



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/155744

PRELIMINARY RECITALS

Pursuant to a petition filed February 27, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Continuous MCO in regard to Family Care (FC) eligibility, a hearing was held on May 14, 2014, by telephone. A hearing set for April 10, 2014, was rescheduled at the petitioner's request.

The issue for determination is whether the agency correctly determined that the petitioner no longer satisfies the functional eligibility requirement for the Family Care program (FC).

There appeared at that time 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: Kelly Hermanson, supr.
Continuus
28526 US Hwy 14
Lone Rock, WI 53556

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Green County.
2. The petitioner has been a recipient of FC benefits for at least one year. To remain eligible for FC, the recipient must periodically undergo functional screening to determine whether she continues

to have functional care needs at the requisite level. The petitioner underwent such a functional screening on January 30, 2014.

3. As a result of 2014 functional screening, the FC program determined that the petitioner was no longer functionally eligible for the program. On February 14, 2014, the FC agency issued notice to the petitioner advising her that she was no longer eligible for “nursing home level” FC benefits due to her failure to satisfy the nursing home related functional eligibility requirements of the program. The petitioner timely appealed and aid was ordered continued pending appeal.
4. The petitioner, age 29, has diagnoses of fibromyalgia, depression, anxiety, Ehler-Danlos Syndrome type III, chronic low back pain with L5-S1 degenerative disk disease, and a history of surgery for an arachnoid cyst. She lives in a residence with her two children, ages 5 and 7. For purposes of FC program eligibility, the petitioner has a “long-term condition.”
5. *ADLs*. The petitioner is ambulatory without an assistive device in her home and is independent in bathing, eating, toileting, and transferring.
6. *Instrumental ADLs*. The petitioner desires physical assistance with laundry and household chores. She is able to do all of the following independently: take medication, prepare simple meals, manage money, use her telephone, and drive a car. Although she is able to do the laundry and chores for herself and her children, she must take frequent breaks due to pain. The petitioner is not employed. She does not require overnight supervision, and no documentation from a medical provider of a diagnosis of a cognitive deficit has been submitted into this record. The petitioner is fully communicative, is not physically resistive to care, does not wander, has not demonstrated self-injurious behavior, is not violent towards others, and does not engage in substance abuse.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for physically/developmentally disabled or elderly adults. See, Wis. Stat. §46.286, and Wis. Admin. Code ch. DHS 10. Whenever the local Family Care program decides that a person is to be terminated from the program, the client is allowed to file a fair hearing request. The petitioner did so here.

In order to qualify for FC services, with certain exceptions not applicable here, a person’s functioning must be such that they would otherwise require institutional care. Wis. Stat. §46.286(1)(a). To be found eligible, the applicant must undergo an assessment of his/her needs and functioning.

I. THE DHS COMPUTERIZED SCREENING TOOL DETERMINED THAT THE PETITIONER IS NOT FUNCTIONALLY ELIGIBLE AT THE “NURSING HOME CARE LEVEL.”

The Wisconsin Department of Health Services has made efforts to improve the statewide accuracy of functional assessments by implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained 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), and has experience working with long term care consumers.

This screener asks the applicant, or a recipient at a periodic review, questions about his/her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits (as occurred here) the “Functional Screen Report” for the applicant to the Department’s Division of Long Term Care. The Department then treats the Long Term

Functional Screen data (or “tool”) by computer programming to see if the applicant/recipient meets any of the nursing levels of care.

In the initial implementation of the "functional screen" process, the Department employed a statistical consultant to test the use of the “tool” (the Level of Care Functional Screen form, or "LOC" form) and the reliability of the outcomes obtained in using the tool and the computer analysis program. The consultant found that the use of the functional screen resulted in a high degree of reliability and consistency. Current policy requires the Department’s local agent to utilize this system. See <http://dhs.wisconsin.gov/LTCare/FunctionalScreen/Index.htm>. The cross-referenced Level of Care (LOC) Functional Screen form reiterates the skeletal definitions from the federal Medicaid rules for Intermediate Nursing Care and institutional Developmental Disability facilities.

The petitioner’s diagnoses are not in dispute; she suffers from fibromyalgia, Ehler-Danlos, and chronic low back pain, among other things. The agency assessor determined in January 2014, that the petitioner was able to perform all of the ADLs and many IADLs independently. When the petitioner’s functional ability scores were entered into the DHS algorithm, the result was a DHS conclusion that the petitioner does not have care needs at the nursing home level. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

II. INDEPENDENTLY OF THE DHS LOC ALGORITHM, I CONCLUDE THAT THE PETITIONER DOES NOT MEET THE COMPREHENSIVE FUNCTIONAL CAPACITY LEVEL AT THIS TIME.

The petitioner argues that she has care needs, due to her lower back pain, which make the continuation of FC program benefits necessary for her.

Independently of the DHS computerized result, this ALJ’s overall sense of the petitioner’s care level is that it does not rise to the “comprehensive functional capacity level” required in the state code. In code, the verbally expressed standard, as opposed to a computer algorithm, for the requisite level of care is as follows:

DHS 10.33 Conditions of functional eligibility.

...

(2) DETERMINATION OF FUNCTIONAL ELIGIBILITY. (a) *Determination.* Functional eligibility for the family care benefit shall be determined pursuant to s. [46.286 \(1\)](#), Stats., and this chapter, using a uniform functional screening prescribed by the department. To have functional eligibility for the family care benefit, the functional eligibility condition under [par. \(b\)](#) shall be met and, except as provided under [sub. \(3\)](#), the functional capacity level under [par. \(c\)](#) or [\(d\)](#) shall be met.

(b) *Long-term condition.* The person shall have a long-term or irreversible condition.

(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.

(emphasis added)

Wis. Admin. Code §DHS 10.33(2)(a)-(c) (November 2009). IADLs are defined at §DHS 10.13(32). The petitioner can perform all ADLs unassisted, and can perform at least *five* IADLs unassisted (*i.e.*, medication management, meal preparation, money management, telephone use, transportation).

Because the petitioner does not lack the ability to perform five or more IADLs, she does not meet the code standard for the comprehensive functional capacity level of the functional eligibility test.

The agency correctly sought to discontinue eligibility. FC is meant to be a nursing home diversion program, and this client is not at risk of needing nursing home care at this time.

CONCLUSIONS OF LAW

1. The petitioner does not have care needs at the nursing home/comprehensive functional capacity level at this time; therefore, she currently does not satisfy the functional eligibility requirements of the FC program.

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, 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 31st day of May, 2014

\sNancy J. Gagnon
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 2, 2014.

Continuus
Office of Family Care Expansion