

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-09/17-489
)
Appeal of)
)

INTRODUCTION

Petitioners appeal the proposed termination of their son's eligibility for "Katie Beckett" Medicaid by the Vermont Department for Children and Families ("Department"). The following facts are adduced from the written evidence and arguments filed by the parties.

FINDINGS OF FACT

1. The petitioners' son ("E."), who is currently seven years old, has had significant hearing loss since the time of his birth, due to a highly complicated delivery. He was found eligible for "Katie Beckett" Medicaid a few months after he was born, retroactive to his birthdate.

2. "Katie Beckett" Medicaid eligibility allows for the disregard of parental income and resources (to a point) if a child's disability is of a particular severity - as determined by Social Security Administration ("SSA")

disability listings - and the child is in need of an "institutional" level of care.

3. E. was initially determined eligible as an infant for "medically equaling" disability listing 111.09c, with a neurological condition related to a "communication impairment." In the most recent determination of his eligibility in 2014 - prior to the decision currently under appeal - he was found to have "met" SSA listing 102.10A related to his hearing loss. However, the requirements to meet this listing change when a child reaches the age of five (as discussed more fully below).

4. The evidence generally establishes that E. is currently "doing well" academically with the use of his hearing aids. This includes exhibiting speech and language skills commensurate with his peers. There is evidence in the record that, without his hearing aids, E. would face significant challenges in his functioning.

5. In a school and in particular his classroom setting, E. also has access to the use of an "FM" (frequency-modulated) device which assists him in hearing sounds directed at him, in an environment that has a high level of randomly-directed background noise. With or without his FM device, the most recent evaluation of E.'s hearing submitted

by petitioners (from December of 2017) concludes that there was "good performance of the hearing aids in background noise" (noting that this was even further improved with the FM system) and that "he continues to make good gains with his hearing aids."

6. Evaluations of hearing measure impairment in both the "middle" ear (which is tested by "air" conduction) and "inner" ear (which is tested by "bone" conduction). The listed disability standard requires a level of severity in *both* of these parts of the ear, as measured in the *better* ear. The evidence is undisputed that E.'s impairment is generally worse in his middle ear and that tests show an average "air conduction [middle ear] threshold" of at worst 60 dB in his better ear. Moreover, E. exhibits aided word recognition of 92 percent and unaided word recognition of 62 percent.¹

7. The Department's initial decision on appeal, dated May 19, 2017, terminated E.'s eligibility based on the following:

Child allowed 4/24/2014 for meeting listing of 102.10A with [history of] severe to profound [hearing loss].

¹ This is based on E.'s most recent evaluation submitted to the hearing officer.

Past birth history includes Intracranial hemorrhage and Hypoxic Ischemic encephalopathy.

Child is now 6 years old: Last updated eval was 1/16/2017 which showed bilat loss below 60 dB average in the better ear and 70 dB averaged in the worse ear. With hearing aides [sic] and IEP/Special Ed, child has done very well academically, incl excellent speech/language skills, and is making social gains/confidence. He will transition to 504 Plan at school. No longer meets listing level severity.

8. The May 19, 2017 decision, while determining that E.'s underlying impairment is "severe" (a threshold determination required before considering whether a child is disabled)², also found that E. had no limitations in any of the six areas (Acquiring and Using Information; Attending and Completing Tasks; Interacting and Relating With Others; Moving About and Manipulating Objects; Caring for Yourself; and Health and Physical Well-Being) considered to "functionally equal" the disability standard. It is emphasized that this determination is based on E.'s *hearing-aided* functioning. As noted above, there is evidence which might support that E.'s *unaided* functioning is significantly limited - and as further discussed below, consideration of such (or not) is at the heart of the dispute here.

² It should be noted that the determination that an impairment is "severe" is distinct from a determination that an applicant meets "listing level severity" or has a "severe" functional limitation.

9. During the course of this proceeding, the Department updated its decision based upon additional information provided by petitioners; reaffirming the decision that E. does not meet or medically equal the listed disability standard based on the tests of his hearing, and that he does not otherwise have severe enough (if any appreciable) functional limitations in two or more of the six domains of functioning to qualify based on "functional equivalence."

10. While the record supports that E. experiences some challenges even with his hearing impairment aided (i.e. with his hearing aids), the record does not support a determination that these challenges are marked or severe in any domain of his functioning, nor has there been any showing that his hearing loss is "medically equal" (based on any other medical evidence) to the level of hearing loss required under the listings.

ORDER

The Department's decision is affirmed.

REASONS

Review of the Department's decision is de novo. As this concerns a termination of Medicaid eligibility, the

Department has the burden of establishing, by a preponderance of evidence, the appropriateness of its decision under the applicable rules. The basis of the Department's decision was its determination that E. is no longer "disabled" under the rules.

"Katie Beckett" Medicaid eligibility waives income and resource standards for children who meet Social Security Administration disability standards and require the same level of care as that provided in a "medical institution." Health Benefits Eligibility and Enrollment ("HBEE") § 8.05(k)(6). The cost of care for the child in the community cannot be more than the cost of caring for the child in an institution. See Id.

