STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FCP/153787

The attached proposed decision of the hearing examiner dated June 24, 2014, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed December 02, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee County Department of Family Care - MCO in regard to Medical Assistance, a hearing was held on April 15, 2014, at Milwaukee, Wisconsin.

NOTE: The record was held open until April 29, 2014 to give Disability Rights Wisconsin (DRW) an opportunity to submit a brief and to give Milwaukee County Family Care an opportunity to respond. On April 22, 2014, DRW submitted its brief. It has been marked as Exhibit 7 and entered into the record. On April 29, 2014, Milwaukee County Department of Family Care submitted its closing statement. It has been marked as Exhibit 8 and entered into the record.

On May 19, 2014, DRW submitted a rehearing request that was granted on May 28, 2014. Because there was no further dispute of facts, a new hearing was not convened, but this Proposed Decision is being issued to address the error of law raised in the May 19, 2014 rehearing request.

The issue for determination is whether Milwaukee County Department of Family Care (MCDFC) correctly determined the Petitioner's level of care.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Lillian Alford, Quality Insurance Co-ordinator
Milwaukee County Department of Family Care - MCO
901 N. 9th St.
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #[redacted]) is a resident of Milwaukee County.
2. Petitioner suffers from numerous ailments including Cicatrical Pemphigoid (a blistering auto-immune disease), Bulous Dermatosis, Type 2 Diabetes, Stage 3 Kidney Disease, Inflammatory Auto Immune Disorder, Post Traumatic Stress Disorder, Esophageal Reflux, Hypohthyroidism, asymmetrical hearing loss, chronic pain, viral labyrinthitis (inner ear infection), nutcracker esophagus (motility disorder), depressive disorder, myoclonus (involuntary muscle twitches), lymphedema, anxiety, hematochezia (the passage of blood into and with stool) and decreased peripheral vision. (Exhibit 4A and Exhibit 6, pg. 12)
3. On November 22, 2013, the Department of Milwaukee County Family Care sent the Petitioner a notice indicating that her level of care had changed from nursing home level of care to non-nursing home level of care. (Exhibit 1, pg. 2)
4. The Petitioner filed a request for fair hearing that was received by the Division of Hearings and Appeals on December 2, 2013. (Exhibit 1, pg. 1)
5. In May 2013, Project Access, a Care Management Unit contracted by MCDFC, completed a Long Term Care Functional Screen of the Petitioner, indicating that the Petitioner was 1) independent with all activities of daily living, 2) needed assistance with three instrumental activities of daily living – meal preparation, laundry and/or chores and transportation, and 3) had no issues with communication or cognition. Project Access indicated Petitioner's risk level to be at a 2. (Exhibit 6, pgs. 17-24)
6. In November 2013, MCDFC completed another Long Term Care Functional Screen of the Petitioner that indicated that the Petitioner was independent with all activities of daily living, 2) required assistance with one instrumental activity of daily living – transportation and 3) had no issues with communication or cognition. The agency assessed Petitioner's risk level to be a 1. (Exhibit 6, pgs. 6-16)
7. Petitioner needs grab bars to bathe safely; she needs grab bars to toilet safely, and on occasion, she needs a cane to ambulate safely. (Testimony of [redacted] DRW Ombudsman; Testimony of [redacted], Project Access Case Manager; Exhibits 4H and 4I)
8. Petitioner is able to independently bathe with grab bars, dress, eat, walk with her cane, toilet herself with grab bars, and transfer from one surface to another. (Testimony of [redacted], DRW Ombudsman; Testimony of [redacted], Project Access Case Manager)
9. Petitioner is independent with all instrumental activities of daily living, except for transportation. (See Exhibit 7, pg. 3)

DISCUSSION

The Petitioner filed an appeal, because she disagreed with the agency's determination that her level of care has dropped from nursing home level of care to non-nursing home level of care.

The terms "nursing home level of care" and "non-nursing home level of care" are given general definitions in Wis. Stats §46.286(1)(a):

> **(a)** *Functional eligibility.* A person is functionally eligible if the person's level of care need, as determined by the department or its designee, is either of the following:

1m. The nursing home level, if the person has a long-term or irreversible condition, expected to last at least 90 days or result in death within one year of the date of application, and requires ongoing care, assistance or supervision.

2m. The non-nursing home level, if the person has a condition that is expected to last at least 90 days or result in death within 12 months after the date of application, and is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others.

