

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing Nos. R-01/16-704
) & R-04/18-225
)
Appeal of)
)

INTRODUCTION

Petitioner appeals his substantiation by the Department of Disabilities, Aging and Independent Living ("Department" or "DAIL") for financial exploitation of a vulnerable adult (his mother, now deceased). The following is based on an evidentiary hearing held by video on July 29, 2020, and July 30, 2020. DAIL presented evidence from five (5) witnesses: an Adult Protective Services ("APS") investigator; two (2) witnesses with (at the time) the nursing home where petitioner's mother resided until her death; a long-term care Medicaid supervisor with the State of Vermont; and the coordinator of a state program designed to assist Medicaid beneficiaries with returning to their home(s) from long-term care facilities. Petitioner presented testimony from his brother and also testified on his own behalf.

A lengthy procedural history preceded the hearing. The evidence presented by DAIL at hearing related solely to

allegations of financial exploitation in Fair Hearing No. R-01/16-704. No evidence was presented as to the allegations which led to petitioner's substantiation and appeal in Fair Hearing No. R-04/18-225.¹

PROCEDURAL HISTORY

Petitioner's first appeal was filed in 2016. The hearing officer assigned at the time convened an evidentiary hearing but continued the matter when petitioner indicated that he wished to retain an attorney. Petitioner eventually retained counsel - however, the hearing officer retired at the beginning of 2018 and a new hearing officer was assigned. Petitioner's second appeal (of a second substantiation) was filed in April 2018 and the appeals were consolidated. In a series of status conferences that followed, the parties essentially agreed to continue the appeals for a variety of reasons; primarily, petitioner was in the process of attempting to obtain records in the possession of the federal government which he believed were relevant to his appeal; in addition, the attorneys' respective schedules and petitioner's health issues (including potential surgery) contributed to the difficulties in scheduling.

¹ The Department indicated that material witnesses for this matter were unavailable and not locatable.

When it was clear that petitioner had exhausted the efforts he was willing or able to make to obtain records from the federal government and his medical issues did not prevent scheduling, the appeals were set for two days of hearing, in-person, in May 2020. However, with the subsequent onset of the Covid-19 pandemic, the hearing officer continued the hearings (over the Department's objections and corresponding request that the hearings be conducted by phone) and rescheduled the hearings by video (over petitioner's objections and corresponding insistence that the hearings be held in-person) on July 29, 2020, and July 30, 2020. The hearings were held and included approximately one and a half days of testimony and argument, with several exhibits entered into evidence by both parties.

Subsequently, in the process of preparing a recommendation on the appeals, the hearing officer became aware that a portion of petitioner's testimony (approximately 45 minutes) had not been recorded due to a technical issue out of the parties' and hearing officer's control. The hearing officer convened a telephone status conference on October 14, 2020, to discuss how to address this issue; petitioner objected to consideration of the appeals without that portion of his testimony in the recorded record (on due

process grounds), and following the status conference, indicated he would not be available to re-submit his testimony (petitioner indicated he was "unable" to re-submit his testimony, for unspecified reasons).

FINDINGS OF FACT

1. The alleged victim in this appeal is petitioner's mother, who entered a nursing home on May 15, 2015 (petitioner's mother passed away on August 3, 2018 at the age of 101). The parties have stipulated that petitioner's mother met the definition of a "vulnerable adult" during the relevant time period of the matters in dispute. Petitioner became his mother's power of attorney in June 2004 and remained her power of attorney while she was living in the nursing home, until her death.

2. Petitioner's substantiation stemmed from events initially reported in late 2015 (in October or November), after his mother entered the nursing home. These events were the subject of a DAIL investigation by the Adult Protective Services division which continued from 2015 into mid-2016, leading to petitioner's substantiation and this appeal.

