



FH
FCP/170448

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION ON REHEARING
Case #: FCP - 170448

PRELIMINARY RECITALS

On December 2, 2015, the above petitioner filed a hearing request under Wis. Admin. Code § DHS 10.55, to challenge a decision by Care Wisconsin regarding Family Care, a Medical Assistance (MA)- related program. The hearing was held on April 13, 2016, by telephone. A decision was issued, and the petitioner timely requested a rehearing. On June 24, 2016, this office granted the rehearing request, but specified that another hearing would not be convened. The record was held open for the receipt of new evidence, which was received on July 8, 2016.

The issue for determination is whether the Administrative Law Judge erred in awarding 89.25 hours of weekly SHC from the FC program to the petitioner, in her May 2016 decision. The FC agency had sought to reduce the petitioner's SHC hours to 87.5 hours weekly.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI53703

By: [REDACTED], care mgr.
Care Wisconsin
P.O. Box 14017
Madison, WI 53708-0017

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

[Findings #1 - #6 are unchanged from the May 2016 decision, except for enumeration]

1. Petitioner is a resident of Oconto County.
2. The petitioner has been eligible for participation in a now defunct MA Community Waiver program for several years. She was transitioned to the Family Care (FC) program, prompting a review of her care. FC services are furnished through a local care management organization (CMO), which is under contract with the FC program.
3. The petitioner, age 30, resides with her parents. Due to an automobile accident suffered in 2006, the petitioner sustained a traumatic brain injury, and suffers from quadriplegia, aphasia, contractures, constipation, and GERD. She operates an electric wheelchair for all mobility. The petitioner requires physical assistance to perform any activity of daily living (ADL) – bathing, dressing, eating (supervision), some grooming, toileting (incontinent, wears briefs), taking medication, transfers, and moving within her home. She also requires hands-on assistance with all instrumental activities of daily living (IADLs) – meal preparation, medication administration, money management, laundry/chores, transportation, and telephone use. The petitioner’s IQ is between 75 and 85; she does not wander, and is not dangerous to self or others.
4. The petitioner had been granted 20 hours of SHC daily (144 hours weekly) through a predecessor program. The CMO re-determined the amount of time needed by the petitioner as part of an overdue annual review.
5. Post-review, the CMO tabulated the amount of SHC time needed by referring to a DHS standardized task time table. Using its Resource Allocation Method analysis, the CMO decided to reduce the SHC hours to 12.5 hours daily/87.5 hours weekly. The CMO granted 34.0 hours weekly for ADLs, excluding transfers. The approved time for Medically-Oriented Tasks (transfers, medication administration, three times weekly suppository placement and skin care) was 9.5 hours weekly. An additional eight hours were approved for cleaning the petitioner’s bathroom and bedroom, preparing her meals, doing her seven loads of laundry, cleaning her wheelchair, and emptying her garbage. Also weekly, 12.5 hours were approved for a caregiver to take the petitioner offsite to New View for prevocational services. Finally, because the petitioner’s mother works away from home, worker time of 24 hours weekly was approved for evenings when the mother is away at work (four nights x 6 hours). The petitioner’s mother is also employed by a care agency, REM, as an employee who furnishes 40 hours weekly of SHC to the petitioner in their home.
6. On November 18, 2015, the CMO issued a *Notice of Action* which reduced the SHC hours to 12.5 daily, effective December 3, 2015. After receiving the *Notice*, the petitioner then filed a fair hearing request.
7. *ADLs*. This Judge’s May 2016 decision stated the following regarding ADLs:

The petitioner requires the 34.0 hours of weekly ADL help approved by the CMO. However, some of the approved ADL time requires supplementation. The petitioner’s mother advised the CMO that the petitioner takes a bath three times weekly. The CMO awarded the standard 30 minutes per bathing episode, for a total of 90 minutes weekly. The Wisconsin Department of Health Services’ *Personal Care Activity Time Allocation Table*, from *ForwardHealth Update*, No. 2009-08, identifies a standard for a daily bath/shower as requiring 30 minutes of assistance. The petitioner sometimes resists bathing care, so a 25% augmentation for difficult behavior is appropriate, resulting in an award of 112 minutes (90 + 22) weekly for bathing. The CMO awarded adequate amounts of time for dressing, grooming, toileting, medication assistance and ambulation. The CMO did not allot time for taking on/off TEDS stockings; the DHS recommended standard of 35 minutes weekly is appropriately added here. The CMO allotted 45 minutes daily for range of

motion exercises, which exceeds the DHS recommendation. The petitioner's ISP (from her own exhibit) states that she requires 45 minutes for ROM daily, so the 45 minute figure is correct.