In further defining levels of care for the Family Care Program, Wis. Admin. Code §DHS 10.33(2)(c) and (d) refers to "nursing home level of care" as "Comprehensive functional capacity" and it refers to "non-nursing home level of care" as "intermediate functional capacity":

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.

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.

In the case at hand, DRW argues that both the prior Long Term Care Functional Screen (LTCFS) and the current LTCFS were wrong, because Petitioner cannot safely perform three activities of daily living (ADLs) – bathing, mobility and toileting – and is therefore, at the nursing home level of care per Wis. Admin. Code §DHS 10.33(2)(c) 1.

It is undisputed that with the use of assistive devices, such as grab bars and a raised toilet seat that the Petitioner is independent with bathing and toileting. It is also undisputed that Petitioner uses a cane on at least rare occasions to ambulate and can therefore, ambulate independently. However, DRW argues that the very fact that Petitioner needs assistive devices to bathe, ambulate and toilet safely is proof she needs assistance as defined by the administrative code.

Wis. Admin. Code §DHS 10.13(6) defines assistance as, "cueing, supervision or partial or complete hands-on assistance from another person."

The administrative code definition does not include in its definition of "assistance" the aid or use of a device, adaptive equipment or piece of medical equipment. It only refers to cueing from another person, supervision from another person and the partial or complete hands on assistance from another person.

DRW argues that despite this, the instructions for completing the LTCFS lead to the conclusion that use of an assistive device should equate to 'requires assistance from another person'. DRW produced copies from the Department of Health Service's "screen logic" manuals 2008.2 and 2011.1 for its Long Term Care subsystem, Adult Long Term Care Eligibility Page Name, which indicate that, "An ADL is counted if some degree of help is needed (1 or greater), *or if adaptive equipment is required."* Exhibits C and D of Petitioner's Rehearing Request *Emphasis added.*

Milwaukee County Family Care asserts that the instructions for the LTCFS direct the screener to find a person independent with an ADL if he/she can safely perform the ADL with the use of an assistive device. The instructions for the LTCFS can be found on-line at:

http://www.dhs.wisconsin.gov/LTCare/FunctionalScreen/LTCFSinstrux-clean.pdf

A review of Section 4.2 – Overview of the ADLs/IADLs Module and Section 4.3 – Choosing Level of Help Ratings for ADLs/IADLs, of the LTCFS instructions does not reveal instructions to mark a person as independent with an ADL, if they need an assistive device to complete the task and can safely do so. (LTCFS Instructions, pgs. 4-2 and 4-3)

Under Section 4.5 Adaptive Equipment of the LTCFS instructions, there are no directions telling the screener to mark a person independent if they need an assistive device to complete a task and can safely do so. Although, with improvised equipment (versus actual medical equipment), if a person would otherwise need help from another person to perform the ADL, the instructions direct the screener to mark the person as needing assistance:

> **4.5 Adaptive Equipment**
>
> Four of the ADLs (Bathing, Mobility, Toileting, and Transferring) and two of the IADLs (Meal Preparation and Laundry and/or Chores) have some adaptive equipment listed. Select only equipment the person currently needs, has, and is actually using.
>
> Sometimes a person will improvise to meet a need for equipment. For example, instead of a tub bench they may use a sturdy object to sit on during bathing. In this instance, you would not select 'Uses tub bench' in the bathing equipment box. Do not capture a person's use of improvised or home-made items as a substitute for the equipment on the list.

> A screener should only select the types of equipment listed on the LTCFS the person needs, has, and uses. Do NOT select a type of equipment that is a facsimile of what is on the list.
>
> If a person uses an improvised or home-made item and without it, they do not need assistance from another person to complete the task, the screener should select 0: (Independent). Do NOT check the use of any equipment.
>
> If a person uses an improvised or home-made item and without it, they would need any assistance from another person to complete the task, the screener should select 1: (Help is needed-helper need not be present throughout the task). Do NOT check the use of any equipment (for the improvised or home-made item).
>
> (LTCFS Instructions, pg. 4-4)

The LTCFS instructions for bathing and toileting do not recognize that use of an assistive device as a basis to mark the box for assistance. (LTCFS Instructions, pg. 4-6 and pg. 4-10) However, the LTCFS instructions specifically state that the box for assistance should NOT be marked if the person can walk himself/herself with an assistive device. (LTCFS Instructions, pg. 4-9)

Current LTCFS instructions do not provide further instructions regarding how to treat an individual who can independently complete a task with the use of an assistive device, so there is no basis to conclude that use of an assistive device equates to 'assistance from another person'.

