FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION
Case #: FCP - 216075

PRELIMINARY RECITALS

Pursuant to a petition filed on November 26, 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 January 8, 2025, by telephone.

The issue for determination is whether the FC agency erred in its action to reduce supportive home care from 496 hours per month to 446 hours per month.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

Jessica Toscano
Aging And Long-Term Care
1402 Pankratz Street, Suite 111
Madison, WI 53704

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By: H. Rux
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 Douglas County.
2. Petitioner is enrolled in the Family Care Program ("FCP").

3. Inclusa, the FCP agency, issued a notice on 10/4/24 reducing petitioner's SHC from 196 per year to 446 per year.
4. Petitioner filed a grievance with the agency.
5. The agency upheld the reduction by notice of decision on 11/20/24.
6. Petitioner appealed to DHA

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 after an internal grievance. Because a service reduction is sought here, and the decision was upheld by the agency after a grievance, the Petitioner appropriately sought a fair hearing for a further 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:

> DHS 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).

It is a well-established principle that a moving party, meaning the party that wants to change the status quo, 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). In this case, it is Inclusa who is acting to reduce existing service to petitioner. In this case, **Inclusa has the burden at hearing to show that the action it wishes to take is justified and correct.**

At hearing, the agency representative read a statement into the record. This statement explained that SHC hours were reduced from 496 hours per month to 446 hours per month. She explained that the reduction followed a periodic review of authorized services and a resulting identification by the agency of excess hours of SHC that had been approved but were not necessary in petitioner's case. The representative also explained that the "team" followed policies and guidelines after identifying the "Medicaid waste." The representative explained that the team used the RAD companion when making the determination.

The problem is that even after the presentation by the agency, it is not at all clear to me why the reduction was determined to be appropriate. The representative did not mention a single change in petitioner's condition or environment or caregivers that resulted in a finding that he has less need than he did 6 months ago when this agency thought 496 hours was appropriate. The agency representative made vague allusions to "active supervision" and passive supervision" and what those terms mean. But, the representative did not provide any testimony that explained why she was talking about those terms or how

they applied to petitioner's assessments. The representative did not explain what hours were found to be "waste" and why they were previously approved but now found to be unnecessary.

A case like this does not need to be complex or include hundreds of pages of documents. It can be quite simple really. An agency may explain what happened with the petitioner that resulted in a change to his needs, such as an injury that healed and resulted in improved mobility. Or, if petitioner's condition has not changed, the agency could clearly explain that the agency had previously erred in granting hours for certain tasks which it should not have granted previously. But, simply implying that new agency staff have looked at the case and they feel differently does not justify a reduction. After all, next year a new team may come in and have again different opinions. Will that make another reduction justified?

Petitioner's representative similarly read a statement into the record and provided no substantial evidence through her testimony. She also did not identify what specific hours were reduced and explain why the reduction was wrong.

But, when an agency seeks to change or reduce services it previously covered, it is the agency's burden to prove that the change should occur. It may be that the agency is correct about the reduction. But, it must show that at hearing. Simply reading a statement that essentially says "we followed our procedures" is not persuasive. Because it was the agency's burden to demonstrate that the action in this case was correct, and because the agency's presentation of evidence at hearing was vague and unpersuasive, the agency does not prevail.

CONCLUSIONS OF LAW

The agency did not err meet its burden to demonstrate that the reduction in supportive home care hours is appropriate.

THEREFORE, it is ORDERED

That this matter is remanded to the agency with direction to reverse the 10/4/24 reduction in supportive home care. This must be completed within 10 days 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 24th day of February, 2025

\s_____
John Tedesco
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
5th Floor North
4822 Madison Yards Way
Madison, WI 53705-5400

Telephone: (608) 266-7709
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on February 24, 2025.

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