

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. B-10/19-677  
 )  
Appeal of )  
 )

INTRODUCTION

The petitioner appeals the decision by the Department of Disabilities, Aging and Independent Living (DAIL or Department) reducing the amount of funding, and therefore the number of hours of paid assistance, she receives under the Attendant Services Program (ASP). The issue is whether the reduction is supported by the evidence and in a manner consistent with the Department's regulations.

A hearing in the matter was held on December 18<sup>th</sup> with petitioner participating by phone and with petitioner's husband attending in person and acting as her spokesperson. The following is based upon the evidence presented by the parties at hearing.

FINDINGS OF FACT

1. The petitioner is a 65-year old woman who receives funding from the Department's General Fund (non-Medicaid) Attendant Services Program (ASP) that allows her to pay for

services in her home to help her to perform "activities of daily living" (ADLs) and "instrumental activities of daily living" (IADLs). Her husband is paid to perform the personal care attendant services and stated at hearing that he has been serving in this role for 14 years.

2. Although the history of the amount of petitioner's ASP services was somewhat unclear, the parties agreed at hearing that some five (5) to six (6) years ago, petitioner appealed a prior assessment conducted by the Department and, in an internal appeal, was granted a waiver that allowed her a greater amount of services in the amount of the program maximum of 13 hours/day; petitioner's husband has been paid for 13 hours of care a day for the last several years. Neither party provided an evidentiary basis for the waiver although petitioner's husband indicates that he spends a considerable amount of time doing massage therapy of petitioner to alleviate her pain.

3. An assessment was conducted in April 2019 that resulted in a reduction of the number of approved hours. Petitioner filed an internal appeal and a reassessment was conducted by a new assessor in a home visit on June 21, 2019 (referred to as the "assessment"). The assessment was conducted by a very experienced long-term care clinical

coordinator who has been a Registered Nurse for 51 years. Beginning in 1993, the assessor worked for the Department in various positions, to include serving as the Division Director for Disability and Aging Services. She participated in developing the Department's long-term care programs, and oversaw the operation of the ASP, as well as other programs, from 2001 to 2010. Since 2012, the assessor has been performing clinical assessments for the Department. In sum, the assessor is extremely knowledgeable about the standards used to evaluate need under the ASP and in conducting individual evaluations; her testimony was highly credible. At hearing, petitioner's husband complimented the assessor on the level of attention and care that she demonstrated during the assessment.

4. The outcome of her assessment was that petitioner was eligible for 6.5 hours of services/day. As a result of an internal appeal, this figure was increased by an additional 45 minutes, for a total of approximately 7.35 hours/day for all ADLs and IADLs. Petitioner filed a request for fair hearing asking that the number be moved back to 13 hours/day.

5. Prior to conducting the assessment, the assessor was provided with information on petitioner's medical conditions

to include the following: hypertension, arthritis including include chronic left hip pain, meralgia paresthetica of left side, fibromyalgia, lymphedema, secondary adhesive capsulitis of right shoulder and impingement of right shoulder (related to shoulder surgery in 2019), anxiety and depression. Petitioner's weight gain during the last few years was also mentioned as exacerbating her conditions.

6. The assessor testified that she went to petitioner's home on June 21, 2019 to perform the assessment. She explained that the assessment criteria are very specific and are used to evaluate the individual's level of need. The form identifies ten (10) ADLs; all may not be relevant to everyone's situation and some of the ten ADLs are merged with others.

7. In order to be eligible for the ASP, an individual must need assistance at a score of "2" or greater for at least two (2) ADLs. The ADL is evaluated with a score as follows: "0" Independent (No help or oversight OR help provided 1 of 2 times), "1" Supervision (Oversight/cuing 3 times OR oversight with physical help 1-2 times), "2" Limited Assistance (Non-weight bearing physical help 3+ times or extensive help 1-2 times), "3" Extensive Assistance

(Weight bearing help Or full caregiver assistance 3+ times),  
"4" Total Dependence (Full assistance every time).

8. The assessor used an ASP assessment form that has been developed by the Department for use in all evaluations. In developing the assessment, and incorporating information observed over a period of years, the Department has evaluated the standard amount of time needed for completion of each ADL and IADL according to the level of need score that is demonstrated. In addition to that standard time, an assessor may waive that standard and add additional time as the evaluation demonstrates is necessary.

