



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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

DECISION

CWA/147101

PRELIMINARY RECITALS

Pursuant to a petition filed February 05, 2013, under Wis. Code § HA 3.03, to review a decision by the Dane County Department of Human Services in regard to Medical Assistance, a hearing was held in the hearing room at the Division of Hearings and Appeals (DHA) in Madison, WI beginning on July 23, 2013, and that hearing was continued and completed on August 08, 2013, at Madison, Wisconsin. At the request of petitioner, hearings set for February 26, 2013 and ██████ 13, 2013 were rescheduled. Several prehearing conferences were held prior to the hearing. During those prehearings, both parties agreed to the consolidation of the two appeals of CWA/147098 for ██████ ██████ and CWA/147101 for ██████ ██████ into one hearing. With the agreement of the parties, a briefing schedule was established for the Department's initial brief, the Petitioner's responsive brief, and the Department's Reply brief. The briefs were timely submitted to DHA and are received into the hearing record.

At the request of the petitioner, DHA retained and paid a Hmong translator, ██████ ██████, for the petitioner and her husband for the above-captioned case. The hearing scheduled for 1:00 p.m. on July 23, 2013 began at about 1:35 p.m. because the interpreter, ██████ ██████ arrived 30 minutes late for the hearing. From about 1:35 to 2:00 p.m., Ms. ██████ interpreted for the petitioners, as preliminary procedural matters were addressed by the ALJ and the parties. Prior to the testimony of the first Departmental witness, ██████ ██████, the petitioners on their own initiative both chose to leave the hearing room (Ms. ██████ ██████ appeared to be too upset to remain in the hearing). During the testimony of ██████ ██████, this ALJ twice invited either or both of the petitioners to return to the hearing room, and both petitioners chose not to return, but to be solely represented by Attorney ██████. As a result, there was no need for any further translation by Ms. ██████ during the three hours of testimony and cross examination of ██████ ██████ regarding each petitioner. Moreover, Attorney ██████ confirmed in his July 29, 2013 e mail to DHA that: "After confirming with my two witnesses, they do speak English and the interpreter is not needed . ." Clearly, there was no need for an interpreter for either petitioner during the hearing. Both petitioners submitted a signed statement to DHA confirming that they waived their right to attend the continued hearing on August 8, 2013.

On the issue of the applicable administrative code section which applies to the instant appeal, Attorney ██████ did not submit any responsive statement or objection to Attorney ██████'s June 26, 2013 thorough analysis of the applicable code section. Attorney ██████ concluded correctly that there is no specific Wisconsin Code section for level of care determinations in COP Waiver program cases, but the closest analogous code section is to the Family Care Program in DHS 10.33(2)(c) for nursing home level of care. See ██████ 23, 2013 Prehearing Conference Report, paragraph #3.

