STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing Nos. A-10/09-539
	)	& A-10/09-540
Appeal of	)	

INTRODUCTION

The petitioner appeals two decisions by the Department of Disabilities, Aging and Independent Living (DAIL).

Fair Hearing No. A-10/09-539

Petitioner appealed a decision by DAIL that the nursing home discharge notice met federal and state requirements. Petitioner notified the Board subsequent to the record closing that he left the nursing home to live in the community. The issue is now whether petitioner's appeal is moot.

Fair Hearing No. A-01/09-540

Petitioner appeals the decision by DAIL that he does not meet the clinical eligibility criteria for the Choices for Care (CFC) program. The issue is whether petitioner meets the clinical eligibility criteria for the CFC program.

The decision is based upon the evidence adduced at hearing and subsequent briefing.

FINDINGS OF FACTS

1. The petitioner is a fifty-three year old individual who is under guardianship. Petitioner's guardian is his mother, B.B.

2. The petitioner suffers from a combination of mental and physical conditions.

The petitioner is schizophrenic and receives care from the local community mental health agency, NWCSS. He is eligible for Community and Rehabilitation Treatment (CRT) services.

Petitioner is developmentally delayed. The last two IQ tests administered to petitioner place his IQ in the mid 60s.

Petitioner's physical conditions include hypertension, cerebral palsy, severe neuromuscular back pathology with curvature impinging on petitioner's respiratory function, chronic pain, seizure disorder, GERD, and hyperlipidemia.

3. The petitioner has a treatment team through NWCSS. The following people are part of petitioner's treatment team:

a. Dr. A.L.W., petitioner's treating psychiatrist since December 2007. Dr. A.L.W. sees petitioner every six to eight weeks.

b. L.B.P., CRT clinical program manager. She has been involved with petitioner for over five years.

c. A.A., community support worker and case manager. She provided petitioner with life skills assistance from 2003-2006 and has been his case manager since 2006.

They testified on petitioner's behalf at hearing. The petitioner's psychiatric condition is under control through medication administered by NWCSS on a regular basis. As will be more fully spelled out below, the treatment team's concerns about petitioner's CFC eligibility arise from the interplay of petitioner's behavior, lack of judgment impacting negatively on his ability to care for himself, and his physical conditions. They do not consider his behavior to be a manifestation of his psychiatric impairment.

4. The petitioner was admitted to the hospital on or about December 11, 2008 due to a life threatening esophageal tear/respiratory failure. This was petitioner's second hospitalization for an esophageal tear in a two-year period. Prior to his hospitalization, petitioner lived in a community placement.

5. On or about January 19, 2009, petitioner was transferred to a local nursing home, SAHR, for rehabilitation. (Subsequent to hearing, petitioner moved into a home in the community that is funded by NWCSS.)

6. The treatment team has several concerns arising out of petitioner's behavior, judgment, and ability to care for his basic needs. These concerns include:

a. Proper nutrition. Their experience is that petitioner believes that his nutritional needs can be met by drinking Mountain Dew. Left to his own devices, he will subsist on Mountain Dew. As a result, petitioner has been malnourished and/or emaciated at times. He needs prompting and supervision to eat properly.

Petitioner needs help when eating. Specifically, he needs to have his food cut up in small pieces because he is in danger of choking if he tries to swallow too big a piece. His spinal curvature makes swallowing difficult.

b. Judgment. Petitioner has little insight into his behavior. Without proper supervision, petitioner will not take medications, wash, etc. Dr. A.L.W. recounted two occasions over the past three years when petitioner came to appointments in urine soaked clothing.

In their experience, petitioner is not a good reporter. He will respond by yes/no rather than explanations. L.B.P. recounted that petitioner will answer "yes" to questions whether he can do what is asked or not such as answering "yes" to cooking when he cannot cook.

Even with prompting, cuing, and supervision, petitioner does not always follow through on meeting his needs.

c. Sexualized behavior. Petitioner engages in improper behavior such as public masturbation and making passes at females.

The treatment team is concerned that petitioner's actions can place him at risk for medical problems; for example, suffering a seizure because he fails to take medication or having another esophageal tear due to his nutrition. Over a three to four year period, petitioner had a few seizures due to failure to take his medications.