9. Participants in the ASP receive "eyes on" assessments every three (3) years and phone assessments are conducted in the intervening years. The assessor testified that an assessment typically takes about 45 minutes; however, petitioner's assessment took almost 2 hours. The assessment begins when the assessor enters the individual's residence and reviews general environmental and safety factors (e.g. width of doorways, stairs and railings, driveways, etc.)

10. The assessor testified that next the individual is observed to determine if the person is in distress or pain. Next, the assessor asks the individual a series of questions to ensure that the individual understands the assessment

process. The questions continue during the entire assessment as the individual is asked to share his or her view of his or her needs. This assessment was conducted in the 2<sup>nd</sup> floor bedroom where petitioner spends most of her days and in the 2<sup>nd</sup> floor bathroom.

11. At hearing, petitioner and her husband were given the opportunity to ask questions or offer their position on the assessor's testimony on each ADL and IADL as each of those factors were discussed - their comments, including the additional period of time that they suggested was appropriate are noted in the discussion of the factors below. Petitioner agreed with the assessor's evaluation of the level or need for some but not all of the ADLs and IADLs.

12. For the ADL of "Dressing", the assessor found that petitioner needed assistance on a score of "3" (Extensive Assistance) due to impingement of her right shoulder (petitioner was able to lift her shoulder only to 45 degrees). The standard time for a "3" score in dressing is 20 minutes/day. The assessor noted that petitioner became fatigued during the dressing process and had to take breaks and therefore she used the waiver provision to add another 20 minutes, for a total of 40 minutes/day/7 days per week for the ADL of dressing (to include undressing). Petitioner's

husband stated that he believes it usually takes him approximately one hour/day to assist petitioner with dressing - a difference of 20/minutes/day.

11. For the ADL of "Bathing" (act of showering or bathing including help sitting down in the tub but excluding washing back or hair), petitioner also scored a "3" (Extensive Assistance needed). The assessor again noted petitioner's fatigue in performing functions relating to bathing and added 5 additional minutes to the 30-minute standard for a total 35 minutes/day/7 days per week.

12. For the ADL of "Personal Hygiene" (e.g. combing hair, washing hands, brushing teeth, etc.), the assessor also scored petitioner with a "3" due to petitioner's limited arm movement and added five (5) minutes to the 15 minute standard for a 20 minutes total/day/7 days per week.

13. For the ADL of "Mobility in Bed", the assessor scored petitioner as "3" again due to the impingement of her right shoulder. The assessor noted that petitioner needed full caregiver assistance to lift her legs onto the bed and appeared to become dizzy as she changed positions in bed, therefore the assessor added five (5) minutes to the 10 minute standard for a total of 15 minutes/day/7 days per week. Petitioner's husband testified that it was difficult

to nail down a particular amount of time for this task but that it took him a bit longer than the awarded time because it takes him quite a bit of time to position the bed pillows so that petitioner can comfortably lie down.

14. For the ADL of "Toilet Use", petitioner was again scored as needing level "3" (Extensive Assistance needed). The assessor noted that petitioner needs caregiver assistance at least three (3) times/day. The assessor added 10 minutes to the normal time for a "3" rating for a total of 30 minutes/day/7 days per week. Petitioner's husband stated that he believed 30-40 minutes/day was an appropriate time to allot for this function.

15. For the ADL of "Adaptive Devices" (splints, braces, or devices that must be attached), the assessor was not told that any were in use on a daily basis, so no score was assigned. At hearing, petitioner's husband indicated that petitioner has splits for both of her thumbs that she uses occasionally, but that they were not recommended for daily use.

16. For the ADL of "Transfer" (moving from bed to chair to standing), the assessor again rated petitioner as needing level "3" which has a normal time allotment of 15 minutes, which was awarded. Petitioner's husband here noted that due



to petitioner's edema, petitioner can lose her balance due to swelling in her feet and that he must hold her. The assessor agreed and said that she had noted the edema in her notes and had included that in her assessment rating.

17. For the ADL of "Mobility" (moving between locations), the assessor again scored petitioner as "3". The time standard for a "3" in this ADL is 20 minutes/day. The assessor noted that she observed petitioner's husband assist her to move by using a "gait belt" to move around the bedroom. The assessor noted that petitioner spends most of her time in her room sitting in a chair, including eating in this room, and does not go down the stairs unless leaving the house for an appointment. The assessor estimated it would take 10 minutes to assist petitioner in moving around the room and estimated 10 trips a day, therefore, she used the waiver option to grant 100 minutes/day. After the completion of the assessment, petitioner appealed and was granted an additional 45 minutes/day for assistance with "range of motion" activities such as raising one's arms while seated in a chair. At hearing, the assessor stated that she had not allotted time for "range of motion" activities as it was her observation that petitioner's limitations would not allow her to tolerate range of motion activities. In any event, the

total now granted for mobility assistance is 140 minutes/day/7 days per week.