5. The petitioner has experienced cardiac medical problems: atrial fibrillation, elevated myocardial infarction and Hyperlipidemia. R. Ex. 7, p.36. She has been prescribed medication to treat and control her symptoms and heart concerns (Hydrochlorothiazide and Norvasc to treat her high blood pressure, Albuterol inhaler for her periodic shortness of breath, and Lipitor for high cholesterol).
6. On March 15, 2011, petitioner's doctor found petitioner to be mentally alert and oriented to all three spheres. Her motor strength and deep tendon reflexes were symmetrical and intact. She had no sleep disturbances, memory changes or depression. P. Ex. pp. 137-139.
7. Petitioner consulted a cardiologist on December 16, 2011 and reported that she was without symptoms when taking her medication, that she was doing some minor housework, and cleaning dishes in her kitchen. She also reported that she climbed stairs without problems. P. Ex. p.149. On September 25, 2012 her medical diagnoses included Preglaucoma, Hypertension, Hyperlipidemia and Chronic Obstructive Pulmonary disease. On October 5, 2012, petitioner went to her doctor for a "wellness exam" and complained of elbow pain. The doctor twice in the report noted that petitioner appeared well, and younger than her state age. P. Ex. pp 157-158.
8. A Hmong Dane county social worker, [REDACTED] [REDACTED], took over the petitioner's case (replacing Mr. [REDACTED] [REDACTED]) during 2012. Ms. [REDACTED] visited the petitioner at her home during July, August, and November, 2012. On November 29, 2012, Ms. [REDACTED] completed a functional screen with the petitioner. During those meetings, petitioner told Ms. [REDACTED] that she was independent in all her activities of daily living. There was no grab bars in the bathroom, and petitioner used no devices to walk around the house. She was able to get into and out of the bathtub independently. The petitioner was able to take her own medications which included, Albuterol, Norvasc, Lipitor, Hydrochlorothiazide, Ibuprofen and Prednisone. Petitioner needed assistance with heavy chores, with purchasing groceries and with writing checks and did not drive a car. Her speech in Hmong was logical and coherent, and she displayed no memory or cognitive problems. The petitioner was basically an active person who helped in the garden, did household cleaning, folded laundry, cleaned the bathroom, washed and dried the dishes, and watered household plants. P. Ex pp. 66-78. Ms. [REDACTED] concluded that petitioner was basically independent in all of her ADLs and IADLs, and that she did not meet the nursing home level of care for COP eligibility. Testimony of [REDACTED] [REDACTED].
9. The county agency sent a January 7, 2013 Notice of Waiver Program Termination to the petitioner stating that effective January 17, 2013 petitioner's COP Waiver eligibility would discontinue because the petitioner's November 29, 2012 Long-Term Care Functional Screen results indicated she no longer meets the nursing home level of care to qualify for continued COP Waiver eligibility.
10. The petitioner filed with the Division of Hearings and Appeals (DHA) on February 5, 2013 an appeal of the January 17, 2013 COP Waiver discontinuance.
11. There was no reliable medical evidence to document any substantial decline in the petitioner's health between November 29, 2012 and April 18, 2013, despite petitioner's questionable allegations of severe disabilities and limitations (after losing her COP Wavier eligibility as of January 17, 2013).
12. The petitioner did not establish with any reliable evidence any cultural bias against the petitioner as a reason for the discontinuance of her COP Waiver benefits.
13. At the request and agreement of both parties as an independent evaluator, screener [REDACTED] [REDACTED] completed a second functional screen of the petitioner on April 18, 2013. During that screening, petitioner, without any documented medical evidence or credible testimony, surprisingly claimed to need medical assistance in **all** activities of daily living (ADLs), from needing someone to select her clothing for her to needing someone to cut up her food for her. Ms. [REDACTED] concluded in her April 18, 2013 functional screen report that petitioner did not need such alleged assistance, and

continued to not meet the nursing home level of care for eligibility in the COP Waiver program. See Exhibit R-13 and Testimony of [REDACTED] [REDACTED].

DISCUSSION

The county agency seeks to discontinue the petitioner's eligibility for MA-Waiver benefits because she no longer requires the level of care needed to remain in the program. See *Medicaid Eligibility Handbook*, Chapter 28, generally, or information on the various MA-Waiver programs. Eligibility 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. Depending upon the program, persons can be eligible at either the nursing home or non-nursing home level of care. Wis. Admin. Code, § DHS 10.33(2); Wis. Stat. § 46.286.(1)(a). The petitioner must meet the nursing home level of care to remain eligible for the benefits she has been receiving.

The nursing home 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 a 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).

A developmental disability is defined in Wis. Admin. Code, § 10.13(16), as follows:

Developmental disability" means a disability attributable to brain injury, cerebral palsy, epilepsy, autism, Prader-Willi syndrome, mental retardation, or another neurological condition closely related to mental retardation or requiring treatment similar to that required for mental retardation, that has continued or can be expected to continue indefinitely and constitutes a substantial handicap to the afflicted individual. "Developmental disability" does not include senility that is primarily caused by the process of aging or the infirmities of aging.

Cognitive pertains to “conscious intellectual activity” such as “thinking, reasoning, remembering, imagining, or learning words.” Definition found online at <http://www.merriam-webster.com/medical/cognitive>.

Activities of daily living, or ADLs, refers to “bathing, dressing, eating, mobility, transferring from one surface to another such as bed to chair and using the toilet.” Wis. Admin. Code, § DHS 10.13(1m). Instrumental activities of daily living, or IADLs, refers 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 Department seeks to end the petitioner’s Waiver benefits because the screening tool indicated that she does not meet the nursing home level of care in the November 29, 2012 and April 18, 2013 functional screenings. The petitioner is an 89 year-old woman who needed assistance with heavy chores, with purchasing groceries, writing checks and did not drive a car. The hearing record indicates that her medical conditions are controlled with medications. She is not suffering from any cognitive limitations, and does not have dementia. She does not require daily care or supervision. She was found doing dishes in the home kitchen unsupervised, and she manages her own monthly income. Monthly adult family home reports verify that petitioner is capable of doing dishes as well as gardening and house cleaning.

