



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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

DECISION

CWA/157759

PRELIMINARY RECITALS

Pursuant to a petition filed May 20, 2014, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance (MA) Waiver eligibility, a hearing was held on July 8, 2014, by telephone.

The issue for determination is whether the Department correctly denied the petitioner’s application for COP-Waiver (COP-W)/CIP-2 eligibility.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Petitioner's Representative:

Attorney [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Kevin Lafky, Program Analyst
Bureau of Long-Term Support
1 West Wilson
Madison, WI

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Dane County.
2. The petitioner applied for COP-W/CIP 2 benefits in April 2014. A Long-Term Care Functional Screen (screen) for the petitioner was performed on April 16, 2014. The screen results were

entered into the Department's relevant computer program, which yielded the conclusion that the petitioner required a nursing home level of care. The Department chose to review the screening further, and concluded that he did not need nursing home level care. On April 28, 2014, the Department issued a decision that found the petitioner ineligible because his care needs "are not related to a physical disability need. The identified needs are mental health related..." The petitioner timely appealed.

3. The petitioner, age 46, has diagnoses of left knee fusion, diabetes, malnutrition, hypertension, arthritis, anxiety disorder, bipolar/manic depressive disorder, and depression. Twice daily blood sugar testing is now required. He is 5 feet, 3 inches tall, and weighs 212 pounds. The petitioner was hospitalized in 2011 and then protectively placed to a nursing home. Medicaid paid for his nursing home care. At the time of the screen, the petitioner was leaving the nursing home and was hoping to move to a group residential care setting (*e.g.*, CBRF).
4. The petitioner fits within the physically disabled target group for COP-W/CIP 2 purposes.
5. The petitioner is able to independently perform the following activities of daily living (ADLs): eating, toileting, in-home mobility and transferring. He requires physical help with bathing, (a "1" assistance level) and lower body dressing ("1" assistance level).
6. The petitioner is *not* able to independently perform the following instrumental activities of daily living: meal preparation, medication administration, money management, and laundry. He is independent in telephone use, but does not drive an automobile. The petitioner does require overnight care/supervision, and needs help with daily decision-making. He has adequate communication skills, has no obvious memory impairment, is not physically resistive to care, does not wander, does not exhibit self-injurious behaviors, is not violent toward others, and does not abuse drugs.

DISCUSSION

The MA Community Waiver Programs (*e.g.*, Community Integration Program, Community Options Program - Waiver) are partially funded by the federal government through the Medical Assistance (MA) program. These Waiver programs must meet federal requirements, including MA regulations when applicable. To receive services through the Waiver programs, a person must be currently eligible for MA, have institutional-level care needs, and be elderly or disabled. *Medicaid Eligibility Handbook (MEH)*, §28.1, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/>, and the *MA Waivers Manual (Manual)*, at http://dhfs.wisconsin.gov/ltc_cop/waivermanual/index.htm.

To meet the functional eligibility requirement (*i.e.*, to have institutional-level care needs), a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. *Manual*, §2.07; 42 C.F.R. §§ 435.217 & 435.441.301(b). To be found or remain eligible, the applicant must undergo an assessment of his/her needs and functioning.

I. THE DHS COMPUTERIZED SCREENING TOOL DETERMINED THAT THE PETITIONER IS FUNCTIONALLY ELIGIBLE AT THE "NURSING HOME CARE LEVEL."

The Wisconsin Department of Health Services has made efforts to improve the statewide consistency of functional/LOC 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 experience working with long term care consumers. This screener asks the applicant 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 the "Functional Screen Report" for the applicant to the Department's Division of Long Term Care. The Department runs the Long Term

Functional Screen data through a computer program to see if the applicant meets any of the nursing levels of care.

The petitioner's diagnoses are not in dispute. The very experienced screen assessor determined in April 2014 that the petitioner needed assistance with bathing and dressing, as well as multiple instrumental activities of daily living (IADLs). He was otherwise able to perform his ADLs independently. When the petitioner's functional ability scores were entered into the DHS algorithm, the result was a DHS conclusion that the petitioner *does* have care needs at the nursing home level.

However, the Department elected to review the case further, and subsequently determined that the petitioner does not currently have care needs at an institutional level. In particular, the Department asserts that the petitioner does not require the physical assistance of another for bathing and dressing, and that he should not have been scored as needing help with any IADL, other than money management, due to his *physical* problems.

II. INDEPENDENTLY OF THE DHS LOC ALGORITHM, I CONCLUDE THAT THE PETITIONER DOES MEET THE INSTITUTIONAL LEVEL OF CARE REQUIREMENT AT THIS TIME.

The petitioner argues that he has care needs, due to his knee fusion, which satisfy the institutional level of care requirement.

Looking at legal definitions, rather than the computer program result, federal law requires that a person have care needs at an institutional level (hospital, nursing home) as a condition of adult MA Waiver eligibility. The petitioner does not appear to be arguing that he has regular care needs that require hospitalization. Federal law defines a nursing facility at 42 U.S.C. 1396r(a). Of particular note is the requirement that a resident must need a health-related service above the level of room and board. The petitioner requires assistance above the level of provision of food and lodging.

The COP-W program evaluates institutional level of care needs in the same manner as the Family Care program (with the exception of a requirement that ADL deficits must be present for a longer time period). The Wisconsin Administrative Code specifies the types of deficits that lead to the conclusion that a person has institutional care level needs for the Family Care program:

(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)(c). The petitioner meets item #2 above.

The Department disputed the screener's assertion that the petitioner needs physical help with bathing and lower body dressing. It believes that the petitioner could get by with adaptive equipment. The screener, who has nine years of experience and has performed 1,500 screenings, testified to her opinion that the petitioner could not perform these tasks without the physical help of another. I found her testimony to be credible. A shower grab bar was always available to the petitioner for bathing in the nursing home. Nonetheless, the nursing home always assigned someone to him for physical assistance with bathing. He required assistance to step into a tub/shower, and he cannot reach his legs or feet to clean them. Similarly, he cannot reach his feet to perform lower body dressing. When these two ADLs are added to the undisputed need for assistance with the money management IADL, the results is that the requisite care level is met.

CONCLUSIONS OF LAW

1. The petitioner currently requires an institutional level of care.
2. The Department incorrectly determined that the petitioner is not eligible for COP-W/CIP II services.

THEREFORE, it is

ORDERED

That the petition is remanded to the Department with instructions to continue the processing of the petitioner's COP-W/CIP 2 application in accord with the Conclusions of Law above.

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 15th day of August, 2014

\s\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 August 15, 2014.

Bureau of Long-Term Support
Attorney [REDACTED] [REDACTED]



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Bureau of Long-Term Support