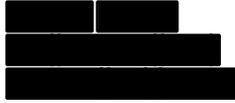




STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MGE/158398

PRELIMINARY RECITALS

Pursuant to a petition filed June 18, 2014, under Wis. Stat., §49.45(5), to review a decision by the Division of Health Care Access and Accountability (DHCAA) to deny Medical Assistance (MA) payment for petitioner to reside in a skilled nursing facility (SNF), a hearing was held on July 23, 2014, by telephone.

The issue for determination is whether petitioner meets the SNF level of care requirement for MA coverage of her nursing home stay.

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By: Lucy Miller, Nurse Consultant (Did not appear)
Division of Health Care Access and Accountability
P.O. Box 309
Madison, WI 53701-0309

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [redacted]) is a 98-year-old resident of Dodge County.

2. Petitioner resided in the assisted living facility connected to Hope Health and Rehab until February 28, 2014. She moved to the nursing facility on February 28 because she no longer had private funds to pay for the assisted living residence.
3. Petitioner's primary medical conditions are hypertension, hypoxia, pain, and depression. She requires oxygen on an as needed basis for her hypoxia, but is able to handle the oxygen intake on her own. She takes a number of medications including one for depression. The chronic pain does not limit her substantially. Staff at the nursing home provide no active cares for petitioner.
4. The facility requested that the DHCAA make a level of care determination for MA funding after its Minimum Data Set (MDS) on petitioner did not pass the state's computerized processing. After reviewing petitioner's medical records, Ms. Miller of the DHCAA determined that she did not meet an SNF level of care, and notified the facility of the determination by a letter dated May 6, 2014. The facility appealed the determination, and petitioner authorized facility staff to represent her.

DISCUSSION

An MA recipient can appeal, among other things, whether MA payments on her behalf "have not been properly determined. Wis. Stat., §49.45(5)(a). For that reason, although the facility filed the request for level of care determination and received the denial notice, I find that petitioner can appeal the denial of MA payment at the nursing facility. I note that not only did petitioner sign the authorization to represent her at the hearing, she appeared at the hearing and participated in it. I note also that although Nurse Miller, the Department representative, did not appear at the hearing she forwarded me the records reviewed by the DHCAA, and they are in the record.

The Wisconsin Administrative Code, §DHS 107.09 provides the legal basis for MA coverage of nursing home care. Covered nursing home services are "medically necessary services" prescribed by a physician and provided by a certified nursing home to an inpatient. §DHS 107.09(2). Services are skilled "[w]here the inherent complexity of a service prescribed for a patient is such that it can be safely and effectively performed only by or under the direct supervision of technical or professional personnel." §DHS 107.09(4)(e)1. "A service that is ordinarily nonskilled shall be considered a skilled service where, because of medical complications, its performance or supervision or the observation of the patient necessitates the use of skilled nursing or skilled rehabilitation personnel." §DHS 107.09(4)(e)3.

§DHS 107.09(4)(f)1 requires that a nursing home provide skilled nursing services seven days per week. Skilled services can include the overall management and evaluation of the care plan, observation and assessment of the patient's changing condition, and patient education. §DHS 107.09(4)(f)2. "In determining whether the services needed by a recipient can only be provided in a skilled nursing facility on an inpatient basis, consideration shall be given to the patient's condition and to the availability and feasibility of using more economical alternative facilities and services." §DHS 107.09(4)(h)1. A physician must certify that there is a need for SNF services for MA to cover the cost of the services. §DHS 107.09(4)(m).

Essentially, all of the above means that MA will pay for nursing home services only if the recipient needs to be there. MA will not pay a nursing home if the person chooses to live there for reasons other than medical necessity. In petitioner's case, questions arose immediately after her admission to the SNF because her move from the assisted living facility resulted from her running out of funding to pay for the assisted living, not because of any stated medical need.

I started by reviewing the MDS. It shows that petitioner has no deficits in hearing, speech, or vision except that she wears glasses. It shows no deficits in her cognitive abilities. She has slight negative

mood symptoms (some lack of energy and eating difficulty), but no behavior problems. She is shown to be independent in activities of daily living except for meal set-up. Although she uses a walker she is independently mobile. Although she has pain that sometimes limits her, she rated it as only a “two” with “ten” being the worst pain imaginable. She has no medical conditions other than hypertension and hypoxia, and the MDS lists no active treatments for her. She has depression and takes medication for it. She also takes a diuretic.

I then paged through the lengthy nurses’ notes. Again, what I find is a course of supervision, not active care. Nursing staff check in on petitioner regularly and check for vitals, but except for a period when petitioner had nose bleed problems that led to an emergency room visit, invariably nothing was done for her other than to note her condition.

A medical note from July 9, 2014 was presented at the hearing. The striking thing about the note is petitioner’s remarkable condition. There are no physical or mental concerns, and the only order is to continue on current medication. Yet the final sentence is that petitioner remains appropriate for SNF placement due to multiple medical and emotional problems that require skilled “coordination.” The multiple problems simply do not appear in the record, and tellingly, coordination alone does not meet the definition of skilled nursing services in a facility. Petitioner’s condition is not complex and subject to change, and the lack of nursing services provided to her over the past months is confirmation.

The primary argument on petitioner’s behalf is that she has lived at the facility for six years and trusts the staff, and that it would be difficult to relocate. Unfortunately, I do not have the authority to make an exception to the skilled nursing services rule. My only role is to determine whether the DHCAA correctly or incorrectly determined that petitioner does not meet the skilled nursing level of care. I find the DHCAA determination that she does not meet the level of care to be correct.

CONCLUSIONS OF LAW

Petitioner does not meet the level of care for skilled nursing services in a nursing home.

THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby 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 28th day of July, 2014

\sBrian C. Schneider
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 28, 2014.

Division of Health Care Access and Accountability