



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
[Redacted]
Redact

DECISION

FCP/162651

PRELIMINARY RECITALS

Pursuant to a petition filed December 15, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by Community Care Inc. in regard to the Family Care Program, a telephonic continued hearing was held on May 14, 2015, at Appleton, Wisconsin. At the request of petitioner, hearings set for February 5, 2015 and March 5, 2015 were rescheduled. During the initial hearing on March 16, 2015, petitioner had not cooperated with releasing her medical records or performing her ADLs so that Community Care could assess her functional abilities to continue in the Family Care Program (FCP). Petitioner agreed to provide all needed medical releases and participate in a re-screening. Both parties agreed for petitioner's functional re-screening to be completed and the functional screen results to be sent to DHA prior to the continued hearing on May 14, 2015. The re-screening was completed on April 20, 2015. At the end of the May 14, 2015 hearing, both parties agreed for the record to be held open for consecutive brief to be submitted to the Division of Hearings and Appeals (DHA) and to the other party. Both parties timely submitted their briefs to DHA which are received into the hearing record.

The issue for determination is whether the Family Care Program (FCP) correctly discontinued the petitioner's Family Care eligibility effective December 11, 2014, due to no longer meeting the nursing home level of care.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted]
[Redacted]
Redact

Petitioner's Representative:

Attorney [Redacted] Redacted,
Disability Rights of Wisconsin
[Redacted]
[Redacted]

Respondent:

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

By: [Redacted], FCP supervisor
Community Care Inc.
205 Bishops Way
Brookfield, WI 53005

ADMINISTRATIVE LAW JUDGE:  
 Gary M. Wolkstein  
 Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner (CARES # Redact) is a 52 year old resident of Outagamie County in an independent apartment where she receives in-home services to help her with some of her activities of daily living (ADLs) and instrumental activities of daily living (IADLs).
2. The petitioner has been an ongoing recipient of the Family Care Program (FCP) benefits since May, 2011. To remain eligible for the FCP, the recipient must periodically undergo functional screening to determine whether she continues to have functional care needs at the requisite level. The petitioner underwent such a prior functional screening on May 15, 2014 during which she was found to be at the nursing home level of care.
3. As a result of the November 25, 2014 long-term care functional screen (LTCFS), the FC program determined that the petitioner was no longer functionally eligible for the program at the “nursing home level.”
4. The FC agency, Community Care, Inc., issued a notice to the petitioner advising that she was no longer eligible for FCP services, effective December 11, 2014. The reason for the FCP discontinuance was that the petitioner could not receive “nursing home level of care” FC benefits due to failure to satisfy the program’s nursing home-related functional eligibility requirement. The screen determined that petitioner need assistance with only one ADLs (bathing) and only one IADL (meal preparation).
5. The petitioner has diagnoses of diabetes, hyperglyceridemia, obesity, bilateral ankle arthritis, shoulder impingement, carpel tunnel, fibromyalgia, chronic pain, obstructive sleep apnea, and anxiety. For purposes of FC program eligibility, the petitioner has a “long-term condition.”
6. The petitioner completed a functional re-screening on April 20, 2015 with a determination that petitioner remained at the non-nursing home level of care. See above Preliminary Recitals.
7. In her March 9, 2015 letter, petitioner’s primary physician, Redact, D.O, stated in pertinent part: “. . . Because of her rotator cuff tear and adhesive capsulitis, she cannot lift up her shoulders and so she has difficulty getting dressed, especially with buttoning shirts and fastening her brassiere.”
8. *ADLs*. The petitioner is ambulatory and independent in eating, toileting, transferring and grooming. The petitioner requires some physical assistance with bathing and dressing.
9. *Instrumental ADLs*. The screenings established that the petitioner requires assistance with the instrumental ADL of meal preparation. She is independent in the other “IADLs” of medication administration, 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 is to be terminated from the program, or have her services reduced, the client is allowed to file a fair hearing request. The petitioner did so in the instant appeal.

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 an annual reassessment process. 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 cannot perform two ADLs unassisted (bathing, dressing), and cannot perform one IADL unassisted (*e.g.*, meal preparation).

The parties agree that the petitioner requires physical assistance with one IADL (meal preparation) plus the ADL of bathing, but do have a factual disagreement as to whether the petitioner requires physical assistance with dressing. The petitioner's shoulder impingement and rotator cuff tear causes her to have good days and bad days with dressing; the screen scoring instructions for dressing advise that the need for physical help is **based on the "bad days."** Community Care was unable to refute with any reliable evidence that on those bad days, the petitioner cannot manipulate fasteners on her clothing and fasten her brassiere. Based on the updated medical documentation by Dr. Meyers (including confirmation of her diagnoses – Finding of Fact #5 above) and the testimony of petitioner, I found that the petitioner needs physical help for dressing.

During the March 16, 2015, continued hearing on May 14, 2015 and in its closing arguments, the Family Care agency (Community Care) representatives argued that petitioner's testimony and evidence was inconsistent regarding her need for assistance with "dressing." However, some of the alleged "inconsistencies" can be explained on the basis that on "bad days" petitioner needs more assistance to manipulate fasteners on her clothing and fasten her brassiere. In any case, Community Care was unable to refute that her physician, Dr. **Redact**, concluded in her March 9, 2015 letter that petitioner needs assistance with dressing: "Because of her rotator cuff tear and adhesive capsulitis, she cannot lift up her shoulders and so she has difficulty getting dressed, especially with buttoning shirts and fastening her brassiere."

The Community Care representatives also asserted that petitioner was uncooperative in signing needed medical releases and performing requested ADLs during her November 25, 2014 functional screening. There is merit to that complaint because even during the initial March 16, 2015 hearing, this ALJ needed to request the assistance of Attorney **Redact** to explain to her client (petitioner) that she needed to cooperate with signing medical releases and performing requested ADLs, if she wanted to proceed with the ordered functional re-screening.

In the future, petitioner must continue to cooperate with the FC agency in their future re-assessments, if she wants to receive continued FC benefits. However, despite petitioner's lack of cooperation, the FC agency failed to meet its burden of proof that petitioner did not need assistance with dressing, and thus was eligible for continued FCP benefits under the nursing home level of care, as explained in Findings of Fact #5, #7 - #9 above.

As evidenced by the recent screens, the petitioner falls within the comprehensive functional capacity definition -- she cannot safely/appropriately perform two ADLs (bathing and dressing) and one IADL (meal preparation). Thus, per code, she meets the comprehensive/nursing home level of care. The code has the force of law, and must be followed. 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).

*This Decision does not preclude the FC agency from issuing a new FCP discontinuance notice to the petitioner in the future if she does not cooperate with and complete her required FCP eligibility reviews.*

**CONCLUSIONS OF LAW**

1. The petitioner remains at the nursing home level of care as defined in the FCP chapter of the Wisconsin Administrative Code; therefore, she currently satisfies the functional eligibility requirements of the FC program.
2. The discontinuance of petitioner's FCP services effective December 11, 2014, based upon a theory of lack of functional eligibility, was incorrect.

**THEREFORE, it is**

**ORDERED**

That the petition is remanded to the agency with instructions to continue the petitioner's Family Care Program nursing home level of care benefits from December 11, 2014, forward, in accord with the Conclusions of Law above, 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 15th day of June, 2015

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\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 June 15, 2015.

Community Care Inc.  
Office of Family Care Expansion  
Attorney Redact