8. The petitioner was re-assessed by registered nurse [REDACTED] [REDACTED] on July 5, 2016. The petitioner's physical condition has not changed, which makes this re-assessment relevant to the original May 2016 decision. [REDACTED] concluded that the petitioner requires the following weekly assistance with ADLs: Bathing – 360 minutes (4 days x 90 minutes), Dressing – 560 minutes (14 episodes x 40), Grooming – 130 minutes, Toileting – 840 minutes, Ambulation stand-by – 60 minutes, ROM – 315 (7 x 45, same as May 2016 decision), and Feeding assistance – 105 minutes (21 x 5 minutes). These task times total 2,710 minutes weekly/45.25 hours weekly. This determination that the petitioner requires 45.25 hours weekly for these tasks is credible.
9. [REDACTED]'s July re-assessment found that the petitioner requires 645 minutes/10.75 hours weekly for Medically-Oriented Tasks. Those tasks include mechanical transfers, medication assistance multiple times daily, skin care three times weekly, and a bowel program. This determination is credible.
10. *Disputed Non-ADLs*: At the time of the May 2016 decision, the CMO awarded 40 minutes weekly for the cleaning of the petitioner's bathroom, and 10 minutes for dusting/vacuuming her bedroom. Seventy minutes were awarded for changing bedding (10 minutes per episode x 7 days). The CMO approved the standard 10 minutes for meal preparation, for all three meals daily. Because the petitioner's food must be cut up into small pieces, this Judge added 10 minutes daily for meal preparation. The CMO awarded the DHS standard time of 15 minutes per laundry load, at one load daily. The CMO awarded 10 minutes weekly for cleaning the petitioner's wheelchair. However, she has other medical equipment that requires cleaning—a hospital table, shower chair, peddler, stander, lift bar, braces and hospital bed. This Judge added an additional 30 minutes weekly (rounded down from 35 minutes) requested by the petitioner for cleaning this equipment. The petitioner also sought cleaning time for a living room that is shared with her parents, a kitchen that is shared with her parents, and a bathroom (not her own) that is accessed by non-parental care workers. The CMO denied SHC time for cleaning those areas, and this Judge agreed with the CMO in the original decision. The DHS standard time amounts for the tasks referenced in this Finding are found in DHS' online *MIDAS SHC Assessment* table.
11. [REDACTED]'s July re-assessment found that the petitioner requires more time for non-ADLs. Specifically, she credibly found that the petitioner has weekly requirements of 50 minutes for her bathroom cleaning, 80 minutes for bedroom cleaning/changing sheets (same as May 2016 decision), 155 minutes for kitchen clean-up, and 210 minutes for meal preparation (same as May 2016), 150 minutes for laundry, 10 minutes for cleaning adaptive equipment (*same as May 2016*), 35 minutes for emptying garbage (same as May 2016), 60 minutes for a shopping excursion, and 540 minutes for supervision at New View. These amounts total 1,290 minutes/21.5 hours.
12. [REDACTED]'s July re-assessment assigned 35 minutes weekly to cleaning of a living room in the house shared by the petitioner and her parents. The necessity of SHC funds for that purpose is not supported in this record.

DISCUSSION

The Family Care program is supervised by the Wisconsin Department of Health Services, and is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized at Wis. Stat. § 46.286, and is further described at Wis. Admin. Code, ch. DHS 10.

The CMO must develop an Individual Service Plan (ISP) in partnership with the client. Wis. Admin. Code § DHS 10.44(2)(f). The ISP must reasonably address all of the client's long-term needs to assist the

client to be as autonomous as possible, while also being cost effective. While the client has input, the CMO does not have to provide all services the client desires if there are less expensive alternatives to achieve the same results. *Id.*, 10.44(1)(f). ISPs must be reviewed periodically. *Id.*, 10.44(j)(5). When there is a disagreement over the amount of services in the ISP that goes to a fair hearing, the standard for decision is the preponderance of the credible evidence; in this case the burden is on the reduction-seeking respondent.

Supportive home care (SHC) services are included in the list of FC-covered services in the statutory note for Wis. Admin. Code §DHS 10.41(2) (June, 2009). The Department's CMO contract is viewable at <https://www.dhs.wisconsin.gov/familycare/mcos/cy2016mcocontract.pdf>, and SHC is listed as a covered service. Having established that SHC hours can be a covered service, the question that remains is, how many SHC hours are essential to meeting the petitioner's needs?

The petitioner disagrees with the CMO's proffered service plan because it provides 87.5 hours weekly of supportive home care. The CMO based its 87.5 hour figure on observations of the petitioner in the fall of 2015. A specific breakdown of approved task times was proffered by the CMO in Exhibit 1, pp. 25-30.

The skeletal legal guidance that pertains to determining the type and quantity of daily care services that must be placed in an individualized service plan (ISP) is as follows:

HFS 10.44 Standards for performance by CMOs.

...

