



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

FCP-20/62470

PRELIMINARY RECITALS

Pursuant to a petition filed March 18, 2004, 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 April 26, 2004, at Fond Du Lac, Wisconsin. With the consent of petitioner, the record was held open for additional submissions and a possible additional proceeding. Petitioner consented to extension of the open record period. No submissions were received, and no additional proceedings occurred.

The issues for determination are whether (1) this office has subject matter jurisdiction herein, and (2) the petitioner's CMO correctly denied his requests for a walker and electric wheelchair.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Wisconsin Department of Health and Family Services
P.O. Box 7850
Madison, WI 53707-7850.

By: Lora Yaggie, Reg. Nurse; Amanda Dautermann, S.W.; and Debra Kurek, Supr.

Creative Care Options
50 North Portland Street
Fond Du Lac, WI 54935

ADMINISTRATIVE LAW JUDGE:

Peter D. Kafkas

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx) is a resident of Fond Du Lac County.
2. The petitioner has been found eligible for participation in the Wisconsin Family Care program. Family Care program services are furnished through a care management organization (CMO), which is under contract with the Family Care program.
3. The petitioner requested a power wheelchair and four-wheeled walker. Petitioner's CMO denied the requests.
4. The power wheelchair and four-wheeled walker were not included in petitioner's individualized service plan (ISP).
5. The petitioner timely filed a fair hearing request with this office. There is no evidence in the record that the petitioner filed a grievance with the CMO or for a departmental review with the Department of Health and Family Services, OSF Area Administration Section, per Wis. Adm. Code § HFS 10.54.

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. Whenever the local Family Care program decides that a person is ineligible for the program, or when the CMO denies a requested service, the client is allowed to file a local grievance. It does not appear the petitioner did so here.

Regardless, under some circumstances, the client may then request a fair hearing through this office (Division of Hearing and Appeals). The following matters may be contested through a fair hearing:

- (a) Denial of eligibility under s. HFS 10.31 (5) or 10.32 (4).
- (b) Determination of cost sharing requirements under s. HFS 10.34.
- (c) Determination of entitlement under s. HFS 10.36.
- (d) Failure of a CMO to provide timely services and support items that are included in the plan of care.
- (e) Reduction of services or support items in the enrollee's individualized service plan, except in accordance with a change agreed to by the enrollee.
- (f) An individualized service plan that is unacceptable to the enrollee because any of the following apply:
 1. The plan is contrary to an enrollee's wishes insofar as it requires the enrollee to live in a place that is unacceptable to the enrollee.
 2. The plan does not provide sufficient care, treatment or support to meet the enrollee's needs and identified family care outcomes.
 3. The plan requires the enrollee to accept care, treatment or support items that are unnecessarily restrictive or unwanted by the enrollee.
- (g) Termination of the family care benefit or involuntary disenrollment from a CMO.
- (h) Determinations of protection of income and resources of a couple for maintenance of a community spouse under s. HFS 10.35 to the extent a hearing would be available under s. 49.455(8) (a), Stats.
- (i) Recovery of incorrectly paid family care benefit payments as provided under s. HFS 108.03 (3).

(j) Hardship waivers, as provided in s. HFS 108.02 (12) (e), and placement of liens as provided in ch. HA 3.

(k) Determination of temporary ineligibility for the family care benefit resulting from divestment of assets under s. HFS 10.32 (1) (i).

Wis. Adm. Code § HFS 10.55(1). The petitioner has requested a fair hearing for an issue that cannot be the subject of a fair hearing under Wis. Adm. Code § HFS 10.55(1). There is no question that the petitioner remains eligible for the Family Care program. He seeks to compel the CMO to provide new services/support items (the wheelchair and a walker), which are not listed in his individualized service plan (ISP). Neither party alluded to the requested wheelchair and walker as being listed in the ISP. Based on the assumption that the wheelchair and walker are not listed as a provided service in the ISP, I conclude that the petitioner's issue is not among those enumerated in the jurisdictional code section above. Therefore, I have no authority to reach the merits of this dispute, and cannot override the CMO's decision.

