STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. M-03/19-175
	)	
Appeal of	)	
	)	

INTRODUCTION

Petitioner appeals a substantiation determination by the Department of Disabilities, Aging and Independent Living ("DAIL" or "Department"). The issue is whether a preponderance of evidence supports a conclusion that petitioner abused and/or neglected, L.G., her husband, and whether he was a vulnerable adult, under Title 33 of Vermont law. The appeal process included numerous status conferences, three days of hearings (held on September 19, 2019, October 18, 2019 and October 25, 2019), along with oral argument and written briefing by the parties, with the record closing as of January 10, 2020.[1]

FINDINGS OF FACT

1. At the time of the incidents in question, petitioner's husband, L.G. was in his early seventies and in

[1] This matter was heard contemporaneously with another appeal involving the same petitioner, as a matter of judicial economy and for the convenience of the parties and witnesses. However, separate decisions have been rendered for each appeal.

April of 2017 had received a diagnosis of dementia. He lived with petitioner at his home, until she moved out in September of 2018. L.G. passed away in August of 2019.

2. While DAIL asserts that L.G. met the statutory definition of a vulnerable adult at all times relevant to this matter based on the date of his diagnosis in 2017, petitioner disputes that she was aware of L.G.'s condition until approximately June of 2018, over one year after the diagnosis was made.

3. Record evidence showed that L.G. had a medical appointment for a routine physical exam on February 14, 2017 with his physician. The notes from that visit reflect that petitioner attended the appointment with L.G. and both expressed concerns about his memory loss. The appointment resulted in a referral to a physician for a memory evaluation. The appointment summary listed sixteen different medications that L.G. had been prescribed.

4. A follow up appointment was conducted by a different physician on April 20, 2017. L.G. went to this appointment on his own. After an evaluation, the conclusion of the provider following that appointment was that L.G. had moderately advanced dementia. There is no evidence that petitioner knew of the evaluation results.

5. L.G. attended his next appointment, scheduled as a medication review, on August 16, 2017 by himself. The appointment summary lists twenty-one different medications prescribed for L.G. During the appointment his physician brought up her concerns about his driving and proposed administering a road test to confirm his ability to safely operate a motor vehicle. L.G. indicated that he wanted to speak to petitioner about this. When L.G. was asked whether he had spoken to petitioner about the results of his memory evaluation, he indicated that he did not know. He was instructed to bring petitioner with him to a follow up appointment to discuss the results of the memory evaluation.

6. L.G.'s next medical appointment, based on the evidence submitted in this case, was more than seven months later and took place on March 29, 2018, and the visit was a pre-operative appointment for knee replacement surgery scheduled to take place on April 17, 2018. L.G. was accompanied by petitioner. While the written appointment documentation notes that there had been a diagnosis of Alzheimer's on April 20, 2017, there is no indication that this was discussed at this pre-op appointment for the knee replacement surgery or that petitioner was given a copy of the appointment summary that contained this information.

7. A phone note in L.G.'s medical file dated May 4, 2018 indicates that petitioner called to set up an appointment to discuss L.G.'s behavior since his knee surgery the prior month.

8. Both L.G. and petitioner attended that appointment for L.G. on May 7, 2018. Discussed at the appointment were changes in mood and appetite following the knee replacement surgery three weeks prior. The appointment summary refers to memory loss, mood changes, appetite changes, possible brain injury, delirium while in the hospital during the knee surgery and the diagnosis of dementia. While is not possible to determine from the appointment summary whether the dementia diagnosis was discussed during the appointment, it appears more likely than not that it would have been, given that petitioner initiated the appointment for the specific purpose of discussing behavioral changes. Thus, as of early May of 2018, it appears that petitioner may have known of L.G.'s dementia diagnosis.