3. Prior to entering a nursing home, petitioner's mother lived with him in her home. It is generally

undisputed that petitioner was his mother's primary caregiver prior to her admission into a nursing facility. Petitioner has both an educational background and employment experience as a nurse, although he has not been employed in that field for several years due to physical and other medical issues. Petitioner also indicates that he worked less and less as the care needs of his father and then his mother became more demanding.

4. Petitioner was not employed during the time period relevant to this appeal, including the time his mother was residing in a nursing home. His mother had social security retirement income (of just over \$1,600 per month) which was deposited into a bank account that petitioner had access to and control of due to his authority as power of attorney. Petitioner was also his mother's "representative payee" for his mother's social security income, meaning he was the person designated to receive those funds on her behalf.

5. Following her entry into the nursing home, petitioner's mother became eligible for long-term care Medicaid coverage. This included what is known as a "patient share" obligation, paid monthly to the nursing home, which is based upon the gross income of the Medicaid enrollee minus certain limited deductions. While the nursing home is

reimbursed by Medicaid for a portion of beneficiary's care, the patient share represents the resident's contribution (based on income) towards that care; failure to make the patient share may be grounds for eviction of the resident.

6. In the case of petitioner's mother, her Medicaid patient share was \$871.56 beginning in June 2015 (it was pro-rated at \$461.92 in May 2015) and increased to \$1,460.34 effective November 1, 2015. The primary reason for the increase at that point was the elimination of her "home upkeep" deduction, which is allowed for the first six (6) months of residing in a nursing facility but ends after that time period. The home upkeep deduction is allowed on the premise that the resident will or is likely to return home and therefore may utilize some of their income to maintain their home.

7. Calculation of the patient share also included what is categorized as a "personal needs allowance" deduction of \$47.66 - a standardized monthly amount that the long-term care beneficiary is allowed to take out of their income for small personal necessities. These funds are typically managed by the nursing home to enable the resident's access to the funds.

8. With respect to the patient share, home upkeep deduction, and personal needs allowance, once these amounts are determined, the Medicaid program does not condition eligibility based upon whether the enrollee's income is actually spent for these purposes; in particular, payment of the patient share is generally a matter between the enrollee and the nursing home.

9. Petitioner made no payments of the patient share to the nursing home while his mother was residing there, accumulating an arrearage of several thousands of dollars during her residence in the home (including the time period relevant to petitioner's substantiation).²

10. There is no evidence that petitioner's mother had access to the funds designated as a "personal needs allowance" during her residence at the home and in particular during the time period and events at issue in this appeal.

11. Credible evidence presented by the Department established that petitioner at times expressed objections of "principle" to paying the patient share - such as indicating that the patient share was "unfair," "immoral," or "irresponsible" (to pay). The record also reflects that

² Although not material, petitioner and the nursing home eventually reached a settlement of this liability after the home sued petitioner for payment.

petitioner at times also indicated that he could not maintain his mother's home (where he resided) if he were to have paid the patient share. Credible evidence established that petitioner stated that he considered his mother's income "his money" and that he needed this income to "stay alive."

12. Petitioner's overall dissatisfaction with the care provided to his mother by the nursing home was clear from his testimony and the testimony of others. Petitioner indicated to the APS investigator that he believed the home was "criminally negligent" and at one point he made a formal complaint to the licensing division about her care. However, petitioner did not seek to discharge her into another facility. He further indicated to the APS investigator that he did not believe the home would evict his mother despite her, or his, failure to make the patient share payments (the home never attempted to take this action).

13. Petitioner never appealed the imposition or amount of the patient share, which he had the right to do under the applicable Medicaid rules (although it should be recognized that challenging the imposition or amount of the patient share is an uphill battle under existing rules and Board precedent).

14. During the Department's (APS) investigation, petitioner was forthcoming about how he was spending the funds from his mother's income, although he could only document a portion of his use of the funds. Petitioner produced receipts and a handwritten ledger to the investigator showing that he had spent the funds on items such as home heating fuel, automobile repairs and insurance, and food for himself as well as household items purchased from Walmart and Kmart (the produced store receipts totaled between \$150-200 in cash purchases in February 2016).

