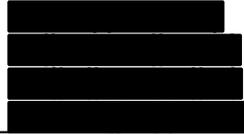




STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FCP/157328

PRELIMINARY RECITALS

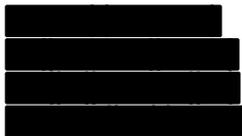
Pursuant to a petition filed April 30, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milw Cty Dept Family Care - MCO in regard to Medical Assistance, a hearing was held on July 08, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the agency properly reduced the Petitioner's supportive home care (SHC) services.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: Marla Shawver
Milw Cty Dept Family Care - MCO
901 N 9th St
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County. She is 86 years old and lives with her daughter.

2. Petitioner's primary diagnosis is Alzheimer's Disease. She is unable to communicate her needs and has no physical or mental capacity for participating in her daily cares. She is bed/wheelchair bound. She requires total assistance with all activities of daily living (ADLs) and instrumental activities of daily living (IADLs). She also requires 24 hour supervision. She is medically stable and currently takes one daily medication for arthritis.
3. Petitioner's daughter works full-time at her own business. Currently, the Petitioner's SHC services cover 6:00 a.m. – 7:00 p.m. on weekdays and 7:00 a.m. – 8:00 p.m. on weekends. Weekend services are provided by the Petitioner's granddaughter who drives from Chicago and is paid for the services provided.
4. Prior to December, 2012, the Petitioner was approved for 103 hours/week of SHC services. In December, 2012, the agency reduced the hours to 101.75 hours/week. In October, 2013, the agency reduced the hours to 91 hours/week. These changes were not due to any changes in the Petitioner's condition.
5. On April 25, 2014, the agency completed a SHC assessment of the Petitioner. The agency issued a Notice of Action to the Petitioner informing her that it had determined her supportive home care hours would be reduced from 91 hours/week to 53 hours/week effective May 10, 2014. It noted that the changes are made to reflect the times that the Petitioner is in need of services when natural supports are at work and for respite on the weekend. It notes that 53 hours/week allows for 9 hours/day (8 hours + 1 hour of travel) to accommodate weekday work schedule and 4 hours/day on Saturday and Sunday for respite.

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. Whenever the local Family Care program decides that a person is ineligible for the program, or when the CMO discontinues an ongoing service in the service plan, the client is allowed to file a fair hearing request. Because a service reduction is sought here, the petitioner appropriately sought a fair hearing for a further, de novo review of the CMO decision. Wis. Admin. Code §DHS 10.55(1).

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs. In this matter, Milwaukee County Dept. of Family Care (MCDFC) is trying to change the status quo by reducing Petitioner's supportive home care services, so it has the burden of proving that she no longer requires 91 hours of paid SHC services per week. It is uncontested that Petitioner's needs have not decreased and her condition has not changed.

The state code language on the scope of permissible services for the FC reads as follows:

DHS 10.41 Family care services. ...

(2) SERVICES. Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department's contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under 42 USC 1396n(c) and ss.46.275, 46.277 and 46.278, Stat., the long-term support services and support items under the state's plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and meet the needs of enrollees as identified through the individual assessment and service plan.

Note: The services that typically will be required to be available include adaptive aids; adult day care; assessment and case planning; case management; communication aids and interpreter services; counseling and therapeutic resources; daily living skills training; day services and treatment; home health services; home modification; home delivered and congregate meal services; nursing services; nursing home services, including care in an intermediate care facility for the mentally retarded or in an institution for mental diseases; personal care services; personal emergency response system services; prevocational services; protective payment and guardianship services; residential services in an RCAC, CBRF or AFH; respite care; durable medical equipment and specialized medical supplies; outpatient speech; physical and occupational therapy; supported employment; supportive home care; transportation services; mental health and alcohol or other drug abuse services; and community support program services.

Wis. Admin. Code §DHS 10.41(2).

Supportive home care and personal care services are included in the list of covered services in the statutory note above.

The skeletal legal guidance that pertains to determining the type and quantity of daily care services that must be placed in an individualized service plan (ISP) is as follows:

DHS 10.44 Standards for performance by CMOs.

...

(2) CASE MANAGEMENT STANDARDS. The CMO shall provide case management services that meet all of the following standards:

...

(f) The CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee, with the full participation of the enrollee and any family members or other representatives that the enrollee wishes to participate. ... The service plan shall meet all of the following conditions:

1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e)1.
2. Reasonably and effectively addresses all of the enrollee’s long-term care outcomes identified in the comprehensive assessment under par. (e)2 and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes.

...

Wis. Admin. Code §DHS 10.44(2)(f).