They also testified about petitioner's ability to do activities of daily living (ADLs) such as dressing. Their testimony can be summarized as petitioner needing prompting, cuing, and supervision in regard to activities such as dressing, eating, or bathing.

7. M.K. is a Long-Term Care Clinical Coordinator (LTCCC) employed by DAIL. She did the assessment of petitioner's CFC eligibility. She first saw petitioner in February when he was receiving rehabilitation. She was called by A.W. of SAHR and told that petitioner did not need nursing home level care. M.K. did her assessment on July 27, 2009. Her assessment was based on interviewing the petitioner for approximately ten to fifteen minutes and reviewing the nursing home chart for thirty to forty minutes.

8. L.P.B. contacted A.W. when the CFC eligibility process began. She requested that the assessor include her and B.B. as part of the assessment process. They were not included. M.K. testified that she did not know that NWCSS staff or others wanted to be involved.

9. M.K. found that petitioner did not need nursing home level of care. She found that petitioner did not need more than supervision for the ADLs of bathing, dressing, and personal hygiene.

In the assessment, M.K. found that petitioner was able to make decisions (modified independence), did not engage in socially disruptive behavior, and that he had minimal difficulty remembering. Without the information from NWCSS, M.K. did not have sufficient information to come to all of these conclusions.

ORDER

The petitioner's appeal of the nursing home discharge is moot and is dismissed. DAIL's decision that petitioner is ineligible for CFC is affirmed.

REASONS

Nursing Home Discharge

When petitioner appealed DAIL's decision that the nursing home discharge notice met applicable federal and state requirements, he was a resident of that nursing home. A successful appeal would have nullified the discharge. Subsequently, petitioner left the nursing home and is now in the community. The relief petitioner sought is no longer a live controversy.

The Board addressed mootness in Fair Hearing No. 17,272 stating on pages 5-6 that:

> [t]he Vermont Supreme Court has said that as a general rule a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." In re S.H., 141 Vt. 278, 280 (1982) quoting from United States Parole Commission v. Geraghty, 445 U.S. 388, 396 (1980) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)).

The petitioner argues that the case is not moot as he is at risk of returning to nursing home care.

The Court addressed a limited exception to the mootness doctrine in In re S.H., *supra*. In that case, the petitioner challenged a decision by the Board that the Board did not have jurisdiction to review her placement as a delinquent into a residential school. Subsequent to the Board decision, the petitioner was removed from the residential school leading the Court to find the case moot. The Court articulated a limited exception to the mootness doctrine in the absence of a class action or an action for monetary damages. The exception has two prongs—(1) the challenged action was too short to allow for adjudication **and** (2) there is a reasonable expectation that the petitioner would be subjected to the same action again. The Court did not find the second prong. They found that even if the petitioner was placed in the same residential school, she would have sufficient time to ask for review.

The same holds true in this case. In the event that petitioner finds himself in the same nursing home, facing the same reasons for discharge, facing the same notice, and the same action by DAIL, the petitioner would have sufficient time for review through the fair hearing process.

The petitioner's case does not present a live controversy and should be considered moot.

Choices for Care

The Choices for Care (CFC) program is a Medicaid waiver program authorized under Section 1115(a) of the Social Security Act. Medicaid waiver programs allow States latitude in meeting the medical needs of their residents.

Congress targeted home health care and services as an alternative to institutionalization as an area for Medicaid waivers by stating in 42 U.S.C. § 1396n(c)(1) that:

> The Secretary may by waiver provide that a State Plan approved under this subchapter may include as "medical assistance" under such plan payment for part or all of the cost of home and community-based services . . .which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals **require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded** . . . (emphasis added).

The Vermont Legislature endorsed the idea of obtaining a Medicaid 1115 waiver to allow individuals choice between

"home and community based care or nursing home care" in Act 123 (2004). DAIL obtained approval for such a waiver from the Centers for Medicare and Medicaid Services. DAIL adopted regulations through the Vermont Administrative Procedures Act setting out eligibility criteria. The CFC program provides personal care services to those elderly or physically disabled Vermonters who meet the eligibility criteria.

