



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

In the Matter of

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

PROPOSED DECISION

MGE/155163

PRELIMINARY RECITALS

Pursuant to a petition filed January 28, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Barron County Department of Human Services in regard to Medical Assistance, a hearing was held on March 18, 2014, at Barron, Wisconsin. The record was left open for 44 days at the petitioner’s request. The petitioner submitted a brief.

The issue for determination is whether the petitioner may, as an alien, receive medical transportation through medical assistance back to his native country.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Respondent:

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

By: David Hensley

Barron County Department of Human Services
Courthouse Room 338
330 E Lasalle Ave
Barron, WI 54812

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Barron County.

2. The petitioner seeks authorization through the medical assistance program for a medical flight back to the Netherlands. The county agency denied the request because it contends that the flight is not an emergency service and thus not covered for aliens.
3. The petitioner is a 41-year-old alien who has been in the United States since May 23, 2006. He is not a refugee, an asylee, an alien whose deportation is withheld, a Cuban, a Haitian, or an American Indian born in Canada. He has never sought United States citizenship or residency.
4. The petitioner suffered heat stroke in July 2011. This left him with permanent brain damage and paralysis. He requires a respirator to breathe.
5. The petitioner has lived in the ventilation unit of a nursing home since soon after suffering heat stroke. His care costs approximately \$600,000 to \$700,000 per year. Medical assistance pays for his care.
6. It would cost between \$74,870 and \$95,846 to transport the petitioner to the Netherlands.
7. Medically transporting the petitioner to the Netherlands will not adversely affect his health, safety or welfare

DISCUSSION

The petitioner is a 41-year-old Dutch citizen who entered the United States on May 23, 2006. Although he married a few days later, he never sought United States citizenship or residency. In July 2011 he had heat stroke, which left him with permanent severe brain damage and paralysis. Soon after this, he entered the ventilation unit of a nursing home, where he remains. Because he probably will never recover, he wishes to return home to the Netherlands, which would require a medical flight. The county agency denied his request because, as an alien, he is eligible only for emergency services. Wis. Admin. Code, § DHS 103.03(2); 8 USC 1255a(h)(3). Emergency services are “those services which are necessary to prevent the death or serious impairment of the health of the individual.” Wis. Admin. Code, § 101.03(52).

The county economic support agency submitted no information other than a three-sentence explanation of the denial. That statement did not cite any specific statutes, regulations, or policies. The record does not even include the notice denying the request. Nevertheless, the parties did agree on the relevant facts, the most noteworthy of which is the comparative costs of providing the petitioner’s care and the medical flight. His nursing home care costs \$600,000 to \$700,000 per year. Bed-to-bed transportation, including ambulance service to the airport and a flight from the Chippewa Valley Regional Airport to Amsterdam, costs between \$74,870 and \$95,846, depending upon the provider. The cost could be less if the company could arrange to transport a person back to the United States.

Although the requested transportation is expensive, it represents less than two months of the cost of the petitioner’s nursing home care. The state has probably spent over \$2,000,000 on his care so far and, because he could live for years or even decades, is likely to spend millions more if he remains in a nursing home. This means that it is in the Department’s financial interest to grant his request. The question is whether there is a legal means to do so.

The petitioner’s attorney submitted a brief after the hearing in which she requested a discretionary waiver under Wis. Admin. Code, § DHS 106.13. This section allows a discretionary waiver or variance from any rule found in some of the statutes and regulations pertaining to the medical assistance program, including the rules found in Wis. Admin. Code, Ch. DHS 103, which contains the subsection limiting most aliens to only emergency medical services. Requests for a waiver or variance must meet all of the following criteria:

- (a) The waiver or variance will not adversely affect the health, safety or welfare of any recipient;
- (b) Either:

1. Strict enforcement of a requirement would result in unreasonable hardship on the provider or on a recipient; or
 2. An alternative to a rule, including a new concept, method, procedure or technique, new equipment, new personnel qualifications or the implementation of a pilot project is in the interests of better care or management;
- (c) The waiver or variance is consistent with all applicable state and federal statutes and federal regulations;
- (d) Consistent with the MA state plan and with the federal health care financing administration and other applicable federal program requirements, federal financial participation is available for all services under the waiver or variance; and
- (e) Services relating to the waiver or variance are medically necessary.

