

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. R-10/20-628
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Appeal of)
)

INTRODUCTION

Petitioner appeals the denial of Medicaid "high needs" or "highest needs" Choices for Care eligibility by the Department of Disabilities, Aging and Independent Living ("DAIL" or "Department"). The following is based on two telephone status conferences held November 2, 2020 and November 16, 2020, and an evidentiary hearing held by telephone on December 8, 2020. Documents submitted by the parties at hearing were also reviewed and considered.

FINDINGS OF FACT

1. Petitioner is 65 years old. She has been diagnosed with chronic lower back pain, other generalized pain, fatigue and difficulty concentrating. Petitioner is currently receiving Choices for Care ("CFC") services in the "moderate needs" category. Seeking additional assistance, petitioner applied for CFC in the "high" or "highest" needs category on

July 31, 2020 and was assessed for eligibility by DAIL on August 20, 2020, by phone.

2. The assessment was performed by a DAIL long-term clinical care coordinator who also holds a nursing license as a registered nurse (since 1986). A caregiver for petitioner was present with the petitioner during much of the assessment and an agency case manager for petitioner was also present by phone.

3. The assessment determined that petitioner was "independent" in most categories of her activities of daily living ("ADLs") and needed "supervision" (the most minimal level of assistance) in two ADLs, "dressing" and "mobility."

4. As a result of this assessment, the Department determined that petitioner was not eligible for "high" or "highest" needs CFC. DAIL mailed a letter to petitioner dated September 15, 2020, informing her that she had been determined ineligible for CFC because she did not meet the "nursing home level of care" requirement.¹

5. CFC eligibility determinations involve an assessment of an applicant's functional performance in nine ADLs within their home: dressing, bathing, personal hygiene,

¹ Following petitioner's appeal, the Department performed an internal review of her request, as required by the rules, and did not change the original decision.

mobility in bed, toilet use, use of adaptive devices, transferring, mobility, and eating. Applicants are assessed as to their functional ability based on a scale starting with "independent" to "[needs] supervision" to "[needs] limited assistance" to "[needs] extensive assistance" and finally to "total dependence."

6. Petitioner's assessment concluded that she is "independent" in the areas of toilet use, bed mobility, transferring, bathing, personal hygiene and eating. As noted above, the assessment concluded that she needs "supervision" in the areas of mobility and dressing (the use of adaptive devices was not applicable, nor in dispute here). She was not assessed to need limited or extensive assistance, or have total dependence, in any area.

7. The assessment form utilized by the Department contains the following guidance for each level of need (measured over the course of one (1) full week):

- independent: no help at all or help/oversight for 1-2 times.
- supervision: oversight/cue 3+ times or oversight/cue + physical help 1-2 times.

- limited assistance: non-weight bearing physical help 3+ times or non-weight bearing help + extensive help 1-2 times.
- extensive assistance: weight-bearing help or full caregiver assistance 3+ times.
- total dependence: full caregiver assistance every time

8. The Department presented credible evidence at hearing regarding its assessment from the nurse who performed the assessment. As the assessment was by phone, it was based in large part on answers provided by petitioner. It was also based in part on answers given by petitioner's "moderate needs: caregiver who present during part of the assessment. In addition, the assessment included a review of petitioner's medical records by the assessor. As confirmed by the testimony at hearing, the assessment form documented (in general) petitioner's own responses to her ability to perform ADLS:

9/14/2020 65-year-old female assessed over phone with CM from VNA due to Covid 19 and social distancing. Client is reporting that she is independent with her care during assessment. Upon completing the assessment I questioned the client as to what her "unmet needs" were and she states housekeeping, laundry and shopping needs.

9. At hearing, petitioner disputed the assessment in general and in particular that she had given the answers testified to by the Department's assessor, alleging that the assessor had fabricated much of her (the assessor's) testimony. However, the credibility of the Department's witness was not undermined by petitioner's objections to the testimony.

10. Petitioner also indicated a fear of falling while she was bathing. However, to the extent this is a consideration of CFC eligibility, the evidence establishes that petitioner was able to address this issue by giving herself sponge baths. In any event, this issue does not establish that petitioner needs "extensive" (or more) assistance with bathing.