(2) CASE MANAGEMENT STANDARDS. The CMO shall provide case management services that meet all of the following standards:

...

(f) The CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee, with the full participation of the enrollee and any family members or other representatives that the enrollee wishes to participate. ... The service plan shall meet all of the following conditions:

1. *Reasonably and effectively addresses all of the long-term care needs* and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e)1.
2. *Reasonably and effectively addresses all of the enrollee's long-term care outcomes* identified in the comprehensive assessment under par. (e)2 ...

.

3. *Is cost-effective compared to alternative services* or supports that could meet the same needs and achieve similar outcomes.

...

(emphasis added)

Wis. Admin. Code §DHS 10.44(2)(f).

In the original decision, I concluded that 89.5 hours weekly were sufficient. Due to a computational error, the figure should have been 90.75 hours. However, the re-assessment by Nurse [REDACTED] makes that computation moot.

Nurse [REDACTED] was able to view the petitioner in person, in her home environment. I am reluctant to second-guess her in-person observations. Accordingly, I adopt her time computations for the tasks of bathing, dressing, grooming, toileting, ambulation, ROM, and feeding assistance. I adopt her five minutes per meal feeding assistance determination in lieu of the 10 minutes I used in my original decision for cutting up food. However, I did not observe a place to add time for the petitioner’s combativeness during bathing on the assessment tool. A 25% add-on is given for difficult behaviors in Medicaid personal care worker services, so a similar treatment seems appropriate here. I will add 90 minutes weekly for that reason.

I also found Nurse [REDACTED]’s determination that 10.75 hours weekly are needed for MOTs to be credible, and that number is adopted here.

Similarly, I found most of Nurse [REDACTED]’s determination regarding non-ADLs to be credible. I have adopted all of her assessment results, with the exception of cleaning the living room. With the exclusion of the living room cleaning, the needed time is 21.5 hours. This figure appears to include 540 minutes for supervision of the petitioner at New View. [REDACTED] awarded 10 minutes weekly for cleaning adaptive equipment, which is less than I included in the May 2016 decision. I defer to her in-person observation and expertise regarding adaptive equipment, and adopt her figure.

An ongoing dispute in this case is whether SHC time should be paid to clean the living room of the house in which the petitioner and her parents reside. Perhaps a floor plan would have helped me to understand the petitioner’s argument better. Based on what I know, there is no justification for expecting the FC program to pay to clean a common living area in the house that the petitioner and her parents share. Thus, I did not include the 35 minutes weekly shown in [REDACTED]’s assessment for cleaning the living room.

Although the petitioner argued for maintaining the prior 144 hour weekly allotment, her evidence did not adequately support portions of her argument. Her mother damaged her credibility during the hearing by making several unreasonable or incorrect assertions. For instance, although 45 minutes are needed for ROM daily (per care plan), she argued for 60 minutes for ROM in her exhibit, and 90 minutes at hearing. Also, an argument was advanced by the petitioner’s mother that the workers need an astonishing 45 minutes (rather than the approved 10 minutes) to dust/vacuum, mop the petitioner’s 10 x 12 foot bedroom. This caused me further concern as to the mother’s credibility. The petitioner also correctly observed that a reduction from 144 hours to (now) 103 hours is substantial. The problem with the old, 144 hour calculation, is that I have no way to assess its rationality. That number was awarded by a predecessor agency, which was not at hearing to explain how it got to this number. There is no documentation comparable to the *MIDAS SHC Assessment* documents submitted at the May 2016 hearing and in the rehearing submission period, to show me how the previous agency came up with 144 hours. In my lengthy experience, 144 weekly hours is a very large award. I have no way of knowing what standards the 144 hours was based on, *if any*. Thus, the old level of service determination was given less deference than a clearly explicated determination would have been given.

After tallying the time allotments that I have determined, in my discretion, to be “reasonable” and “cost-effective,” a weekly average of 103.0 hours of service time results. The tally, expressed in hours per week, is as follows:

ADLs	45.25
Bathing add-on	1.5
MOTs	10.75
Other weekly tasks	21.5 (includes New View time)
Parent working offsite	<u>24.0</u>
Weekly Total	103.00

CONCLUSIONS OF LAW

1. To meet the petitioner’s credible care needs, the petitioner reasonably requires 103.0 hours of SHC service time weekly from the Family Care program.

THEREFORE, it is

ORDERED

That the petition herein be remanded to the CMO with instructions to enter 103.0 hours of weekly SHC time effective December 3, 2015, into the petitioner’s current ISP. This action shall be taken within 10 days of the date of this Decision. In all other respects, the petition is dismissed.

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, **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 25th day of July, 2016

\s _____
Nancy J. Gagnon
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 July 25, 2016.

Care Wisconsin First, Inc
Office of Family Care Expansion
Health Care Access and Accountability