The Department has previously acknowledged that there is an inconsistency between the Administrative Code and the LTCFS in regard to determination of level of care. When there is such an inconsistency in an individual case, the provisions in the Administrative Code will be followed. This priority of authority has been upheld in numerous prior decisions of the Division of Hearings and Appeals.

Because the Petitioner does not need cueing from a person, supervision from a person or hands-on assistance from another person to safely bathe, walk or toilet and only needs adaptive equipment to complete these tasks safely, she does not need 'assistance' as defined by Wis. Admin. Code §DHS 10.13(6), above.

I note that this is consistent with the instructions for the Personal Care Screening Tool, which is a different tool utilized by DHS to determine the need for Personal Care Service Hours, which states that, "Assistance from a PCW with an activity is not medically necessary if the member can perform the activity safely with the use of an assistive device…" The Personal Care Screening Tool Instructions can be found on-line at:

http://www.dhs.wisconsin.gov/forms/F1/F11133a.pdf

Thus, it is found that the Petitioner needs assistance in only one area, transportation. Applying criteria set forth in Wis. Admin. Code §DHS 10.33(2)(c) and (d) above, it is found that the Petitioner is at the non-nursing home/intermediate functional capacity level of care.

CONCLUSIONS OF LAW

The Milwaukee County Department of Family Care correctly determined Petitioner's level of care.

THEREFORE, it is **ORDERED**

That the petition is 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 Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **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 request (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 Madison, Wisconsin, this 23 day of October, 2014.

Kevin E. Moore

Kevin E. Moore, Deputy Secretary
Department of Health Services

FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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PROPOSED DECISION

FCP/153787

PRELIMINARY RECITALS

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By: Lillian Alford, Quality Insurance Co-ordinator
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Milwaukee, WI 53233

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FINDINGS OF FACT

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2. Petitioner suffers from numerous ailments including Cicatrical Pemphigoid (a blistering auto-immune disease), Bulous Dermatosis, Type 2 Diabetes, Stage 3 Kidney Disease, Inflammatory Auto Immune Disorder, Post Traumatic Stress Disorder, Esophageal Reflux, Hypohthyroidism, asymmetrical hearing loss, chronic pain, viral labyrinthitis (inner ear infection), nutcracker esophagus (motility disorder), depressive disorder, myoclonus (involuntary muscle twitches), lymphedema, anxiety, hematochezia (the passage of blood into and with stool) and decreased peripheral vision. (Exhibit 4A and Exhibit 6, pg. 12)
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DISCUSSION

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In further defining levels of care for the Family Care Program, Wis. Admin. Code §DHS 10.33(2)(c) and (d) refers to "nursing home level of care" as "Comprehensive functional capacity" and it refers to "non-nursing home level of care" as "intermediate functional capacity":

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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.

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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.

In the case at hand, DRW argues that both the prior Long Term Care Functional Screen (LTCFS) and the current LTCFS were wrong, because Petitioner cannot safely perform three activities of daily living (ADLs) – bathing, mobility and toileting – and is therefore, at the nursing home level of care per Wis. Admin. Code §DHS 10.33(2)(c) 1.

It is undisputed that with the use of assistive devices, such as grab bars and a raised toilet seat that the Petitioner is independent with bathing and toileting. It is also undisputed that Petitioner uses a cane on at least rare occasions to ambulate and can therefore, ambulate independently. However, DRW argues that the very fact that Petitioner needs assistive devices to bathe, ambulate and toilet safely is proof she needs assistance as defined by the administrative code.

Milwaukee County Family Care asserts that the instructions for the LTCFS direct the screener to find a person independent with an ADL if he/she can safely perform the ADL with the use of an assistive device. The instructions for the LTCFS can be found on-line at:

http://www.dhs.wisconsin.gov/LTCare/FunctionalScreen/LTCFSinstrux-clean.pdf

A review of Section 4.2 – Overview of the ADLs/IADLs Module and Section 4.3 – Choosing Level of Help Ratings for ADLs/IADLs, of the LTCFS instructions does not reveal instructions to mark a person as independent with an ADL, if they need an assistive device to complete the task and can safely do so. (LTCFS Instructions, pgs. 4-2 and 4-3)

