



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FCP/156666

PRELIMINARY RECITALS

Pursuant to a petition filed April 7, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care of Central Wisconsin in regard to Medical Assistance, a hearing was held on June 10, 2014, at Balsam Lake, Wisconsin.

The issue for determination is whether the petitioner continues to meet the nursing home level of care, which is required to remain eligible for Family Care Medical Assistance Benefits.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Brettingen

Respondent:

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

By: Nancy Tischbein
Community Care of Central Wisconsin
3349 Church St, Suite 1
Stevens Point, WI 54481

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. The petitioner (CARES # [redacted]) is a resident of Polk County.
2. The petitioner had been receiving Family Care Medical Assistance at the nursing home level of care. Her care maintenance organization, Community Care of Central Wisconsin, notified her on

March 28, 2014, that she would no longer receive services at this level but would continue to be eligible at the non-nursing home level of care.

3. The petitioner has been diagnosed with mental retardation.
4. The petitioner can perform all of her activities of daily living without assistance. These include bathing, dressing, eating, mobility, transferring from one surface to another (such as bed to chair), and using the toilet.
5. The petitioner can prepare simple meals, drive a car, use a telephone, shop for groceries if someone prepares a list for her, and do her own laundry. She takes no medication. Her sister has been appointed as her representative-payee and helps her manage her money.
6. It took the petitioner four years to earn her driver's license.
7. The petitioner can communicate with little or no noticeable impairment. Her memory is adequate to carry on her daily activities. She makes safe decisions for routine or familiar situations but not for new or unfamiliar situations.
8. The petitioner is able to live on her own if she is properly supervised.
9. The petitioner has held supervised employment for over 15 years at the Polk County Recycling Center. Her employer must explain her duties to her several times a week, and she has difficulty learning new tasks.

DISCUSSION

The petitioner receives Family Care Medical Assistance benefits at the nursing home level of care through her care maintenance organization (CMO), Community Care of Central Wisconsin. CCCW seeks to end her eligibility. The Family Care Program is a health-service delivery system authorized by Wis. Stat. § 46.286 and comprehensively described in Wis. Admin. Code, Chapter DHS 10. It is designed to increase the ability of the frail elderly and those under 65 with disabilities to live where they want, participate in community life, and make decisions regarding their own care. It places a recipient under the roof of a single private provider that receives a uniform fee, called a capitation rate, for each person it serves. The provider is responsible for ensuring that the person receives all the Medicaid and Medicare services available to her. The theory behind the program is that it will save money by providing recipients with only the services they need rather than requiring that they enroll in several programs whose services may overlap. Each CMO signs a contract with the State of Wisconsin that sets forth exactly what services it must provide.

Eligibility for the Family Care Program depends upon a person's meeting one of the program's target groups and upon her ability to function independently falling below a certain level. Wis. Admin. Code, §§ DHS 10.32 and 10.33. CCCW contends that the petitioner no longer meets the developmentally disabled target group. If she does meet this target group, she must still demonstrate that her ability to function—what is referred to as her functional capacity level—remains at the nursing home level of care.

The nursing home level of care, which is also referred to as the comprehensive level of care, is described as follows at Wis. Admin. Code, § DHS 10.33(2)(c):

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)(c).

Activities of daily living, or ADLs, refer to “bathing, dressing, eating, mobility, transferring from one surface to another such as bed to chair and using the toilet.” Wis. Adm. Code, § DHS 10.13(1m). Instrumental activities of daily living, or IADLs, refer to “management of medications and treatments, meal preparation and nutrition, money management, using the telephone, arranging and using transportation and the ability to function at a job site.” Wis. Admin. Code, § 10.13(32)

Agencies must determine eligibility using a uniform functional screening tool prescribed by the Department. Wis. Admin. Code, § DHS 10.33(2)(a). The problem with this requirement is that the Department has changed the screening tool to better comply with the federal government’s long-term waiver provisions, but it has not changed the administrative code to reflect these changes. *See DHA Decision No. FCP-44/115906*. Because the administrative code has the force of law, I must follow it rather than the screening tool.

The petitioner is a 43-year-old woman diagnosed with mental retardation and a bipolar disorder. Her condition has not changed in the last year, but the Department’s interpretation of the various rules has. As alluded to above, it contends that, under this new interpretation, her developmental disability does not meet the necessary criteria. The law in this area is derived from a complex blend of state and federal statutes, administrative code provisions, and policy interpretations. It is unnecessary to enter this legal thicket because the petitioner does not meet the nursing home level of care as that is defined in Wis. Admin. Code, § DHS 10.33.

It is undisputed that she can perform all of her activities of daily living without assistance. As for her instrumental activities of daily living, she can prepare simple meals that involve warming up food; she drives a car, uses the telephone, and does her laundry without assistance; she takes no medication; she shops for her own groceries but needs help setting up her shopping list; and she requires assistance managing her money. This means that there at most three instrumental activities of daily living that she cannot perform. As a result, she does not meet the requirements of Wis. Admin. Code, § 10.33(2)(c)1-5. Thus, to meet the nursing home level of care, she must demonstrate that she meets the requirements of subsection 6.

The petitioner’s sister testified that the petitioner has made some poor decisions. These include getting pregnant, chasing a person in her car on the highway because that person owed her money, forgetting to

buy tampons, and buying and selling things that were not in her best interest to buy and sell. Her sister indicates that she has trouble with “gray areas.” Whether this meets the requirement that she must have “frequent medical or social intervention to safely maintain an acceptable health or developmental status” is questionable because these problems appear to be sporadic rather than frequent. Furthermore, although the decisions are unquestionably poor ones, they are not that much different than those made every day by many other persons who unquestionably belong outside of a nursing home. Nor is there sufficient evidence that she meets the second prong of this subsection. She is not receiving specialized services—or even medication—for her deficits. She does not wander, physically abuse herself or others, resist needed care, or neglect herself to the extent that it endangers her health. There is some evidence that she has trouble remembering things that occurred two or three weeks ago and that she has trouble following two or three-step directions, but I do not find that these deficits are so great that she requires ongoing care or supervision. None of this means that she does not have significant mental deficits. She does. But the level of care rules are ultimately meant to determine whether she can live outside of an institution without constant and significant care.

She has demonstrated that she can. She goes out in the community by herself in a car she drives. She shops and holds down a job. Her attorney alleges that she cannot communicate adequately, but I asked her a number of questions at the hearing, and she was able to answer each satisfactorily. Thus, although her mental impairment no doubt limits her ability to discuss certain topics, she can converse well enough to ensure that her needs are met. None of her deficits or combination of deficits is so great that it prevents her from living in the community.

In conclusion, although she requires guidance, she does not require the constant and comprehensive care one receives in a nursing home. Based upon this, I find that she is not eligible for Family Care at the nursing home level of care under Wis. Admin. Code, § DHS 10.33(2)(c)2. In making this decision, I am aware that her condition has not changed in the last year and that she previously met the nursing home level of care. I do not know what went into that decision and am basing my decision solely on the law and facts now before me. They support the current decision.

CONCLUSIONS OF LAW

The petitioner does not meet the nursing home level of care.

THEREFORE, it is

ORDERED

The petitioner's appeal 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 11th day of July, 2014

\sMichael D. O'Brien
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 July 11, 2014.

Community Care of Central Wisconsin
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