



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/151168

PRELIMINARY RECITALS

Pursuant to a petition filed August 06, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. in regard to Medical Assistance, a telephonic hearing was held on December 23, 2013, at Milwaukee, Wisconsin. At the request of petitioner, hearings set for October 2, 2013 and November 13, 2013 were rescheduled.

The issue for determination is whether the Family Care Program (FCP) correctly discontinued the petitioner's Family Care Program (FCP) benefits effective August 14, 2013, due to no longer meeting the nursing home level of care based upon functional screens of the petitioner.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representatives:

Hope Lloyd, IRIS and Family Care
Ombudsman, and written submissions by
Attorney Christine Ann Gabron
Disability Rights of Wisconsin
6737 W. Washington St Suite 3230
Milwaukee, WI 53214

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Mike Gallun, supervisor

Family Care [REDACTED] Inc.
3073 S. Chase Ave., Suite 240
Milwaukee, WI 53207

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County who resides in a home with her daughter. Petitioner became disabled after a right foot injury which caused neuropathy.
2. Petitioner is a Family Care Program (FCP) recipient. Until the agency action her functional eligibility was at the nursing home level of care.
3. On May 6, 2013, the Family Care team visited the petitioner's residence to complete her annual review. During that meeting, the screener, [REDACTED] [REDACTED], completed the long term care functional screen (LTCFS). Based upon petitioner's answers in the functional screen and a review of medical records, petitioner was found to no longer meet the nursing home level of care. Petitioner was instead assessed at the non-nursing home level of care. By a notice dated May 31, 2013, the agency informed petitioner that she was no longer at the nursing home level of care for the FCP program. Benefits have continued pending this appeal.
4. A re-screening was done on June 17, 2013 by screeners [REDACTED] [REDACTED] and [REDACTED] [REDACTED] from [REDACTED] Inc. (CCI). The result of the new functional screen was calculated and a July 12, 2013 notice was issued indicating that petitioner met only the non-nursing home level of care.
5. The July 12, 2013 screen indicated that petitioner needs assistance with the two activities of daily living (ADLs) of bathing and dressing (page 3 of 10 of the functional screen). That July 12, 2013 screen also indicated that petitioner met one instrumental activities of daily living (IADL) of needing assistance with meal preparation (page 5 of 10 of the functional screen).
6. The petitioner was financially eligible for nursing home level of care.
7. [REDACTED] Inc. (CCI) sent a July 31, 2013 Notice of Change in Level of Care to the petitioner stating that effective August 14, 2013 she no longer met the nursing home level of care, but instead only met the non-nursing home level of care benefits package.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services (DHS), is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized in the Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10.

Wis. Adm. Code, §DHS 10.33(2) provides that an FCP applicant must have a functional capacity level of comprehensive or intermediate; I note here that Wis. Stat., §46.286, uses the terms "nursing home" and "non-nursing home" levels just as the agency in this case. If the person meets the comprehensive (nursing home) level, she is eligible for full services through a care management organization (CMO), including Medical Assistance (MA). Wis. Adm. Code, §DHS 10.36(1)(a). If the person meets the intermediate (non-nursing home) level, she is eligible for full services only if she is in need of adult protective services, she is financially eligible for MA, or she is grandfathered as described in §DHS 10.33(3). Wis. Adm. Code, §DHS 10.36(1)(b). A person eligible under the non-nursing home level is eligible for less FCP services.

Wis. Adm. Code, §DHS 10.33(2)(c) describes comprehensive functional capacity:

(c) *Comprehensive functional capacity level.* 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.

(Emphasis added)

Wis. Adm. Code, §DHS 10.33(2)(d) describes intermediate functional capacity:

d) *Intermediate functional capacity level.* A person is functionally eligible at the intermediate level if the person is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others, as is evidenced by a finding from application of the functional screening that the person needs assistance to safely or appropriately perform either of the following:

1. One or more ADL.
2. One or more of the following critical IADLs:
 - a. Management of medications and treatments.
 - b. Meal preparation and nutrition.
 - c. Money management.

