



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/157906

PRELIMINARY RECITALS

Pursuant to a petition filed May 27, 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 determined the Petitioner’s level of care for the Family Care Program.

There appeared at that time and place 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: Tracy Hedman
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 is a resident of Milwaukee County.
2. Petitioner is 56 years old and lives alone. Her primary diagnoses include cholelithiasis, esophagitis, myositis, lymphedema, morbid obesity, chronic pain secondary to fibromyalgia and osteoarthritis, hypertension and asthma.

3. On May 9, 2014, the agency completed a long term care functional screen (LTCFS) for the Petitioner. The agency concluded the Petitioner requires assistance with bathing, mobility, meal preparation, laundry/chores and transportation. The agency concluded the Petitioner is independent with all other activities of daily living (ADLs) and all other Instrumental Activities of Daily Living. As a result of the screen, the Petitioner was found to be eligible for Family Care at a non-nursing home level of care. A re-screen on May 14, 2014 yielded the same result.
4. On May 16, 2014, the agency issued a Notice of Action to the Petitioner informing her that her supportive home care and transportation services would be discontinued because her level of care changed from a nursing home level of care to a non-nursing home level of care.
5. On May 27, 2014, the Petitioner filed an appeal with the Division of Hearings and Appeals.
6. On June 4, 2014, the agency re-screened the Petitioner again. The re-screen again found the Petitioner requires assistance with bathing, mobility, meal preparation, laundry/chores and transportation.

DISCUSSION

The Family Care Long Term Care program (FCP) is a long-term care benefit for the elderly, people with physical disabilities and those with developmental disabilities. Medicaid Eligibility Handbook (MEH), §29.1. It is authorized in the Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code at Chapter DHS 10. Also see Medicaid Eligibility Handbook (MEH), §29.1.

Once a person has been enrolled in FCP they may become ineligible for a variety of reasons, including a change in functional eligibility. *Id.*, §29.5.2.

As of January 1, 2008 the levels of care are:

1. Nursing Home (formerly Comprehensive NH)
2. Non-Nursing Home (formerly Intermediate and Comprehensive non-NH)

See the MEH, §29.4.

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, however, that Wis. Stat., §46.286, uses the terms “nursing home” and “non-nursing home” levels just as the agency in this case. If the person meets the comprehensive (nursing home) level, s/he is eligible for full services through a care management organization (CMO), including Medical Assistance (MA). Wis. Admin. Code, §DHS 10.36(1)(a). If the person meets the intermediate (non-nursing home) level, s/he is eligible for full services only if s/he is in need of adult protective services, s/he is financially eligible for MA, or she 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.

Comprehensive functional capacity (nursing home level of care) is defined at Wis. Admin. Code, §DHS 10.33(2)(c):

(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.

Intermediate functional capacity (non-nursing home level of care) is defined at Wis. Admin. Code, §DHS 10.33(2)(d):

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.

A person's long term care needs and the level of care are determined by use of the Long Term Care Functional Screen. The Long Term Care Functional Screen (LTCFS) is a functional needs assessment describing assistance needed with:

- Activities of Daily Living (ADL's-bathing, dressing, mobility, transfers, eating, toileting)
- Instrumental Activities of Daily Living (IADL's-meal preparation, medication management, money management, laundry, telephone, transportation, and employment)
- Health Related Tasks (including skilled nursing)
- Diagnoses

- Behavioral Symptoms and Cognition

The LTCFS also includes information on risk factors, mental health and substance abuse, and where the person would like to live. Source: Wisconsin Dept of Health Services, online, Adult Long-Term Care Functional Screen, Module #1: Overview of the Long Term Care Functional Screen (LTC FS), §1.1 History. (<http://dhs.wisconsin.gov/lcicare/FunctionalScreen/instructions.htm>)

Petitioner is not cognitively impaired so must be unable to safely perform 3 or more activities of daily living; 2 or more ADLs and 1 or more IADLs or 5 or more IADLs to meet the nursing home level of care to be found functionally eligible at the nursing home/comprehensive level of care.

Here there is no dispute between the parties with regard to the facts of Petitioner's need for assistance. Petitioner does require assistance with 2 ADLs (bathing and mobility) and 3 IADLs (meal prep, laundry/chores and transportation). The agency, however, is constrained by the LTCFS which categorizes the degree of care needed and concluded here that Petitioner does not 'pass' the LTCFS as to the nursing home level of care because the degree of care needed is not hands on enough to maintain the nursing home level of care. On the other hand, Petitioner's advocate points to the law above and contends that under the law Petitioner is functionally eligible for the nursing home level of care and thus her FCP eligibility was incorrectly discontinued. Petitioner points to Division of Hearings and Appeals decisions that have stated the same thing. Division of Hearings and Appeals decisions do not have precedential value but can be persuasive in their reasoning. A relevant portion of one of those decisions captures the conclusions of the other decisions cited by Petitioner and states:

...

As evidenced by the March 2012 screen, the petitioner falls within the comprehensive functional capacity definition – she cannot safely/appropriately perform two ADLs and one IADL (item 2 above). Thus, per code, she meets the comprehensive/nursing home level of care. The code has the force of law, and must be followed. Therefore, although the screening personnel followed their DHS instructions correctly, the discontinuance of the petitioner's IRIS eligibility due to failure to meet the level of care requirement was incorrect. This decision is in accord with prior decisions FCP-11/113325 (Wis. Div. of Hearings & Appeals October 26, 2010, ALJ Schneider)(DHS), FCP-44/115906 (Wis. Div. of Hearings & Appeals April 5, 2011, ALJ Schneider)(DHS), and Rehearing FCP/130316 (Wis. Div. of Hearings & Appeals September 29, 2011, ALJ O'Brien)(DHS).

...

DHA Case # CWA-139759 at page 3, issued July 9, 2012.

Based on the undisputed evidence, the Petitioner meets the criteria for the comprehensive functional level of care (nursing home level of care) at DHS 10.33(2)(c)2 (she cannot safely or appropriately perform 2 or more ADLs and one or more IADL). Therefore I conclude she is functionally eligible for the nursing home level of care.

CONCLUSIONS OF LAW

The Petitioner remains eligible for the Family Care Program at a nursing home level of care because she cannot safely or appropriately perform at least 2 ADLs and 3 IADLs.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency with instructions to take all administrative steps necessary to reverse the agency's determination and continue the Petitioner's eligibility for the Family Care Program at a nursing home level of care provided she is otherwise eligible for the program. 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

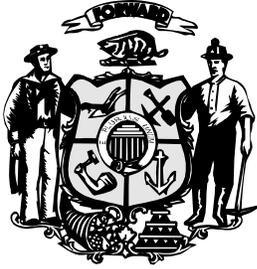
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

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 11th day of August, 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 August 11, 2014.

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