



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FCP/157953

PRELIMINARY RECITALS

Pursuant to a petition filed May 28, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Continuum in regard to Medical Assistance, a hearing was held on September 17, 2014, at New Richmond, Wisconsin. Hearings scheduled for July 17, 2014, and August 19, 2014, were rescheduled at the petitioner's request.

The issue for determination is whether the petitioner remains functionally eligible for the Family Care Program.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: T.J. Adkins
Continuum
28526 US Hwy 14
Lone Rock, WI 53556

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. The petitioner (CARES # [redacted]) is a resident of St. Croix County.

2. The petitioner receives Family Care Medical Assistance through Continuus. Continuus notified her on April 30, 2014, that it was ending her services because she no longer met the nursing home level of care.
3. The petitioner has been diagnosed with dementia. Her full scale IQ score was 73 on a test given in 1984, while she was in high school.
4. The petitioner has degenerative disk disease, osteoarthritis, lumbar disk syndrome, and chronic pain that affects her lower back. Her back pain is worse when she bends, reaches, or stands for a significant amount of time.
5. The petitioner has severe and persistent mental illness; diagnoses related to her mental health include anxiety, post-traumatic stress disorder, and bipolar affective disorder with major depression. She attempted suicide in May 2013.
6. The petitioner can dress and feed herself. She uses the toilet without help. She must often be reminded to shower. She does not need help once she is in the shower, but she has trouble standing long enough to complete her shower.
7. The petitioner moves about without assistance from others or from durable medical equipment such as braces, a cane, or a wheelchair. She can get into and out her bed and on to and off from a couch and other furniture without help.
8. The petitioner can cook some meals such as chicken and items that require heating in a microwave. She has lost her ability to cook most other items. She requires help shopping for groceries because she cannot lift much weight.
9. The petitioner cannot vacuum. She can put clothes in her washer and dryer but cannot carry or move more than one or two items at once.
10. The petitioner receives her medication in bubble packs from her pharmacy. She needs occasional reminders to take it. She knows what medications she has what they are for.
11. The petitioner closed her checking account because she could not manage it. She does understand money, but she often buys unwisely.
12. The petitioner can use a telephone without assistance.
13. The petitioner rarely drives an automobile and presents a danger when she does. She can arrange alternate transportation for herself.
14. The petitioner does not wander or engage in behavior that endangers herself or others.
15. The petitioner does not require frequent medical or social intervention to safely maintain an acceptable health or developmental status.
16. The petitioner does not require frequent changes in service due to intermittent or unpredictable changes in her condition
17. The petitioner does not require a range of medical or social interventions due to a multiplicity of conditions
18. The petitioner does not have has a developmental disability that requires specialized services.

DISCUSSION

The petitioner receives Family Care medical assistance benefits at the nursing home level of care. Her care maintenance organization, Continuus, seeks to end her benefits because it contends that she no longer requires this level of care. To continue receiving benefits, she must demonstrate by the preponderance of the credible evidence that her impairments hinder her ability to perform a wide array of

activities and instrumental activities of daily living. She has always had an intellectual impairment, which is now exacerbated by dementia and a variety of physical and mental health problems. She contends these prevent her from properly bathing, doing laundry, managing her money, cooking meals, and performing other tasks.

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.

The nursing home level of care, which is also referred to as the comprehensive level of care, requires a person to demonstrate that she requires substantial help from another person by proving that she cannot perform some specified combination of activities and instrumental activities of daily living:

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. Admin. 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 45-year-old woman diagnosed with dementia, degenerative disk disease, osteoarthritis, lumbar disk syndrome, chronic pain in her lower back, and severe and persistent mental illness. Even with her physical problems, she can perform all of her activities of daily living without any physical assistance, although she does need to be reminded to shower and complains that she has trouble finishing because she cannot stand long enough. I do not find that this sufficiently impairs her because she could use a shower chair or bathe if she needs to rest, and she has been clean when her workers see her. Because she can perform her ADLs, she must show that she cannot adequately perform five of her IADLs, that she has a cognitive impairment and cannot perform four of her IADLs, or that she has a complicating condition that limits her ability to meet her needs independently.

Continuus argues that she does not have a cognitive impairment because she not meet the federal definition of developmental disability. I disagree. I cannot find a definition of cognitive impairment in the Wis. Admin. Code, Ch. DHS 10 or among the definitions found in Wis. Admin. Code, § DHS 101.03 that are used for the general provisions of the medical assistance program. But 30 years ago, when she was in high school, her IQ was tested and found to be 73, which is in the borderline area and falls almost two standard deviations below the norm. She has since had head injuries and developed dementia, so I assume her cognition has declined from that level. Continuus contends that she is intelligent but manipulative. She may exaggerate her problems and be difficult to work with, but the evidence does not support that she is intelligent. Rather, I find that she has a cognitive impairment and thus needs to prove that she cannot adequately perform four rather than five IADLs.

It is undisputed that she can use the telephone.

Continuus contends that she requires no help managing her money. She does understand money in the sense that she knows what each denomination represents and can pay for items. But she recently closed her checking account because of problems maintaining it, and she has a history of compulsive buying. I find that she cannot manage her money appropriately.

She contends that she needs reminders about when to take her medication. This is normal for all people who take many medications, as she does. She knows what medications she takes, what those medications do, and when she should take them. Her pharmacy packages the drugs in a way that helps her take the proper drug at the right time. She can manage her medications appropriately.

She also contends that she has forgotten how to cook most meals. But she testified that she could cook chicken and could not testify to any particular meal she could not cook. She has the burden of proving that she meets the criteria for eligibility. She has not proved that she cannot prepare meals that are adequate to provide her with adequate nutrition. Her child's father, with whom she lives, helps her shop for groceries because she cannot carry them by herself. This is not enough to prove that she cannot appropriately prepare her meals.

She has a driver's license and drives occasionally, but her driving raises "serious safety concerns." Still, her 17-year-old son and her son's father, who both live with her, can give her a ride wherever she needs to go. She can appropriately obtain transportation.

She requires some help with her laundry because she can lift a full basket or put in or take out more than an item or two each time. She cannot perform this task appropriately.

The petitioner has shown that there are only two IADLs that she cannot perform appropriately. As a result, she does not meet the requirements of Wis. Admin. Code, § 10.33(2)(c)1-5. This means that to meet the nursing home level of care, she must demonstrate that she has a complicating condition that limits her ability to meet her needs independently. She has not shown that she requires frequent medical or social intervention to safely maintain an acceptable health or developmental status. Nor has she shown that she requires frequent changes in service due to intermittent or unpredictable changes in her condition. And she has not shown that she requires a range of medical or social interventions due to a multiplicity of conditions

Based upon this, I find that she is no longer eligible for Family Care at the nursing home level of care under Wis. Admin. Code, § DHS 10.33(2)(c)2. I am aware that her condition has not improved 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 base my decision solely on the law and facts now before me.

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.

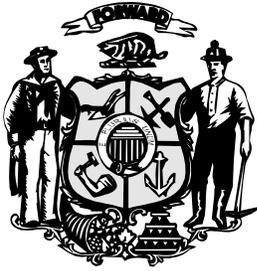
APPEAL TO COURT

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 7th day of October, 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 October 7, 2014.

Continuus
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