

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-07/09-404
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL) reducing the amount of petitioner's personal care services under the Choices for Care (CFC) program for the 2009 service year.

Choices for Care personal care services are comprised of various Activities of Daily Living (ADLs), the Instrumental Activities of Daily Living (IADLs) of meal preparation and medication management, the remaining IADLs, and, if necessary, additional time for urinary and/or bowel incontinence. A recipient's continuing eligibility and services are recalculated annually.

Petitioner previously brought a fair hearing regarding the amount of services for the 2008 service year, Fair Hearing No. A-07/08-310. That decision upheld some of her variance requests and denied others. Subsequent to that decision, changes to the 2008 service plan were made during February 2009. A chart showing the 2008 and 2009 service year requests, DAIL action and actual 2008 award is attached

to this decision as Appendix A. The 2008 Final on Appendix A is the baseline for looking at petitioner's requests and DAIL's decisions regarding the 2009 service year.

The Findings of Fact set out in Fair Hearing No. A-07/08-310 are incorporated except for changes referenced in the Proposed Findings of Fact below. A copy of Fair Hearing No. A-07/08-310 is attached for reference as Appendix B.

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

FINDINGS OF FACT

1. The petitioner is a severely disabled fifty-seven-year-old woman. Petitioner's primary diagnosis is rheumatoid arthritis affecting her neck, upper spine, and hands. Petitioner is also 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. Petitioner uses oxygen continuously. She has four or more episodes of urinary incontinence each day.

Petitioner lives alone with her service dog. She is very independent and would prefer not to need the level of services she receives.

Over the past year, petitioner has changed her primary care doctor. Petitioner has been prescribed different exercises and changes in her medications. She has been prescribed a Bi-Pap apparatus to use daily.¹ The petitioner uses the Bi-Pap during the day but is afraid to use the apparatus during the night. She is afraid of what could happen if the mask falls off during the night or she loses power during the night while the mask is on her face.

2. The petitioner is considered "highest needs" for the CFC program.

3. 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 22, 2009. As part of her assessment, B.A. spent an April 2009 morning with petitioner, her PCA (personal care attendant), and her LNA.² B.A.

¹The Bi-Pap is a breathing apparatus that helps people get more air into their lungs and is calibrated at different pressures for inhaling and exhaling.

²For the 2008 service year assessment, B.A. spent five hours with petitioner and her PCA observing petitioner's services.

testified that she reduced times required for certain ADLs because of her understanding of what DAIL would allow.

B.A. has completed petitioner's annual CFC assessments since August 2007 when petitioner transitioned to the CFC 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.

4. B.A. observed the petitioner's morning care. B.A.'s visit coincided with the LNA services provided by the Visiting Nurse Association (VNA). Petitioner receives 2.5 hours of VNA services three mornings per week for dressing, bathing, and personal hygiene. B.A. took the VNA services into consideration prior to completing petitioner's request for CFC services so there would be no duplication of services.

5. B.A. found that the petitioner seemed improved since the prior year's assessment. B.A. noted that the petitioner's physical appearance was improved and that petitioner had less edema in her legs. However, B.A. noted that the petitioner's curvature of neck was more twisted and that petitioner's pain increased. B.A. testified that petitioner's physical limitations remained the same.

B.A. noted the changes made by petitioner's new primary care doctor including the addition of the Bi-Pap apparatus, increasing the use of a diuretic (Lasix) from three days per week to daily use, other medication adjustments and changes to petitioner's exercise routine.

6. B.A. submitted an ILA and a Variance Request on behalf of petitioner on or about April 22, 2009 requesting a total of 4425 minutes per week or 147.5 hours every two weeks. The 2008 service year allowed 4127 minutes per week or 137.5 hours every two weeks. The particular requests that remain at issue will be dealt with below.

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. B.S. did not use the prior fair hearing decision or the 2008 service year allocations as her starting point; she went back to her proposed 2008 service year calculations after her review of petitioner's 2009 service year request. B.S. did

not contact B.A. for any clarification prior to doing her decision.

