10.33(2)(c).

Activities of daily living, or ADLs, refer to "bathing, dressing, eating, mobility, transferring from one surface to another such as bed to chair and using the toilet." Wis. Adm. Code, § DHS 10.13(1m). Instrumental activities of daily living, or IADLs, refer to "management of medications and treatments, meal preparation and nutrition, money management, using the telephone, arranging and using transportation and the ability to function at a job site." Wis. Admin. Code, § 10.13(32)

Agencies must determine eligibility using a uniform functional screening tool prescribed by the Department. Wis. Admin. Code, § DHS 10.33(2)(a). The problem with this requirement is that the Department has changed the screening tool to better comply with the federal government's long-term waiver provisions, but it has not changed the administrative code to reflect these changes. *See DHA Decision No. FCP-44/*115906. Because the administrative code has the force of law, I must follow it rather than the screening tool.

The petitioner is 57-year-old man who lives in an apartment with a roommate. Curative determined that he no longer meets the nursing home level of care. The Functional Screen determined that petitioner does not need any assistance with activities of daily living (ADL's), i.e., bathing, dressing, eating, mobility in home, toileting, transferring. Exhibit R1-4a. At hearing the petitioner did not contest his independence in these areas.

With regard to Instrumental Activities of Daily living (IADL's), the Functional Screen determined that petitioner needs some assistance with meal preparation, medication management, money management, laundry, and transportation.

Respondent noted that petitioner suffered a traumatic brain injury due to external trauma, which causes significant cognitive impairment. Exhibit R-1.

As evidenced by the LTCFS, petitioner falls squarely into number 5 of the Comprehensive Functional Capacity definition. He requires assistance and cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment. Exhibit R1-4a. Thus under the code definition he meets the Comprehensive, or Nursing Home, level of care. Based upon the clear definition of the functional levels as defined in the administrative code, I find that petitioner remains at the Nursing Home level of care.

CONCLUSIONS OF LAW

That the agency incorrectly discontinued petitioner's eligibility as the available evidence does demonstrate that he continues to meet nursing level of care functional eligibility standards.

THEREFORE, it is **ORDERED**

That this matter is remanded to the agency with instructions to rescind the change in petitioner's level of care and reinstate petitioner's Comprehensive, or Nursing Home, level of care. All actions required under this Order shall be completed within 10 days following the date of this Decision.

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, Room 651, 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 20th day of December, 2013

_____

\sPeter McCombs
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 December 20, 2013.

Milw Cty Dept Family Care - MCO
Office of Family Care Expansion