



STATE OF WISCONSIN  
Division of Hearings and Appeals

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

FCP/168218

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**PRELIMINARY RECITALS**

Pursuant to a petition filed August 25, 2015, under Wis. Admin. Code § DHS 10.55, to review a decision by the Waukesha County Health and Human Services in regard to Medical Assistance, a hearing was held on October 13, 2015, at Waukesha, Wisconsin. Post-hearing, the record was held open for 10 days to allow the Petitioner to submit additional evidence. Additional evidence was received on October 19, 2015 and the record was closed.

The issue for determination is whether the agency properly determined that the Petitioner is at a non-nursing home level of care for the Family Care program.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: Tammy Depies

Waukesha County Health and Human Services  
514 Riverview Avenue  
Waukesha, WI 53188

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Waukesha County. Petitioner lives alone. He lives on the [REDACTED] of an apartment building with no elevator.

2. Petitioner's current diagnoses include: hypothyroidism, esophageal reflux, diverticulosis, hernia, hyperlipidemia, scoliosis, osteoporosis, myalgia, chronic back pain, headaches, myiasis, paresthesia, degenerative disc disease, bladder obstruction, depression, compulsive personality disorder, leg cramps, urinary urgency, coronary atherosclerosis, gastric ulcers, anxiety, cystic retinal tuft of left eye, panic disorder, posterior vitreous detachment.
3. Petitioner is attending physical therapy 2x/week from [REDACTED]
4. In September, 2014 a referral was made for the Petitioner to have a Long Term Care Functional Screen (LTCFS) completed.
5. On September 24, 2014, the agency completed a LTCFS for the Petitioner. It was determined that he was at a non-nursing home level of care. The Petitioner declined to enroll in the Family Care program at that time.
6. On November 10, 2014, the Petitioner requested a new LTCFS due to a change in condition. On November 18, 2014, a LTCFS was completed and the Petitioner was again found to be at a non-nursing home level of care.
7. On April 29, 2015, the Petitioner received bathing assistance through the Waukesha County ADRC 1x/week on a donation basis. On May 19, 2015, the Petitioner cancelled this assistance.
8. On May 12, 2015, the Petitioner requested a new LTCFS due to a change in condition. On August 6, 2015, a LTCFS was completed and the Petitioner was again found to be at a non-nursing home level of care. Specifically, the assessors determined the Petitioner has the following needs:

Bathing – Level 1 – Petitioner is independent with this task. He uses a grab bar and has a shower chair that he chooses not to use. He reports difficulty in/out of tub but is able to do it. He reported he can stand 20 minutes. Petitioner reported he is fearful of showering and would feel safer if someone is in the apartment when he is showering.

Dressing – independent. Petitioner reported it is difficult to bend due to back issues but that he is able to put on shoes and socks.

Eating – independent. Petitioner must cut food into small bites due to esophageal issues but he is able to do so.

Mobility – independent. Petitioner reported he uses a cane in the morning and later in the day when tired. He does not use it throughout the day. Petitioner also reported that he has issues with walking.

Toileting – independent. Petitioner uses the tub to help with transfers on/off toilet. He reported incontinence at night occasionally.

Transferring – independent. Petitioner reported he has physical therapy exercises to help with getting in/out of bed.

Meal Preparation – independent. Petitioner is able to shop and prepare meals.

Medication Administration/Management – independent.

Money Management – independent

Laundry/Chores – Level 1 – Petitioner's laundry facilities are in the basement. He lives on the [REDACTED]. He needs assistance to get laundry up and down. Apartment is noted to be very clean though Petitioner reports cleaning is difficult.

