



FH
2181422524

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Germantown, WI 53022

DECISION
Case #: FCP - 177326

PRELIMINARY RECITALS

Pursuant to a petition filed on October 14, 2016, under Wis. Admin. Code § DHS 10.55, to review a decision by Waukesha and Milwaukee counties regarding the Medical Assistance (MA), a hearing commenced on November 16, 2016 with another Division of Hearings and Appeals ALJ and was adjourned to give parties an opportunity to continue case organization. It recommenced on December 13, 2016 with the undersigned ALJ but was adjourned to allow participation by both Milwaukee and Waukesha counties. The hearing concluded on February 6, 2017.

The issue for determination is whether the start date for the Petitioner's enrollment in Family Care can be backdated.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Germantown, WI 53022

Petitioner's Representative:

Attorney Jonathan P. Barstow
Barstow Elder Law Center SC
2149 Velp Ave Suite 205
Green Bay, WI 54303

Respondent:

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

By: Jan Sanchez for Waukesha County and Teresa Smith for Milwaukee County

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # 2181422524) is currently a resident of Milwaukee County. She is years of age (DOB).

2. Petitioner inquired about Family Care Program (FCP) eligibility in July 2016 with Waukesha County. A LTFS was performed on July 18, 2016.
3. Petitioner's family was seeking an assisted living type of facility for Petitioner to live in and ended up with Petitioner living in Milwaukee County as of mid-August 2016. There was some communication with Waukesha County staff about this.
4. The Medicaid application necessary for the FCP was submitted by Petitioner's attorney by fax on August 24, 2016. That was sent to Milwaukee County and Milwaukee processed it as an elderly blind and disabled application and established eligibility for Petitioner but with a deductible. The application submitted for Petitioner does have a FCP enrollment application included but as that form is usually completed by the ADRC the economic support agency contacted the Milwaukee ADRC for additional information.
5. On October 18, 2016 Waukesha transferred Petitioner's long term functional screen to Milwaukee after inquiry from Milwaukee County.
6. A second long term functional screen was performed for Petitioner by Milwaukee County in December 2016.
7. The completed enrollment package for Petitioner was received by the economic support agency in Milwaukee from the Milwaukee ADRC in December 2016.
8. There is no evidence or contention that Petitioner was ineligible for the FCP upon completion of the LTFS and the application in August 2016. There were no notices available to put into the hearing record that indicate a denial of FCP eligibility though a September 2, 2016 notice was sent to Petitioner's attorney and states that no action was needed on behalf of Petitioner and that the agency was checking with other agencies as to community waivers. The lack of any contact is, at least in part, what triggered the October 14, 2016 appeal.
9. There was phone contact during the process here by Petitioner's family and attorney with at least some agency staff as to Petitioner's move to Milwaukee and other matters related to the process.
10. Petitioner's income is from Social Security and is about \$1400.00 per month.
11. Milwaukee County enrolled Petitioner in the FCP as of January 1, 2017.

DISCUSSION

I want to recognize at the outset that there is a dearth of precise evidence for this case – the process stretched out for several months and involved 2 counties, 2 ADRCs, at least one economic support agency (Milwaukee Enrollment Services), multiple staff from these agencies, Petitioner's family and Petitioner's attorney. Regardless, the issue here is not to find fault or blame but to determine whether the FCP eligibility date for Petitioner can be established earlier than January 1, 2017.

The Family Care program, which is supervised by the Department of Health Services, 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. Admin Code, § DHS 10.31(6) Eligibility determination.

- (a) Decision date. Except as provided in par. (b), as soon as practicable, but not later than 30 days from the date the agency receives an application that includes at least the applicant's name, address, unless the applicant is homeless, and signature, the agency

shall determine the applicant's eligibility and cost sharing requirements for the family care benefit, using a functional screening and a financial eligibility and cost-sharing screening prescribed by the department. If the applicant is a family care spouse, the agency shall notify both spouses in accordance with the requirements of s. 49.455 (7), Stats.

(b) Notice. The agency shall notify the applicant in writing of its determination. If a delay in processing the application occurs because of a delay in securing necessary information, the agency shall notify the applicant in writing that there is a delay in processing the application, specify the reason for the delay, and inform the applicant of his or her right to appeal the delay by requesting a fair hearing under s. DHS 10.55.

Wis. Admin. Code, §DHS 10.33(2) provides that an FCP applicant must have a functional capacity level of comprehensive or intermediate (also called nursing home and non-nursing home). The process contemplated for an applicant is to test his/her functional eligibility, then his/her financial eligibility, and if s/he meets both standards, to certify him/her as eligible. Then s/he is referred to a Managed Care Organization (MCO) for enrollment in the MCO. See Wis. Admin. Code, §§DHS 10.33 – 10.41. The MCO then drafts a service plan using MCO selected providers, designing a care system to meet the needs of the person, and the person executes the service plan. At that point the person's services may begin. With regard to the start date, Wis. Admin. Code, §DHS 10.36(1), provides that a person who meets all conditions of eligibility is entitled to enroll in an MCO. §DHS 10.36(2) provides that entitlement to the FC benefit first applies on the effective date of the contract between the MCO and the applicant:

...

(a) Effective date. Except as provided in pars. (b) and (c), within each county and for each CMO target population, entitlement to the family care benefit first applies on the effective date of a contract under which a CMO accepts a per person per month payment to provide services under the family care benefit to eligible persons in that target population in the county.

...

Wis. Admin Code, §DHS 10.36(2)(a).