Under Section 4.5 Adaptive Equipment of the LTCFS instructions, there are no directions telling the screener to mark a person independent if they need an assistive device to complete a task and can safely do so. Although, with improvised equipment (versus actual medical equipment), if a person would otherwise need help from another person to perform the ADL, the instructions direct the screener to mark the person as needing assistance:

> **4.5 Adaptive Equipment**
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> Four of the ADLs (Bathing, Mobility, Toileting, and Transferring) and two of the IADLs (Meal Preparation and Laundry and/or Chores) have some adaptive equipment listed. Select only equipment the person currently needs, has, and is actually using.
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>
> A screener should only select the types of equipment listed on the LTC FS the person needs, has, and uses. Do NOT select a type of equipment that is a facsimile of what is on the list.
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> If a person uses an improvised or home-made item and without it, they do not need assistance from another person to complete the task, the screener should select 0: (Independent). Do NOT check the use of any equipment.
>
> If a person uses an improvised or home-made item and without it, they would need any assistance from another person to complete the task, the screener should select 1: (Help is needed-helper

need not be present throughout the task). Do NOT check the use of any equipment (for the improvised or home-made item).

(LTCFS Instructions, pg. 4-4)

The LTCFS instructions for bathing and toileting do not contain instructions to not mark the box for assistance, if a person is able to perform the task with an assistive device. (LTCFS Instructions, pg. 4-6 and pg. 4-10) However, the LTCFS instructions do state that the box for assistance should NOT be marked if the person can walk himself/herself with an assistive device. (LTCFS Instructions, pg. 4-9)

Given that the current LTCFS instructions do not provide clear instructions regarding how to treat an individual who can independently complete a task with the use of an assistive device, one must turn to other sources of law and policy.

Wis. Admin. Code §DHS 10.13(6) defines assistance as, "cueing, supervision or partial or complete hands-on assistance from another person."

The administrative code definition does not include in its definition of "assistance", the aid or use of a device, adaptive equipment or piece of medical equipment. It only refers to cueing from another person, supervision from another person and the partial or complete hands on assistance from another person.

DRW produced copies from the Department of Health Service's "screen logic" manuals 2008.2 and 2011.1 for its Long Term Care subsystem, Adult Long Term Care Eligibility Page Name, which indicate that, "An ADL is counted if some degree of help is needed (1 or greater), *or if adaptive equipment is required.*" Exhibits C and D of Petitioner's Rehearing Request *Emphasis added.*

This would seem to indicate that a person is considered in need of assistance with an ADL, even if he or she can complete the task with the use of an assistive device. Thus, it is found that the Petitioner is need of assistance with the ADLs of bathing, mobility and toileting.

Applying the criteria set forth in Wis. Admin. Code §DHS 10.33(2)(c) and (d), above, it is found that the Petitioner is, in fact, at the nursing home/comprehensive functional capacity level of care, because she needs assistance with the three ADLs discussed above, and because she needs assistance with one IADL, transportation.

I note that the Care Management Units who are completing the Long Term Care Functional Screens, might be getting confused because the instructions for the Personal Care Screening Tool, which is a different tool utilized by DHS to determine the need for Personal Care Service Hours, states that, "Assistance from a PCW with an activity is not medically necessary if the member can perform the activity safely with the use of an assistive device..." The Personal Care Screening Tool Instructions can be found on-line at:

http://www.dhs.wisconsin.gov/forms/F1/F11133a.pdf

Because of the potential for confusion and the lack of clarity in the current instructions for the LTCFS, it is appropriate for this decision to be sent to the Secretary of the Department of Health Services, as proposed, to give the Department of Health Services an opportunity to review and clarify its policies.

CONCLUSIONS OF LAW

The Milwaukee County Department of Family Care incorrectly determined Petitioner's level of care.

THEREFORE, it is

ORDERED

That MCDFC reinstate the Petitioner at the Nursing Home/Comprehensive Level of Care. If this decision is sustained by the Secretary, MCDFC shall take all administrative steps necessary to complete this task within 10 days of the Secretary's decision.

NOTICE TO RECIPIENTS OF THIS DECISION:

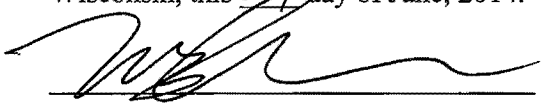
This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Milwaukee,
Wisconsin, this 24 day of June, 2014.



Mayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals