



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
Redact

DECISION

FCP/163999

PRELIMINARY RECITALS

Pursuant to a petition filed February 14, 2015, under Wis. Admin. Code § DHS 10.55, to review a decision by iCare in regard to the Family Care Program, a telephonic hearing was held on March 10, 2015, at Milwaukee, Wisconsin. At the request of the parties, the record was held open for the submission of consecutive briefs by April 14, 2015. The 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 FCP eligibility effective March 1, 2015, due to no longer meeting the level of care requirement.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted]
Redact

Respondent:

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

By: Attorney [Redacted], general counsel
iCare (Independent Care Health Plan)
1555 N. Rivercenter Drive
Suite 206
Milwaukee, WI 53212

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner (CARES # Redact) is a 66 year old resident of Milwaukee County who resides independently in his apartment.
2. The petitioner is diagnosed with diabetes, arthritis, asthma. He has chronic pain related to his previous hip replacement surgeries.
3. The petitioner has been enrolled in the Family Care Program (FCP) since December 1, 2011.
4. The petitioner was determined to meet the nursing home level of care in his August 28, 2014 re-screening by iCare based upon needing assistance with one ADL (activity of daily living), mobility (visibly short of breath and using walls and chairs to steady himself while walking). Petitioner also needed assistance with IADLs (instrumental activity of daily living) of grocery shopping and laundry/household chores. Exhibit 6.
5. The iCare Family Care team met with petitioner on January 19, 2015 for his Long Care Term Functional Screen (LTCFS). The FC functional screener, RN Redact, completed petitioner's functional screening concluding that petitioner was no longer functionally eligible for the nursing home level of care due to improvements in his functional abilities. Exhibit 7. The petitioner is independent with all of his ADLs. In respect to his IADLs, petitioner can prepare meals, clean up and do some limited shopping (not carry larger grocery orders) with rest breaks, but needs assistance with heavier household chores such as laundry and vacuuming. He was rated as a Risk level 1.
6. The iCare Family Care sent a January 29, 2015 notice to the petitioner stating that based upon his functional screen petitioner was determined to no longer meet the nursing home level of care to continue eligibility in the Family Care Program.
7. During the March 10, 2015 hearing, both parties agreed to promptly complete a re-screening of the petitioner's functional level of care.
8. As a result of the in-home rescreening on March 16, 2015 of the petitioner, the Family Care program again determined that the petitioner was no longer functionally eligible for the nursing home level of care due to improvements in his functional abilities. The changes were that: a) petitioner no longer required assistance with mobility because petitioner was walking up and down the stairs outside of his apartment using the hand railing, but was steady on his feet; b) petitioner can ambulate safely within his home using a cane; c) petitioner no longer needed assistance with any ADLs. Petitioner only met the two IADLs grocery shopping and household chores/laundry.
9. iCare's counsel, Attorney Redact, sent a March 26, 2015 closing argument which persuasively argued that even after the re-screening, petitioner failed to satisfy the nursing home level of care functional eligibility requirements of the FCP program, and thus was no longer eligible for continued FCP benefits.
10. The petitioner sent an April 6, 2015 responsive closing statement to DHA which was unable to refute with any reliable information that he no longer met the nursing home level of care requirement for continued nursing home eligibility in the Family Care program as of March 1, 2015.

### DISCUSSION

The Family Care program, which is supervised by the Department of Health Services (DHS), is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized in the Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10.

Wis. Adm. Code, §DHS 10.33(2) provides that an FCP applicant must have a functional capacity level of comprehensive or intermediate; I note here that Wis. Stat., §46.286, uses the terms “nursing home” and “non-nursing home” levels just as the agency in this case. If the person meets the comprehensive (nursing home) level, he/she is eligible for full services through a care management organization (CMO), including Medical Assistance (MA). Wis. Adm. Code, §DHS 10.36(1)(a). If the person meets the intermediate (non-nursing home) level, he/she is eligible for full services only if he is in need of adult protective services, he is financially eligible for MA, or she is grandfathered as described in §DHS 10.33(3). Wis. Adm. Code, §DHS 10.36(1)(b). A person eligible under the non-nursing home level is eligible for less FCP services.

The Wisconsin Department of Health Services made efforts to improve the statewide efficacy of functional assessments by designing and implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained quality assurance screener. The screener met with the petitioner as part of the reassessment process. Current policy requires the Department’s local agent/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.

Wis. Admin. Code § DHS 10.33(2)(c) describes comprehensive (a/k/a nursing home) functional capacity:

**(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, ...

**(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.

As evidenced by the re-screening on March 16, 2015 (and the January 19, 2015 initial screen), the petitioner no longer falls within the comprehensive functional capacity definition – that he meets any of the above required levels to be unable to safely/appropriately perform any of the above combinations of ADL's and/or IADLs (under item 2(c) above). Thus, per code, he does not meet the comprehensive/nursing home level of care. The screening personnel correctly followed their DHS instructions. Accordingly, based upon the above, I must conclude that the Family Care Program correctly determined that the petitioner no longer meets the nursing home level of care requirement for continued nursing home eligibility in the Family Care program as of March 1, 2015.

### **CONCLUSIONS OF LAW**

The Family Care Program correctly determined that the petitioner no longer meets the nursing home level of care requirement for continued nursing home eligibility in the Family Care program as of March 1, 2015 (but is still eligible for non-nursing home level of care).

**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 12th 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**

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

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

The preceding decision was sent to the following parties on June 12, 2015.

iCare  
Office of Family Care Expansion