B.S. agrees that petitioner is functionally the same as during the prior service year.

B.S. determined that petitioner should be allocated 3800 minutes per week or 127 hours every two weeks.

8. On July 6, 2009, 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.

9. On or about July 23, 2009, the petitioner requested a fair hearing with continuing benefits of 137.5 hours every two weeks.

10. A commissioner's review was held on September 8, 2009 and the Commissioner issued her decision on September 30, 2009 upholding the reduction of service hours.

11. An evidentiary hearing was held on November 19, 2009. Both B.A. and B.S. testified. In addition, the petitioner and M.B., one of petitioner's personal care attendants testified.

12. The 2009 service year ADL and IADL requests and DAIL action can be characterized as (1) the petitioner and DAIL are in agreement and service times remain at 2008

levels, (2) DAIL accepted the petitioner's request although petitioner requested less time than the 2008 levels, (3) DAIL increased the petitioner's request, and (4) DAIL did not grant the full amount of petitioner's variance request. The categories are set out as follows:

a. No dispute, 2008 service levels remain

Bed Mobility	210 minutes per week
Meal Preparation	420
Urinary Incontinence	280
IADLs	270

b. DAIL agrees to petitioner's requests

Toilet Use	455
Eating	315

(Petitioner requested a reduction of 42 minutes per week in toilet use and 70 minutes per week in eating.)

c. DAIL increases petitioner's request

Transfer	560
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Petitioner requested 315 minutes per week. Petitioner received 560 minutes per week during the 2008 service year.

d. DAIL does not grant full variance requests

	<u>request</u>	<u>grant</u>	<u>2008 award</u>
Dressing	455	280	280
Bathing	840	490	525
Personal Hygiene	140	100	350
Adaptive Devices	175	105	105
Mobility	340	210	140
Med Management	210	105	105

The dispute focuses on the activities in c and d above.

13. M.B. has been one of petitioner's personal care attendants for over twelve years and testified in petitioner's earlier case. M.B. previously 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. She testified that B.A.'s testimony, as set out in this decision, is accurate. She further testified that petitioner lately has more bedsores needing care and that they have started to work on petitioner's neck.

Bathing and Transferring³

14. Petitioner has a tub bath four days per week and a sponge bath three days per week. The LNA does the tub bath two days/week and a sponge bath one day/week. The personal care attendant (PCA) handles the tub bath two days per week and the sponge bath two days per week. A plastic tub is placed on petitioner's bed for her tub bath. Petitioner is placed into a Hoyer lift for the transfers and while in the tub. In 2008, petitioner was granted 525 minutes per week for bathing.

15. B.A. observed the LNA give petitioner a tub bath. She described the tub being filled through a hose from the

³These two ADLs are combined since B.A. and B.S. differ as to where to place certain activities such as the transferring that is done for bathing or to use the hot tub.

bathroom. As the tub fills up over the course of an hour, the LNA undressed petitioner. The PCA helps the LNA transfer the petitioner during bathing. According to B.A., it takes thirty minutes to empty and clean the tub.

The petitioner's weekly variance request included 315 minutes (PCA doing sponge baths two days per week and doing tub bath two days per week and assisting LNA the other days) and 360 minutes for use of the hot tub six days per week. B.A. added time to ready the inflatable tub, fill it, drain it and clean it. The petitioner requested a total of 840 minutes per week.

B.A. included the hot tub in the bathing category because she did not see another category that applied and used this category the prior year. Petitioner does range of motion exercises for her lower extremities in the hot tub in the afternoons. The hot tub is also used to alleviate pain. Petitioner's use of the hot tub six days per week is a change from the prior service year in which she received this type of therapy three days per week.

16. B.S. testified that she felt that some of the time petitioner requested for bathing and the hot tub should have been placed in the transferring category. B.S. maintained transferring at 560 minutes per week.

