

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-07/08-310
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL) denying part of her request for additional time (variances) for personal care services funded by the Choices for Care (CFC) program.

DAIL approved petitioner for personal care services totaling 135 hours every two weeks. Petitioner is seeking authorization for personal care services totaling 145 hours every two weeks including variance requests for additional time for dressing, toilet use, personal hygiene, eating, and meal preparation. The issue is whether petitioner meets the criteria for her variance requests.

The decision is based upon Stipulated Exhibits and the evidence adduced at hearing.

FINDINGS OF FACT

1. The petitioner is a severely disabled fifty-six-year-old woman. Petitioner's primary diagnosis is rheumatoid arthritis affecting her neck, upper spine, and hands. In addition, petitioner is diagnosed with peripheral vascular disease, hemi paresis, depression, migraines, and constant pain.

The petitioner is wheelchair bound. Her hands are constricted, contorted, and look claw-like. She cannot hold up her head; her head is turned inward on her shoulder. As a result, she has difficulty swallowing and chokes easily. Since September 2008, petitioner uses oxygen continuously. In addition, she has daily urinary incontinence.

2. The petitioner is considered "highest needs" for the CFC program. DAIL has rated petitioner as needing total assistance with the following Activities of Daily Living (ADLs): dressing, bathing, personal hygiene, bed mobility, toilet use, adaptive devices, transferring, and eating. The petitioner was transitioned to the CFC Flexible Choices Program in 2007.¹ The CFC program is a Medicaid waiver program that funds personal care services. In addition to

¹The flexible care program gives individuals greater control over the funds allocated by DAIL in their cases.

the CFC program, petitioner receives services by a licensed practical nurse (LPN) through the Visiting Nurse Association (VNA).

3. DAIL regularly reassesses individual's eligibility for CFC services and, if the individual continues to be eligible, DAIL reassesses the individual's particular services needs.

4. B.A. is a registered nurse who has been employed by Transition II since 2005. B.A. completed an Independent Living Assessment (ILA) and variance request on petitioner's behalf on or about April 17, 2008. B.A. completed the previous year's assessment during August 2007 when petitioner transitioned to the flexible care program. Prior to her employment with Transition II, B.A. worked for DAIL reviewing ILAs in the Medicaid waiver programs from 2002 to 2005.

5. B.A. was concerned that petitioner had deteriorated over the course of the year. She testified that petitioner's head and neck were worse with petitioner's ear on her shoulder and with her body more twisted. She testified that petitioner had increased edema in her legs and feet. Normally, B.A. spends approximately one to two hours with an individual gathering information and observing part of an individual's ADLs. In this case, B.A. stayed with petitioner

and her personal care attendant for approximately five hours to observe petitioner's personal care needs.

6. B.A. noted in petitioner's variance request that petitioner is totally dependent on her caregivers. B.A. also took into consideration the services provided by the VNA before making petitioner's specific variance requests. A variance request is one for time above the maximum time limits set out in the ILA. The petitioner requested a total of 145 service hours every two weeks. In her request, petitioner requested the following variances:

Dressing	20 minutes per day
Bathing	30 minutes per day
Personal Hygiene	30 minutes per day
Toilet Use	14 minutes per day
Transferring	18 minutes per day
Eating	10 minutes per day
Meal Preparation	10 minutes per day

7. B.S. is a Long-Term Care Clinical Coordinator (LTCCC) employed by DAIL. Her job includes review of an individual's continuing eligibility for CFC including determination of service hours and variance requests. B.S. has been a LTCCC since August 2005. She is a registered nurse and a nurse practitioner. B.S. has reviewed petitioner's case since 2005. B.S. conducted a paper review of petitioner's variance requests.

8. B.S. made the following decisions regarding the variance requests:

Dressing	approved 10 minutes per day
Bathing	approved 25 minutes per day
Personal Hygiene	denied
Toilet Use	approved 5 minutes per day
Transferring	approved
Eating	denied
Meal Preparation	denied

B.S. approved a total of 127.5 service hours every two weeks. B.S. did not contact B.A. prior to making her decision. B.S. assumed that petitioner did not take into consideration her VNA services in her request; this assumption is not accurate.

9. On July 2, 2008, DAIL mailed petitioner a Notice that her service plan was not approved as requested because the time for some requests were considered unnecessary and because there were activities showing duplicate time.