The issue in this case is the amount of paid SHC hours and amount of informal supportive care for Petitioner. MCDFC has developed a SHC Assessment tool to allow it to consistently determine the number of hours required by each recipient. The screening tool allots a specific amount of time in each area the recipient requires help, which the reviewer can then adjust to account for variables missing from the screening tool’s calculations.

MCDFC contends that it is reducing the Petitioner’s hours because it now interprets its policies concerning preferred caregiver payments and respite care for supportive home care services to require additional reduction in paid SHC services it will provide because Petitioner has additional informal or natural support available. The agency produced its Preferred Caregiver Payments policy which was originally issued on April 5, 2004 and most recently revised on June 7, 2013. MCDFC appears to rely on the following language, which states in pertinent part:

...

3) Utilizing the Supportive Home Care (SHC) Assessment tool in MIDAS, the IDT will determine the type and frequency of SHC services needed by the Member to meet outcomes. This part of the assessment tool takes the place of Steps 3, 4 and 5 in the RAD tool.

a) The IDT will maximize the amount of natural supports available to the member before authorizing paid services, and build in support, such as respite for informal caregivers as appropriate.

b) When family members living with the Member, and are regularly available to perform specific tasks, the assessment of the need for paid services should focus on assistance with personal care and not routine household tasks family members typically expect to do for one another.

...

The Care Management Organization does not pay family members for activities that a relative/family member would normally provide for another family member as a matter of course in the usual relationship among members of a family.

- Services that are typically assumed to be the responsibility of persons living in the same household are routine laundry, meal preparation, shopping, usual cleaning, general/non-medical supervision, assisting with mobility, companionship, and transportation/escorting.
- Services that are considered to exceed the typical care-giving/support responsibilities of a person living in the same household are toileting, bathing (other than set-up) other non-skilled personal care the member is unable to do for him or herself, frequent laundry due to incontinence/illness, complete transfer assist, or other unique services that may be considered for member-specific situations.

Supportive Home Care services are to be provided for the Family Care member ONLY. If a Member lives with others, homemaking services will be limited to the areas that are solely belonging to the Member. Maintenance and upkeep of shared areas and/or belongings is the responsibility of those living in the household, not the paid caregiver.

...

The agency testified that it also relies on the Respite Care policy which was originally issued on October 1, 2003 and most recently revised on March 16, 2012. It states, in pertinent part:

...

IDTs should always try to provide respite services through the use of informal supports first.

...

The IDT will monitor member’s care needs at assigned intervals including the need for respite services. This includes meeting with the member’s caregivers to assess for symptoms of caregiver “burnout” or inability to cope with the role of caregiving.

Caregivers may also identify a need for respite to meet their need to work or to tend to their own social needs.

As noted earlier, the agency has the initial burden of proof as the moving party. In this case, I conclude that the agency has presented insufficient evidence to demonstrate that it appropriately reduced the Petitioner's SHC services. The agency's only evidence is the SHC assessment which contains no explanation for why or how it concluded the reduction in hours of SHC is sufficient to meet the Petitioner's needs. The agency concedes there is no change in the Petitioner's condition or needs and that she continues to require 24 hour care and supervision.

The agency has concluded that the Petitioner's daughter can provide additional informal support to the Petitioner but provides no evidence or any analysis to demonstrate how it arrived at that conclusion. CF's testimony that, as a business owner, she is required to put in more than 40 hours/week of work and is required to be on call most of the time, is credible. Also, I do not find that the Petitioner's granddaughter can be considered as a natural or informal support for every weekend when she has to drive to Milwaukee from Chicago. CF's testimony that the granddaughter, as a young adult, is not in a position to be able to drive to Chicago every weekend to take care of her grandmother without being paid is also credible. CF also testified that she has accepted the previous reductions in the SHC hours without appealing. Over a period of less than 18 months, the agency has reduced the Petitioner's SHC hours from 103 hours/week to 53 hours/week though there has been no change in the Petitioner's condition or needs. CF testified that this additional reduction on top of the previous reductions would present a hardship to her and the Petitioner.

The agency presented no evidence of CF's or the granddaughter's schedule or situations or any other evidence to allow me to conclude that the agency has properly evaluated the informal support available to the Petitioner. As the moving party, it is the agency's responsibility and burden to present sufficient evidence to support its position. The agency has not met its burden in this case.

CONCLUSIONS OF LAW

The agency did not properly reduce the Petitioner's SHC hours.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to take all administrative steps necessary to rescind the Notice of Action to the Petitioner dated April 25, 2014 and restore the Petitioner's SHC hours to 91 hours/week. This action shall be taken within 10 days of the date of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 14th day of July, 2014

\sDebra Bursinger
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 14, 2014.

Milw Cty Dept Family Care - MCO
Office of Family Care Expansion