18. For the ADL of "Eating" (ability to eat food and drink liquids), the assessor found that petitioner was "Independent" as petitioner was able to eat her food independently. Petitioner's husband objected to this rating and said he has to assist petitioner with cutting her food. However, the assessor noted that cutting food is not a part of this function but that cutting food is included in the IADL of food preparation, as noted below.

19. Next, the assessor discussed her evaluation of the IADLs. IADLs are rated on a scale from "0" Independent, "1" Done with Help, or "2" done by Others. For the IADL of "Meal Prep", the assessor noted that this work was completely done by petitioner's husband and she awarded the maximum need level of 60 minutes/day. Petitioner's husband objected to this score and said that he cooks only Indian food, which takes longer to shop for and to prepare and that he should be paid for one and a half to two (1.5 - 2) hours/day. The assessor noted that the standard for "Meal Prep" is to allow time to prepare "light meals" for the individual receiving care. Here, petitioner's husband is preparing food for himself, his wife, and a son and a granddaughter who live in

the home, so the assessor did not believe that additional time was warranted as time is not awarded for preparing food for other family members. In addition, the assessor noted that the assessment does not provide additional time for different cuisines.

20. For the IADL of "Medications Management" the assessor rated petitioner a "1" (Done with Help) and allotted 5 minutes/day. It should be noted that this task does not include obtaining medicine from the pharmacy.

21. For the IADL of "Money Management" the assessor rated the function as a "2" (Done by Others). The standard time allotment for this score was 20 minutes/day.

22. For the IADL of "Household Maintenance" petitioner was scored as a "2" (Done by Others) and awarded the allotted time standard of 60 minutes/day. Petitioner's husband asserted that 180 minutes per day should be awarded as he has to clean the ramps from the house. The assessor indicated that when the home is a shared residence, the standard time allotment assumes that the normal amount of required maintenance is shared by the other residents.

22. For the IADL of "Light Housekeeping" the assessor scored the task of "2" (Done by Others) and awarded the

standard for that rating of 180 minutes/week. Petitioner's husband agreed that that amount of time was sufficient.

23. For the IADL of "Shopping" petitioner was scored at a "2" (Done by Others) rating and awarded the standard for that rating of 120 minutes/week. Petitioner's husband stated that he spent approximately 180 minutes/week to include going to the pharmacy and to the ethnic grocery stores that stock the food supplies he needs. He stated that he travels a far distance to get to grocery stores where he can purchase the ingredients for Indian food. The assessor noted that the assessment tool allots a generic amount of time and doesn't take ethnic cuisine differences into account.

24. For the IADL of "Transport" petitioner was scored a "2" rating and received the total allotment of 60 minutes/week (or 4 hours/month based on a 4-week month). Petitioner's husband asserted that given the traffic in their community, this time period should be doubled. When asked how many appointments he took his wife to each month, petitioner's husband said at least two (2) appointments/month. In addition, in the past he had taken her to aqua therapy every week, but that she has not had that therapy for the last few months.

25. For the IADL of "Equipment Management" (care of equipment), because the assessor observed that petitioner sometimes used a cane or a walker, and would not be caring for these devices herself, she scored this as a "2" (Done by Others) and allotted 20 minutes/week to care for those items. Petitioner agreed with that time allotment.

26. For the IADL of "Incontinence Needs" the assessor indicated that she granted 10 minutes/day for the additional time to assist petitioner to get to the bathroom for bladder incontinence.

27. The total of the assessor's scoring was factored into the formula used by the Department to establish program funding. Based on the assessment, the petitioner was awarded funding in the amount of \$1,144.52/pay period. As noted above, an additional 45 minutes per week was added to this score in the letter of decision on the internal appeal dated September 30, 2019 and funding was increased to \$1,276.87/pay period. This was a reduction from the funding of \$2,240.52 that was paid when the previous waiver was granted to allow 13 hours of payment/day.

28. Based on the assessor's extensive experience, her knowledge of the standard times allotted for each ADL and IADL, and her careful evaluation of petitioner, her testimony

at hearing demonstrated that she conducted a fair and thorough assessment and that her scoring was accurate.

ORDER

The Department's decision reducing petitioner's ASP hours and funding is affirmed.