9. On May 23, 2018 L.G. had another pre-operative medical appointment, this time for cataract surgery which petitioner attended. L.G. was scheduled to have the surgery on June 5, 2018 and June 19, 2018. The appointment summary notes "Patient presents with wife to review diabetes,

hypertension, ASHD [Arteriosclerotic Heart Disease], Alzheimer's disease and for pre-op PEX [Physical Exam] for bilateral cat[a]racts." Depression is also noted as one of the health problems being addressed by L.G.'s medical provider. Again, the visit summary does not affirmatively indicate that the diagnosis was discussed with petitioner, however under the listed diagnosis for Alzheimer's Dementia is the note "Plan discussed supportive care" which could support a conclusion that the diagnosis was discussed.

10. The appointment summary of L.G.'s medical visit on June 7, 2018 does appear to definitively demonstrate that by that date petitioner was aware of L.G.'s dementia diagnosis. Petitioner was with L.G. at the appointment and the purpose of the visit was to discuss L.G.'s decreased appetite. Notes from the visit indicate that L.G. was "alert and cooperative" but that he demonstrated "decreased accuracy of facts" and appeared "unaware of deficits in memory". Under the "Impressions and Recommendations" section for Problem #1 Alzheimer's dementia - the summary reads: "Detailed discussion/explanation re: this matter. Wife is with him, he is not doing well as far as memory and function. Has been seen in past by Dr. B----, he should have a follow up. His wife should come in without him to discuss future issues

related to dementia and where she can get help. Difficult to discuss while he is in the room."

11. Notes from L.G.'s next medical appointment on July 19, 2018 reveal that he was hospitalized for three days from June 26-28 of 2018 for a cardiac event and the implantation of stents related to his Coronary Artery Disease. Regarding problem #4 identified as Alzheimer's dementia the appointment notes state: "Wife feels level of functioning unchanged since recent MI [Myocardial Infarction]. She is comfortable caring for him at home currently. Plan discussed. Resources available if behavior deteriorates over next few years."

12. In August of 2018 L.G.'s license to operate a motor vehicle was revoked based on a statement from his medical provider that L.G. had dementia.

13. Petitioner worked full time at a home for the developmentally disabled. In addition to her employment obligations outside the home, petitioner was also earning income as a paid caregiver and home provider for a disabled adult, who lived with petitioner and L.G. from Spring of 2017 through September of 2018 when petitioner permanently left her husband L.G. and the marital home.

14. Evidence was presented at hearing regarding L.G.'s abilities and behavior that were consistent with memory loss

and cognitive decline. What remains unclear and uncertain, however, despite the confirmed dementia diagnosis, was whether and in what way the dementia manifested itself in terms of L.G.'s behavior and functioning in the home, and what if any supervision was necessary to maintain his health and safety.

15. The bulk of the evidence about L.G.'s behavior in the home came mainly from three witnesses: petitioner herself, and L.G.'s two daughters from a prior marriage.

16. Testimony established that L.G.'s daughters were approximately the same age as petitioner, and that petitioner was more than twenty years younger than her husband L.G. One of petitioner's daughters lived across the street from the family home occupied by petitioner and L.G. The other daughter visited regularly and ultimately moved in with her sister in August of 2018.

17. L.G.'s daughters informed the APS investigator and later testified at hearing about specific types of memory loss experienced by L.G. that they believed were consistent with his diagnosis of dementia. These included the loss of the ability to operate certain appliances and equipment such as an air compressor, an electrical breaker, a faucet, a television remote control, an electric can opener, and

eventually the loss of the ability to drive a car. No clear time frames were provided for the loss of these abilities.

18. While testimony was adduced that L.G. was unable to use one telephone, the same witness indicated that in response to this difficulty, a different telephone was purchased and that this telephone was easier to use. The logical inference to be drawn from this last information is that L.G. was able to use the telephone.

