



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

FCP-20/59842

PRELIMINARY RECITALS

Pursuant to a petition filed September 25, 2003, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Office of Strategic Finance (OSF) in regard to Family Care Program, a hearing was held on February 9, 2004, at Fond Du Lac, Wisconsin. Hearings set for October 24, 2003 and January 9 and 21, 2004, were rescheduled at the petitioner's request.

The issue for determination is whether the agency correctly denied a number of services.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Department of Health and Family Services
Office of Strategic Finance
1 West Wilson Street, Room 631
Madison, WI 53701

By: Kay Krause, Deputy Director
Creative Care Options of Fond du Lac County
50 N. Portland Street
Fond du Lac, WI 54935

ADMINISTRATIVE LAW JUDGE:

Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Fond du Lac County. The petitioner suffers from a neuro-muscular disease that has been diagnosed as cerebral palsy.
2. Creative Care Options of Fond du Lac County (CCO) started serving the petitioner under the Family Care Program (FC) on May 26, 2003.

3. On May 27th, there was an initial assessment that included discussions with the petitioner, her significant other, and her mother. At that time, the petitioner requested that her bathroom be modified for a shower instead of a bathtub and a ramp for the house. The CCO has continually denied that request because the petitioner was living in a rental property and it was unclear how long she was going to be there. The last denial notice was September 24, 2003.
4. At the time FC started, the petitioner was living in an apartment owned by her mother and stepfather. She did have some difficulty in easily accessing the entire apartment. She needed help getting into the bathtub, but even with help she would still hit her legs when she entered it. She was able to bathe herself when seated in the appropriate chair.
5. The petitioner uses a scooter, which she has difficulty getting up and down stairs at the rental property.
6. The petitioner's mother and stepfather have since installed a ramp and modified the bathroom to install a walk-in shower. The total cost was \$1,396.87. The petitioner voluntarily disenrolled from FC on September 29, 2003.

DISCUSSION

The Family Care Program which is supervised by the Department of Health and Family Services, is designed to provide appropriate long-term care services for elderly or disabled adults. Wis. Stat. § 46.2805(4) (1999-00); Wis. Admin. Code § HFS 10.13(21) (October 2000). The Family Care Benefit is available to eligible persons only through enrollment in a CMO. See Wis. Admin. Code § HFS 10.41(1) (October 2000). Application for the Family Care Benefit must be made to the agency serving the county, tribe or family care district in which the person resides. Wis. Stat. § 46.287(2)(a)1. (1999-00); Wis. Admin. Code § HFS 10.55(3) (October 2000). The Family Care Program procedures and eligibility requirements are found in the Wisconsin Administrative Code, Chapter HFS 10.

When a person enrolls in FC and is eligible, the agency must perform an assessment to identify the person's needs, strengths, and long term outcomes. See Wis. Adm. Code, §HFS 10.44(2)(e). The agency then must develop an individual service plan (ISP) for the enrollee that addresses those needs, services, and outcomes. See §HFS 10.44(2)(f). If the enrollee and the agency do not agree with the ISP, the enrollee may file a grievance with the agency, request a department review, or request a fair hearing. §HFS 10.44(2)(f)5.

I. Jurisdiction Over the Appealed Items

The first issue in this case is what, exactly, the Division of Hearings and Appeals has jurisdiction over. Wis. Stat., §46.287(2)(a)1 provides that a person may appeal the following FC issues within 45 days of the notice of the action:

- a. Denial of eligibility.
- b. Determination of cost sharing.
- c. Denial of entitlement once eligibility has been determined.
- d. Failure to provide timely services and support items included in the plan of care.
- e. Reduction of services or support items.
- f. Development of a plan of care is unacceptable.
- g. Termination of the FC benefit.
- h. Imposition of ineligibility for FC due to a finding of divestment.
- i. Denial or reduction of the FC benefits due to treatment of trusts.
- j. Spousal impoverishment determinations.
- k. Recovery by the Department of incorrectly paid FC benefit payments.

In addition, a person may appeal an action of a CMO after first filing a grievance with the department's unit that monitors the CMO.

On September 24, 2003, the CCO sent a Change Notice to the petitioner indicating that ramp and the bathroom modification would not be funded. The request for payment of the items in question was continuous from the date of enrollment to the date of disenrollment.

