



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

██████████
██████████
██████████

DECISION
Case #: FCP - 211909

PRELIMINARY RECITALS

Pursuant to a petition filed on January 29, 2024, 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 March 27, 2024, by telephone.

The issue for determination is whether the respondent correctly determined that petitioner does not meet the nursing home level of care for Family Care Program purposes.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

██████████
██████████
██████████

Petitioner's Representative:

Amy Lancelle
Disability Rights Wisconsin
1655 University Dr
Menasha, WI 54952

Respondent:

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

By: J. Barnett

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

ADMINISTRATIVE LAW JUDGE:

John Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Green Lake County.

2. Petitioner is enrolled in the Family Care Program (“FCP”).
3. The agency had a long-term care functional screen (“LTCFS”) completed on 10/12/23.
4. Petitioner is 59 years old with diagnoses including Cerebellar Atrophy, Osteo Arthritis, Neuropathy, and Chronic Pain.
5. Petitioner currently needs, has and is using an adaptive aid for 3 ADLs (bathing, toileting and mobility).
6. Petitioner cannot safely or appropriately complete and needs assistance with 3 IADLs (meal prep, laundry/chores, and work)
7. Petitioner meets the physical disability target group for FCP purposes.
8. The agency submitted the LTCFS data to DHS for analysis and the DHS algorithm determined that petitioner did not meet the nursing home level of care.
9. By notice dated 1/24/24 of the Inclusa grievance panel the agency affirmed a decision that petitioner does not meet the nursing home level of care.

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 has made efforts to improve the statewide accuracy of functional assessments by designing and implementing a computerized functional assessment screening system called the Long-Term Care Functional Screen (LTCFS). The LTCFS is part of a computer program developed by the Department to determine an individual’s level of care, which is also known as a functional level, and ultimately, the individual’s eligibility for Family Care services. Wis. Admin. Code. § DHS 10.33(2)(a). A screener starts the assessment by completing a face-to-face interview with the applicant. Policy requires the screener to then enter the data/information obtained from the interview into the Department’s LTCFS computer program. The LTCFS program is supposed to follow the skeletal definitions from the federal Medicaid rules for Intermediate Nursing Care and institutional Developmental Disability facilities. Agencies use a person’s computed functional level of care produced by the LTCFS program to determine whether a person will be eligible for FCP and/or whether a service will be covered. Generally, the level of supportive home care services depends upon whether a person is determined to require a nursing home level of care or non-nursing home level of care. On January 9, 2017 DHS issued new instructions for completing the LTCFS.

The terms “nursing home level of care” and “non-nursing home level of care” are given general definitions in Wis. Stats §46.286(1)(a):

- (a) Functional eligibility.** A person is functionally eligible if the person's level of care need, as determined by the department or its designee, is either of the following:
- 1m.** The nursing home level, if the person has a long-term or irreversible condition, expected to last at least 90 days or result in death within one year of the date of application, and requires ongoing care, assistance or supervision.
 - 2m.** The non-nursing home level, if the person has a condition that is expected to last at least 90 days or result in death within 12 months after the date of application, and is at risk of

losing his or her independence or functional capacity unless he or she receives assistance from others.

In further defining levels of care for the Family Care Program, Wis. Admin. Code §10.33(2)(c) and (d) refers to “nursing home level of care” as “Comprehensive functional capacity” and it refers to “non-nursing home level of care” as “intermediate functional capacity”:

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.

Intermediate functional capacity level. A person is functionally eligible at the intermediate level if the person is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others, as is evidenced by a finding from application of the functional screening that the person needs assistance to safely or appropriately perform either of the following:

1. One or more ADL.
2. One or more of the following critical IADLs:
 - a. Management of medications and treatments.
 - b. Meal preparation and nutrition.
 - c. Money management.

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.

There are no disputes of material fact in this matter. Rather, the issue in this case is a legal one: specifically, whether the petitioner's undisputed need for adaptive aid devices is equivalent to requiring human assistance and should therefore be counted as an ADL requiring assistance for purposes of determining whether the petitioner is functionally eligible for FCP. The petitioner argues 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). The agency has the burden of proof in this case as it involves a change in the petitioner's eligibility for FCP.

In the present matter, the results of the LTCFS are undisputed. Petitioner cannot safely perform, or uses adaptive aids for 3 ADL's and 3 IADL's. When the petitioner's functional ability scores were entered into the DHS algorithm, the result was a LTCFS determination that the petitioner does not have care needs at the nursing home level. The petitioner was then found to be ineligible for FCP.

DHS revised the LTCFS instructions in January 2017. The petitioner does not dispute that the Inclusa screener followed the revised January 2017 LTCFS instructions. It appears there remain internal inconsistencies between the LTCFS Instructions and the LTCFS computer logic, particularly with regard to whether the use of adaptive aids constitutes a need for assistance. In addition, there is inconsistency with regard to the Administrative Code provisions. Though the prior cases and DHA decisions are not binding precedent, for purposes of consistency it is reasonable to adopt the rationale in those prior cases resulting in a finding that the use of adaptive equipment is equivalent to human assistance.

Therefore, the petitioner falls into the comprehensive functional capacity/nursing home level of care because petitioner needs assistance with three or more ADLs and three IADLs. See Wis. Admin. Code §DHS 10.33(2)(c)1 and 2.

CONCLUSIONS OF LAW

1. The petitioner meets the nursing home level of care criteria under Wis. Admin. Code §DHS 10.33(2)(c)1 and 2.
2. The petitioner meets functional eligibility requirements for the Family Care program.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to take all administrative steps necessary to rescind its Notice of Change in Level of Care dated January 24, 2024 issued to the Petitioner and revise its records to reflect Petitioner's continuing eligibility for the FCP program at a nursing home level of care. 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, 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).

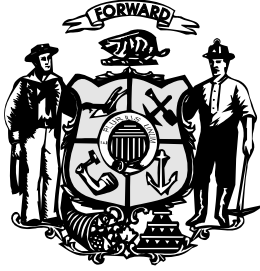
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

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



\s

John 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 April 23, 2024.

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