19. DAIL presented testimony on one specific incident, again reported by L.G.'s daughters, involving L.G. eating food directly out of a can, that appeared, due to jagged holes in the lid, to have been opened with an implement other than a can opener. This incident took place in late summer of 2018 and was witnessed by one of L.G.'s daughters, who took a photograph of the can. While the photograph was given to the APS investigator, there was no information on whether petitioner was told about the incident at the time. DAIL's investigator testified that he recalled being told that L.G. had injured himself on this can, but the daughter who actually saw the incident said there had been no injury. Petitioner testified on the other hand, that during her marriage, she had seen L.G. regularly eat things like soup, fruit and beans right out of the can, with a long handled

iced teaspoon. She also noted that if a pop top on a can was broken, that he would puncture the can with a knife.

20. L.G.'s daughters also testified that at times L.G. wore his clothing inside out, and while he could make a sandwich, would put the 'wrong condiment' on it, explaining he once put butter instead of mayonnaise on a sandwich. They further noted that he could no longer cut up vegetables for a favorite family sauce but did not describe whether he lacked the ability to actually perform the task or simply no longer did it.

21. There was also testimony that it was possible that L.G. might not have recalled how to use a stove, or might not remember to turn it off after use, but all of this testimony was conjectural in that none of it was tied to a specific instance of behavior. While it is certainly possible that this may have been true, there was no testimony that L.G. ever tried to use the stove or used it and forgot to turn it off. This could theoretically have raised a health and safety concern, but insufficient evidence was provided to make a determination that it was, in fact, an actual concern.

22. It is painfully clear from testimony that the relationship between petitioner and L.G.'s daughters, though cordial early on in petitioner's twenty-three-year marriage

to L.G., had become quarrelsome and extremely combative by the time of the events described herein. No party disputed that the relationships had become very difficult and the APS investigator testified that he was aware of this circumstance from the outset. At hearing, it was also evident that the relationships remained very strained and contentious even following the death of L.G., which occurred in August of 2019, the month prior to the commencement of the hearing in this matter.

23. During the investigation of this case, one of L.G.'s daughters provided photographs to the APS investigator of unopened medication blister packs, that she reported to have found in L.G.'s home after petitioner moved out. The medications were identified by their labels as having been prescribed for L.G. From the photographs admitted into evidence, it appears that there were a total of ten doses of unopened medication for L.G. spanning a three and a half month period. The medication packages were dated for June 7, June 8, June 11, June 26, June 27 (2), June 28, July 10, August 2 and September 18.

24. No evidence was presented on the nature of the medications themselves, meaning what the specific medications were, or what condition they were prescribed for, by whom or

whether missing the dosages identified in the photos, in the amounts and on the dates in question, would have had a deleterious effect on L.G.'s health. Nor was any explanation provided as to why the medications had not been taken on the dates and times identified on the blister pack.

25. Four of the doses of medications found in the home were dated between June 26 through June 28, when L.G. was, according to medical records introduced into evidence by DAIL, hospitalized for an emergency cardiac event and a related surgical procedure. Thus, the failure of L.G. to take doses of medications during this period was more likely than not, due to this unanticipated hospitalization, and not for any other reason.[2]

26. DAIL presented testimony about an instance where L.G. swallowed a small plastic cap, as evidence that petitioner did not properly supervise his medication management. In response however, petitioner credibly testified that the cap had been removed from a syringe used by L.G. to inject insulin for his diabetes, and that L.G. had

[2] To the extent that DAIL asserted that the "abundance of unused medication prescribed for L.G. found in the home" served as a basis for the claim of neglect, it is troubling that they did not compare the dates of unused medications to the medical records they provided and realize that four out of the ten doses of missed medication were during an emergency hospitalization when the medication may not have been available, or permitted by L.G.'s emergency treating physician.

scooped it up in his hands with a large group of other medications that he was taking and swallowed it inadvertently. Petitioner was there when this occurred, tried the Heimlich maneuver on L.G. and was driving L.G. to the Emergency Room when the cap was retrieved by unspecified means. Petitioner's testimony on this incident was found credible.