10. On or about July 9, 2008, the petitioner requested a fair hearing with continuing benefits of 135 hours every two weeks. A commissioner's review was held and DAIL agreed to keep petitioner's hours at 135 hours every two weeks and deny the additional variance requests. The dispute involves the request for an additional 10 service hours every two weeks.

11. An evidentiary hearing was held on November 10, 2008. Both B.A. and B.S. testified. In addition, the petitioner and M.B., one of petitioner's personal care attendants testified.

12. M.B. has been one of petitioner's personal care attendants for ten years. M.B. explained that it was difficult to separate out the time a particular ADL took since petitioner's care was comprised of several actions at one time. For example, M.B. explained that the total time for a bed bath is 1.5 hours; this time period includes undressing petitioner, placing the plastic bathtub on petitioner's bed, filling it with water, using a Hoyer lift to place petitioner in the bath, bathing petitioner, using the Hoyer lift to get petitioner out of the bath, drying her, applying lotions, dressing her, and then draining and cleaning the tub.

Dressing

13. B.A. testified that she requested additional time for dressing because of the additional time to dress/undress petitioner when she has pool therapy. Petitioner was being switched from using a pool to using a hot tub for pain relief and exercises. B.A.'s variance request factored in use of the hot tub six days per week. B.A. testified that she also

factored in additional time for clothing changes due to petitioner's urinary incontinence.

14. M.B. testified that dressing petitioner is taking longer due to petitioner's rheumatoid arthritis. She noted that petitioner's arms are stiffer in the morning making it more difficult to put on and take off clothing. M.B. needs to massage petitioner's arms before she can dress petitioner. M.B. stated that the petitioner currently uses the hot tub three days a week although she should use it daily.

15. B.S. testified that she looked at the last variance and saw that petitioner was using the pool less often. As a result, she approved part of the variance.

Bathing

16. Petitioner has a sponge bath on Tuesday, Thursday, Saturday and Sunday. Petitioner has a bed bath on Monday, Wednesday and Friday. A plastic tub is placed on petitioner's bed for the bed bath. The personal care attendants use the Hoyer Lift to place petitioner in and out of the plastic tub. The personal care attendant assists the LPN when the LPN gives petitioner a bed bath.

17. B.A. testified that she observed a sponge bath. She also took into account that the LPN gives petitioner a bath three days per week before asking for the variance. In

addition, B.A. explained that she has not observed a bed bath. In August 2007, B.A. observed a bath in the bathroom bathtub. The VNA no longer allows personal care attendants to assist when the LPN uses a regular bathtub because of liability concerns. This necessitated the switch to a bed bath.

18. M.B. estimated that bathing petitioner takes about thirty minutes per bath.

19. B.S. testified that she granted the majority of the waiver request because the personal care attendants are not allowed to help the LPN when they do a tub bath.

Personal Hygiene

20. B.A. testified that she requested a waiver because petitioner needed extra time to properly care for her hands, legs/feet, and backside. Because the petitioner's hands are drawn up into fists, the personal care attendant needs to open the fists, clean, dry, and apply lotions or ointments. In the variance request, B.A. estimated an additional five minutes per day to do this task three times per day.

Petitioner has edema in her feet and legs. B.A. testified that petitioner's legs are more edematous than before and sometimes weep. B.A. watched the personal care attendant unwrap the ace bandage around petitioner's legs and

feet, wash, dry, apply lotions, and then rewrap the area. This is done twice per day; five minutes each time.

The personal care attendants stand petitioner twice daily to clean her backside and care for rashes for a total of ten minutes per day. In addition, the personal care attendants wash petitioner's face multiple times due to drooling; this task takes ten minutes per day.

Proper cleaning is necessary to prevent skin infections. B.A. stressed that the variance request was for services over and above normal personal hygiene (brushing teeth, hair care, range of motion, etc.).

21. M.B. testified that petitioner's personal care includes washing petitioner each time she eats because she drools, regular cleaning up of drool during the day, daily mouth care, hair care, and range of motion exercises in addition to the cleaning and lotions to petitioner's extremities and backside.

22. B.S. testified that she considered petitioner's hand care part of everyday care that is factored into the maximum time limits. She also stated that she did not give extra time for leg care because petitioner's edema dated from 2005 so she assumed there was no change.

