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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION
Case #: FCP - 206703

PRELIMINARY RECITALS

Pursuant to a petition filed on October 31, 2022, under Wis. Admin. Code § DHS 10.55, to review a decision by the MY Choice Family Care regarding Medical Assistance (MA), a hearing was held on January 11, 2023, by telephone.

The issue for determination is whether the agency erred in its denial of request for SHC hours for petitioner's mother to accompany her to medical appointments.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

Mary Colleen Olson
Disability Rights Wisconsin
1502 W. Broadway Suite 201
Madison, WI 53713

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By: [redacted]
MY Choice Family Care
10201 Innovation Dr, Suite 100
Wauwatosa, WI 53226

ADMINISTRATIVE LAW JUDGE:
John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Dane County.
2. Petitioner is enrolled in the Family Care Program ("FCP").
3. Petitioner's diagnoses[1] include:
    - Chronic pain
    - Calculus of kidney = kidney stones
    - Ehlers-Danlos syndrome
    - Epicondylitis of elbow
    - Fibromyalgia
    - Lumbago with sciatica
    - Abdominal pain
    - Dizziness and giddiness
    - Bipolar disorder
4. My Choice Family Care is petitioner's Family Care agency and is respondent in this matter.
5. Petitioner's 6/1/22 FCP Member Centered Plan indicates that petitioner is independent with regard to communication and telephone communication, but that she does need assistance with decision-making.
6. Petitioner's 6/2/22 Long-Term Care Functional Screen indicates that petitioner "can fully communicate with no impairment or only minor impairment."
7. Petitioner lives in a residence with her mother and her sister. Both petitioner's mother and her sister are paid caregivers to petitioner.
8. Petitioner sister is authorized to provide 31.5 paid hours of supports.
9. Petitioner's mother, [redacted], is authorized for reimbursement of 125 miles per week for medical transportation.
10. On 6/15/22 petitioner requested supportive home care hours for the purpose of payment to petitioner's mother to accompany her to medical appointments and facilitate petitioner's engagement in those appointments.
11. The agency denied the request by notice dated 7/8/22.
12. Petitioner appealed the denial to the agency's grievance committee which upheld the denial.
13. Petitioner filed a timely appeal to DHA.
14. In a letter dated 10/27/22 and addressed "To whom it may concern", petitioner's chiropractor, Dr. [redacted], stated his position that "[i]n my medical opinion, I do not believe it is necessary for [redacted] to be present in all chiropractic appointments. We can communicate before, after, or during appointments as we have up to this point." This provider also provided a different letter dated in September that advocated for [redacted] to accompany petitioner to appointments.
15. In a letter with a fax header date of 10/18/22, petitioner's psychotherapist at UW Health stated her position that "I do not encourage [petitioner's] mother to attend all therapy sessions. I wish to support [redacted] in increased independence and self-advocacy."

[1] These are the diagnoses noted in the DRW letter brief. I have also reviewed and considered additional diagnoses found elsewhere in the record included in the 6/1/22 member Centered Plan and the Long-Term Care Functional Screen.

DISCUSSION

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. Whenever the local Family Care program decides that a person is ineligible for the program, or when the CMO discontinues an ongoing service in the service plan, the client is allowed to file a fair hearing request. Because a service reduction is sought here, the Petitioner appropriately sought a fair hearing for a further, de novo review of the CMO decision. Wis. Admin. Code §DHS 10.55(1). It is the agency's burden to prove by a preponderance of the evidence that the reduction in services and hours is appropriate.

The state code language on the scope of permissible services for the FC reads as follows:

> DHS 10.41 Family care services. …
> (2) SERVICES. Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department's contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under 42 USC 1396n(c) and ss.46.275, 46.277 and 46.278, Stat., the long-term support services and support items under the state's plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and meet the needs of enrollees as identified through the individual assessment and service plan.
>
> Note: The services that typically will be required to be available include adaptive aids; adult day care; assessment and case planning; case management; communication aids and interpreter services; counseling and therapeutic resources; daily living skills training; day services and treatment; home health services; home modification; home delivered and congregate meal services; nursing services; nursing home services, including care in an intermediate care facility for the mentally retarded or in an institution for mental diseases; personal care services; personal emergency response system services; prevocational services; protective payment and guardianship services; residential services in an RCAC, CBRF or AFH; respite care; durable medical equipment and specialized medical supplies; outpatient speech; physical and occupational therapy; supported employment; supportive home care; transportation services; mental health and alcohol or other drug abuse services; and community support program services.

Wis. Admin. Code §DHS 10.41(2).

Supportive home care is included in the list of covered services in the statutory note above. Having established that SHC hours can be a covered service, the issue is whether the agency has appropriately determined the SHC hours that are essential to meeting the Petitioner's needs.

SHC services are permitted as follows:

> Supportive Home Care (SHC) is the provision of a range of services for participants who require assistance to meet their daily living needs, ensure adequate functioning in their home and permit safe access to the community.

Supportive home care services include:

1. Personal Services

a. Assistance with activities of daily living such as eating, bathing, grooming, personal hygiene, dressing, exercising, transferring and ambulating;
b. Assistance in the use of adaptive equipment, mobility and communication aids;
c. Accompaniment of a participant to community activities;
d. Assistance with medications that are ordinarily self-administered;
e. Attendant care;
f. Supervision and monitoring of participants in their homes, during transportation (if not done by the transportation provider) and in community settings;
g. Reporting of observed changes in the participant's condition and needs; and
h. Extension of therapy services. "Extension of therapy services" means activities by the SHC worker that assist the participant with a PT/OT or other therapy/treatment plan. Examples of these activities include assistance with exercise routines, range of motion exercises, standing by during therapies for safety reasons, having the SHC worker read the therapist's directions, helping the participant remember and follow the steps of the exercise plan or hands on assistance with equipment/devices used in the therapy routine. It does not include the actual service the therapist provides.

