



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/154503

PRELIMINARY RECITALS

Pursuant to a petition filed December 28, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Fond Du Lac County Department of Social Services in regard to Medical Assistance, a telephonic hearing was held on March 17, 2014, at Fond Du Lac, Wisconsin. At the request of petitioner, a hearing set for February 10, 2014 was rescheduled.

The issue for determination is whether the county agency correctly determined the petitioner's Family Care Program (FCP) enrollment date of December 1, 2013 and whether that enrollment date may be backdated.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

Representative:

[REDACTED], POA and daughter
[REDACTED]
[REDACTED]

Respondent:

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

By: Deborah Bohlman, ESS
Fond Du Lac County Department of Social Services
87 Vincent Street
Fond Du Lac, WI 54935-4595

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Fond Du Lac County who resides in a Community based residential facility.
2. On or about August 19, 2013, the petitioner's daughter and POA, [REDACTED] [REDACTED], applied on behalf of petitioner for the Family Care Program (FCP).
3. The petitioner failed to submit all required financial information by the September 23, 2013 deadline.
4. The county agency sent a September 24, 2013 notice to the petitioner denying petitioner's August, 2013 FCP application due to failure to verify all financial information including petitioner's life insurance policy.
5. On October 14, 2013, petitioner's POA re-applied on behalf of petitioner for the Family Care Program, and submitted all required financial (including life insurance policy) and non-financial information.
6. The county agency did not begin to process that October 14, 2013 application until November 7, 2013.
7. The county agency had e mail correspondence with the Managed Care Organization (MCO), [REDACTED] Care District, from November 7, 2013 through November 12, 2013. See Exhibit 13.
8. On November 18, 2013, the MCO completed its enrollment process and determined petitioner's actual date of enrollment in the Family Care Program to be December 1, 2013. See Exhibit 14.
9. The county agency sent a November 21, 2013 Notice of decision to the petitioner stating that petitioner was approved in Group C of the Family Care Program as of December 1, 2013 with a cost share of \$1,740.96.

DISCUSSION

The Family Care Program is a subprogram of Wisconsin's Medical Assistance (MA) program, and is intended to allow families to arrange for long-term community-based health care and support services for older or impaired family members without resort to institutionalization, *Wis. Stats.* §46.286; *Wis. Admin. Code* §DHS 10.11. The Family Care Long Term Care program (FCP) is a long-term care benefit for the elderly, people with physical disabilities and those with developmental disabilities. *Medicaid Eligibility Handbook (MEH)*, §29.1. An individual who meets the functional and financial requirements for Family Care, *Wis. Stats.* §46.286(1) participates in Family care by enrolling with a Care Management Organization (CMO), *Wis. Admin. Code* §DHS 10.41 which, in turn, works with the participant and his/her family to develop an individualized plan of care. The CMO implements the plan by contracting with one or more service providers.

The petitioner's representative disagrees with the county agency concerning the county agency refusing to backdate the petitioner's Family Care Program (FCP) eligibility from December 1, 2013 to November 1, 2013. The petitioner has been enrolled in the Family Care Program since December 1, 2013. However, petitioner requested that her FC eligibility be backdated to November 1, 2013 to cover the past costs of her care at the Community Based residential facility. This would require backdating eligibility for FCP.

The Family Care Program provides financial assistance for long-term care and support. See WI Stat § 46.2805(4); WI Admin Code § DHS 10.13(21). The FCP Benefit is available to eligible persons only through enrollment in a Care Management Organization (CMO). See WI Admin Code § DHS 10.41(1).

Application for the Family Care must be made to the agency serving the county, tribe or family care district in which the person resides. See WI Stat § 46.286(1)(a)2.

The process contemplated for an applicant is to test her functional eligibility, then her financial eligibility, and if she meets both standards, to certify her as eligible. Then she is referred to a CMO for enrollment in the CMO. See, WI Admin Code §§ DHS 10.33 – 10.41. The CMO then drafts a service plan using CMO selected providers, designing a care system to meet the needs of the person, and the person executes the service plan. At that point the person's services may begin, which in this case was December 1, 2013.