B.S. testified that inflating the tub as well as filling the tub and draining it are not covered under the CFC program. These times can be used to do something else. She testified that a tub bath takes more time than a sponge bath but she did not specify times. She used an average of 70 minutes per day for 490 minutes per week for bathing. B.S. gave no evidence why the time for bathing should be reduced from 2008 to 2009.

Adaptive Devices

17. B.A. testified that petitioner is now consistently using devices that had been prescribed in the past. B.A. included a bungee device that keeps petitioner's head up to relieve tension on muscles and that is used one to two times per day (10 minutes/day); a special helmet when petitioner uses the computer (5 minutes/day), arm braces (5 minutes/day), and leg wraps twice per day (5 minutes/day). The arm braces are painful; petitioner does not use them daily. The arm brace allows a utensil for feeding to be placed in her hand and her head is bent down; this did not appear to be successful. B.A. requested 25 minutes per day or 175 minutes per week.

18. B.S. testified that she halved the time requests for putting on/off the special helmet and ace wraps based on

her personal experience of doing these tasks. She did not allow any time for the armbands because the petitioner is totally dependent on her PCA for feeding.

Dressing

19. B.A. testified that the LNA dresses petitioner three days per week in the morning and allots 25 minutes per day for the task. B.A. described the LNA dressing petitioner as putting on her bra, dress pulled down over petitioner's head and being smoothed out, slippers, and no underpants. The process is difficult because it is hard to get petitioner's limbs straightened out. B.A. testified that undressing takes 15 minutes.

20. The PCA does the morning dressing four times per week (25 minutes per time or 100 minutes per week). The PCA undresses and dresses petitioner before and after using the hot tub six days per week (25 minutes per time or 150 minutes per week). Petitioner wears a bathing suit in the hot tub. The PCA undresses the petitioner at night and puts her nightclothes on every day (15 minutes per time or 105 minutes per week). There may be occasions when petitioner needs to be dressed due to spills but B.A. did not include these needs into petitioner's request.

When the PCA does all the dressing and undressing, B.A. found that it would take her 65 minutes. B.A. made a mathematical error on her variance request by determining that the PCA spent 65 minutes every day. The correct calculation for the week is 355 minutes.

21. B.S. testified that she averaged time at 40 minutes daily by 7 days for 280 minutes per week for dressing. B.S.'s calculations do not take into account the four mornings that the PCA dresses petitioner.

Personal Hygiene

22. B.A. testified that the VNA allotted the LNA thirty minutes each time she performed petitioner's personal hygiene in the morning. The LNA brushes petitioner's teeth and does petitioner's skin care. In terms of skin care, the LNA needs to make sure that petitioner's folds of skin are properly cleaned, dried and ointment applied. Given petitioner's body, this is more difficult because there are many skin folds and her hands need to be pried open to do hand care. The PCA does this care on the other four days of the week.

B.A. found that the PCA did additional personal hygiene care daily including face care and extra peri care. Petitioner uses a device that fits against her body for urination but there are times that she does not hit the

device and the PCA must clean and dry the area. Petitioner verified that she does make a mess sometimes when using this device. B.A. testified that due to the problems petitioner has when she urinates, the PCA does extra peri care twice per day with a more thorough cleaning and application of ointment to the skin to prevent skin breakdown. To compensate for this time, B.A. asked for 35 minutes/day for four days or 140 minutes per week.

23. B.S. testified that she gave petitioner 25 minutes per day or 100 minutes per week for personal hygiene by the PCA. She felt that peri care was normally within personal hygiene. She did not say why she would allot less time than the VNA allots for daily personal hygiene.

Medical Management

24. At the time of the 2008 review, petitioner took Lasix approximately three times per week. Now, petitioner takes Lasix daily in the early evening causing petitioner to urinate approximately every ten minutes over the course of one to two hours.

