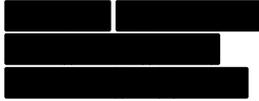




STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FCP/155440

PRELIMINARY RECITALS

Pursuant to a petition filed February 12, 2014, under Wis. Admin. Code, §DHS 10.55, to review a decision by ContinuUs to discontinue the Family Care Program (FCP), a hearing was held on May 21, 2014, at Madison, Wisconsin. Hearings set for March 18, March 21, and April 25, 2014 were rescheduled at the petitioner's request.

The issue for determination is whether petitioner continues to meet the level of care requirement for FCP eligibility.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Kelly Hermanson
ContinuUs
28526 US Hwy. 14
Lone Rock, WI 53556

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [redacted]) is a resident of Green County currently living in a senior living facility in Madison. He has been enrolled in the FCP program since 2009.

2. Petitioner's Care Management Organization (CMO) is ContinuUs. In January, 2014, ContinuUs completed an annual functional screen to determine if petitioner continued to meet the level of care requirement for FCP eligibility. After completing the screen, ContinuUs informed petitioner that he no longer met the level of care requirement. The notice, dated January 28, 2014, informed petitioner that FCP was being discontinued February 28, 2014. FCP has continued, however, pending this appeal decision.
3. The functional screener found that petitioner was independent in activities of daily living (ADLs) as well as instrumental activities of daily living (IADLs). Petitioner had undergone surgery in 2013 that substantially alleviated physical impairments for petitioner, and in addition he became sober, which positively impacted his ability to handle daily living activities.
4. Petitioner is 53-years-old with a diagnosis of encephalopathy-related traumatic brain injury. He suffers from hearing loss, chronic back pain, and chronic obstructive pulmonary disease (COPD).
5. Petitioner requires assistance with medication management.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, 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. Admin. 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. If the person meets the comprehensive (nursing home) level, he is eligible for full services through a CMO, including Medical Assistance (MA). Wis. Admin. Code, §DHS 10.36(1)(a). If the person meets the intermediate (non-nursing home) level, he is eligible for full 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. Admin. Code, §DHS 10.36(1)(b). A person eligible under the non-nursing home level is eligible for less FCP services.

Wis. Admin. 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.

Wis. Admin. 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.

ADLs include bathing, dressing, eating, mobility, and transferring. Wis. Admin. Code, §DHS 10.13(1m). IADLs include meal preparation, medication management, money management, laundry and chores, telephone, and transportation.

The Department has developed a computerized functional assessment screening system. The system relies upon a face-to-face interview with a quality assurance screener who has at least a bachelor of science degree in a health or human services related field, with at least one year of experience working with the target populations (or, if not, an individual otherwise specifically approved by the Department based upon like combination of education and experience). The screener asks the applicant, or a recipient at a periodic review, questions about his or her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits the Functional Screen Report for the person to the Department's Division of Disability and Elder Services. The Department enters the Long Term Functional Screen data into a computer program to see if the person meets any of the required levels of care.

If the assessor enters information into the functional screen correctly, then it is assumed that the computer will accurately determine the level of care. However, in the past it has been evident that the screen might miss the intermediate functional level for FCP cases because the specifics of the code definition do not necessary fit into the general definition of institutional care. Thus for FCP cases it is possible that a person could meet the code definition even if the person fails the functional screen.

Petitioner's representative does not argue that he meets the Comprehensive level of care. Instead the argument is that petitioner meets the Intermediate (non-nursing home) Functional Capacity Level.

As a first point, I agree with petitioner's representative that petitioner falls within the target group for physical disabilities. That is not to say that the agency was incorrect in having him listed as within the Alzheimer's/dementia group because his history could put him there as well. However, the 2013 CAT

scan indicated that he has a traumatic brain injury related to encephalopathy, and that diagnosis puts him within the physical disability group as pointed out in section III of the petitioner's prehearing brief.

With that in mind, I will find that petitioner does need assistance with medications, and that he thus meets the criteria for the Intermediate/non-nursing home level of care. The agency personnel testified that petitioner has shown no signs of needing assistance with medications, that he can name each medication, and that he knows what each medication is for. They point out that his own doctor bases his statement on short contacts with petitioner and petitioner's own reporting. However, of particular significance to me is the report from petitioner's most recent residential care provider that staff at the residence were responsible for his medication management and administration, and that petitioner would have difficulty remembering to take his many medications timely without assistance.

Petitioner strikes me as someone who is capable of handling his life much of the time, but is also equally capable of losing control at any time. His ongoing problems with care managers and residential managers appear to be related to his brain trauma, and I doubt he would succeed living without residential assistance. I imagine he is a difficult person for ContinuUs staff to manage; I can say with some certainty that he is a difficult petitioner to manage.

I note that petitioner contacted me by telephone on May 30; I avoided talking about the merits of the case, but in a lengthy soliloquy petitioner railed against his care staff and also against his legal representatives who he said "did nothing for him" at the hearing. It is precisely that sort of thought process that assists in my conclusion that petitioner has a significant brain trauma and that he needs some level of assistance in his daily living. I would even venture to surmise that petitioner might meet the Comprehensive level of care under the catch-all §DHS 10.33(2)(c)6.

CONCLUSIONS OF LAW

Petitioner meets the Intermediate/non-nursing home level of care under the physical disability target group because he needs assistance with medication management.

THEREFORE, it is

ORDERED

That the matter be remanded to the agency with instructions to continue petitioner's FCP eligibility under the non-nursing home level of care under the physical disability target group.

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 3rd day of June, 2014

\sBrian C. Schneider
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 June 3, 2014.

Continuus
Office of Family Care Expansion
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