The Department of Health Services explains the process for applying for Family Care as follows:

1. There are three steps to determine eligibility and enrollment in a Family Care MCO. The ADRC helps people with each step. The ADRC will visit the person and complete the Long Term Care Functional Screen to assess the person's level of need for services and functional eligibility for the Family Care benefit. Once the individual's particular needs for long-term care are determined, the ADRC will provide advice about the options available to him or her. Options may include enrollment in Family Care, Partnership, IRIS or a different long-term care program. Or the person could choose to receive services through the Medicaid fee-for-service system, or to privately pay for services.
2. If the person is interested in Family Care or another Medicaid program, the ADRC will help the person contact an income maintenance agency to determine financial eligibility.
3. Once functional and financial eligibility is established, the ADRC contacts the person, either by phone or in person. The ADRC makes sure the person understands what it means to become a member of the MCO, and that he or she understands all the options

for long-term care available. If the person decides on Family Care, the resource center finishes the enrollment process and notifies the MCO of the enrollment date.

<https://www.dhs.wisconsin.gov/familycare/apply.htm>

Strictly applying the regulations concerning the date of Family Care enrollment can and has led to harsh results. With many entities involved—local agencies, the ADRC, and the CMO—applications sometimes get lost in the shuffle and the chance for error increases. When this happens, the potential recipient, through no fault of his own, does not receive benefits he is entitled to and must find his own financing for things such as nursing care and adult family homes. Because Family Care benefits are not retroactive, stringently applying the regulation that allows benefits only to those actually enrolled in a CMO does not allow the department or the Division of Hearings and Appeals to correct any error that might occur somewhere in the application process by paying for services the applicant has already received and was eligible for. The Division of Hearings and Appeals has issued a number of decisions upholding this type of result because it lacks equitable powers that would allow it to consider the fairness of the situation. See, e.g., DHA Decision No. FCP/163632.

In the last year, the Department of Health Services has issued some final decisions that mitigate the harshness of this interpretation. Although the department's final decisions are not binding on the Division of Hearings and Appeals, the division generally gives them significant weight and deference. Recently, the Department issued Final Decision No. FCP/173457. In that matter, the agency incorrectly calculated the applicant's assets, which led to an incorrect denial of Family Care benefits. The final decision reversed the denial and found the applicant eligible back to the date of his second application. In doing so, it held: "Although there is no retroactive enrollment in the Family Care program, enrollment as of the date established in correction of an agency error is necessary and appropriate."

Another final decision, this one modifying a decision the Division of Hearings and Appeals issued last October, found that enrollment in a CMO can begin "effective the actual date on which an individual completed an enrollment form and meets all eligibility and entitlement criteria, even if that date is earlier than the date on which the agency completes all its calculations/verifications and verifies the individual has met all financial and non-financial eligibility criteria." Final Decision No. FCP167655. As an example, it noted that if a "person was determined to be functionally eligible on January 1st and also completed the MA application and the Family Care Enrollment form on January 1st, but the agency finishes its eligibility determination on February 5, 2015, and verifies the person met all financial, non-financial eligibility criteria as of January 1st, there is nothing that precludes enrolling the person effective January 1st."

There are three points to take from this decision. First, enrollment can begin before the date the CMO actually accepts the person into the program. The department noted that in these instances, the CMO could receive capitation payments to cover the cost of the service it provided before the person was formally accepted into the program. Of course, if the applicant loses his appeal, he may be responsible for those costs. The second point is that financial eligibility does not depend upon the date the applicant proves that he is financially eligible but rather on the date he actually met the financial requirements. Third, functional eligibility begins on the date a functional screen establishes that the person is functionally eligible. This is established by the language in Final Decision No. FCP167655 (rehearing requested by the agency and denied by DHS Secretary Office on September 13, 2016) that makes eligibility dependent on the date the person was determined to be functionally eligible." This refers to the date that the determination was made. If the department had meant for functional determinations to consider the person's functional ability before it was determined, the language would clearly state this as it did when referring to financial eligibility.

All of the above can be applied to this case.

Petitioner was functionally eligible for the FCP as of the July 2016 long term functional screen. Financial eligibility is not an issue. Financial eligibility for the FCP is based on home and community based waiver financial standards. *MEH*, §38.1.

Beyond that there were delays in processing Petitioner's application and eligibility which resulted in a delay in enrollment in Family Care. The evidence does not suggest any lack of diligence on the part of Petitioner's representatives in their efforts to provide the necessary information for the processing of the applications. I cannot conclude that any errors and delay were caused by the Petitioner or her representatives. Again, there is no reason to find blame or fault, but it is apparent that this case is something of a 'pop fly' that dropped through no fault of Petitioner. Thus, I conclude that this is a case in which the holding from the Department of Health Services' final decision of FCP/173457 noted above is appropriate: "Although there is no retroactive enrollment in the Family Care program, enrollment as of the date established in correction of an agency error is necessary and appropriate." In this case, the record is clear that Petitioner was functionally and financially eligible for Community Waivers/Family Care as of August 24, 2016 and should have been enrolled effective as of that date.

CONCLUSIONS OF LAW

The Petitioner was functionally and financially eligible for Community Waivers/Family Care as of August 24, 2016 and should have been opened for Community Waivers and enrolled in Family Care as of that date.

THEREFORE, it is

ORDERED

That this matter is remanded to the IM agency and the ADRC to take all administrative steps necessary to revise its records to show Petitioner's effective date of enrollment in Community Waivers and the Family Care program is August 24, 2016. These actions shall be completed 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.

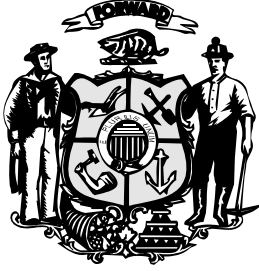
APPEAL TO COURT

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, **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 24th day of February, 2017

\s _____
David D. Fleming
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on February 24, 2017.

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Health Care Access and Accountability
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