The general approach to making disability determinations is to consider whether the person's impairment(s) is "severe," which is not disputed here, and if so, whether such "meets," "medically equals," or "functionally equals" a listed impairment - the fundamental criteria for determining disability. See 20 C.F.R. §§ 416.925, 416.926, and 416.926a.

Medical Improvement Standard

Once an individual is found disabled under SSA standards, they are subject to periodic continuing disability

reviews. To find a child no longer disabled, the applicable laws, regulations, and SSA rules initially require a finding of "medical improvement" and that "the child's impairment(s) no longer results in marked and severe functional limitations. . ." SSA Program Operations Manual System ("POMS") DI 28005.001; see also 42 U.S.C. § 423(f); 20 C.F.R. § 404.1594.

In the first instance, when the beneficiary no longer meets a specific listing - as is the case here, because the listed disability standard changed when E. reached the age of five - this in and of itself arguably satisfies the requirement of medical improvement, where the basis for disability finding was meeting a specific listing which is now different solely as a function of age. However, whether or not that principle is in operation here, by all accounts E. is currently doing well in numerous ways, including academically, socially, and at home. His progress and overall successful functioning (with hearing aids) is generally undisputed. As such, this evidence in the record meets the "medical improvement" standard.

Meeting or Medically Equaling the Disability Listings

Once medical improvement is established, the Department must still show that E. no longer meets a disability listing.

In this case, the "listed" disability standard at issue - related to hearing loss - is as follows, with differing standards for children under age five and five and over:³

102.10 Hearing loss not treated with cochlear implantation.

A. For children from birth to the attainment of age 5, an average air conduction hearing threshold of 50 decibels or greater in the better ear (see 102.00B2).

OR

B. For children from age 5 to the attainment of age 18:

1. An average air conduction hearing threshold of 70 decibels or greater in the better ear and an average bone conduction hearing threshold of 40 decibels or greater in the better ear (see 102.00B2f); or

2. A word recognition score of 40 percent or less in the better ear determined using a standardized list of phonetically balanced monosyllabic words (see 102.00B2f); or

3. An average air conduction hearing threshold of 50 decibels or greater in the better ear and a marked limitation in speech or language (see 102.00B2f and 102.00B5).

SSA POMS, Part B (Childhood Disability Listings), § 102.10.

The only potentially relevant criteria from the above listing is that concerning the average air and bone conduction thresholds in E.'s better ear; however, the audiological testing - without dispute - does not establish

³ While the policy reason for this distinction is generally irrelevant, the Department represents that it is based on the ability of children to make adjustments to their hearing loss as they become older.

that he has “[a]n average air conduction hearing threshold of 70 decibels or greater in the better ear and an average bone conduction hearing threshold of 40 decibels or greater in the better ear.” *Id.* (emphasis added) Nor has E. exhibited a word recognition score of 40 percent or less. Thus, the Department’s determination that E. no longer meets a disability listing is supported by a preponderance of evidence. Of note, there is no assertion or evidence that his condition otherwise “medically equals” a listing.⁴

“Functionally Equaling” the Listings

Even assuming a finding of medical improvement and that a child does not meet or medically equal a listed disability, to be determined no longer disabled, one’s impairment(s) must also be found to not result in “marked and severe functional limitations.” See SSA POMS DI:28005.001, *supra*. A preponderance of evidence supports that E.’s *aided* (with hearing aids) functioning is not marked and/or severe, in the

⁴ As discussed in the POMS, “[i]f you have an impairment that is described in the Listing of Impairments but you do not exhibit one or more of the findings specified in the particular listing, or you exhibit all of the findings, but one or more of the findings is not as severe as specified in the particular listing, we will find that your impairment is medically equivalent to that listing if you have other findings related to your impairment that are at least of equal medical significance to the required criteria.” POMS DI 25220.010. There are no “other related findings” in the record here which are of equal medical significance to the listed criteria.

evaluations of his functioning by his educational and medical providers.

However, and getting to the primary dispute between the parties, E.'s *unaided* functioning might support such a finding. The rules allow the Department to consider a person's functioning with adaptations, assistive devices, and treatment or intervention. See 20 C.F.R. § 416.924. Neither the regulations or POMS speak specifically to the question of whether a hearing aid that improves functioning as in this case should be considered in support of terminating or denying disability eligibility. However, a decision by the 8th Circuit Court of Appeals - *Scales v. Barnhart*, 363 F.3d 699 (8th Cir. 2004) - speaks directly to this question. In that case, the Court upheld a finding that a child was no longer disabled and had no significant hearing impairment with the use of hearing aids, concluding that "[a]n impairment that is controllable does not support a finding of disability. . ." *Id.* at 705.⁵ This persuasive authority,

⁵ This decision has been favorably, if generally, cited by federal district court cases in the 2nd Circuit. See *Haggerty v. Astrue*, 2010 WL 2572883.

along with related regulations and rules compels the same conclusion here based on the evidence of E.'s functioning.⁶

For these reasons the Department's decision is consistent with the rules and the Board must affirm. See 33 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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⁶ It must be emphasized that this does not pertain to cases where the intervention or assistive device itself is so significant that it, in and of itself, supports a finding of disability, or in cases of "medical fragility," neither of which are at issue here. See e.g., Fair Hearing No B-04/15-450.