Toilet Use

23. Petitioner takes diuretics (lasix) three days per week. The personal care attendants use an appliance or device that they place and hold against petitioner's body when petitioner urinates rather than use the commode which would take longer. The personal care attendants need to partially undress petitioner, wash her, clean the appliance, and dress petitioner. On the days, petitioner takes her diuretics; she needs to urinate approximately seven times over a two hour period.

24. B.A. was present on a day that petitioner took her diuretic and observed petitioner urinate every five to ten minutes over a two hour period. She estimated an additional two minutes each time or a total of an additional fourteen minutes on the days petitioner takes her diuretics. Her request for a variance did not make it clear that she was seeking the additional fourteen minutes daily for only three days (42 minutes) rather than seven days.

25. B.S. approved an additional five minutes per day (35 minutes) to take into consideration the additional time to deal with the diuretics.

Eating

26. Petitioner's hands and arms are not mobile. Her personal care attendant feeds her. There are certain

medications petitioner must take with food. Petitioner is unable to manage a whole meal and eats small meals eight to ten times per day.

27. B.A. saw petitioner eat a small amount of scrambled eggs and toast. She estimated that petitioner took ten minutes to eat this amount. B.A. was informed by petitioner's doctor that petitioner's condition affects her digestive system so that she cannot tolerate a whole meal.

28. B.S. testified that the 45 minutes per day allowed for total care should be sufficient for eating. If petitioner ate nine meals per day, this time would average 5 minutes per meal.

29. M.B. testified that feeding petitioner soft foods such as scrambled eggs takes her fifteen minutes to do. M.B. testified that petitioner has more difficulty eating. She explained that over the past year, petitioner's head is down more on her shoulder making it more difficult for petitioner to swallow.

Meal preparation

30. B.A. testified that she asked for a variance for meal preparation because she thought it would take more time to prepare meals or to heat pre-prepared meals.

31. B.S. testified that the personal care attendants can prepare seven to eight meals at the same time. Also, since petitioner does not eat the full amount, preparation should take less time.

ORDER

DAIL's decision is affirmed in part and reversed in part.

REASONS

The Choices for Care (CFC) program is a Medicaid waiver program that allows individuals who need nursing home level of care the means to choose whether to remain in their own home or enter a nursing home.

The general policy of the CFC program "shall be based on person-centered planning, and shall be designed to ensure quality and to protect the health and welfare of the individuals receiving services." CFC Program Manual, Highest & High Need Groups (CFC Regulations) Section I.A. As a result, each individual's case turns on information specific to the individual.

Once an individual is eligible, the individual is reassessed on a regular basis. CFC Regulations Sec. V.3.II. The individual's case manager submits an Independent Living

Assessment (ILA) to DAIL. The ILA includes a personal care worksheet that addresses the level of care and time requested for each ADL and for two IADLs (meal preparation and medication management); the remaining IADLs are aggregated.

The ILA lists maximum time limits for each ADL depending on the level of need. Recognizing that the program maximums may not meet an individual's needs, the regulations set out guidelines for requesting a variance. CFC Regulations Sec.IV.3.E.

The criteria for variance requests are found at CFC Regulations Sec. V.8.III which states:

A. **DAIL** may grant variances to the Choices for Care regulations.

B. Variances may be granted upon determination that:

1. The variance will otherwise meet the goals of the Choices for Care waiver; and

2. The variance is necessary to protect or maintain the health, safety or welfare of the individual.

3. **Applicants, participants, and providers** may submit requests for a variance to the DAIL at any time.

4. Variance requests shall be submitted in writing, and shall include:

a. A description of the individual's specific unmet need(s);

b. An explanation of why the unmet need(s) cannot be met; and

c. A description of the actual/immediate risk posed to the individual's health, safety or welfare.

5. In making a decision regarding a variance request, **DAIL** may require further information and documentation to be submitted. **DAIL** also may require an in-home visit by **DAIL** staff. **DAIL** shall review a variance request and forward a decision to the individual, his or her legal representative, if applicable, and to the provider(s).

6. **DAIL** shall make a decision regarding a variance request within thirty (30) days of receiving the request and shall send written notice of the decision, with appeal rights, within thirty (30) days.