Petitioner and her representatives do not assert that the May 31, 2013 screen or the July 12, 2013 re-screening were done incorrectly or inaccurately by CCI. Instead, petitioner's representatives argue correctly that the Wisconsin Long Term Care Functional Screen (LTCFS) is more restrictive than the law as specifically stated in Wisconsin Administrative Code DHS 10.33 resulting in an incorrect final conclusion (determination) by the screen. The Department of Health Services (DHS) is aware of the issue and does not dispute that the LTCFS can be more restrictive than the law. However, DHS has not changed the screen as of the date of the December 23, 2013 hearing date.

The Administrative Code §DHS 10.33(2)(c) states clearly that nursing home level of care (comprehensive functional capacity) is satisfied by:

2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.

As indicated in Finding of Fact #5 above, the July 12, 2013 re-screening concluded that petitioner needs assistance with the two activities of daily living (ADLs) of bathing and dressing, and petitioner needs assistance with one instrumental activities of daily living (IADLs) of meal preparation. Thus, under the above code definition, petitioner meets the nursing home level of care of §DHS 10.33(2)(c)2.

During the hearing and in its written argument, the Family Care Program explained that by contract CCI is only authorized to determine the member's level of care by means of the member's LTCFS screen. In response, Disability Rights Attorney Christine Ann Gabron correctly argued that when the screen is more restrictive than the law, then the law takes precedence over any policy or screening methodology (such as a functional screen). DHS could have changed its functional screen to conform to the Wisconsin Administrative Code, but has not yet done so.

The Family Care program also asserts that it would "violate" its contract with DHS to "change" the results of a member's functional screen. The Family Care Program is misunderstanding the larger legal picture. The Administrative Code has the force of law and must be followed. Furthermore, there have been five (5) prior final DHA decisions that have concluded that the LTCFS is more restrictive than the law, and reversed the Family Care denials or discontinuances of nursing home level of care based upon §DHS 10.33. See DHA Cases FCP-11/113325, FCP-44/115906, FCP/130316, CWA/139759, and CWA/150560.

Attorney Gabron stated in pertinent part in her December 16, 2013 letter:

If there is an issue with the contract between CCI and DHS, CCI should address this issue with DHS. Their contract does not allow them to ignore the law and refuse to provide services to a person who qualifies pursuant to said law. Five judges have ordered Care Wisconsin, Outagamie County Department of Health Services, Eau Claire County Department of Human Services, Community Health Partnership, and IRIS six (6) times to find a Petitioner to be NHLOC because they qualified pursuant to the law.

CCI cannot hide behind the tool that clearly does not conform to the law and then try to invoke their DHS contract to again evade the clear, black and white language of the promulgated law. Disability Rights Wisconsin, Inc. requests that CCI be ordered to find that [REDACTED] [REDACTED] remains at Nursing Home Level of Care. CCI can then consult with DHS and resolve whatever issues they think exist, without further delay and harm to the petitioner.

Attorney Gabron is correct. DHS needs to change its LTCFS to conform to the law (DHS 10.33, Wis. Adm. Code). In the instant case, based upon the clear definition of the functional levels as defined in the administrative code as it reads now, I find that petitioner remains at the Nursing Home level of care. Accordingly, I conclude that the Family Care Program incorrectly discontinued the petitioner's Family Care Program (FCP) benefits effective August 14, 2013, due to no longer meeting the nursing home level of care based upon functional screens of the petitioner.

CONCLUSIONS OF LAW

1. Petitioner remains at the Nursing Home level of care as defined in the Family Care Program provision of the Wisconsin Administrative Code §DHS 10.33(2)(c)2.

2. The Family Care Program incorrectly discontinued the petitioner's Family Care Program (FCP) benefits effective August 14, 2013, due to no longer meeting the nursing home level of care based upon functional screens of the petitioner.

THEREFORE, it is

ORDERED

That the matter be remanded to the Family Care program with instructions to take any and all necessary administrative action to restore petitioner's Family Care Program eligibility under the Nursing Home Level of Care retroactive to August 14, 2013, within 10 days of 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 13th day of January, 2014

\sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on January 13, 2014.

Community Care Inc.
Office of Family Care Expansion
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