15. Pointedly, the handwritten ledger produced by petitioner showed that he made cash withdrawals from his mother's account averaging \$617 per month from June 2015 through February 2016. Petitioner included a budget which showed his average food and home necessities equaling \$600 per month (\$20 per day), minus \$194 that he received in 3SquaresVT, meaning his actual costs in this area were \$400. Petitioner then added \$200 per month in "all other house [and] car maintenance" and made a note that the \$400 plus \$200 equaled \$600 in "avg. mnthly CASH withdrwls."

16. Petitioner's handwritten ledger included a note that any funds not going into the above areas would go to "cash reserve" for "emergency, shortfall [and] priority

projects not addressable in single month" with a further note that the "reserve" contained "\$0" in cash.

17. Finally, the written document produced by petitioner contained a bank account ledger from February 2016 showing handwritten entries, starting with the Social Security deposit of \$1,508 (the amount of the check sent to petitioner's mother from the SSA), followed by debits or withdrawals for a utility bill, phone bill, telecom (i.e. Comcast) bill, a loan payment, auto insurance, home insurance, property taxes, a car repair, a bill paid to "Associates in Podiatry", and two separate cash withdrawals of \$200.

18. The above characterization and understanding of the documentation provided by petitioner was confirmed with the credible testimony at hearing by the Department's investigator, based on her interview of petitioner. This evidence is only buttressed by credible testimony presented by DAIL from a nursing home administrator that petitioner had explained his failure to make the patient share payments by showing her proof of payment for his cable bill (among other things). The Department investigator ultimately concluded that the funds being spent by petitioner, belonging to his mother, were being spent solely for petitioner's benefit.

19. The evidence in the record reasonably supports this conclusion, and at a minimum supports the conclusion that a substantial portion of the mother's funds were being spent on items that solely benefited petitioner, such as food and household supplies, cable bills, and car repairs, among other things. This is the case even accepting petitioner's assertion that his mother was expected to return home within the first 6 months of her admission (a period that ended in mid-November 2015) or that petitioner and his mother wanted her to return home even after that period. Many of the above items and services were paid for after that 6-month period and, in any event, were completely unrelated to maintenance of the home.

20. There is no evidence or even assertion that petitioner's mother specifically authorized or directed him to purchase the items or services described above or directed him to decline to pay the patient share.

21. A copy of the power of attorney was entered into evidence. Petitioner points to nothing in this document (nor is anything apparent) which specifically authorized him to purchase the items and services described above, such as food and household goods, auto repairs, and his cable bills, among other things.

22. Petitioner largely rests on the assertion that he and his mother wished her to return home, that he had been his mother's primary caregiver for several years and continued to play that role at some level despite her admission into a nursing home, and that he was not acting intentionally to take her funds for his own purposes, but rather in good faith service of the hope and belief that his mother would indeed return home.

23. The parties jostled about whether it was realistic for petitioner's mother to return home, and to the extent no discharge plan was ever fully developed for her to return home, who was to blame for this failure. However, this issue is ultimately immaterial given the clear evidence of petitioner's use of his mother's funds for items and services solely benefiting him.

24. On that point, the evidence is persuasive that petitioner was utilizing his mother's funds for items and services that personally benefited him and in a manner that was manifestly intentional in the act itself e.g., the purchase of food and household goods and services for himself and repairs to his vehicle. Petitioner's statements in the record to others - such as that he needed his mother's income to "survive" - also show that he utilized the funds for his

own benefit knowingly and intentionally. At the same time, petitioner was neglecting to meet his mother's financial obligations to the facility that was, in fact, providing 24-hour residential and medical services to his mother, as well as all of her food and essential personal care needs. Not only did this expose his mother to the risk of ejection from the facility, it buttresses the evidence that petitioner willfully declined to use his mother's funds for a purpose directly related to her needs and instead spent her funds on his own needs.

