



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/162399

PRELIMINARY RECITALS

Pursuant to a petition filed December 4, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee County Dept. of Family Care - MCO in regard to Family Care (FC) eligibility, a hearing was held on March 18, 2015, at Milwaukee, Wisconsin. Hearings set for January 22 and February 18, 2015, were rescheduled at the petitioner's request.

The issue for determination is whether the agency correctly determined that the petitioner no longer satisfies the functional eligibility requirement for the Family Care program (FC).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney [REDACTED]
Disability Rights Wisconsin
6737 W Washington St Suite 3230
Milwaukee, WI 53124

Respondent:

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

By: Lindsay Alberti, RN
Milwaukee Co. Dept. of Family Care - MCO
901 N. 9th St.
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.

2. The petitioner has been a recipient of FC benefits. A July 2014 screening found that he had functional care needs at the required nursing home level. He underwent another functional screening in September 2014, followed by a re-screening on October 29, 2014.
3. As a result of the fall 2014 screenings, the FC program determined that the petitioner was no longer functionally eligible for the program. On September 24, 2014, the FC agency issued notice to the petitioner advising that he was no longer eligible for “nursing home level” FC benefits due failure to satisfy the program’s nursing home-related functional eligibility requirement. The change was to be effective with the date of the letter, but a re-screening was offered and requested. The petitioner appealed after receiving the re-screening result.
4. The petitioner, age 51, has diagnoses of intellectual disability (IQ of 67), anxiety disorder, hypothyroidism, sleep apnea, and high cholesterol. He resides with his parents. For purposes of FC program eligibility, the petitioner has a “long-term condition.” Also, he has a confirmed developmental disability with onset prior to age 22.
5. *ADLs*. The petitioner is ambulatory and independent in bathing, dressing, eating, toileting, transferring and grooming.
6. *Instrumental ADLs*. The July 2014 screening established that the petitioner requires assistance with the following instrumental ADLs: meal preparation, medication administration and management, money management, and transportation. The fall 2014 screenings stated that he required assistance with meal preparation, money management and transportation, but *not* for medication management.
7. The petitioner requires assistance with the instrumental ADLs of meal prep, medication managements, money management, transportation, and job site functioning.

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.

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). 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 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 reassessment process. In this case, the petitioner and screener agree as to the screener’s findings of the petitioner’s ADL needs. Policy requires the local 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 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. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

However, the computer program infrequently yields a result that is not consistent with state code. 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 petitioner can perform all ADLs unassisted, and cannot perform five IADLs unassisted (meal prep, medication/treatment management, money management, transportation, job site functioning).

The petitioner falls within the comprehensive functional capacity definition -- he has a cognitive impairment and cannot safely/appropriately perform five IADLs (item 5 above). Thus, per code, he meets the comprehensive/nursing home level of care. The code has the force of law, and must be followed. Therefore, although the screening personnel followed their DHS instructions correctly the discontinuance of the petitioner's FC eligibility for failure to meet the level of care requirements was incorrect. This decision is in accord with prior decisions FCP-11/113325 (Wis. Div. of Hearings & Appeals October 26, 2010, ALJ Schneider)(DHS), and FCP-44/115906 (Wis. Div. of Hearings & Appeals April 5, 2011, Judge Schneider)(DHS).

CONCLUSIONS OF LAW

1. The petitioner remains at the nursing home level of care as defined in the FC chapter of the Wisconsin Administrative Code; therefore, he currently satisfies the functional eligibility requirements of the FC program.

THEREFORE, it is

ORDERED

That the petition is remanded to the agency with instructions to continue the petitioner's FC benefits from September 25, 2014 forward, in accord with the Conclusion of Law above, if he is otherwise eligible for the program. This action shall be taken within 10 days of the date of this Decision.

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 24th day of April, 2015

\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 April 24, 2015.

Milw Cty Dept Family Care - MCO
Office of Family Care Expansion
Attorney [REDACTED] [REDACTED]