2. Household Services

a. Performance of household tasks and home maintenance activities, such as meal preparation, shopping, laundry, house cleaning, simple home repairs, snow shoveling, lawn mowing and running errands;
b. Assistance with packing/unpacking and household cleaning/organizing when a participant moves.

3. Room and board costs for SHC providers who "live in" are allowable under this SPC.

Application for a §1915(c) Home and Community-Based Services Waiver, Waiver Number WI.0485.R01.00, Effective January 1, 2011 (emphasis added).

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 and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes.

…

Wis. Admin. Code §DHS 10.44(2)(f).

Petitioner argued, through counsel, that her mother must accompany her to medical appointments in order to provide assistance with ADL's and communication prior to, during, and after the appointment. Petitioner argues that her mental health issues make it difficult for her to express necessary facts and needs to her providers and also to understand and process information conveyed by providers. Petitioner also explained that, in addition to transportation petitioner's mother provides emotional support and support with mobility, and potentially other needs, when at the appointment. At hearing, petitioner clarified that there is no ceiling or cap to the requested allowance, and that petitioner seeks payment for her mother's time at "any and all" appointments.

At hearing, the agency explained that it offered numerous alternatives to compromise and achieve some of what petitioner is seeking. The agency explained that it offered medical transportation services for petitioner to travel to her appointments. The agency representative also explained that provider offices are able to facilitate patients' mobility at the appointments if needed. The agency explained that it had suggested the use of MyChart in order for petitioner's mother to communicate with providers. The agency also offered some additional hours per month for the purpose sought by petitioner but the hours would be capped at 6.5 per month at $15.00 per hour. The agency explained that petitioner found all of the proposals unsatisfactory. The agency representative testified that petitioner is able to communicate in a two-way conversation and would be able to satisfactorily communicate at a medical appointment.

Both parties submitted letters from providers. I read and considered them all in reaching the decision in this matter. I find it very interesting that Dr. [redacted], the chiropractor, provided a letter to petitioner that advocated for her mother's attendance, and provided a different and subsequent letter to respondent advocating the opposite. I find it not unreasonable for the subsequent letter to supersede the earlier one. But, I also question whether the provider simply wrote the letter that was sought by the different requestor with little care as to what was communicated. This is the perfect example of the deficiency of such letters. An ALJ is unable to know the conversation that led to the submission; and the ALJ is unable to question the provider in order to determine credibility and rationale. It is also often unclear, as it is in this case, whether such providers understand at the time of the writing of such a letter, that the letter will be

submitted as evidence at a legal proceeding as pseudo-testimony. Actual testimony would be under oath, these letters are not. The ALJ is additionally unable to ask clarifying questions such as to determine whether some lesser allowance could meet petitioner's desire. For these reasons, letters from providers present challenges and their weight is often minimal.

Of more interest to me in this case is the letter from petitioner's therapist. She does not remain neutral but states that she does not support petitioner's mother's attendance at appointments. Again, I was unable to ask her questions about her reasoning. But my impression is that the therapist believes her mother can be a barrier to petitioner's "independence and self-advocacy." This is notable in that at hearing, petitioner's mother is the one who testified. Petitioner did not testify. And, petitioner's mother even testified to try to clarify what the therapist meant in her letter. Petitioner also submitted a written statement that was typed by her mother. Petitioner's mother, however, testified that the words in the statement were petitioner's. Those statements in that letter were also not under oath. Petitioner's mother provided the only testimony for petitioner and is the person who would benefit financially from the granting of petitioner's request. This creates an inherent bias. I also note that the Member-Centered Plan and the Long-Term Care Functional Screen both seem to say that petitioner is able to communicate adequately. I do not doubt that there are some barriers. But the request of petitioner suggests some inability to communicate or advocate. This is not demonstrated by these documents which are the product of various inputs including that of petitioner and her mother.

Based on the record at hearing, I am unpersuaded that petitioner has a medical need for the services petitioner seeks. In fact, I am not entirely convinced that petitioner, herself, seeks the additional services. I find it at least as likely that petitioner's mother wants the additional hours, the related compensation, and that petitioner's mother wishes to be present at all appointments because she wants to be involved. Finally, I note that nothing in this Decision precludes petitioner's mother from attending appointments with petitioner. The only issue in this case is whether the agency should grant additional SHC hours in order to pay money to petitioner's mother for such accompaniment.

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs. The petitioner is seeking to change the present state of affairs: the petitioner by requesting an increase in the supportive home care hours for a specific purpose. Based on the record here, I am not persuaded that SHC hours utilized for her mother's in-person attendance at all of her medical encounters are necessary, reasonable, appropriate or cost-effective to meet petitioner's outcomes.

CONCLUSIONS OF LAW

1. The FCP agency did not err in its denial of the request for SHC hours in order for petitioner's mother to accompany her to all medical appointments; and,
2. Petitioner did not meet her burden of demonstrating that it is necessary and reasonable for her mother to accompany her to all medical appointments.

THEREFORE, it is ORDERED

That this appeal 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, 4822 Madison Yards Way, 5th Floor North, 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 Madison,
Wisconsin, this 16th day of February, 2023

\s

John P. Tedesco
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 February 16, 2023.

MY Choice Family Care
Office of Family Care Expansion
Health Care Access and Accountability
[redacted]