27. Another incident was reported concerning L.G. injecting his insulin through his shirt, instead of directly into his skin. Clearly someone was there when this occurred, so L.G. was not alone at the time, and it is unclear if any medical intervention was needed, whether this practice was common for diabetics, or even if it was in any way a threat to L.G.'s health and safety.

28. Petitioner testified that the last four years of the marriage were very difficult and that she and L.G. argued about money, his children, and her employment, among other things. Petitioner acknowledged that L.G.'s memory problems began as early as April of 2017 and that her concerns about his behavioral changes were reported just over a year later in May of 2018. It is undisputed that petitioner and L.G. had verbal altercations. Petitioner acknowledged that L.G. yelled at her and called her names and that she responded in

kind. Furthermore, petitioner testified that on one occasion, during a very heated argument, petitioner made a video recording of L.G. shouting at her and calling her names. She testified that she then showed him the video, because she thought that if he saw what he was acting like he would stop. Upon seeing the video, petitioner reported that L.G. apologized and pledged never to do that again.

29. Petitioner asserted that for a long time she did not believe L.G. had dementia. She also testified that she was not his caregiver, but his wife, and noted that given her employment as a caregiver for the disabled that she knew the difference. She also emphasized that many of the tasks she performed for L.G. were because he was her husband and that she did them because she loved him and cared for him, not because he could not do them for himself. She explained that when she was interviewed by the APS Investigator (which she indicated was an extremely traumatic event for her) and asked whether she was the caregiver of L.G., she responded based on her role as his spouse, and was not affirming that she believed she met the statutory definition of caregiver set forth in 33 V.S.A. §§ 6902(2).

30. Petitioner also pointed out that between April and June of 2018, L.G. had four debilitating surgical procedures:

a knee replacement operation, two cataract operations and an emergency cardiac operation. During the four-month period over which he recuperated from these medical procedures, a significant increase in personal care assistance was necessary, because L.G.'s physical functioning was very limited during that time, and that as his wife, it was natural for petitioner to provide such assistance.

31. Petitioner acknowledged working long hours at her employment outside the home but expressed no concern about L.G.'s ability to function with respect to his own health and safety.

32. L.G.'s daughters stated that in late summer of 2018, following the cardiac event, they checked up on L.G, hourly while petitioner was at work, but other than the conduct described above, reported no events that could be characterized as having created a health and safety risk.

33. It is undisputed that L.G.'s memory problems and cognitive decline were significant by the summer of 2018.

34. Coincident with L.G.'s four different health crises during the Spring and Summer of 2018 was petitioner's growing realization and acceptance of his dementia diagnosis. However, during this period, which immediately precedes the end of the relationship, it is not possible on this record to

say whether providing L.G. assistance with certain activities was volitional, a necessary part of his surgical recovery or necessary due to the diminishment of his functional abilities due to his dementia.

ORDER

The Department's decision is reversed.

REASONS

The Department of Disabilities, Aging and Independent Living investigates allegations of abuse, neglect and exploitation concerning vulnerable adults. *See* 33 V.S.A. §§ 6901, *et. seq.* Names of individuals substantiated for abuse, neglect or exploitation are placed on a registry maintained by DAIL which may be disclosed to potential employers or volunteer organizations serving vulnerable adults, *see* 33 V.S.A. § 6911(b), potentially affecting an individual's employment, livelihood, and associations. Appeals from a substantiation finding are reviewed by the Board de novo and DAIL has the burden of establishing the substantiation by a preponderance of the evidence.

The evidence supports the conclusion that L.G was a vulnerable adult as defined by 33 V.S.A. § 6902(14) by virtue of his dementia.

The totality of the evidence adduced at hearing which includes medical reports as well as testimony, establishes that by July 19, 2018 or possibly earlier, petitioner knew of L.G.'s condition and also met the definition of caregiver to L.G. as defined by 33 V.S.A. § 6902(2).