Petitioner was able to independently dress herself. She can bathe herself, using the shower wall to lean on while entering and exiting the tub. She sometimes uses a shower chair. Petitioner can adjust the water temperature herself. Petitioner is capable of independently eating, and is capable of cutting her own food. She is able to safely walk around her house without assistance including the two sets of stairs. She is also capable of toileting herself and is not incontinent of bladder or bowel. Petitioner is capable of transferring herself from one position to another, and is able to use the stairs with some dexterity. The petitioner is basically capable of all activities of daily living.

In regard to IADLs, petitioner has the physical and cognitive ability to obtain and prepare basic routine meals. See Pet Ex. p 37. She is also capable of using the microwave oven. She does need assistance with the physical activity of grocery shopping. She is able to administer her own medications, which consists of pills and eye drops. Petitioner manages her own money, and knows how to use the telephone.

The petitioner has been receiving these benefits since 2010. The petitioner alleges that her condition declined between the period of her first screening (November 29, 2012) and the second screening (April 18, 2013). However, petitioner failed to establish with any reliable medical evidence such sudden, substantial decline in her health. There is also the allegation by county agency witnesses that petitioner’s functional capacity was incorrectly determined in the past by Mr. [REDACTED]. See Finding of Fact #4 above.

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. The Department acknowledged the principle laid down in *Hanson* in *Final Decision ATI-40/87198* where Deputy Secretary Richard Lorang ruled on August 17, 1995, that in

any fair hearing concerning the propriety of an agency action, the county or state agency has the burden of proof to establish that the action it took was proper given the facts of the case.

During the hearing and in its briefs, the Department presented the convincing testimony of three witnesses: 1) [REDACTED], a social worker who administered the November 29, 2012 functional screen to each of the petitioners; 2) [REDACTED], a social worker who pursuant to the agreement of the parties administered the second functional screen on April 13, 2013; and 3) [REDACTED], program manager for the Dane county long term support agency. In addition, Attorney [REDACTED] presented reliable evidence and credible witnesses to clearly establish the Department's burden of proof that the county correctly discontinued the petitioner's MA Community Waiver program eligibility in its January 17, 2013 notice to petitioner due to no longer meeting the level of care requirement. The Department further asserted with some credible evidence that the petitioner's prior county worker and screener (Mr. [REDACTED]) had incorrectly determined that petitioner had been COP Waiver eligible in previous functional screenings. The hearing record indicates that [REDACTED] and [REDACTED] correctly and accurately determined that petitioner did not meet the level of care for continued eligibility based upon each petitioner's ADLs and IADLs in their two recent functional screenings.

During the hearing and in his brief, Attorney [REDACTED] argued that the recent two functional screens performed by [REDACTED] and [REDACTED] were unreliable, and alleged that the earlier screenings by Mr. [REDACTED] were actually the reliable ones. However, Mr. [REDACTED] did not appear at the hearing to testify and be cross examined, and petitioner did not obtain any affidavit from Mr. [REDACTED]. Furthermore, credible testimony and evidence offered by Ms. [REDACTED] and Ms. [REDACTED] (and Exhibit R8) convincingly undermined the reliability of Mr. [REDACTED]'s past screenings of petitioner. The Department's Exhibit R-1 shows the differences in the functional screen performed by [REDACTED] between 2008 and 2011, and the functional screens done by [REDACTED] during November, 2012 and then by [REDACTED] during April, 2013. Mr. [REDACTED] found the petitioner needed assistance in all activities of daily living whereas in direct contradiction Ms. [REDACTED] and Ms. [REDACTED] found no such need. See Department's Reply Brief, pp 1-3.

While petitioner is 89 years old with some medical problems, the medical records and the reliable hearing testimony establish that petitioner needed minimal assistance with ADLs and IADLs. She was basically an independent person who only needed limited assistance. Petitioner's extreme position in her April 13, 2013 screening to assert that she needed assistance in all her ADLs simply undermined her credibility, especially given the detailed and credible testimony of both [REDACTED] and [REDACTED].