25. In providing evidence on his own behalf, petitioner points to the care that he provided to his mother before and after her admission to the home, the issues he saw with her care while she was there, and his hope and belief that she would return home. However, this does not change the nature and scope of petitioner's use of his mother's funds for his own benefit, as outlined above, persuasively established by the evidentiary record.

26. Petitioner also points to the fact that during this time period (shortly after DAIL completed its investigation), the nursing home managed to become his mother's representative payee (for receipt of her social security check) for a single month, June 2016, following which he was

able to regain that status, effective July 2016. However, there is no evidence that the decision of the Social Security Administration at that time had any bearing on the specific allegations investigated by DAIL and at issue in this appeal.³

ORDER

DAIL's substantiation of petitioner for exploitation in Fair Hearing No. R-01/16-704 is affirmed; petitioner's substantiation in Fair Hearing No. R-04/18-225 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

³ Petitioner appears to be making the argument, without explicitly stating so, that there is some kind of preclusive effect of the SSA's designation of petitioner as his mother's representative payee. However, even if it could be established that the issues considered by the SSA are the same issues in this appeal, the SSA decisions entered into evidence provide no content as to the reasons or conclusions of the SSA in making those decisions (except that petitioner is "suitable" to be the payee). Under these circumstances this evidence carries little, if any, weight.

employment, livelihood, and associations. On the other hand, the overarching purpose of the statute is to protect vulnerable adults from abuse. See 33 V.S.A. § 6901.

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.

Fair Hearing No. R-07/16-704 - Allegation of Exploitation

The parties have stipulated that petitioner's mother met the statutory definition of a "vulnerable adult." See 33 V.S.A. § 6902(14) ((14) "Vulnerable adult" means any person 18 years of age or older who: (A) is a resident of a facility required to be licensed under chapter 71 of this title..."). The statute protects vulnerable adults from "abuse, neglect and exploitation"; the issue in petitioner's case is whether he committed exploitation of a financial nature, in particular under the following definition:

(6) "Exploitation" means:

(A) willfully using, withholding, transferring, or disposing of funds or property of a vulnerable adult without or in excess of legal authority for the wrongful profit or advantage of another..

33 V.S.A. § 6902.

The facts establish that petitioner repeatedly utilized his mother's income for services and items that were solely

for his "wrongful profit or advantage." As established by the evidence that petitioner used his mother's funds to purchase items and services that were solely to his benefit, the "wrongful" and "willful" nature of these transactions is intrinsic to the act itself and also supported by petitioner's own statements to others about how he needed his mother's income to meet his own needs. There is no evidence that petitioner suffered from any cognitive inability to distinguish between purchases for himself (such as food) versus purchases for his mother, especially given that he willfully refused to pay for his mother's care through her Medicaid patient share obligation. Finally, there is no evidence that petitioner's use of his mother's funds was specifically authorized by her or by the power of attorney granted to him, by her. If anything, Vermont's power of attorney law limits an agent's authority to make payment to themselves for services, absence specific authorization. See 14 V.S.A. § 3504(d).⁴

⁴ For that matter, Vermont's power of attorney law imposes affirmative duties on the agent to "act in good faith and in the interest of the principal," "refrain from self-dealing...", to "exercise the degree of care that would be observed by a prudent person dealing with the property and affairs of another person," and "take no action beyond the scope of authority granted by the terms of the power of attorney..." 14 V.S.A. § 3505(a).

The preponderance of evidence establishes that petitioner exploited his mother through his authority as her power attorney and squarely within the definitions and standards contained in the applicable (vulnerable adult abuse) statute, and specifically as defined by 33 V.S.A. § 6902(6). As such, DAIL's substantiation of petitioner in Fair Hearing No. R-01/16-704 is consistent with the applicable law and must be affirmed by the Board. See 33 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

Fair Hearing No. R-07/18-225 - Unspecified Allegations

The Department presented no evidence on petitioner's appeal in Fair Hearing No. R-07/18-225. As such, this substantiation must be reversed. See 33 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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