



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

MPA/162553

PRELIMINARY RECITALS

Pursuant to a petition filed December 08, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability, now known as the Office of the Inspector General (OIG), in regard to Medical Assistance (MA), a telephonic hearing was held on January 22, 2015, at Milwaukee, Wisconsin.

The issue for determination is whether the OIG correctly determined the number of personal care worker (PCW) hours for petitioner pursuant to a prior authorization (PA) request.

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 written submittal of: Robert Derendinger, RN, BSN
Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

Also present: Keila Resto, Spanish Interpreter
David Oldberg, Autism Behavioral Network (ABN)

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County. He is 10 years old and certified for MA.
2. Petitioner is diagnosed with autism, urinary and fetal incontinence, intellectual disability, visual impairments and seizures.
3. Petitioner attends school on Mondays, Wednesdays, and Fridays. He receives in-home autism behavioral (ABN) services for three hours after school on those days. On Tuesdays and Thursdays, he receives ABN services for six hours during the day. The total face-to-face ABN time for the week is 24 hours.
4. On August 5, 2014 petitioner's PCW provider Independence First (IF) requested prior authorization on petitioner's behalf for 35 hours per week of PCW services and 7 hours per week of PCW travel time (PA # [REDACTED]) to begin September 30, 2014. IF filed an amendment request on October 13, 2014 to that PA.
5. By a notice dated November 17, 2014, the OIG modified the requested hours for PCW services and granted 29 hours of PCW services. The travel time was de-requested by IF, therefore none was awarded.

DISCUSSION

MA coverage of PCW services is described in the Wis. Adm. Code, §DHS 107.112. Covered services are specified in subsection (1), and are defined generally as "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." Examples of covered services are assistance with bathing, with getting in and out of bed, with mobility and ambulating, with dressing and undressing, and meal preparation. In determining the number of PCW hours to authorize the OIG uses that standard along with the general medical necessity standard found at Wis. Adm. Code, §DHS 101.03(96m). It provides:

"Medically necessary" means a medical assistance service under ch. DHS 107 that is:

- (a) Required to prevent, identify or treat a recipient's illness, injury or disability; and
- (b) Meets the following standards:
 1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
 2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider, and the setting in which the service is provided;
 3. Is appropriate with regard to generally accepted standards of medical practice;
 4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
 5. Is of proven medical value or usefulness and, consistent with s. DHS 107.035, is not experimental in nature;
 6. Is not duplicative with respect to other services being provided to the recipient;
 7. Is not solely for the convenience of the recipient, the recipient's family, or a provider;
 8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
 9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Admin. Code, §DHS 101.03(96m).

To determine the number of PCW hours to authorize the OIG uses the Personal Care Screening Tool, a computer program it believes will allow it to consistently determine the number of hours required by each recipient. The screening tool allots a specific amount of time in each area the recipient requires help, which the OIG's reviewer can then adjust to account for variables missing from the screening tool's calculations.

The OIG modified the PA/Amendment because it determined that the documentation submitted with it did not support the medical necessity of the hours requested. In reviewing the information submitted by the provider, I can see how the OIG was unable to determine that the requested PCW hours were medically necessary, and technically I am reviewing the OIG's determination.

The petitioner was represented at hearing by his parents and caregivers who clearly want the best for him. They described how his lack of safety awareness requires constant supervision. However, supervision is not a PC service covered under MA. The enumerated covered services only include:

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. Adm. Code, §DHS 107.112(b). Further, constant supervision *of a PC service* is reserved for members who cannot perform the personal care activity without continuous direction from a PCW *and* if the PCW physically intervenes to ensure the member performs the activity safely. The PCW must be actively involved in *directing* the member during the execution of the activity *and physically participate* in one or more steps of the activity the member is performing. Watching the member executing the task by himself or herself without physical intervention is not "constant supervision." See Prior Authorization : Personal Care Screening Tool, available at <https://www.forwardhealth.wi.gov/WIPortal/Online%20Handbooks/Display/tabid/152/Default.aspx?ia=1&p=1&sa=47&s=3&c=565&nt=Parameters+for+Making+Selections>. Accordingly, activities such as taking the petitioner for walks outside, keeping an eye on him so he does not do something harmful, practicing his ABN activities, or providing a calming influence during those ABN activities are not covered PC services.

Another problem with the petitioner's case is the documentation about petitioner's schedule. The PA shows him attending school daily, while the direct testimony at hearing showed he attends school Monday, Wednesday and Friday. On Tuesdays and Thursdays he is home receiving the ABN therapy. The testimony was vague however on what PCW assistance is *required* on those two days, beyond what was approved, as the testimony and documentary evidence showed that the PCW or a family member may assist him with feeding or toileting. It is unclear if a PCW is *required* around the noon hour on Tuesdays or Thursdays, or if the PCW is there anyway because her presence helps the petitioner attend to his ABN activities. It is clear that the petitioner and his family appreciate the work of their particular PC worker. However, the services that she provides must be covered PC services for her to be reimbursed under MA. The agency approved time for bathing, which includes time for application of lotion and a

change of clothes. It allowed time for his behaviors. It allowed time for incidental services so that his personal clothing could be laundered. It allowed time for other covered PC services as well, but the forementioned were issues raised by the petitioner's representatives at hearing.

I therefore must conclude that the OIG was correct in its modification of the PA. As in all prior authorization request cases, the petitioner bears the burden of proving the services he requests are necessary, and that has not been done. Petitioner is essentially at the mercy of the provider who is required to justify the requested services and should know how to navigate the complexities involved with a PA request like we have here. IF may be able to file another amendment to the prior authorization request correcting the problems and explaining more fully the need for the hours. A revised estimated time schedule could help in showing the OIG the hours needed according to an accurate schedule of petitioner's activities. It also looks like requesting Pro Re Nata (PRN) time may be the best way to account for the needs here when petitioner goes to his MA covered medical appointments. I suggest that the petitioner, his provider, and the medical specialists he sees review his PCW needs and that they provide increased documentation to support a new request for additional ongoing PCW time, including physician orders for same. This is not intended to diminish the challenges petitioner and his family face, but rather to explain that the documentation must be there to support the requested services.

I add, assuming petitioner finds this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

CONCLUSIONS OF LAW

The OIG authorized appropriate PCW hours for the petitioner.

THEREFORE, it is **ORDERED**

That the petition for review herein 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 Milwaukee,
Wisconsin, this 25th day of February, 2015

\sKelly Cochrane
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 February 25, 2015.

Division of Health Care Access and Accountability