That said, the determination that L.G. was a vulnerable adult and that petitioner was his caregiver, does not automatically give rise to the conclusion that he was abused or neglected. L.G.'s specific needs that are pertinent to the maintenance of his health and safety, if any, must first be identified, and only then can a determination be made that there was neglect, if these needs were unmet. As noted above and as is commonly known, Alzheimer's Dementia is a progressive disease which involves the deterioration of abilities over time, but which abilities are lost, at what pace, and whether and when they impact a person's health and safety is highly variable.

In this appeal then, the issues that remain are whether petitioner's actions and conduct with respect to L.G. meet the definition of neglect or abuse under the statute.

"Neglect" is defined, in pertinent part, as:

> (7)(A) purposeful or reckless failure or omission by a caregiver to:

> (i) provide care or arrange for goods or services necessary to maintain the health or safety of a vulnerable adult, including food, clothing, medicine, shelter, supervision, and medical services, unless the caregiver is acting pursuant to the wishes of the vulnerable adult or his or her representative, or an advance directive, as defined in 18 V.S.A. § 9701;
>
> (ii) make a reasonable effort, in accordance with the authority granted the caregiver, to protect a vulnerable adult from abuse, neglect, or exploitation by others;
>
> (iii) carry out a plan of care for a vulnerable adult when such failure results in or could reasonably be expected to result in physical or psychological harm or a substantial risk of death to the vulnerable adult, unless the caregiver is acting pursuant to the wishes of the vulnerable adult or his or her representative, or advance directive, as defined in 18 V.S.A. § 9701; or
>
> (iv) report significant changes in the health status of a vulnerable adult to a physician, nurse, or immediate supervisor, when the caregiver is employed by an organization that offers, provides or arranges for personal care.
>
> (B) Neglect may be repeated conduct or a single incident which has resulted in or could be expected to result in physical or psychological harm, as a result of subdivisions (A)(i), (ii), or (iii) of this subdivision (7).

33 V.S.A. § 6902(7).

DAIL's burden on appeal is to prove that petitioner's actions while she served as caregiver to L.G. meet this definition. They have not satisfied this burden. Put differently, the Department did not demonstrate that petitioner failed: either purposefully, recklessly or by

omission; to "provide care or arrange for goods or services necessary to maintain the health and safety" of L.G.,

DAIL's conclusion that petitioner neglected L.G. is based in large part on the fact that petitioner worked long hours outside the home and was thus not there to care for him during that time. But no proof was offered as to what care he needed that he did not get. The incidents described by L.G.'s daughters about L.G.'s diminished abilities, while certainly evidence of dementia, do not support a conclusion that petitioner was not properly caring for him, or that her absence put his health and safety in jeopardy.

L.G.'s reported inability to operate a compressor, to drive a car, to cut up vegetables for a favorite family dish, to put the right condiment on a sandwich, or even to put on his clothing right side out are not circumstances which would appear to jeopardize his health and safety.

DAIL asserts, without proof, that L.G. could not safely be left alone, but fails to provide evidence of any specific negative incident that occurred because he was alone. DAIL also presented testimony from one of L.G.'s health care providers, concerning what she believed were areas in which L.G. would likely need assistance, but this testimony was in essence educated conjecture, and the witness did not conclude

that L.G. could not perform necessary functions such as feeding himself or taking his medication, nor did she have knowledge of which of those activities L.G. himself could not perform, what type of assistance he may have required, or what level of help in these matters petitioner did in fact provide.

With respect to L.G.'s daily existence, his two daughters testified that by a certain point during the summer of 2018 they were so concerned that petitioner was working outside the home for long periods, that they checked up on L.G. hourly while petitioner was at work. However, other than the handful of incidents described above, none of which demonstrated that L.G.'s health or safety were in jeopardy, the daughters did not report significant problems. They stated that they went over hourly, but then left. If they believed their father needed "eyes on" care at all times, they had the ability to and clearly could have stayed with him. They did not.