The petitioner is seeking eligibility through either the highest needs or the high needs criteria. The petitioner has the burden of proof in making a case for initial eligibility for the CFC program.

The applicable eligibility criteria for the highest needs group is found at Choices for Care 1115 Long-term Care Medicaid Waiver Regulations (CFC Reg.) IV.B.1; the pertinent sections state:

> ii. Individuals who have a severe impairment with decision-making skills or a moderate impairment with decision-making skills and one of the following behavioral symptoms/conditions, which occur frequently and is not easily altered:
>
> Wandering — Verbally Aggressive Behavior
> Resists Care — Physically Aggressive Behavior
> Behavioral Symptoms

The applicable regulation for eligibility for the high needs group is CFC Reg. IV.B.2.iii that states:

Individuals who have impaired judgment or impaired decision-making skills that require constant or frequent direction to perform at least one of the following:

Bathing	Dressing
Eating	Toilet Use
Transferring	Personal Hygiene

The applicable definitions are found at CFC Reg. II which include:

7. "Behavioral Symptoms" means behavior that is severe, frequent and requires a controlled environment to provide continuous monitoring or supervision.

12. "Controlled Environment" means an environment that provides continuous care and supervision.

39. "Physically Aggressive Behavior" means hitting, shoving, scratching, or sexual assault of other persons. The behavior must be severe and frequent, requiring a controlled environment to provide continuous monitoring or supervision.

44. "Resists Care" means unwillingness or reluctance to take medications, injections, or accept ADL assistance. Resisting care does not include instances where the individual has made an informed choice not to follow a course of care (e.g. individual has exercised his or her right to refuse treatment, and reacts negatively as staff try to reinstitute treatment). Resistance may be verbal or physical (e.g. verbally refusing care, pushing caregiver away, scratching caregiver).

51. "Verbally Aggressive Behavior" means threatening, screaming at, or cursing people. The behavior must be severe and frequent, and because of its hostile nature, requires consistent planned behavioral interventions and approaches requiring a controlled environment to provide continuous monitoring or supervision.

The petitioner presents many difficulties to his care providers. He receives CRT services (Community

Rehabilitation and Treatment). CRT is one part of the 1115B Medicaid Waiver; CRT targets the mentally ill and provides both therapeutic services and support services. Support services can include housing and community supports.

Petitioner has physical disabilities. He presents complex behavioral issues that can impact on his self-care. He is asking for some personal care services to complement the services funded by Medicaid and the through the Department of Mental Health.

As will be discussed below, the petitioner has not met his burden of proof that he meets the eligibility criteria for either the highest needs or high groups. Petitioner has not shown that he needs nursing home level care.

Petitioner has not provided evidence that his behavioral symptoms are so severe or so frequent that he needs continuous supervision in a controlled setting. He needs to be cued to take medications, bathe, or eat properly. He can do these activities himself. He does not need skilled nursing services.

Petitioner's treatment team is concerned that harm may befall petitioner because petitioner, on occasion, has not followed through with his self-care. During the last three to four years, petitioner had a few seizures due to failure

to take medication and was hospitalized twice for esophageal tears. But, he does not need nursing home level care to ensure that he takes care of himself properly.

Petitioner is not physically aggressive as that term is defined in the CFC regulations nor is he verbally aggressive as that term is defined in the CFC regulations.

Although petitioner argues that his behavior is not derived from his psychological condition, it is not clear from the evidence what the root of his behavioral issues is. There is no evidence of a physical diagnosis that leads to the behaviors of concern. Petitioner's schizophrenia is under control from medication. However, petitioner is developmentally delayed, and these delays may impact on petitioner's behavior.

The CFC program is aimed at those individuals who need nursing home level of care but want the option of remaining in the community. Petitioner presents challenges to his treatment team.[1] He needs services but his needs do not rise to the level of need for nursing home services.

Conclusion

[1] Petitioner may qualify for Medicaid community services or developmental disability services.

Based on the foregoing, petitioner's appeal of the nursing home discharge is dismissed as moot. In addition, DAIL's decision to deny CFC eligibility is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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