



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
[Redacted]
Redact

DECISION

FCP/164416

PRELIMINARY RECITALS

Pursuant to a petition filed March 04, 2015, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. (CCI) in regard to eligibility for Family Care (FC), a Medical Assistance-related program, a hearing was held on April 21, 2015, by telephone. The hearing record was held open for petitioner's submission of a prescription copy, which was received.

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]
Redact

Respondent:

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

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

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Calumet County.
2. The petitioner has been eligible for FC benefits since December 2013. To remain eligible for FC or when changing CMOs, the recipient must periodically undergo functional screening to

determine whether he continues to have functional care needs at the requisite level. The petitioner underwent such a functional screening on approximately January 5, 2015.

3. As a result of the January 2015 screening, the FC program determined that the petitioner was no longer functionally eligible for the program. On January 7, 2015, the FC agency issued notice to the petitioner advising him that he was no longer eligible for “nursing home level” FC benefits due to his failure to satisfy the nursing home related functional eligibility requirements of the program, effective February 1, 2015. The petitioner timely appealed.
4. The petitioner, age 51, has diagnoses of Type I diabetes (uncontrolled), diabetic retinopathy, glaucoma, chronic kidney disease – Stage III, edema, coronary artery disease, bipolar disorder, depression, generalized and left hip osteoarthritis, pain in the back/lower leg/knee/shoulder, right rotator cuff syndrome, hypothyroidism, hypersomnia, high cholesterol, and hypertension. The petitioner is right-handed. For purposes of FC program eligibility, the petitioner has a “long-term condition.”
5. *ADLs.* Per the January 2015 screening, the petitioner is ambulatory and independent in eating, toileting, and transferring. The parties agree that he needs physical assistance with bathing and dressing. Pre-2015, the screening score declared that the petitioner needed help with transfers; the 2015 screening stated that he needed no physical assistance with transfers. He needed physical help with transfers as of February 16, 2015.
6. *Instrumental ADLs.* The petitioner needs physical assistance with laundry and household chores. Significantly, as of March 2015 he needed assistance with daily application of his prescription skin cream, Diclofenac (Voltaren), four times daily. Voltaren is an NSAID used to relieve osteoarthritis pain in joints. The need to have it applied by others means that the petitioner required help with management of medications/treatments. The petitioner is capable of simple meal preparation, but needs help with grocery shopping.

The petitioner is independent in the use of a telephone, and drives an automobile. He is not employed, and receives SSI disability benefits. He does not require overnight supervision, and no documentation from a medical provider of a diagnosis of a cognitive deficit has been submitted into this record. The petitioner is fully communicative, is not physically resistive to care, does not wander, has not demonstrated self-injurious behavior, is not violent towards others, and does not engage in substance abuse.
7. The petitioner switched to the Redact Redact CMO effective February 16, 2015.

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, the client is allowed to file a fair hearing request. The petitioner did so here.

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). Essentially, a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. To be found 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 accuracy of functional assessments by implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained screener.

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 evaluates the Long Term Functional Screen data by computer programming to see if the applicant/recipient meets any of the nursing levels of care.

The petitioner’s diagnoses are not in dispute. All assessors have agreed that the petitioner requires physical assistance with at least two ADLs – bathing and dressing. A pre-2015 assessor found that he needed help with transfers. Because he needed help with at least three ADLs, the computer program (and state code) found that he needed a nursing home level of care. When an agency assessor determined on January 5, 2015 that the petitioner was able to transfer independently, the computer program scored him as not needing a nursing home level of care. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

The petitioner testified that his condition has not improved since the earlier screening, that he moves slowly during transfers, and that he has good and bad days (the majority of them bad). He argues that the January 2015 screener caught him on a good day. His CCI nurse manager (Redact) testified that her weekly observations of the petitioner around the time of screening and thereafter until his transfer to Redact in mid-February, were consistent with what the screener saw (slow transfer with rocking back and forth to launch out of a chair). The petitioner countered that his already low ability to transfer worsened, because his arthritis pain worsened in February and March, leading to the need for the Voltaren NSAID prescription.

I find that the January screener correctly made the very close call that the petitioner could transfer independently in January. However, the petitioner’s condition deteriorated back to the level identified by the pre-2015 screener by the time the petitioner transferred to Redact in mid-February 2015. I assume that Ms. Redact was no longer observing the petitioner on a weekly basis after his transfer to Redact. Also, the petitioner’s need for increased pain control by the time of the March 2015 Voltaren prescription suggests a worsening of his condition and function.

II. INDEPENDENTLY OF THE DHS LOC ALGORITHM, I CONCLUDE THAT THE PETITIONER MET THE COMPREHENSIVE FUNCTIONAL CAPACITY LEVEL AS OF 2/16/2015.

Independently of the DHS computerized result, this ALJ’s overall sense of the petitioner’s care level is that it barely did not rise to the “comprehensive functional capacity level” required in the state code in January 2015. However, it later regressed to the required level. In code, the verbally expressed standard, as opposed to a computer algorithm, 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) (November 2009). IADLs are defined at §DHS 10.13(32). By mid-February 2015, the petitioner again could not perform three ADLs unassisted – bathing, dressing, transfers.

Procedurally, I could simply uphold CCI's decision to discontinue the petitioner due to lack of eligibility effective February 1, 2015. The petitioner could then be instructed to re-apply, be assessed again, and request a hearing if the new assessment did not find him eligible. That would seem to be a triumph of bureaucratic process over fiscal efficiency and meeting the needs of a clearly eligible person. Therefore, I will conclude that the February 1, 2015 discontinuance was correct, but that the documented change in the petitioner's needs during the pendency of the hearing process also cause me to conclude that his eligibility should be reinstated with his current CMO, Redact, as of February 16, 2015.

CONCLUSIONS OF LAW

1. The petitioner did not have care needs at the comprehensive functional capacity level in January 2015; therefore, he did not satisfy the functional eligibility requirements of the FC program from February 1 – 15, 2015.
2. The petitioner had care needs at the comprehensive functional capacity level from February 16, 2015, forward.

THEREFORE, it is

ORDERED

That the petition is remanded to the Redact Redact CMO with instructions to reinstate the petitioner's FC eligibility effective February 16, 2015. This action shall be taken within 10 days of the date of this Decision. In all other respects, the petition 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 Madison,
Wisconsin, this 20th day of May, 2015

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on May 20, 2015.

Community Care Inc.
Office of Family Care Expansion