Neither side provided me with the results of a grievance, if one was even held. I will assume that no grievance was held. Technically, I would conclude that the Division of Hearings and Appeals has jurisdiction only over those items specifically grieved by the petitioner. However, it is evident to me that the agency essentially has reviewed almost all of the appealed items in anticipation of the hearing, so requiring petitioner to file a grievance on those issues would require an additional step that likely would result in another appeal after the grievance was denied. The agency essentially is put into a "catch-22" when an appeal like this is filed. If the agency refuses to address the issue because it was not grieved first, it runs the risk of having a hearing examiner rule against it because it was not prepared. If the agency addresses the issue to be fully prepared, the client essentially is able to do an end-run around the grievance process. The problem is the result of a statute that basically allows clients to appeal anything they want to appeal, since §46.287(2)(b) allows the person to grieve, and later appeal, any "decision, omission or action" of a CMO.

Therefore, even though the statute technically would require petitioner to file a grievance concerning any item or service, I am going to address all items fully reviewed by the agency in preparation for this hearing. (See ALJ Brian Schneider's decision in FCP-52/53576.) This also means that the 45-day criterion was met.

II. Whether the Agency Correctly Denied the Requested Items

It is worth noting that both parties agreed that the only issues at this hearing were the reimbursement for the ramp and the modifications to the bathroom. One of the FC program's goals is to provide the client with input so that services reflect her values and preferences. See Wis. Stat., §46.284(4)(c). Care should be "consumer-centered." Family Care Guide (November, 2001), "What is Family Care?" A FC pamphlet titled "Being a Full Partner in Family Care" tells prospective clients that they have the right to be "full partners" in deciding what they need and in planning services. See Wis. Adm. Code, §HFS 10.51(2). Thus the intent in the FC program to allow input from the clients and to attempt to meet the clients' desires as much as possible.

Persons are eligible for services, including equipment, who have enrolled in a CMO per Wis. Adm. Code, §HFS 10.44(2)(e), which states the following in pertinent part:

(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, Stats., the long-term support community options program under s. 46.27, Stats., and specified 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.

Both of the items requested by the petitioner fall within the category of “home modification”. Thus, the requested funding could be permissible under the above regulations.

The nub of the agency’s argument is that the petitioner’s mother was keeping them away from the petitioner and would not let them do a complete and valid assessment of her actual needs. Despite her protests, I believe that the mother did in fact maneuver to keep the agency away from the petitioner. However, I am unconvinced that the reason was to conceal some ill treatment toward her daughter. The real issue is not how cordial the relationship was between the agency and the mother. The key is whether the petitioner had a demonstrated need for the requested home modifications to help her achieve improvement in her health and social outcomes. If the petitioner had such a need for the modifications, then they should be paid for.

The agency argued that based on the information it did have, the requested improvements were not warranted. The agency noted that the petitioner’s home is not very accessible to her so that the ramp would not increase her independence. Further, the petitioner’s friend could help her with her bathing needs without the replacement of the tub to a shower. There was also a discussion of the fact that the petitioner’s home is an apartment owned by her mother and stepfather.

The “greater weight of the credible evidence” means that the Family Care agency has the burden of proof to establish by the preponderance of the evidence presented that the denial of service was proper given the facts of the case. The petitioner must then rebut the agency’s case by establishing facts sufficient to overcome the agency’s evidence.

I have considered the agency’s arguments and the record as a whole. I find that the petitioner has successfully rebutted the agency’s case as to the denial of the services. Based on the PT evaluation, the petitioner clearly would have been expected to benefit from having a walk-in shower instead of the bathtub. The ramp is a close call but I still find that it does assist the petitioner in getting outside on her scooter. The test is not whether these improvements were going to make an enormous change in the petitioner’s life. Instead, it was whether they were going to make a small but clear improvement. I believe that they have met that standard. Thus, the agency must pay the requested sum of \$1,396.87, assuming that the petitioner can present receipts for that amount.

CONCLUSIONS OF LAW

The petitioner was entitled to have both the ramp for the property and the modifications to the bathroom funded by FC.

NOW, THEREFORE, it is

ORDERED

That the petition for review be remanded to the FC agency. That agency must pay no more than the requested sum of \$1,396.87, within 10 days after the petitioner or her representative present the appropriate receipts.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found 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 no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Family Care Program must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 13th day of
February, 2004

/s/ Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
428/JAN

cc: Jenifer Harrison-Metastar - e-mail
April HAYS-DHFS/METASTAR - e-mail
Charles Jones, OSF/CDS - e-mail
Anne Luby - Fond Du Lac Co. - e-mail
Cheryl McIlquham - BHCE
Ann Marie Ott - DHFS - e-mail
Kay Krause Creative Care Options - e-mail