Telephone – independent

Transportation – independent

## Overnight care/supervision – not required

The assessors determined the Petitioner has no issues with communication, memory loss, cognition for daily decision-making or resistance to cares. It was noted that Petitioner reported needing to make a list of things to do in order to not forget them. The assessors also determined that the Petitioner does not have any issues with wandering, self-injurious behaviors, violent or offensive behaviors or substance abuse. It was noted that the Petitioner has mental health diagnoses and sees a psychiatrist and psychologist. He also takes medication for his mental health conditions. The assessors also noted that the Petitioner reported issues with walking, dizziness, headaches and nausea on a daily basis. He was observed to walk around the apartment with no complications though he was slow with ambulation. He was observed to lift his legs, to cross them when sitting several times and to squat to pick up documents.

9. Petitioner submitted medical records of recent physician's visits including a visit on June 10, 2015 which discusses a diagnosis of lumbar levoscoliosis, a visit on August 12, 2015 relating to his diagnoses of coronary atherosclerosis and shortness of breath, a visit on August 21, 2015 relating to leg cramps, chronic back pain, DDD, edema, shortness of breath and scoliosis.
10. Petitioner started physical therapy in July, 2015. The evaluation on July 6, 2015 notes that Petitioner has difficulty with bed mobility and bending, donning/doffing shoes and socks. He was noted to have severe R lateral shift in his spine and slow gait speed. Joint mobility was noted to be decreased. The progress note for July 13, 2015 indicates the Petitioner presented with poor ability to perform supine <math>\leftrightarrow</math> sit transfers, requiring min assist for safety and execution. The note on July 16, 2015 also noted that Petitioner needs to work on strengthening lower extremities and core to allow increased ease with transfers and bed mobility. The note on July 21, 2015 notes that Petitioner is unsteady with transfers and requires assistance with bed mobility. It further noted that he needs multiple verbal cues for safety and multiple rest breaks. It concluded that he lacks functional capacity to perform transfers safely. The note for August 5, 2015 noted that Petitioner demonstrated significant difficulty with transfers and that he is limited by pain and fatigue with activities.

### **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). E.g., 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.

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 applicant/recipient's "Functional Screen Report" 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 Level of Care (LOC) Functional Screen form reiterates the skeletal definitions from the federal Medicaid rules for Intermediate Nursing Care and institutional Developmental Disability facilities.

The Wisconsin Administrative Code requires the agency to use this uniform functional screening tool. Wis. Adm. Code, § DHS 10.33(2)(a). The problem with this requirement is that the Department has changed the screening tool to better comply with the federal government's long-term waiver provisions, but it has not changed the administrative code to reflect these changes. See DHA Decision No. FCP-44/115906. Because the administrative code has the force of law, I must follow it rather than the screening tool.

The petitioner's diagnoses are not in dispute. The agency found, as part of the LTCFS process, that the Petitioner requires some assistance with bathing and with laundry/chores but that he is independent with all other activities of daily living and instrumental activities of daily living. 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. The Petitioner specifically disputes the agency's conclusions that he is independent with dressing and transferring.

In the Wisconsin Administration Code, a nursing home level of care, which is also referred to as the comprehensive level of care, is described as follows:

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.

Wis. Adm. Code, § DHS 10.33(2)(c).

Activities of daily living, or ADLs, refer to "bathing, dressing, eating, mobility, transferring from one surface to another such as bed to chair and using the toilet." Wis. Adm. Code, § DHS 10.13(1m). Instrumental activities of daily living, or IADLs, refer to "management of medications and treatments, meal preparation and nutrition, money management, using the telephone, arranging and using

transportation and the ability to function at a job site.” Wis. Adm. Code, § 10.13(32). Although not mentioned in the code definition, the inability to do laundry/household chores is listed as an IADL on the functional screening tool, implying that it is Department policy to include performance of laundry/household chores as an IADL. Also, performance of laundry/household chores is listed as an IADL in the federal Medicaid definitions. E.g., 42 C.F.R. 441.505.

As already noted, the agency concluded that the Petitioner requires some assistance with one ADL (bathing) and one IADL (laundry/chores). Though the agency testified at the hearing that he is independent with bathing and laundry/chores, it did score him as needing assistance on the LTCFS. The Petitioner argues that he also requires assistance with two additional ADLs - dressing and transferring.