25. Petitioner has eight other prescription medications. She is given medication in the morning, at 3:00 p.m., around 5:30 p.m., and at bedtime. The PCA helps petitioner use an inhaler several times per day; the PCA must

hold the inhaler. She uses a nebulizer about once per week. She is on continuous oxygen. She uses the Bi-Pap during the day and about once per week overnight when her caregiver volunteers to stay overnight.

B.A. testified that the PCA would chop medicines into applesauce and feed it to her. B.A. asked for thirty minutes per day or 210 minutes per week.

26. B.S. testified that she allotted 15 minutes per day or 105 minutes per week, the maximum time allowed. She did not allow any time for the Bi-Pap because it is adaptive equipment, but there is no indication that B.S. considered how the Bi-Pap would impact the time for adaptive equipment.

Mobility

27. Petitioner uses a power chair inside her home and transfers to a manual chair to go out.

28. Not considering range of motion, B.A. and B.S. both gave a baseline figure of twenty minutes per day for mobility.

29. B.A. asked for an additional 28.5 minutes per day for range of motion exercises in the morning and afternoon. Petitioner receives range of motion exercises in the morning for upper body mobility. The LNA does these exercises three times per week; the PCA does it otherwise. The LNA spent

fifteen minutes doing range of motion exercises when B.A. observed her. Petitioner receives range of motion exercises for eight to ten minutes in the hot tub during the afternoon for her lower extremities six days per week.

B.A. requested 340 minutes per week. The math in the variance request is not accurate. The request is twenty minutes per day for mobility (140 minutes per week), range of motion for upper extremities at fifteen minutes/day for four days (60 minutes per week), and range of motion for lower extremities averaging nine minutes/day for six days (54 minutes per week) for a total of 254 minutes per week.

30. B.S. testified that she gave petitioner 20 minutes per day for mobility and 10 minutes per day for range of motion of the lower extremities for 30 minutes per day or 210 minutes per week. She thought that the range of motion for the upper extremities could be done while petitioner was being dressed or bathed.

ORDER

DAIL's decision to reduce petitioner's 2009 CFC award to 127 hours every two weeks is reversed. The case is remanded consistent with the recommendations below.

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, a community setting, 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 1115 Long-term Care Medicaid Waiver Regulations (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. VII.B.

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.XI.

The criteria for variance requests are found at CFC Regulations Sec. XI stating:

A. The Department may grant variances to these regulations. 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. The need for a variance must be documented and the documentation presented at the time of the variance request.

. . .

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

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

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

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

The parties agree that petitioner is severely disabled and needs total assistance for the ADLs and IADLs under consideration except for bed mobility and mobility. The parties disagree as to whether a particular variance should be granted and, in cases where the parties agree there is a need for a variance, disagree about the scope of the variance.

The difficulty in these cases is that the Board cannot only look at the total number of service hours in making a decision. The CFC program has many moving parts. The prior service year provides the baseline for looking at the

petitioner's reassessment. The question is how to treat DAIL's decision regarding a request for a variance of a particular ADL or IADL.

If DAIL's decision includes a reduction in the amount of time from the prior year for a particular ADL, DAIL bears the burden of proof in justifying the reduction of services. In doing so, DAIL must look at the actual services granted for the prior year, not the LTCCC's worksheet for that year. If DAIL has denied a new request for time above the prior year for a particular ADL, the burden is on the petitioner to demonstrate the necessity for that request.

In evaluating the evidence, we need to be mindful that petitioner's evidence includes B.A.'s testimony. B.A. spent several hours with petitioner, the LNA, and the PCA this year. The year before she spent five hours with petitioner and the PCA. In doing so, B.A. observed the help petitioner received for particular ADLs and IADLs. B.A. took into account any changes impacting petitioner's needs over the past year, the allotted VNA services prior to making petitioner's variance requests, and her understanding of what DAIL would fund.

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 use the prior service year's allotment as her reference point in making decisions. B.S. did not have the same quality of information as B.A.