The parties agree that petitioner is severely disabled and needs total assistance for the ADLs under consideration. The parties agree that petitioner needs variances for several of her ADLs although they disagree as to the scope of the variance.

DAIL has not reduced petitioner's prior personal care services; they have denied a request for additional time. The burden is on the petitioner to demonstrate the necessity for each of her requests.

In evaluating the evidence, we need to be mindful that petitioner's evidence included B.A.'s testimony. B.A. spent five hours with petitioner and her personal care attendant. In doing so, B.A. observed the personal care attendant help

petitioner with her ADLs and IADLs. In addition, B.A. assessed petitioner in 2007 and observed how petitioner's condition had deteriorated during this time period. In contrast, B.S. conducted a paper review of petitioner's request. B.S. did not contact B.A. to ask about the variance requests. B.S. did not have the same quality of information as B.A.

In addition, B.A. took into account VNA services prior to making the variance request. B.S. assumed the petitioner did not factor in VNA services in making her variance request. B.S.'s assumption is incorrect.

Even so, the Board needs to look at each variance request separately to see if petitioner has met her burden of proof for each request.

Dressing

DAIL granted part of the variance requested by petitioner. The problem with petitioner's request is that it was predicated on petitioner using the hot tub six days per week. Although petitioner should use the hot tub daily, she only uses the hot tub three days per week. Based on petitioner's actual usage, she has not shown sufficient evidence to support her variance request. DAIL's decision should stand.

Bathing

Petitioner is bathed daily. Four days a week, petitioner's personal care attendants give her a sponge bath. Three days a week, they assist the LPN with a bed bath.

DAIL granted part of petitioner's variance request. DAIL mistakenly assumed that the personal care attendants were not allowed to assist the LPN with a bed bath when the restriction was on assisting with a bath in petitioner's regular bathtub. As a result, the variance should be granted in full.

Personal Hygiene

DAIL denied petitioner's variance request.

B.A. based petitioner's variance request on the additional time needed for petitioner's personal hygiene over and above daily personal hygiene (brushing teeth, hair care, etc.). She observed the personal care attendant take care of petitioner's legs and feet including unwrapping ace bandages, washing, drying, applying lotions and rewrapping petitioner's legs and feet. B.A. noted that petitioner's edema had worsened. She described the extra time needed to care for petitioner's hands and to clean petitioner's rear as well as treat any rashes. Moreover, B.A.'s testimony highlighted the

importance of caring for petitioner's extremities to prevent infections and skin breakdown.

Petitioner presented sufficient evidence to support her variance request.

Toilet Use

DAIL granted part of petitioner's variance request.

Petitioner takes a diuretic three times per week. When petitioner takes her diuretic, she frequently urinates during a two hour period. This is over and above the limits found in the ILA. B.A. observed the impacts when petitioner took her diuretic.

B.A. based her request on an extra fourteen minutes per day for three days per week (42 extra minutes per week). B.A. testified that she added two minutes per toilet use at seven additional times when petitioner took her diuretic. B.S. granted an additional five minutes per day (35 extra minutes per week).

The variance should be amended to grant an extra 42 minutes per week (or 6 minutes per day).

Eating

DAIL denied the petitioner's request.

The petitioner eats eight to ten small meals per day. She is unable to eat large meals. B.A. observed petitioner's

personal care attendant feed her a small amount of scrambled eggs and toast and estimated that petitioner took ten minutes to eat. Based on her observations and the frequency of petitioner's meal, B.A. submitted a variance request.

B.S. denied the variance request believing that petitioner can eat her meals within the allotted 45 minutes per day. If petitioner averaged nine meals per day, she would be allotted five minutes per meal. On its face, this is not reasonable. The variance should be granted.

Meal Preparation

DAIL denied the variance request because they believe that sufficient meals can be made for current and future use within the allotted sixty minutes per day.

The petitioner did not provide testimony with sufficient specificity to support the need for additional time for meal preparation.

The variance is denied.

Conclusion

Based on the forgoing, DAIL's decision to deny variance requests for dressing and meal preparation is affirmed. DAIL's decision to deny variance requests for bathing, personal hygiene, and eating is reversed. DAIL's decision to

limit the variance for toilet use should be changed
consistent with this decision. 3 V.S.A. § 3091(d).

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