



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

FCP-40/63259

PRELIMINARY RECITALS

Pursuant to a petition filed May 8, 2004, under Wis. Stat. §46.287(2), to review a decision by the Milwaukee County Dept. on Aging in regard to the Family Care Program (FCP), a hearing was held on June 16, 2004, at Milwaukee, Wisconsin.

The issue for determination is whether the issue of a change in providers can be appealed directly to the Division of Hearings and Appeals, and if so, whether the agency could require a change to a less costly provider.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:
(petitioner)

Wisconsin Dept. of Health and Family Services
Office of Strategic Finance/Center for Delivery Systems Development
P.O. Box 1379
Madison, WI 53701-1379

By: Nora Gomez, Grievance Committee Chair
Milwaukee County Dept. on Aging
235 W. Galena Street, Suite 180
Milwaukee, WI 53212-3948

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Milwaukee County.
2. Petitioner has been an FCP participant since late 2002. When she enrolled in the Care Management Organization (CMO), her plan of care called for her to receive 12 hours per week supportive home care (SHC) services. The Milwaukee County CMO contracts with two agencies that provide SHC services; however, at that time the two agencies did not have sufficient staff to provide services to all CMO participants. The CMO thus contracted with Rent-A-Daughter to provide petitioner's SHC services.

3. Since November, 2002, Rent-A-Daughter has provided petitioner's services. During the entire time petitioner has had the same aide, (redacted), providing the services.
4. By spring, 2004, the CMO's two contract agencies had sufficient staff to handle the CMO's participants' SHC services. By a notice dated April 30, 2004, the CMO informed petitioner that it would be terminating Rent-A-Daughter's services and switching the SHC services to one of the contract agencies. The notice told her that she could file a grievance with the CMO or a fair hearing with the Division of Hearings and Appeals.
5. The contracting agencies charge the CMO approximately \$7 to \$9 less per hour than Rent-A-Daughter.
6. Petitioner filed a request for a fair hearing. She did not file a grievance with the CMO. The Rent-A-Daughter services have remained in place pending this decision.

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. It is authorized in the Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter HFS 10.

The process contemplated for an applicant is to test her functional eligibility, then her financial eligibility, and if she meets both standards, to certify her as eligible. Then she is referred to a CMO for enrollment. See Wis. Adm. Code, §§HFS 10.33 – 10.41. The CMO then drafts an Individual Service Plan (ISP) using CMO selected providers, designing a care system to meet the needs of the person, and the person executes the service plan. At that point the person's services may begin.

The CMO must develop the ISP in partnership with the client. Adm. Code, §HFS 10.44(2)(f). The ISP must reasonably and effectively address all of the client's long-term needs and outcomes to assist the client to be as self-reliant and autonomous as possible, but nevertheless must be cost effective. While the client has input, the CMO does not have to provide all services the client desires if there are less expensive alternatives to achieve the same results. Wis. Adm. Code, §HFS 10.44(1)(f); DHFS booklet, Being a Full Partner in Family Care, page 9. ISPs must be reviewed periodically. Adm. Code, §HFS 10.44(j)(5).

Wis. Stat., §46.287(2)(a)1 provides that a person may request a fair hearing directly to the Division of Hearings and Appeals the following FCP 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 under the FCP benefit.
- f. Development of a plan of care is unacceptable because it requires the participant to live in an unacceptable place, or it provides cares that are insufficient to meet the person's needs, are unnecessarily restrictive, or are unwanted by the person.
- 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, the participant can file a grievance with the CMO over any decision, omission, or action of the CMO. Wis. Stat., §46.287(2)(b). The grievance committee shall review and attempt to resolve the dispute. If the dispute is not resolved to the participant's satisfaction, she may then request a hearing with the Division of Hearings and Appeals.

In this case the CMO told petitioner that it was terminating petitioner's SHC services, so on the face it appears that she could appeal directly to the Division of Hearings and Appeals under letter "e" above as a reduction of services under the FCP benefit. However, that is not really what is happening here. There actually is no plan to reduce services, only to shift the services to a different provider. This also is not a dispute in the development of the plan of care since petitioner has an ISP in place. Even if it was such a dispute, it would not fit within letter "f" above since the dispute is not that the amount of SHC services are insufficient, or that petitioner does not want SHC services. The dispute is over which entity provides the services.

I conclude that the matter is not ripe for review by the Division of Hearings and Appeals. It must first go through a CMO grievance. The error is not petitioner's; she was informed, after all, that she could request a fair hearing. That the CMO so informed her, however, does not give the Division of Hearings and Appeals jurisdiction.

During the hearing, petitioner and her allies from Rent-A-Daughter suggested at least two different resolutions. This is why a grievance process would be better in this case. Resolving disputes is the point of the grievance process. An administrative law judge, on the other hand, is not a mediator. I would have to decide whether the action by the CMO was correct or incorrect, period.

I will remand the matter to the CMO with instructions to give petitioner a chance to grieve the decision. The CMO should in the future be careful to specify the action taken so that participants do not erroneously file for fair hearings prematurely. Petitioner's current services should continue while the process continues. I fully understand that the result of the grievance could be another hearing request by petitioner, but I do not believe the statutory process can be ignored simply because a participant was given incorrect information about which entity to complain to.

CONCLUSIONS OF LAW

The issue of the change of petitioner's SHC provider is not ripe for review by the Division of Hearings and Appeals because it does not meet any of the Wis. Stat., §46.287(2)(a) criteria for immediate appeal; the issue first must be addressed in a CMO grievance proceeding.

NOW, THEREFORE, it is **ORDERED**

That the matter be remanded to the Milwaukee County Dept. On Aging with instructions to provide petitioner with a grievance proceeding on the issue of the change in her SHC provider.

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). The appeal must be served on the 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 24th day of
June, 2004

/s/Brian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals
0622/bcs