REASONS

Review of the Department's determination is de novo. The Department has the burden of proof at hearing if terminating or reducing existing benefits; otherwise the petitioner bears the burden. See Fair Hearing Rule 1000.3.0.4.

The Attendant Services Program (ASP) provides personal care services for adult Vermonters who have a permanent and severe disability and who need personal services, at a level of "2" or above, for at least two (2) activities of daily living (ADLs). In addition, the applicant must be able to direct his or her attendant care and manage the employment of the attendants. See DAIL Division of Disability and Aging Services Attendant Services Program Regulations (Regulations) §105(c) [Eligibility Criteria].

Attendant care services are defined as follows:

- (a) As used in this section,

(1) "Attendant care services" means one of more of the following types of care or service provided for compensation: assistance with personal care including dressing, bathing, shaving and grooming, and assistance with eating, meal preparation and ambulation. Recipients of attendant care services shall have the opportunity to hire, train and terminate the employment of attendants as necessary, establish work schedules, manage the services and oversee payments of attendants and recordkeeping.

. . .

(3) "Personal services" mean attendant care services provided to an elderly or disabled ...eligible individual in his or her home, which are necessary to avoid institutionalization.

(4) "Participant-directed attendant care" means attendant care services for a permanently, severely disabled individual who requires services in at least two activities of daily living in order to live independently.

. . .

(d) The commissioner shall adopt rules to implement the provisions of this section including eligibility criteria for the programs, criteria for determining service needs, rules relating to control and oversight of services by beneficiaries of a program and procedures for handling and maintaining confidential information. . .

33 V.S.A. § 6321.

The Department's reduction in the allotted time for providing daily assistance to petitioner is based on the assessor's observations of petitioner's functional

capabilities and petitioner's statements during the June 2019 assessment.

The assessor's evaluation ratings are found to be highly credible given her level of experience as an assessor and her knowledge of the time standards assigned for each function that is evaluated. Further, the assessor committed a greater amount of time to petitioner's assessment - almost 2 hours rather than 45 minutes - demonstrating a high level of attention to fairly evaluating petitioner's needs. In addition, it must be noted that the assessor granted a level "3" for most ADLs and in addition, on multiple ADL tasks, scored petitioner above the standard time allotment by using the waiver provision to grant additional time.

In contrast, petitioner's husband's comments on additional time needed for ADLs and IADLs appeared to be based on his subjective standard rather than an objective standard. Petitioner's husband suggested an additional time of 40 minutes/day was needed for three (3) ADLs (20 minutes for dressing, 10 minutes for mobility in bed, and 10 minutes for toileting). Again, the assessor's experience over many years lends credence to her evaluation of the objective time period necessary to perform these tasks.



In the area of IADLs, petitioner's husband requested an additional 60 minutes a day for meal preparation. While he credibly testified that he does spend this amount of time due to his preparation of Indian cuisine, this additional time is not supported by the ASP operating guidelines. The IADL "meal prep" is defined as "[P]lanning and preparing light meals or reheating delivered meals." See *Vermont Independent Living Assessment (ILA) Manual, revised February 2009, p. 52.* Based on this definition, petitioner's argument that the family's preferred cuisine takes additional time to prepare is not a rationale supported by the Department's Manual.

Petitioner's husband also suggested additional time was necessary for the IADLs of household maintenance, shopping and transportation (due to traffic), however, his suggestions were not supported by objective explanations of need - driving further distances to shop for specialty foods is not an additional time period that is supported by the ASP program regulations or Manual and his suggestion that additional time was needed to transport petitioner to appointments was not supported by the number of petitioner's actual appointments.

The final significant area that petitioner's husband stated should be funded is the time he spends on massage

therapy for petitioner each day. As noted by the assessor at hearing, providing hands on therapy is not a function or task that is covered by the ASP. See Id., pps. 45-54 (description of ADL and IDAL tasks covered by the ASP).

At hearing, the assessor noted that for petitioner to be objectively scored for the 13 hours a day she is requesting, she would have to be scored as a "4" Total Dependence on the ADL tasks. That score is not supported by the assessor's observations or the petitioner's testimony.

Because the June 2019 assessment, as amended by the September 2019 amendment (adding 45 minutes/day for "range of motion" activities), reflects the award of time that is appropriate according to the standards for the administration of the ASP, the Department's award of funding in the amount of \$1,276.87/pay period is appropriate.

As such, the Department's decision must be affirmed. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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