Both B.A. and B.S. stated that petitioner's functional abilities remained the same. As such, the 2008 service year provides a good basis for petitioner's needs except to the extent that current requests and information differ with the prior award and are contested by the parties. The 2009 requests and DAIL action for bed mobility, meal preparation, urinary incontinence, IADLs, toilet use and eating are not impacted by this decision.

Petitioner saw a number of changes over the past year that impacted on her care. Petitioner doubled the use of her hot tub from three times per week to six times per week meeting the need to do range of motion exercises for her lower extremities as prescribed; and in the process, increasing undressing/dressing and transfers. Petitioner's medications changed including an increase in the use of a diuretic from three times per week to daily causing increased urination and, given some of the difficulties using her device for urination, increased need for peri care. Petitioner became consistent in the use of her adaptive

devices with the exception of armbands. She has a new device to use, the Bi-Pap machine.

Turning to the points that remain in dispute, the following is found. First, bathing and transferring are considered together. There is no basis in the record to decrease the times allotted in 2008 of 525 minutes per week for bathing or 560 minutes per week for transferring. DAIL is correct that the times for filling and emptying the tub should not lead to an increase of time in bathing. However, there are increased transfers and use of the hot tub that need to be factored into the times; the time necessary for both ADLs should be reviewed by the parties.

Second, petitioner's request for an increase of time for adaptive equipment is predicated on her meeting her doctor's orders in using the equipment she was prescribed. With the exception of armbands, petitioner is doing so. Based on her request, petitioner should be allotted twenty minutes per day or 140 minutes per week.

Third, petitioner is dressed each morning after her tub bath; the PCA dresses petitioner four mornings per week. Petitioner is difficult to dress given the impacts of her rheumatoid arthritis. B.A. observed the LNA take the full twenty-five minutes allotted by the VNA. In addition,

petitioner needs to be undressed and dressed six days per week for her to utilize her hot tub for range of motion exercises and to alleviate pain. Then, petitioner is undressed each night for bed. B.A. computed the times of twenty-five minutes each time the hot tub is used and fifteen minutes for undressing in the evening. DAIL did not address the full number of times petitioner is dressed/undressed during the day. Petitioner has amply shown the need for 355 minutes per week for dressing.

Fourth, petitioner requested a reduced amount of personal hygiene for the 2009 service year that only considered the PCA's duties four days per week to do all of petitioner's personal hygiene including additional peri care to protect petitioner's skin from urinary incontinence. DAIL further reduced this amount by just looking at the times allowed under the guidelines rather than addressing the overall need. Petitioner has demonstrated the need for 140 minutes per week.

Fifth, petitioner's medication management includes the PCAs giving petitioner medications four times per day, aiding the petitioner use an inhaler several times per day, aiding the petitioner use the Bi-Pap daily, and periodic use of a nebulizer. The Bi-Pap machine is new and there is an

increase in the use of lasix. In 2008, petitioner received 105 minutes per week. She now requests 210 minutes per week. The evidence is not clear that the medication changes lead to a doubling of time. The parties should address what increase, if any, is necessary.

Sixth, the last ADL in dispute is mobility. The petitioner has increased the time she does her range of motion for her lower extremities by increasing the use of her hot tub to six days per week. The times for petitioner's range of motion for both her upper extremities and lower extremities need to be added to mobility. DAIL has made assumptions about how range of motion exercises can be done as part of other activities. But, petitioner has provided information documenting how petitioner meets the prescription for range of motion exercises. The petitioner has demonstrated the need for 254 minutes per week for mobility.

In conclusion, DAIL's decision to reduce petitioner's 2009 service year allocation to 127 hours every two weeks is reversed. The Board's conclusions regarding the time necessary for adaptive equipment, dressing, personal hygiene, and mobility are incorporated into the Choices for Care calculations for petitioner. In terms of bathing,

transferring, and medication management, the case is remanded for a decision consistent with the above decision.

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