



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FCP/160385

PRELIMINARY RECITALS

Pursuant to a petition filed September 5, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee County Disability Services Division-DSD in regard to Medical Assistance-affiliated long-term care benefits, a hearing was held on October 22, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the agency correctly determined that the petitioner does not satisfy the functional eligibility requirement for the Family Care program (FC).

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: Linda Olson, counselor
Milwaukee Co. Disability Services Division-DSD
Attention: Mark Stein-DSD
1220 W. Vliet Street, Suite 300
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County.

2. The petitioner sought long-term care assistance in June 2014. To be eligible for Family Care (FC) or IRIS, the recipient must undergo an annual functional screening to determine whether she has functional care needs at the requisite level. The petitioner underwent such a functional screening in June 2014.
3. As a result of the 2014 screening, the FC program determined that the petitioner is not functionally eligible for the program. On August 4 and August 19, 2014, the Department issued notices to the petitioner advising that she was not eligible for “nursing home level” FC benefits due failure to satisfy the program’s nursing home-related functional eligibility requirement. The petitioner appealed, seeking certification as meeting a nursing home level of care.
4. The petitioner, age 52, has diagnoses of diabetes mellitus, high cholesterol, and amputation of the right leg below the knee. For purposes of FC program eligibility, the petitioner has a “long-term condition.”
5. *ADLs*. The petitioner is independent in dressing, eating, toileting, transferring and grooming. She requires physical assistance with bathing. When using adaptive aids such as her walker, the petitioner is independent in in-home mobility. Such aids are available to the petitioner.
6. If adaptive aids were not available to the petitioner, she would not be independent in in-home mobility.
7. *Instrumental ADLs*. The 2014 screening established that the petitioner requires assistance with the Instrumental ADL of meal preparation. She is independent in taking medication, money management, telephone use, and transportation.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for physically/developmentally disabled or elderly adults. *See*, Wis. Stat. §46.286, and Wis. Admin. Code ch. DHS 10. Whenever the local Family Care program decides that a person has not met the program’s requirements for a “nursing home” care level, the client is allowed to file a fair hearing request. The petitioner did so here.

In order to qualify for FC services, with certain exceptions not applicable here, a person’s functioning must be such that they would otherwise require institutional care. Wis. Stat. §46.286(1)(a). In the FC code parlance, this is described as having a “comprehensive functional capacity level.” To be found eligible, the applicant must undergo an assessment of his/her needs and functioning.

The Wisconsin Department of Health Services has made efforts to improve the statewide accuracy of functional assessments by designing and implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained quality assurance screener. The petitioner met with a screener as part of the assessment process. The petitioner and screener agree as to the screener’s findings of the petitioner’s *IADL* needs. Policy requires the screener to then enter this data into the Department’s functional screen computer program. *See* <http://dhs.wisconsin.gov/LTCare/FunctionalScreen/Index.htm>. The Level of Care (LOC) Functional Screen form and program are supposed to reiterate the skeletal definitions from the federal Medicaid rules for Intermediate Nursing Care and institutional Developmental Disability facilities. When the petitioner’s functional ability scores were entered into the DHS algorithm, the result was a DHS conclusion that the petitioner does not have care needs at the nursing home level. The petitioner was then found to be ineligible, consistent with the DHS-directed result.

In the code, the standard for the requisite level of care is as follows:

DHS 10.33 Conditions of functional eligibility.

...

(2) DETERMINATION OF FUNCTIONAL ELIGIBILITY. (a) *Determination.* Functional eligibility for the family care benefit shall be determined pursuant to s. 46.286 (1), Stats., and this chapter, using a uniform functional screening prescribed by the department. To have functional eligibility for the family care benefit, the functional eligibility condition under par. (b) shall be met and, except as provided under sub. (3), the functional capacity level under par. (c) or (d) shall be met.

(b) *Long-term condition.* The person shall have a long-term or irreversible condition.

(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)(a)-(c). IADLs are defined at §DHS 10.13(2). The parties agree that the petitioner cannot perform the ADL of bathing unassisted, and cannot perform one IADL unassisted (meal preparation).

The petitioner argues that she meets the requisite care level because she cannot perform two ADLs and one IADL unassisted (item 2 above). The contested ADL is in-home mobility. The petitioner argues that the Department's negotiations with advocates in 2009 and policy instructions to screeners from 2011 called for a scoring of "needs physical assistance" if the person used an adaptive aid for in-home mobility. *Currently*, the Department's policy instruction to screeners says that a person who is able to walk with a conventional adaptive aid does not need physical assistance for that ADL. *See*, LTCFS Instructions, 4.10, available at <http://www.dhs.wisconsin.gov/LTCare/FunctionalScreen/LTCFSinstrux-clean.pdf> (viewed in November 2014). The petitioner argues that the ambiguity of more generic instructions for use of commercial versus improvised adaptive aids at § 4.5 should be interpreted to her advantage. However, the specific controls the general, so the specific ambulation instruction at §4.10 controls. Thus, the screener in

this case correctly followed current policy instructions in scoring the petitioner as not needing physical assistance with in-home ambulation.

More important than the policy guidance, however, is state code with the force of law. The FC state code chapter has a definition of assistance that does not include the use of adaptive aids:

DHS 10.13 Definitions. In this chapter:

...

(6) "Assistance" means cueing, supervision or partial or complete hands-on assistance from another person.

Wis. Admin. Code § DHS 10.13(6). Because the petitioner does not need cueing, supervision, or any amount of hands-on assistance from another person for in-home walking, she does not need "physical assistance" for purposes of her level of care analysis. This line of reasoning was developed in a Final Decision of the DHS Secretary in Decision No. FCP/153787 (Wis. Div. of Hearings & Appeals October 22, 2014)(DHS), and has since been followed by other Wisconsin administrative law judges. *See*, Judge Schneider's Decision No. FCP/157357 (Wis. Div. of Hearings & Appeals October 27, 2014)(DHS). I find the Secretary's Final Decision persuasive, and follow its logic here.

Finally, independently of the DHS computerized result, this ALJ's overall sense of the petitioner's care level is that it does not rise to the "comprehensive functional capacity level" required in the state code. Being an old judge sometimes proves useful in supplying historical context. Before the computer algorithm existed, administrative law judges decided nursing home care level cases by determining whether an applicant needed services that are typically provided in an intermediate care facility:

(89) "Intermediate care facility" or "ICF" means a facility that:

(a) Provides, on a regular basis, health-related services to individuals who do not require hospital or skilled nursing facility care but whose mental or physical condition requires services that are above the level of room and board and that can be made available only through institutional facilities;

...

Wis. Admin. Code § DHS 101.03(89). This petitioner requires meal preparation services (*i.e.*, "board"). She requires bathing assistance, a service than can be provided outside of a nursing home with a provider who does not have nursing skills. Bathing help can be obtained without using institutional facilities. Finally, the fact that she needs to use a walker does not mean that she requires institutional care. Many senior citizens use walkers but do not need nursing home care. Thus, the petitioner does not meet a common-sense "eyeball test" as a person who requires ICF-level services.

CONCLUSIONS OF LAW

1. The Department correctly determined that petitioner does not have care needs at the nursing home level of care as defined in the FC chapter of the Wisconsin Administrative Code; therefore, she currently does not satisfy the functional eligibility requirements of the FC program.

THEREFORE, it is

ORDERED

That 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 1st day of December, 2014

\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 December 1, 2014.

Milwaukee Cty Disability Services Division-DSD
Office of Family Care Expansion
Attorney [REDACTED]