FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FCP/161642

PRELIMINARY RECITALS

Pursuant to a petition filed October 31, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Continuus in regard to Medical Assistance, a hearing was held on December 18, 2014, at Eau Claire, Wisconsin.

The issue for determination is whether the petitioner is entitled to additional funding for self-directed supports.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: T.J. Adkins
Continuus
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 Eau Claire County.
2. The petitioner receives Wisconsin Family Care Medical Assistance benefits through his Care Management Organization, Continuus.

3. The petitioner is a 53-year-old man diagnosed in 1995 with late-onset Pompe disease, a genetic disorder resulting from a deficiency of acid alpha glucosidase, an enzyme that degrades lysomal glycogen. Put more simply, it is caused by a malfunction in sugar storage that occurs because of the lack of the acid molecule maltase. Pompe causes a progressive weakening of the muscles, especially those in the thighs, back, and diaphragm. The disease steadily impairs breathing, which often leads to respiratory failure and death.

4. The petitioner depends upon others for assistance for all of his activities of daily living.

5. The petitioner receives most of his care from his long-time companion, with whom he lives. Respite care is provided by others so his companion can take time off.

6. The petitioner currently receives $170 a day to pay his regular caregiver for self-directed supports, which totals $6,278 per month. He also receives $1,425 per month to fund 96 hours of respite care. The total amount he receives to pay for self-directed supports is $7,703 per month. This amount includes money for taxes and unemployment insurance premiums.

7. The petitioner has refused to fill out a daily log for a week to show what specific care he receives.

DISCUSSION

The petitioner is a 53-year-old man who was diagnosed in 1995 with Pompe, a genetic disorder that leads to a progressive weakening of the muscles, especially those in the thighs, back, and diaphragm, and steadily impairs breathing, which can lead to respiratory failure and death. He cannot walk, and he requires assistance to perform all of his activities of daily living. He receives Family Care Medical Assistance, which is authorized by a medical assistance waiver under 42 USC 1315 and 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. Family Care recipients are placed under the roof of a single private provider that receives a uniform fee for each person it serves. This provider, known as a care management organization (CMO), must ensure that the person receives all the Medicaid and Medicare services available to him. The petitioner's CMO is Continuus.

Each CMO must assess its recipients' needs and create an individual service plan that meets those needs and values. This plan must provide services and support at least equal to those he would receive under the Wisconsin Medical Assistance Program and the various MA Waivers program. The CMO can provide additional services that substitute for and augment these services if they are cost effective and meet his needs. Wis. Admin. Code, § DHS 10.41(2). The petitioner's intended outcomes are to live as long as possible and to live with his current caregiver as long as possible.

Family Care recipients must have the option to direct their own care. *2014 Contract Between Department of Health Services and Continuus*, pp. 75-78. The petitioner took this self-directed support option and receives money from Continuus to hire and pay his own personal and supportive home care workers. He currently receives a total of $7,703 per month for self-directed supports; most of the care is provided by his longtime companion, with whom he lives. He seeks more funding because he believes that she is underpaid, especially when she takes more than eight hours off while he receives respite care. Continuus denied his request, primarily because he refused to fill out a daily log for a week to show the care he receives. He contends that predicting what care he needs from a single week would be as inaccurate predicting the weather in the Rocky Mountains from a single week.

Continuus seeks the log so that it can base his care on the Resource Allocations Decision Method (RAD), which is the Department's approved method of authorizing services. *Contract,* p.18. This method involves the Personal Care Screening Tool, a computer program that allots a specific amount of time for each task that must be performed for the recipient. The Division's reviewer can then adjust these figures to account for variables missing from the screening tool's calculations. No tool is flawless. But RAD and

the screening tool are at least starting points for making an informed decision. If a week does not provide enough data, then evidence can be drawn from two, or even several, weeks. And that information can be supplemented with testimony about infrequent but predictable events that affect the amount of care needed. But even a week's worth of data allows a more accurate prediction of the care needed than none.

Because he seeks to change the current state of affairs, the petitioner has the burden of proving that he requires more care; it is not up to Continuus to prove that he does not need the care. The reason it is not enough for him to simply state that he requires near constant care is that the amount that can be reimbursed for personal and supportive home care depends upon the total time it takes a worker to perform the individual tasks performed. A worker is not necessarily reimbursed for an entire shift, even if it is impractical to leave and return between tasks; this is especially true when the worker lives with the recipient and thus also must provide for her own needs or does chores such as cleaning that simultaneously provide for the needs of both. Moreover, the tasks that the recipient requires must fall specifically into the personal care or supportive home care categories, as those categories are defined by medical assistance laws, regulations, and policies. This means that even if a service is helpful to the recipient, it might not be covered.

Personal care services are "medically oriented activities related to assisting a recipient with activities of daily living necessary to maintain the recipient in his or her place of residence in the community." Wis. Admin. Code § HFS 107.112(1)(a). Covered services include the following:

1. Assistance with bathing;
2. Assistance with getting in and out of bed;
3. Teeth, mouth, denture and hair care;
4. Assistance with mobility and ambulation including use of walker, cane or crutches;
5. Changing the recipient's bed and laundering the bed linens and the recipient's personal clothing;
6. Skin care excluding wound care;
7. Care of eyeglasses and hearing aids;
8. Assistance with dressing and undressing;
9. Toileting, including use and care of bedpan, urinal, commode or toilet;
10. Light cleaning in essential areas of the home used during personal care service activities;
11. Meal preparation, food purchasing and meal serving;
12. Simple transfers including bed to chair or wheelchair and reverse; and
13. Accompanying the recipient to obtain medical diagnosis and treatment.

Wis. Admin. Code § DHS 107.112(b).

Personal care workers can spend no more than one-third of their time performing housekeeping activities. Like all medical assistance services, personal care worker services must be medically necessary and cost effective. Wis. Admin. Code § DHS 107.02(3)(e)1 and 3.

Supportive Home Care consists of:

a. Hands-on assistance with activities of daily living such as dressing/undressing, bathing, feeding, toileting, assistance with ambulation (including the use of a walker, cane, etc.), care of hair and care of teeth or dentures. This can also include preparation and cleaning of areas used during personal care activities such as the bathroom and kitchen.
b. Observation of the participant to assure safety, oversight direction of the participant to complete activities of daily living, instrumental activities of daily living, or companionship for the participant (excluding hands-on care).

c. Routine housecleaning and housekeeping activities performed for a participant consisting of tasks that take place on a daily, weekly or other regular basis, including: washing dishes, laundry, dusting, vacuuming, meal preparation and shopping for food and similar activities that do not involve hands-on care of the participant.

d. Intermittent major household tasks that must be performed seasonally or in response to some natural or other periodic event. They include: outdoor activities such as yard work and snow shoveling; indoor activities such as window washing, cleaning of attics and basements, cleaning of carpets, rugs and drapery, and refrigerator/freezer defrosting; and the necessary cleaning of vehicles, wheelchairs and other adaptive equipment and home modifications such as ramps.

Contract, pp.288-89.

Although the care the petitioner receives probably falls into one of these two categories, this cannot be proved until he completes some documentation of the tasks performed for him. If he still seeks to increase the amount he receives for his self-directed supports, he must begin documenting the care he receives. If he believes that this documentation does not accurately reflect his overall situation, he should specifically point out why it does not. Until then, I must uphold Continuus's denial.

I note that if this matter comes before me again, I will review the various arguments concerning whether the additional care is cost-effective compared to other care and whether the petitioner's worker is adequately paid. If Continuus is going to argue that the petitioner could go to an adult family home or CBRF, it should be prepared to prove that these places will take him in his current condition and explain why any savings is not outweighed by a change from the care that has kept him alive despite a severe disability for over a decade. The petitioner should be prepared explain more clearly how the time his primary caregiver takes off reduces her pay; I reviewed this argument several times and still do not understand it.

CONCLUSIONS OF LAW

Continuus properly denied the petitioner's request for additional compensation for self-directed supports because he failed to prove by the preponderance of the evidence that the additional support is medically necessary.

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 8th day of January, 2015

_____

\sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on January 8, 2015.

Continuus
Office of Family Care Expansion