No testimony was presented that demonstrated that L.G. was a danger to himself under these circumstances and under the level of supervision he was receiving at the time. In fact, almost all the testimony and evidence about L.G. and his condition, were focused on his memory loss and cognitive

decline. In addition, the testimony about L.G.'s behavior focused on specific instances that while they were consistent with cognitive decline, such as putting clothing on inside out, or forgetting how to use a remote control for a television, and while these deficits are the nature of the malady, it is not the case that every person with dementia and its hallmark cognitive decline and memory deficits needs constant supervision. Put differently, DAIL did not provide proof that these specific instances created risks to L.G.'s health and safety.

The incident with the can of food demonstrates this. While it is clear that the can was opened by means other than a can opener, and had jagged edges, that L.G. opened the can in this manner and proceeded to eat out of it does not fit the definition of neglect.

Critically important here is the fact that the testimony did not specifically describe the manner in which leaving L.G. alone compromised his health and safety. Testimony presented by DAIL was generally inconclusive as to when the specific instances of memory loss and cognitive inability occurred. There is also no evidence that any harm of any kind was experienced by L.G. as a result of these incidents.

The second circumstance that DAIL asserts constitutes proof of neglect concerns L.G.'s medication management. The evidence noted above shows that after petitioner moved out, one of L.G.'s daughters found ten doses of unused medication that had been prescribed for L.G.

DAIL has not met its burden of proof in demonstrating that the fact of certain missed dosages of L.G.'s medication constitutes neglect by the petitioner. As noted above there was no testimony as to what specific medications had been prescribed or when, or what the impact of missing those medications might have been. In addition, the total number of unexplained missed doses of medication is six, over the course of four months. Given evidence that L.G. may have taken up to twenty-one different medications per day, there is no evidence establishing the significance of missing six doses. Finally, the Department did not present evidence sufficient to demonstrate that L.G. was unable to manage his own medication to such a degree that petitioner was obligated as a caregiver to ensure every single does was taken in order to protect his health and safety, not to mention the fact that it is impossible to conclude that petitioner was responsible for or aware of the missed medications. DAIL has

not established that petitioner's behavior towards L.G. satisfied the legal definition of neglect.

"Abuse" is defined, in pertinent part, as:

> (E) Intentionally subjecting a vulnerable adult to behavior which should reasonably be expected to result in intimidation, fear, humiliation, degradation, agitation, disorientation, or other forms of serious emotional distress.

33 V.S.A. § 6902(1).

With respect to abuse, the Department cites evidence of a single incident involving petitioner's videotaping of an argument between her and L.G. and then showing it to him. As noted above, it is undisputed that during the final years of their marriage petitioner and L.G. argued loudly and called one another names. Petitioner admits that she videotaped her husband yelling at her in anger and calling her names, and later showed it to him. Petitioner testified that L.G. was apologetic and pledged not to do so again. No evidence was elicited as to when this incident occurred. DAIL's assertion that this incident alone satisfied the definition of abuse is not supported by the evidence. While it was established that petitioner's action was intentional, and it is reasonable to infer that watching a videotape of himself arguing and yelling at his wife may have upset L.G., the statute requires more. In order to demonstrate that this action constituted

abuse, the Department needed to show not only that this behavior resulted in "intimidation, fear, humiliation, degradation, agitation, disorientation, or other forms of serious emotional distress"; but also that showing such a video to L.G. could "reasonably be expected" to elicit this result. This burden has not been satisfied.

The Department has failed to meet its burden of proof to show that the actions of petitioner here meet the definition of neglect in 33 V.S.A. § 6902(7) or abuse as defined by 33 V.S.A. § 6902(1). As such the decision lacks an evidentiary basis and is therefore inconsistent with the applicable rules and statutes and must be reversed by the Board. *See* 3 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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