It could be argued that durable medical equipment items such as the walker and electric wheelchair at issue here fall under the "care, treatment, or support" aspect of an ISP listing in Wis. Adm. Code § HFS 10.55(1)(f)(2). Other fair hearing decisions, however, have apparently interpreted the administrative code section as not applying to durable medical equipment. ALJ's have found no jurisdiction for review of the denial of electric scooters under administrative code sections. See, DHA Case No. FCP-32/49812 (DHFS September 19, 2001) and DHA Case No. FCP-20/61122 (DHFS February 25, 2004). Scooters would be in the same class as the items requested here. While there could be more than one interpretation of the relevant section, this ALJ sees no reason to deviate from the interpretation of these previous ALJ's who have dealt with the durable medical equipment issue – **at least as to the interpretation of the administrative code sections.**

Another issue deals with a different statutory section allowing for appeals to DHA. Wis. Stat. § 46.287(2)(a) lists limitations as to what areas a petitioner may file an appeal with the Division of Hearings and Appeals on Family Care matters. That statutory subsection is similar to Wis. Adm. Code § HFS 10.55(1). But, another subsection within the main section, Wis. Stat. § 46.287(2)(b), provides

An enrollee may contest a decision, omission or action of a care management organization other than those specified par. (a), or may contest the choice of service provider. In these instances, the enrollee shall first send a written request for review by the unit of the department that monitors care management organization contracts. This unit shall review and attempt to resolve the dispute. If the dispute is not resolved to the satisfaction of the enrollee, he or she may request a hearing under the procedures specified in par. (a) 1. (intro.).

So a client has the statutory right to appeal a broad area of matters if the client has first filed a grievance with the CMO. The Decisions discussing the lack of jurisdiction in matters such as this have not addressed subsection (2)(b) of the relevant statute.

It would appear that petitioner would have had an appeal right for the issues of the instant case (under Wis. Stat. § 46.287(2)(b)) had he filed a grievance with the CMO before he filed a hearing request with DHA; i.e., if the grievance had been dismissed. Apparently in consultation with the CMO staff, petitioner declined to file a grievance with the CMO. See, Exhibit 4, "Notice of Action." The notice provided for petitioner's case manager to answer questions and to assist petitioner in filing a grievance or appeal. It does not appear that the notice or the case manager explained to petitioner that a review the Division of Hearings and Appeals would be limited.

Petitioner wrote, "I prefer to request a fair hearing on these matters." See, petitioner's fair hearing request. But this appears to have been in reliance on the negative notice language and petitioner's case manager. As petitioner was not made aware of the necessity of a grievance prior to jurisdiction of DHA (on his particular appeal issue), the matter is being remanded ordering the CMO to treat the form petitioner completed for an appeal to DHA ("Family Care Complaint/Grievance Form") as a grievance.

Petitioner had agreed to an open record period (with extension) for a possible additional proceeding and for possible argument of the parties and documentation. Given the analysis set forth above, the administrative law judge concluded another proceeding would not be necessary. No additional proceeding was held and no additional argument or documentation was received from the parties.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals would lack jurisdiction to review the CMO's decision that the petitioner would not be given a new service (an electric wheelchair and walker), where those items were not listed in the petitioner's individualized service plan and where petitioner had not first filed a grievance with the CMO.
2. Petitioner was not informed of the limitation on the Division of Hearings and Appeals jurisdiction were he to file a hearing request directly with DHA and not first file a grievance with the CMO, thereby depriving him of his statutory right to review of the denial of the power wheelchair and walker.

NOW, THEREFORE, it is

ORDERED

That the petition herein be remanded to the CMO with instructions to begin processing petitioner's 3/17/04 request for hearing, as set forth on the March 17, 2004, "Family Care Complaint/Grievance Form," as a grievance to the CMO. If petitioner's grievance is denied, petitioner may then file a hearing request with the Division of Hearings and Appeals within applicable time limits. The CMO shall begin processing the grievance within ten (10) days of the date of this Decision.

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 which 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
Milwaukee, Wisconsin, this 14th day of
December, 2004

/sPeter D. Kafkas
Administrative Law Judge
Division of Hearings and Appeals
426/PDK