Wis. Admin. Code, § DHS 106.13(1).

I will deal with each of these requirements in a separate paragraph.

The requested waiver will not adversely affect the health, safety, or welfare of the petitioner or any other recipient because he would continue to receive medical care in his home country.

The petitioner is a gravely ill man who wishes to go home and be near his family. He does not want those who know him in the United States to see him in his current condition. This means that staying in the United States would create a hardship for him. Reasonableness depends upon the totality of the circumstances of a matter. The argument against waiving the rule limiting medical assistance to emergencies is that medical flights cost the medical assistance program a large amount of money, but the cost of enforcing the limitation is likely to be many times more than the cost of waiving it. Other than the cost of the flight, I know of no harm either the Department or the petitioner will potentially suffer if the rule is waived. Because of this, the hardship the petitioner would suffer if the waiver were denied would be unreasonable.

State and federal law does limit medical assistance benefits for aliens to emergency services, but all waivers and variances pertain to services that are barred somewhere in state or federal law. If this variance is denied because of the limitation found in Wis. Admin. Code, § DHS 103.03(2), the waiver is meaningless. Section DHS 106.13 places specific limitations on waivers sought from Wis. Admin. Code, Ch. DHS 107. It contains no such limitation on services provided pursuant to Wis. Admin. Code, Ch. 103. Furthermore, the purpose of limiting the coverage of medical services for aliens to emergency services is to limit funds spent on aliens to the least amount possible consistent with humane treatment. In this matter, enforcing the limitation is inconsistent with this principle because it will cost more to enforce the limitation than to grant the waiver. Based upon this, I find that the requested waiver is consistent with all applicable state and federal statutes and federal regulations.

Because medical assistance covers medical flights, I assume federal financing is available for them. Once the petitioner is flown to the Netherlands, he will have no further need of any federal or state financial participation.

A service is medically necessary if it “required to prevent, identify or treat a recipient's illness, injury or disability” and meets the following standards:

1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider and the setting in which the service is provided;
3. Is appropriate with regard to generally accepted standards of medical practice;

4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
5. Is of proven medical value or usefulness and, consistent with s. DHS 107.035, is not experimental in nature;
6. Is not duplicative with respect to other services being provided to the recipient;
7. Is not solely for the convenience of the recipient, the recipient's family or a provider;
8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Admin. Code, § DHS 101.03(96m)

The medical flight meets the medical assistance requirements. In particular, it is cost-effective compared to the alternative medically necessary service—nursing home care—which is reasonably accessible to the petitioner.

Based upon these factors, I find that a waiver of rule limiting the petitioner's medical care to emergency services should be granted. The parties have 15 days to submit comments. Both parties should submit more documentation of the costs associated with this waiver request. The agency should submit copies of the request and any notices that are relevant to this matter. In addition, although I am treating the petitioner's brief as a request for a waiver, it would be helpful if he submitted a more formal request that clearly complies with Wis. Admin. Code, § 106.13(2)(a) during the comment period.

CONCLUSIONS OF LAW

Medical assistance covers the petitioner's request for a medical flight to his native country because he is entitled to a waiver from the provisions limiting his care to emergency services.

THEREFORE, it is

ORDERED

That if the secretary or her designee adopts this as the Department's final decision, the petitioner shall be entitled to a medical flight and related ambulance transportation from his nursing home to a hospital in the Netherlands. The flight shall be arranged within 14 days of the date this decision takes effect. The Department shall be allowed reasonable flexibility concerning the flight's departure date so that it can attempt to save costs by arranging that the petitioner's plane can take a person to the United States on its return flight.

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 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 Madison,
Wisconsin, this 19th day of May, 2014

Michael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals