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**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

██████████ ██████████
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████████████████████████████████████████

DECISION

CWA/162296

PRELIMINARY RECITALS

Pursuant to a petition filed December 01, 2014, under Wis. Admin. Code § HA 3.03, to review a decision by the Brown County Human Services in regard to Medical Assistance, a telephonic hearing was held on January 14, 2015, at Green Bay, Wisconsin. At the request of the parties, the record was held open for the submission of closing arguments to DHA. The county agency submitted its closing argument with policy to DHA and to petitioner which is received into the hearing record. The petitioner did not submit any closing argument to DHA.

The issue for determination is whether the county agency correctly determined to discontinue the petitioner's Long Term Care CIP waiver services effective November 22, 2014, due to petitioner no longer meeting the functional eligibility (level of care) requirements for continuation in the CIP Waiver program.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

██████████ ██████████
████████████████████
████████████████████████████████████████

Respondent:

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

By: Susan Koeune, CIP manager
Brown County Human Services
Economic Support-2nd Floor
111 N. Jefferson St.
Green Bay, WI 54301

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 47 year old resident of Brown County who resides with her mother, [REDACTED].
2. The petitioner is diagnosed as developmentally disabled with an IQ of about 65. She is also diagnosed with hypothyroidism and hypertension.
3. The petitioner has been enrolled in the Long Term Care CIP IB Waiver program since about October 19, 2011.
4. The petitioner continues to work at [REDACTED] through the pre-vocational program.
5. In petitioner's 2013 long term care functional screen, the petitioner met the following four of the six areas for CIP eligibility under the Developmental disability target group: a) capacity for independent living – due to having difficulty with money transactions and managing her finances; b) self-care – due to medication problems and relying upon her mother; c) learning – due to difficulties in problems solving through new tasks and situations at work; and d) self-direction – due to not knowing what to do when health and safety may be a concern. Exhibit 1.
6. During the October, 2014 functional screen, the screener determined that petitioner could perform the following ADLs and IADLs: a) she is able to independently take her own medications; b) she cleans the house; c) she cook many meals for herself and her mother; d) she is able to shop for groceries; e) she takes care of outdoor chores (moving the lawn and snow removal); f) she was able to explain how to handle emergency situations independently; g) she was able to explain how to take care of herself for her own safety.
7. During the January 14, 2015 hearing, petitioner and her mother admitted that petitioner has improved in her functioning between 2013 and 2014.
8. In petitioner's recent October 27, 2014 functional screen, the petitioner no longer met the criteria for capacity for independent living or learning due to her improvement in those areas. Petitioner only met the criteria for two areas of: a) self-care; and b) self-direction. The petitioner was determined functionally ineligible for the CIP Waiver program and determined to be at a non-nursing home level of care for the Family Care Program. Exhibit 3.
9. The county agency sent a November 10, 2014 Long Term Care Services notice to the petitioner stating that her CIP Wavier program eligibility would discontinue effective November 22, 2014, due to her no longer meeting the criteria for the CIP Wavier program. That notice did indicate that petitioner continues to qualify for pre-vocational services and can continue work at [REDACTED]. Exhibit 2.

DISCUSSION

The MA Community Waiver Programs (e.g., Community Integration Program, Community Options Program - Waiver) are partially funded by the federal government through the Medical Assistance (MA) program. These Waiver programs must meet federal requirements, including MA regulations when applicable. To receive services through the Waiver programs, a person must be currently eligible for MA, have institutional-level care needs, and be elderly or disabled. *Medicaid Eligibility Handbook (MEH)*, §28.1, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/>, and the *MA Waivers Manual (Manual)*, at http://dhfs.wisconsin.gov/ltc_cop/waivermanual/index.htm.

To meet the functional eligibility requirement (i.e., to have institutional-level care needs), a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. *Manual*, §2.07; 42 C.F.R. §§ 435.217 & 435.441.301(b). To be found or remain eligible, the applicant must undergo an assessment of his/her needs and functioning.

I. THE DHS COMPUTERIZED SCREENING TOOL DETERMINED THAT THE PETITIONER IS NOT FUNCTIONALLY ELIGIBLE AT THE “NURSING HOME CARE LEVEL.”

The Wisconsin Department of Health Services has made efforts to improve the statewide efficacy of functional/LOC assessments by implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained quality assurance screener who has experience working with long term care consumers. This screener asks the applicant/recipient questions about his/her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits the “Functional Screen Report” for the applicant to the Department’s Division of Long Term Care. The Department then runs the Long Term Functional Screen data (or “tool”) through a computer program to see if the applicant/recipient meets any of the nursing levels of care.

Initially, the Department employed a statistical consultant to test the use of the “tool” (or "LOC" form) and the reliability of the outcomes obtained in using the tool and the computer analysis program. The consultant concluded that the use of the functional screen resulted in a high degree of reliability and consistency. The LOC form is available at <http://www.dhs.wisconsin.gov/forms/F0/f00366.pdf> and it is designed to incorporate the skeletal definitions from the federal Medicaid rules for Nursing Care and institutional Developmental Disability facilities.

The petitioner’s diagnoses and functional limitations are not in dispute. 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. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

During the hearing, petitioner and her mother admitted that petitioner has improved in functioning between her 2013 and 2014 functional screenings. See Findings of Fact #4 - #8 above. Based on the proffered evidence, I conclude that the functional screen assessor made the correct entries into the LOC form, which in turn resulted in the computer program’s determination that the petitioner does not currently have care needs at an institutional level.

II. INDEPENDENTLY OF THE DHS LOC ALGORITHM, I CONCLUDE THAT THE PETITIONER DOES NOT MEET THE INSTITUTIONAL LEVEL OF CARE REQUIREMENT AT THIS TIME.

The petitioner does not disagree that she no longer meets the nursing home level of care for continuation of her CIP Waiver program benefits.

Looking at legal definitions, rather than the computer program result, federal law requires that a person have care needs at an institutional level (hospital, nursing home) as a condition of adult MA Waiver eligibility. The petitioner is not arguing that he has regular care needs that require hospitalization. Federal law defines a nursing facility as follows:

- (a) *Nursing Facility Defined.*—In this title, the term “nursing facility” means an institution (or a distinct part of an institution) which—
 - (1) is primarily engaged in providing to residents—
 - (A) skilled nursing care and related services for residents who require medical or nursing care,
 - (B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons, or

(C) on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities, and is not primarily for the care and treatment of mental diseases;

42 U.S.C. 1396r(a). Of particular note is the requirement that a resident must need a health-related service above the level of room and board. Because housekeeping services are a "room and board" item, rather than a health-related service, the need for housekeeping services alone cannot qualify a person for the CIP II Waiver. Rehabilitation services (*e.g.*, physical therapy) are not being regularly received in this case, per the record before me.

Turning to the provision of skilled nursing care, the Wisconsin Administrative Code defines levels of nursing care as follows:

(31) "Skilled nursing facility" means a nursing home which is licensed by the department to provide skilled nursing services.

(32)

(a) "Skilled nursing services" means those services furnished pursuant to a physician's orders which:

1. Require the skills of professional personnel such as registered or licensed practical nurses; and

2. Are provided either directly by or under the supervision of these personnel.

(b) In determining whether a service is skilled, the following criteria shall be used:

1. The service would constitute a skilled service where the inherent complexity of a service prescribed for a resident is such that it can be safely and effectively performed only by or under the supervision of professional personnel;

2. The restoration potential of a resident is not the deciding factor in determining whether a service is to be considered skilled or unskilled. Even where full recovery or medical improvement is not possible, skilled care may be needed to prevent, to the extent possible, deterioration of the condition or to sustain current capacities; and

3. A service that is generally unskilled would be considered skilled where, because of special medical complications, its performance or supervision or the observation of the resident necessitates the use of skilled nursing personnel.

...

(10) "Intermediate nursing care" means basic care consisting of physical, emotional, social and other rehabilitative services under periodic medical supervision. This nursing care requires the skill of a registered nurse for observation and recording of reactions and symptoms, and for supervision of nursing care. Most of the residents have long-term illnesses or disabilities which may have reached a relatively stable plateau. Other residents whose conditions are stabilized may need medical and nursing services to maintain stability. Essential supportive consultant services are provided.

Wis. Admin. Code § DHS 132.13(10), (31),(32).

During the January 14, 2015 hearing, the neither the petitioner nor her mother provided any evidence to dispute that the Department had correctly determined the petitioner's level of care and correctly discontinued the petitioner's CIP effective November 22, 2014. In fact, they both agreed that the petitioner has improved in some of her functioning between 2013 and her 2014. However, petitioner explained that she still needed some help and also needed transportation to her employment at [REDACTED]. In its November 10, 2014 notice, the county agency indicated that there is an individual who is able to transport people for free through a grant program. Perhaps, petitioner should contact the agency to discuss arranging such transportation.

In any case, petitioner is not receiving, and does not require, skilled nursing services, because she does not require a service that must be provided by, or under the supervision of, a registered or licensed practical nurse. She also does not require intermediate nursing care services. That is because the type of help that she needs can be provided without use of a registered nurse for observation and recording of reactions/symptoms. Therefore, the petitioner does not require nursing services, as defined under the MA rules above, and he thus does not qualify for CIP II services. Accordingly, based upon the above, I must conclude that the county agency correctly sent a notice to the petitioner stating that her Long Term Care CIP waiver services would discontinue November 22, 2014, due to no longer meeting the functional eligibility (level of care) for the CIP Waiver program.

CONCLUSIONS OF LAW

The county agency correctly determined to discontinue the petitioner's Long Term Care CIP waiver services effective November 22, 2014, due to petitioner no longer meeting the functional eligibility (level of care) requirements for continuation in the CIP Waiver program.

THEREFORE, it is

ORDERED

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 6th day of March, 2015

\sGary M. Wolkstein
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 March 6, 2015.

Brown County Human Services
Bureau of Long-Term Support