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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

██████████
██████████
██████████

DECISION
Case #: FCP - 211106

PRELIMINARY RECITALS

Pursuant to a petition filed on November 17, 2023, under Wis. Admin. Code § DHS 10.55, to review a decision by the Inclusa Inc/Community Link regarding Medical Assistance (MA), a hearing was held on December 13, 2023, by telephone.

The issue for determination is whether petitioner meets the criteria for the FCP nursing home level of care under the Wisconsin Administrative Code.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

██████████
██████████
██████████

Respondent:

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

By:

Inclusa Inc/Community Link
3349 Church St Suite 1
Stevens Point, WI 54481

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Sauk County.
2. For purposes of FCP eligibility a LTCFS was completed on 10/12/23.

3. The parties agreed at hearing that the 10/12/23 LTCFS was accurately completed and the data are correct.
4. Petitioner has a permanent cognitive impairment.
5. Petitioner uses an adaptive aid for bathing.
6. Petitioner cannot safely or appropriately perform 5 IADL's: meal prep, money management, laundry/chores, transportation, and work.

DISCUSSION

The Family Care program (FCP), which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or physically/developmentally disabled adults. It is authorized under Wisconsin Statute, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10. In order to qualify for FCP services, with certain exceptions not applicable here, a person's functioning must be such that they would otherwise require institutional care, which under the Administrative Code is defined as a "comprehensive functional capacity level". Wis. Stat. §46.286(1)(a); Wis. Admin. Code §DHS 10.33(2)(c).

To be found eligible for FCP, the applicant must undergo an assessment of his/her needs and functioning. The Wisconsin Department of Health Services made efforts to improve the statewide efficacy of functional assessments by designing and implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained quality assurance screener. The screener met with the petitioner as part of the reassessment process. In this case, the petitioner and the agency agree as to the accuracy of the data in the 10/12/23 LTCFS. Current policy requires the Department's local agent/screener to then enter this data into the Department's functional screen computer program. See <http://dhs.wisconsin.gov/LTCare/FunctionalScreen/Index.htm>. The Level of Care (LOC) Functional Screen form and program reiterate the skeletal definitions from the federal Medicaid rules for Intermediate Nursing Care and institutional Developmental Disability facilities. 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. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

However, the computer program infrequently yields a result that is not consistent with state code. Wis. Admin. Code § DHS 10.33(2)(c) describes comprehensive (a/k/a nursing home) functional capacity:

(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, ...

(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).

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. Admin. 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. Admin. Code, § 10.13(32). In addition, the LTCFS tool lists “Laundry and/or Chores” as an IADL. It is thus clear that departmental policy considers the performance of laundry and chores to be an IADL. This is consistent with federal Medicaid regulations which indicate that IADLs include the performance of essential household chores. See 42 C.F.R. § 441.505.

Based on the record at hearing, specifically the LTCFS, petitioner has a “permanent cognitive impairment” among his other diagnoses. The record demonstrates, and the respondent’s own LTCFS’s conclude, that petitioner uses an adaptive aid for the ADL of bathing and needs assistance with at least four IADL’s: meal prep, money management, laundry/chores, transportation, and work.

The long line of cases addressing this question has consistently found that use of an adaptive aid is equivalent to requiring human assistance and therefore is sufficient to find that the petitioner requires assistance with the related ADL. The petitioner’s position is supported by DHA decisions and a Final Decision of the DHS, which have found that the use of adaptive aids is sufficient to establish a need for assistance with an ADL. DHS Deputy Secretary Final Decision FCP-169534 (Sept. 7, 2016); DHA Decision Case No. 175205 (Sept. 30, 2016); DHA Decision Case No. 178455 (April 13, 2017); DHA Decision Case No. CWA-181224 (Aug. 3, 2017).

Therefore, per subsections (c)4 and (c)5 quoted above, he qualifies for the nursing home level of care because he has a cognitive impairment and he cannot safely or appropriately perform 4 or more IADL’s. See Wis. Adm. Code, §DHS 10.33(2)(c)5, or one or more ADL and 3 or more IADLs per (c)4.

Therefore, although the screening personnel followed their DHS instructions correctly, the conclusion relating to level of care was incorrect under the Code. This decision is in accord with prior decisions FCP-11/113325 (Wis. Div. of Hearings & Appeals October 26, 2010, ALJ Schneider)(DHS), FCP-44/115906 (Wis. Div. of Hearings & Appeals April 5, 2011, ALJ Schneider)(DHS), and Rehearing FCP/130316 (Wis. Div. of Hearings & Appeals September 29, 2011, ALJ O’Brien)(DHS). Based upon the above, I find that the petitioner falls into the comprehensive functional capacity/nursing home level of care according to the Wisconsin Administrative Code provisions.

CONCLUSIONS OF LAW

The Department determination regarding level of care is inconsistent with the Administrative Code criteria and petitioner meets the legal criteria for the nursing home level of care.

THEREFORE, it is

ORDERED

That the petition be remanded to the agency with instructions to find that petitioner meets nursing home level of care and FCP eligibility based on the 10/12/23 LTCFS, in accord with the Conclusion of Law above, if he is otherwise eligible for the program. This action shall be taken 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, 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).

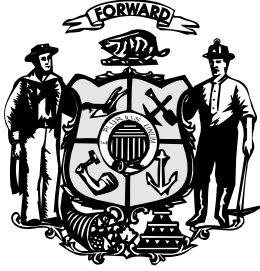
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 23rd day of January, 2024



\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 January 23, 2024.

Inclusa Inc/Community Link
Office of Family Care Expansion
Health Care Access and Accountability