



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/159766

PRELIMINARY RECITALS

Pursuant to a petition filed August 7, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Lakeland Care District (CMO) in regard to Family Care (FC) benefits, a hearing was held on September 16, 2014, by telephone. With the parties' consent, the hearing record was held open for 10 days for submission of documentation related to PCW/SHC pay.

The issue for determination is whether the District correctly reduced the rate of pay for the petitioner's SHC worker.

There appeared at that time 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: Lisa Behnke, supervisor
Lakeland Care District

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Manitowoc County.
2. The petitioner, age 56, has diagnoses of arthritis, fibromyalgia, degenerative joint disease (severe in the right knee), degenerative disc disease, lower extremity neuropathy, diabetes mellitus,

Crohn's Disease, obesity, anxiety disorder and depression. She has a history of bilateral hip replacement. These conditions cause chronic pain and limit her mobility. She uses a walker or cane for ambulation. The petitioner requires physical assistance with bathing, medication administration (Enbrel injection), skin care, nail care, and shaving. She resides in her home with her recently retired husband.

3. Prior to April 2010, the petitioner was enrolled in the COP-Waiver program, and received personal care worker (PCW) services through that program. She enrolled in the FC program in April 2010, and PCW services continued to be included in her individualized service plan (Plan). The rate of pay for PCW under COP-Waiver was \$11.50 hourly, and that rate was continued when the petitioner transitioned into the FC program. The petitioner's daughter is her PCW. Her current Plan (Self-Directed Support type) includes four personal care hours biweekly and 12 hours weekly of supportive home care (SHC).
4. In June 2014, the petitioner's case underwent an annual review. On June 25, 2014, the FC Care Management Organization (CMO) issued written notice to the petitioner advising that it was reducing (1) the number of PCW/Supportive Home Care (SHC) hours from 31.5 to six hours weekly and (2) the worker's rate of pay from \$11.50 to \$9.00 hourly, effective July 10, 2014. The CMO believed that the petitioner's spouse could now perform the routine housekeeping tasks, due to his retirement status. The petitioner filed a local grievance. On July 23, 2014, the CMO issued a grievance decision that upheld the June 25 decision. Payment has continued at the prior level pending appeal.
5. The petitioner is no longer contesting the reduction in the number of covered SHC hours.
6. The marketplace hourly wage comparison for an experienced PCW in Manitowoc County is \$11.05 hourly.

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. A dis-satisfied FC client may file a grievance with his CMO under Wis. Admin. Code §DHS 10.53, request a state-level review by the Wisconsin Department of Health Services under § DHS 10.54, and/or request a fair hearing under § DHS 10.55.

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;... home delivered and congregate meal services; *personal care services*; ... *supportive home care*;

Wis. Admin. Code §DHS 10.41(2) (June, 2009). Personal care services (PCW services) are included in the list of covered services in the statutory note above. Prior to hearing, the parties reached an agreement as to the number of PCW/SHC hours needed by the petitioner. The remaining issue is how much the worker should be paid.

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:

HFS 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...
2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment
3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes.

...

(emphasis added)

Wis. Admin. Code §DHS 10.44(2)(f).

The CMO based the \$9.00 hourly pay figure on wage comparison information for Manitowoc County found at the Wisconsin Department of Workforce Development's website, <http://worknet.wisconsin.gov>. Post-hearing, the CMO polled four un-named home health care agencies and learned that non-CNA workers are paid \$8.50 to 10.50 hourly.

The petitioner argued that experienced PCW workers in her county are paid more than \$9.00 hourly. To support her position, the petitioner provided a home health aide service rate quotation of \$20.00 hourly from a private agency, [REDACTED]. See, Exhibit 3. However, this is not an apples-to-apples comparison. Twenty dollars appears to be what the agency charges the customer, but it is not what the agency pays the aide.

