



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

FCP-40/63803

PRELIMINARY RECITALS

Pursuant to a petition filed June 15, 2004, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Milwaukee County Department on Aging in regard to the Family Care Program, a hearing was held on July 27, 2004, at Milwaukee, Wisconsin.

The issue for determination is whether the issue of a provider change 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)

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

By: Karen Ziemplenski, case manager
Milwaukee County Dept. on Aging
235 W. Galena Street, Suite 180
Milwaukee, WI 53212-3948

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx), age 81, is a resident of Milwaukee County.
2. The petitioner has been a participant in the Family Care Program (FCP) since August, 2001. When she enrolled in the FCP's Care Management Organization (CMO), her plan of care called for her to receive personal care worker (PCW) services and supportive home care (SHC) services. The CMO's agreement to provide these services is memorialized in an Individual Service Plan (ISP). Currently, the Milwaukee County CMO contracts with two agencies (NHS and SHO) to

provide PCW and SHC services; however, back in 2001, those two contractors did not have sufficient staff to provide services to all CMO participants. The CMO therefore contracted with provider Mid-America to furnish PCW and SHC services to the petitioner.

3. While receiving services through Mid-America, the petitioner has enjoyed receiving care from one Russian-speaking aide, Yelena Burshteyn. The petitioner speaks only Russian. Providers NHS and SHO currently have Russian-speaking caregivers as well.
4. By 2004, the CMO's two contract agencies had sufficient staff to handle the CMO's participants' SHC and PCW services. The CMO informed the petitioner that it would terminate Mid-America's services, and switch the petitioner's service hours to one of the two contract agencies. In proposing this switch, the CMO was not reducing the number of service hours received by the petitioner under her ISP: 14 hours weekly of PCW, 1 hours daily of SHC for homemaking, and 1 hour daily for caregiver transportation. The petitioner would not agree to a different service provider. On June 3, 2004, the CMO informed the petitioner that it would be terminating services effective June 17, 2004, due to the petitioner's refusal to select a different provider. 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. Mid-America charges the CMO \$144 more per week for the petitioner's services than either of the two contracting agencies would charge for the same service.
6. The petitioner timely filed a request for a fair hearing with this Division. She did not file a grievance with the CMO. The Mid-America services have remained in place pending the issuance of this hearing 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 superficially it might appear that she could appeal directly to the Division of Hearings and Appeals under letter "e" above as a service reduction 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 the 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 filing error is not the petitioner's; she was informed that she could request a fair hearing. That the CMO so informed her, however, does not give the Division of Hearings and Appeals jurisdiction.

By way of clarifying what time limits should apply in this case going forward, I am instructing the CMO to give the petitioner a chance to grieve the provider change decision within 45 days of the date of this Decision (the normal grievance deadline is 45 days). Per the instructions on the June 3, 2004, notice to the petitioner, her services should continue if she files that grievance request within 14 days of this Decision. I 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 she should contact for an appeal. See in accord, a prior decision by ALJ Schneider, FCP-40/63259 (June 24, 2004).

CONCLUSIONS OF LAW

1. 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.
2. If the petitioner elects to file a grievance request with the local agency, any such request received within 45 days of the date of this Decision shall be considered a timely grievance request.

NOW, THEREFORE, it is

ORDERED

That the petition herein be dismissed.

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 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 9th day of
September, 2004

/s/Nancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals
428/NJG FCPjurProviderChange

cc: