



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/152795

PRELIMINARY RECITALS

Pursuant to a petition filed October 15, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Western Wisconsin Cares-FCP in regard to Medical Assistance, a telephone hearing was held on January 08, 2014. Previously scheduled hearings for November 19, 2013 and December 10, 2013 were rescheduled at petitioner's request.

The issue for determination is whether petitioner is eligible for payment for acupuncture services by the Family Care program.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Mary Tabbert

Western Wisconsin Cares-FCP

ADMINISTRATIVE LAW JUDGE:

Peter McCombs

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of La Crosse County. He has been diagnosed with anxiety attacks, seizures, and chronic pain.
2. On September 19, 2013, the agency issued a notice to petitioner informing that his acupuncture services would be discontinued as of October 6, 2013, because petitioner takes medication to manage

his anxiety and sees a mental health therapist monthly; it further noted that petitioner has never had his complaints of chronic pain evaluated medically.

3. On October 15, 2013, petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

The Family Care Program (FCP) provides financial assistance for long-term care and support. Wis. Stat. § 46.2805(4); Wis. Admin. Code § DHS 10.13(21). Family Care target groups are elderly people, people with physical disabilities and those with developmental disabilities. Medicaid Eligibility Handbook (MEH), § 29.1. The Family Care Benefit is available to eligible persons only through enrollment in a Managed Care Organization. See Wis. Admin. Code § DHS 10.41(1). The MCOs complete a comprehensive assessment and develop a plan of care, as well as provide and/or coordinate long term care services for Family Care enrollees. MEH § 29.2.

Wis. Adm. Code, §DHS 10.33(2) provides that an FCP applicant must have a functional capacity level of comprehensive or intermediate; if the person meets the comprehensive (nursing home) level, he is eligible for full services through a managed care organization (MCO), including Medical Assistance (MA). Wis. Adm. Code, §DHS 10.36(1)(a). If the person meets the intermediate (non-nursing home) level, he is eligible for services only if he is in need of adult protective services, he is financially eligible for MA, or he 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. For petitioner, the practical result is that as a “non-nursing home” rather than “nursing home” level of care, he lacks eligibility for acupuncture. The reason is that the state cannot use federal funds to pay for such services unless the person meets the nursing home level of care.

It is true that all Family Care enrollees must be full partners in the assessment of needs and strengths and in the development of care plans, and that each enrollee must be offered the opportunity to take as much responsibility as he or she is willing and able in the selection, arrangement and monitoring of services. Wis. Admin. Code §§ DHS 10.44(2)(e), (f), (h) and (3)(d). But this option is still subject to the general requirements and limitations outlined for the program, including the limitation on the provision of services such as acupuncture for an individual at the non-nursing home level of care.

Medical Assistance, and all its subprograms, are meant to provide only *basic and necessary health care*, which means that some requests will be denied as not medically necessary even if they are for desired items or services that may improve the recipient’s life. In this case, the negative action was the agency’s determination that petitioner was not eligible for payment for acupuncture services by the Family Care program. However, at hearing petitioner testified that he has been receiving acupuncture services for many years. The respondent appears to be in a situation where it is re-evaluating the services that it is authorized to cover, and tightening its approvals, all to petitioner’s detriment. Petitioner submitted letters from his provider stating that petitioner has had good pain relief and reduction of seizures and headaches since beginning acupuncture and that these services have prevented further medical incidences. Exhibit 4.

The respondent countered that there was little evidence that the acupuncture was effective, since petitioner has been medicated for his anxiety and seizures, and he sees a mental health therapist monthly. The respondent testified further that it based its decision on the fact that the pain issues reported by petitioner have not been assessed by his primary physician; as such, there may be other therapies (physical or occupational) that could help petitioner.

Petitioner has been receiving acupuncture in conjunction with other treatments and medications for his various medical conditions. There is no evidence in the record to establish that the decrease in his symptoms has been solely as a result of the acupuncture services or as a result of the use of the other treatments and medications. While I understand that petitioner strongly believes that these services have been essential to the improvement of his medical condition, I cannot conclude that the services are eligible for coverage as he is at a non-nursing home level of care. Therefore, I must conclude that petitioner is not eligible for payment for acupuncture by the Family Care program.

Finally, I note that the petitioner's argument raises issues of fairness, *i.e.*, these services have been covered previously, so they should be continued. The argument questions the equity of the determination and implicitly requests that the administrative law judge grant relief from the program requirements. It is the long-standing policy of the Division of Hearings & Appeals, Work & Family Services Unit, that the Department's assigned administrative law judges do not possess equitable (fairness) powers. See, *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. Under law, he is not eligible for the requested coverage, and I am without any equitable powers to direct any remedy beyond the remedies available under law.

CONCLUSIONS OF LAW

Petitioner is not eligible for payment for acupuncture by the Family Care program because he is at a non-nursing home level of care.

NOW, THEREFORE, it is **ORDERED**

That the matter 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.

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 28th day of February, 2014

\sPeter McCombs
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 February 28, 2014.

Western Wisconsin Cares-FCP
Office of Family Care Expansion