The Petitioner testified that for dressing, he must sit, bend and lift his leg to put on socks and shoes. While he is able to accomplish the task, he testified that it can take him 25-30 minutes to get dressed and that his pain is 10/10 from his back, down his legs and into his feet. The agency asserts that because he is able to complete the task, it must find that he is independent with the task.

With regard to transferring, the Petitioner testified that it is difficult for him to get in and out of bed. This is one of the areas that he was working on in physical therapy sessions. He testified that he has severe pain in his back and that he has edema and stiffness that develop overnight. He must use his cane and take frequent breaks due to pain and exertion. He testified that it takes him 15-20 minutes to get out of bed. He testified that this can be particularly difficult when he needs to get to the toilet in the morning. Again, the agency asserts that because he is able to complete the task, it must find that he is independent with the task.

The Petitioner refers to the LTCFS Instructions in arguing that the agency should find he needs assistance:

#### LTCFS Instructions 4.3

If a person can complete a task independently, but it takes them a very long time, you need to consider if the person needs any help with that task to complete it safely. If they are in fact completing tasks safely, it does not matter if it takes two or three times longer than for most people. However, if it takes a significant amount of time for the person to complete a task independently and that results in a significant, negative health outcome for the person doing the task so slowly, to the point that another person should be present to help with some or all of the task, than it would be justified to indicate the person has a need of help completing the task.

#### 4.8 Dressing

Check this for a person who:

Is able to dress themselves but it takes additional time to do so and results in a significant, negative health outcome. During the task of Dressing, a significant, negative health outcome is indicated when a person experiences any of the following results: out-of-breath, dizzy, chest pains, exhausted, incontinence, or increased pain, to the point that another person should be present to help with some or all of the task.

#### 4.12 Transferring

Check this for a person who:

Does not need assistance with transfers but it takes them a significant amount of time to do so and results in a significant, negative health outcome. During the task of

Transferring, a significant, negative health outcome is indicated when a person experiences any of the following results: out-of-breath, dizzy, chest pains, exhausted, incontinence, or increased pain, to the point that another person should be present to help with some or all of the task.

Needs cueing or step-by-step directions to transfer.

Based on the evidence submitted, I conclude that the Petitioner requires assistance with transfers in order to perform the task safely. The medical records and PT progress notes demonstrate that the Petitioner has significant pain and is easily fatigued in getting out of bed in the mornings. The progress notes also indicate a need for step-by-step directions for transferring out of bed. The Petitioner thus has significant, negative health outcomes included shortness of breath, exhaustion and increased pain. Especially for the morning when the need to toilet may be urgent, the evidence demonstrates that the Petitioner has a need for assistance.

The evidence is less clear with regard to dressing. Though the Petitioner indicates that he experiences pain, there is no medical documentation or other evidence to indicate that this task causes significant pain to the extent that another person should be present to help with the task. However, because the Administrative Code requires that a person be found to be at a nursing home level of care if assistance is needed for two ADLs and one IADL, I conclude that the Petitioner meets the nursing home level of care because he requires assistance with bathing, transferring and laundry/chores.

### CONCLUSIONS OF LAW

The Petitioner meets the nursing home level of care because he requires assistance with bathing, transferring and laundry/chores.

**THEREFORE, it is**

**ORDERED**

That the petition is remanded to the agency with instructions to promptly continue processing the petitioner's FC application in accord with the Conclusion of Law above. The agency take this action and shall report that it has resumed processing/reviewing the Petitioner's eligibility for FC to DHA 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 Milwaukee,  
Wisconsin, this 19th day of November, 2015

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\sDebra Bursinger  
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 November 19, 2015.

Waukesha County Health and Human Services  
Office of Family Care Expansion  
Health Care Access and Accountability