During the March 17, 2013 hearing, petitioner's representative argued that petitioner should be entitled to backdating of the FCP because the county agency did not handle the application process promptly and correctly, and that her mother's enrollment in the Family Care Program could have begun as of November 1, 2013 and not December 1, 2013. The hearing record does indicate that there were some delays in the processing of petitioner's FCP application from October 14, 2013 to November 7, 2013. In any case, for the sake of this discussion, I will find that the FCP possibly could have enrolled the petitioner at an earlier date. Even so, the petitioner can only be eligible for Family Care earlier if there is a mechanism for me to order backdated FC. Decision FCP-40/55295 was a proposed decision that found that Family Care could not be backdated and that decision was upheld in a Final Decision by the Department Secretary on April 15, 2003. Wisconsin statutes and administrative rules do not allow for backdating of Family Care. The issue of entitlement is addressed in WI Stats § 46.286(3):

(3) Entitlement.

(a) Subject to par. (c), a person is entitled to and may receive the family care benefit through enrollment in a care management organization if all of the following apply:

1m. The person is at least 18 years of age.

2m. The person has a physical disability, as defined in s. 15.197 (4) (a) 2., a developmental disability, as defined in s. 51.01 (5) (a), or is a frail elder.

3m. The person is functionally eligible under sub. (1) (a).

4m. The person is financially eligible under sub. (1) (b) 2m. a., and fulfills any applicable cost-sharing requirements.

(b) *(Omitted as not relevant)*

(c) Within each county and for each client group, par. (a) shall first apply on the effective date of a contract under which a care management organization accepts a per person per month payment to provide services under the family care benefit to eligible persons in that client group in the county. (Emphasis added.)

This is reflected in WI Admin Code, § DHS 10.41(1):

(1) ENROLLMENT REQUIRED. The family care benefit is available to eligible persons only through enrollment in a care management organization (CMO) under contract with the department.

Furthermore, WI Admin Code § DHS 10.36(2) provides that entitlement to the **FC benefit first applies on the effective date of the contract between the CMO and the applicant.**

Thus, based on state law, Family Care coverage of the expenses from a facility such as a community based residential facility may only begin after two things occur: (1) when an individual is “**eligible**” for the program, and (2) when an individual is actually “**enrolled**” in the program. As discussed above, an individual is considered eligible when he or she passes the functional and financial screen and then is enrolled in the program. The individual and the agency must agree to a particular date for enrollment. However, the enrollment date cannot be any sooner than: (a) the date the person signed the enrollment, and (b) the date services (including case management) begin to be provided pursuant to that agreement. Family Care is a capitated, managed care system. There is no ability, as there was under the MA program, to “backdate” eligibility. While eligibility can be established prior to enrollment, services have to be concurrent with the enrollment date. Services cannot be paid for retroactively. The case management component must be in place and services must be provided concurrent with that case management component.

Based upon the above, I must conclude there is no remedy I can provide in this case for the reason that there is no place from which to secure funding to pay for petitioner’s services prior to her December 1, 2013 enrollment. The CMO would not receive a capitated payment before the enrollment date, because before accepting a payment for a client they must complete an assessment and authorize the services. The CMO must, in essence, say “yes, this is the service and we will begin case managing it as of this date.” This is managed care, not fee-for-service. Therefore, as the CMO would not receive funding for this case for the period prior to the enrollment date, there would be no entity from which to secure payment for any services prior to that date. See also, similar cases from the Division of Hearings and Appeals concurring in this result, as follows: DHA Case No. FCP-40/51904; DHA Case No. FCP-40/52227; DHA Case No. FCP-40/53292; DHA Case No. FCP-40/67871; DHA Case No. FCP-32/71953; and DHA Case No. FCP-40/72365.

Finally, as a matter of *law*, I am without authority to reach the decision that the petitioner seeks. I cannot grant the relief the petitioner seeks based on equity. It is the long-standing policy of the Division of Hearings & Appeals that the Department's Administrative Law Judges do not possess equitable 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 state statutes and administrative code provisions. I am without the power to grant the petitioner reimbursement for the costs she incurred prior to December 1, 2013. If she chose to do so, petitioner would need to seek her relief in a circuit court of this State. Finally, I am bound by the Secretary’s decision in FCP-40/55295. Because there is not an adequate remedy available under the state statutes, administrative code or Family Care policy for this circumstance, the petitioner’s request for retroactive Family Care coverage must be denied.

CONCLUSIONS OF LAW

1. Wisconsin statutes and administrative rules do not allow for backdating of Family Care Program (FCP) eligibility.
2. There is no mechanism for ordering petitioner’s Family Care Program services to begin prior to the December 1, 2013 effective date of enrollment, so that the Division of Hearings and Appeals can not order Family Care coverage of services prior to December 1, 2013.

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 Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 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 (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 1st day of May, 2014

\sGary M. Wolkstein
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 May 1, 2014.

Fond Du Lac County Department of Social Services
Office of Family Care Expansion