11. Petitioner also objected to the fact that the assessment was performed over the phone. However, the Department made a credible representation that Vermont had received a waiver from the federal government to perform CFC evaluations by phone or video (if the latter is available), given the Covid-19 pandemic, and had been doing so since mid-March 2020. In addition to the phone interview with the applicant, the Department's assessors gather other information from medical and available family sources. There

is no evidence in the record that petitioner was prejudiced by the Department's assessment procedures.

12. In addition, petitioner submitted a letter from her physician in support of her appeal:

[Petitioner] is under my medical care. It is my medical opinion that she requires a higher level of care such as assisted living. She requires daily help with her medications, preparing meals and shopping. She requires help with bathing, cleaning her house, and doing laundry. She does not drive so requires assistance to do any errands that she might need. Additionally, she struggles with chronic lower back pain and respiratory issues which make it difficult for her to get around and increase her risk for falls.

13. The above letter from petitioner's doctor is the primary substantive evidence submitted by petitioner regarding her personal care needs in performing her ADLs.

14. In addition to assessing petitioner's ability to perform her ADLs, the Department's assessor reviewed other criteria for eligibility such as whether petitioner's health condition would worsen or whether there is an "immediate risk" to her if services are not provided. There is no evidence that petitioner's situation triggers these eligibility criteria or any other high or highest needs CFC eligibility criteria, in particular based on the Department's evidence that petitioner does not suffer from an "unstable" medical condition. The Department also presented credible

testimony that her current access to "moderate needs" CFC services provides assistance in almost all of the areas for which she is seeking assistance and the needs identified by her physician.²

15. As an eligible recipient of CFC "moderate needs," petitioner has the option of requesting a variance to expand or enhance some of the services she is already receiving, which totaled six (6) hours of assistance per week at the time of hearing. During the status conferences and hearing in this matter, petitioner expressed some skepticism about whether this would be helpful to her; however, she also suggested that she may be ultimately open to requesting such a variance. While there is no guarantee that a variance would be granted, it remains an option for petitioner in her case.

16. The Department also presented credible evidence that petitioner could be eligible for an assisted living placement through her community Medicaid eligibility. In addition, as explained to petitioner during the hearing, if

² With the exception of "bathing," with respect to which the evidence established petitioner was "independent," the needs identified by petitioner and her physician do not fall into any ADL category. They do fall into what are termed "instrumental activities of daily living," which are covered by the moderate needs program, and covered for individuals who meet "high" or "highest" needs CFC eligibility.

her circumstances change, petitioner is free to submit a new application for CFC eligibility.

ORDER

DAIL's decision is affirmed.

REASONS

The Department of Disabilities, Aging and Independent Living administers the CFC program, which falls under a Medicaid waiver intended to maximize independence and provide services which enable individuals to live in the community, as feasible. 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 CFC implementing regulations set out the eligibility criteria for the program. See Health Care Administrative Rules ("HCAR") § 7.102. An individual may be clinically eligible under the "highest needs group" if they require extensive or total assistance with at least one of the following Activities of Daily Living (ADLs): toilet use; eating; bed mobility; or transferring, and require *at least* limited assistance with any other ADL." HCAR §

7.102(6)(A)(i). *Id.* (emphasis in original). An individual may be eligible under the "high needs group" if they "require extensive-to-total assistance with at least one of the following ADLs: Bathing, Dressing, Eating, Toilet Use, [and] Physical Assistance to Walk." HCAR § 7.102(6)(A)(i).³

The evidence in the record fails to show that petitioner needs extensive assistance, or even limited assistance, in any ADL listed in the regulations. By petitioner's own request to the nurse-assessor, she wants assistance with housekeeping, laundry and shopping," none of which are considered ADLs under the rules. The only ADL cited in the letter from petitioner's physician is "bathing" and it cannot be construed as establishing that petitioner needs "extensive" assistance with bathing. The physician's letter does not in any rebut or undermine the Department's persuasive evidence that petitioner is "independent" with bathing.

As such, DAIL's denial of petitioner's CFC "high" or "highest" needs eligibility is consistent with the applicable

³It should be noted that there are numerous other avenues for CFC eligibility listed in the regulations that are clearly not applicable here. Thus, the only issue addressed is that claimed by petitioner, that she needs assistance with certain ADLs and other tasks.

rules and must be affirmed. See 33 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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