Attorney [REDACTED] stated the following in pertinent part of page 3 of her Reply brief:

According to the record, Mr. [REDACTED]'s practices with regard to completing the functional screen were questioned by his supervisor. [REDACTED] questioned why Mr. [REDACTED] did not have Mr. [REDACTED] sign his own service plan, instead having Mr. [REDACTED] sign, which created a conflict of interest and failed to respect Mr. [REDACTED]'s rights. Ms. [REDACTED] also questioned why Mr. [REDACTED] determined that Mr. [REDACTED] was determined to be inadequate in performing activities of daily living. She questioned where the diagnosis was that supported the determination and why Mr. [REDACTED] could only communicate basic needs and needed assistance with decision making when there was no documented memory problems. (Dane County's Exhibit's p.28 (R8, p1). It was as if Mr. [REDACTED] viewed his job as making Mr. [REDACTED] eligible for COP services in order to compensate Mr. [REDACTED], rather than determining whether Mr. [REDACTED] indeed qualified.

Furthermore, Attorney argued in her brief convincing reasons why petitioner's recent claims of extreme disability are not credible: 1) there is no medical evidence that petitioner's cognitive functions are not intact. She showed no signs of dementia or memory loss. It makes no sense the recent allegation that petitioner is unable to pick out her own clothing or cut up her own

food; 2) petitioner is able to move about the house, inside or outside without any assistance. There is no physical evidence to support the claims of her caregivers, [REDACTED] and [REDACTED] that they must assist petitioner walk about the home. That claim is contrary to the observations of [REDACTED] [REDACTED] that she was able to independently climb the stairs. Moreover, Attorney [REDACTED] argued the following on p. 11 of her initial brief regarding her caregivers, [REDACTED] and [REDACTED]:

[REDACTED] [REDACTED] did not testify herself that she had limitation. In fact she told [REDACTED] [REDACTED] that she did not. Things changed however after the filing of this appeal. In her interview with [REDACTED] [REDACTED], [REDACTED] [REDACTED] and her family testified that Ms. [REDACTED] having severe disabilities and limitations. Ms. [REDACTED]'s statements, [REDACTED] [REDACTED]'s testimony and [REDACTED] [REDACTED]'s testimony in this regard are not credible. Mr. and Ms. [REDACTED]'s testimony combines some truth with personal bias, exaggeration and additional falsehoods. Ms. [REDACTED] had been instructed to report disability which belied her demonstrations of ability in unguarded moments.

Furthermore, Ms. [REDACTED] argued the following on p 10-11 of her initial brief for petitioner's husband regarding bias on the part of petitioners' caregivers:

[REDACTED] and [REDACTED] [REDACTED]'s testimony is biased by the monthly income they receive to provide caregiver services for [REDACTED] [REDACTED]. Perhaps it creates a cognitive dissonance that since the [REDACTED] receive money to care for their elderly father, then surely the elder [REDACTED] [REDACTED] must need the care they provide or why would they receive the money? The answer is that [REDACTED] [REDACTED] was likely never eligible for the services the [REDACTED] were paid to provide. While the [REDACTED]' outrage is understandable, their bias must factor into evaluating the credibility of their testimony concerning the claimed disabilities of [REDACTED] [REDACTED].

While Attorney [REDACTED] performed zealous and aggressive cross examination of [REDACTED] [REDACTED], he was unable to undermine the basic credibility or reliability of her testimony. Furthermore, petitioner's two witnesses, petitioner's son and caregiver ([REDACTED] [REDACTED]) and petitioner's daughter-in-law and caregiver ([REDACTED] [REDACTED]), testified, but were unable to establish any reliable or convincing evidence that petitioner had sufficient diagnoses or limitations in their ADLs or IADLs to refute that the county agency correctly discontinued the petitioner's COP Waiver eligibility. The petitioner did not establish with reliable evidence that the petitioner remained eligible for the COP Wavier benefits per the nursing home level of care criteria set forth in Wis. Admin. Code, § DHS 10.33(2)(c). Accordingly, based upon the above, I conclude that the county agency correctly discontinued the petitioner's MA Community Waiver program eligibility in its January 17, 2013 notice to petitioner, due to not meeting the nursing home level of care requirement based upon their functional ability or inability to perform ADLs and IADLs.

CONCLUSIONS OF LAW

The county agency correctly discontinued the petitioner's MA Community Waiver program eligibility in its January 17, 2013 notice to petitioner, due to not meeting the nursing home level of care requirement based upon petitioner's functional ability or inability to perform ADLs and IADLs.

THEREFORE, it is

ORDERED

The petition for review herein be and the same is hereby Dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the , , Madison, Wisconsin , **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of , Wisconsin,
this 27th day of March, 2014

\sGary M. Wolkstein
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 March 27, 2014.

Bureau of Long-Term Support

Attorney [REDACTED] [REDACTED]