This judge does not adopt the \$9.00 wage advanced by the CMO. I went to the worknet.wisconsin.gov site, which appears to be a credible information source. The site allows the viewer to select between "Personal Care Aides" or "Personal Care and Service Workers, All Other" for Manitowoc County. The CMO must have selected the latter, because that selection yields the \$8.74 hourly figure cited in agency testimony in support of its position. However, the former category of "Personal Care Aides" contains an Occupation Description that matches what the petitioner's worker does here. The hourly rate for an experienced aide in Manitowoc County is shown as \$11.05 hourly (viewed 10/28/2014). I will adopt that figure as the best available evidence of a cost-effective rate.

Finally, a jurisdictional note. Although not raised by the parties, there is a question as whether this judge has jurisdiction to review a dispute over an FC PCW's hourly rate of pay. This question has been addressed in prior proposed fair hearing decisions, with mixed results. All prior decisions on this topic have cited the FC statute and rule for their broad grants of fair hearing jurisdiction, which are more elastic than Medicaid fair hearing parameters. *See*, Wis. Stat. § 46.287(2)(b); Wis. Admin. Code § DHS 10.55(2). A previous fair hearing decision determined that Administrative Law Judges have jurisdiction to review employee pay levels in FC *self-directed support* cases. *See*, Final decision FCP/74482 (Div. of Hearings and Appeals, proposed issued February 28, 2006)(DHS). Judge Duren's decision in that case was adopted by the Department Secretary in a Final Decision on an unknown date in 2006.

On the other hand, a more recent proposed decision in an FC case with *direct agency purchase* of services resulted in a Final Decision by the Department Secretary that there is no fair hearing jurisdiction to review provider payment rates, notwithstanding the broad terms of the statute and code, because the contract between the Department and the CMO declares that there is no fair hearing jurisdiction over a "change in the rate the MCO pays a provider." *See*, Contract, XI.B.1.b.ii (p. 145), online at <http://www.dhs.wisconsin.gov/lcure/StateFedReqs/cy2013mcocontract.pdf>. The Secretary's decision was appealed to the circuit court, where it was reversed with an Order remanding it back to the Administrative Law Judge to hold a hearing to "supplement the record regarding the adequacy of the proposed CMO rate to the [adult family home] for the care of the petitioner." *Susan Kurth v. Wisconsin Department of Health Services*, Case No. 13 CV 359 (Columbia County Circuit Court, April 4, 2014). Kurth eventually withdrew her appeal before the Administrative Law Judge Maloney held the ordered hearing.

In a *non-self-directed* supports case, the agency assesses and consults with the client, and then the agency's staff authorizes, provides, arrange for, or coordinates services in the service plan. *See*, Contract, p. 59. The agency contracts with providers for the plan services. Significantly, the case before me is a self-directed supports (SDS) case. In an SDS case, the client may purchase long-term care benefits from a list that includes PCW/SHC services, using funds from a fixed budget for the *client* to buy support services from any qualified provider. *See*, Contract, pp. 74-75. There is a specific directive for the agency to assist the client in:

f. Development of a budget for the support members have chosen to self-direct, and a plan that clearly articulates to what extent members would like to participate in the budgeting/payment process;

Id., p.76.

In this case, the agency's decision to lower the hourly pay for a given amount of PCW hours is effectively a decision to decrease the petitioner's SDS budget. The reduction in her budget is a reduction in service, which is appealable. Because the client in an SDS case presumably decides the rate at which she will pay her providers, this budget reduction issue does not run afoul of the Contract's assertion that there is no hearing jurisdiction for payment rate changes to providers by the MCO/agency. The hourly payment reduction for a specific provider is not ultimately made by the agency, it is made by the petitioner. Therefore, jurisdiction is present.

CONCLUSIONS OF LAW

1. A cost-effective payment rate for the petitioner's PCW worker is \$11.05 hourly.
2. The CMO incorrectly sought to reduce the self-directed supports service plan budget by reducing the petitioner's PCW rate of pay below \$11.05 hourly.

THEREFORE, it is

ORDERED

That the petition be remanded to the CMO with instructions to effectuate an hourly PCW/SHC rate of \$11.05 for the petitioner's worker in the self-directed supports budget, effective July 10, 2014. This action shall be taken within 10 days of the date of this Decision. In all other respects, the petition 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 30th day of October, 2014

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on October 30, 2014.

Lakeland Care District
Office of Family Care Expansion