

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-02/11-68
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL) denying her application for Choices for Care (CFC) services. The issue is whether the petitioner meets the clinical eligibility requirements for either the highest needs or high needs CFC program.

Procedural History

The petitioner received a denial from DAIL dated September 20, 2010 informing petitioner that she did not meet the CFC clinical eligibility requirements. Petitioner timely requested a Commissioner's Review.

The Commissioner's Review took place on October 28, 2010. On November 15, 2010, the Commissioner issued a decision upholding the clinical determination that petitioner was ineligible for CFC.

The petitioner requested a fair hearing on or about February 2, 2011. A telephone status conference was held on March 8, 2011 to identify the issues. A question was raised

regarding petitioner's termination from the Attendant Service's Program prior to her application for the CFC program. A telephone status conference was held on April 5, 2011 in which the issue was identified as petitioner's eligibility for the CFC program. The case was scheduled for hearing. Due to problems with witness availability, the hearing was continued to July 25, 2011. Subsequent testimony was taken July 27, 2011. The record remained open for further documentary evidence.

The decision is based upon the evidence adduced at hearing and the documentary evidence submitted post-hearing.

FINDINGS OF FACT

1. The petitioner is seventy-six years old. Her primary diagnoses are osteoarthritis, rheumatoid arthritis affecting her hands, asthma, carpal tunnel syndrome, anxiety and depression. Petitioner is remarried.

Petitioner suffers significant pain from her arthritis. Since 2007, petitioner has received epidural injections at L4-5 on a regular basis to handle her pain.

Petitioner's hands are knobby, deformed, red, and swollen in the joints.

Past History with DAIL

2. Petitioner first applied for the high needs CFC program in 2007 after she fractured her left shoulder. Petitioner was denied CFC eligibility and appealed that decision to the Human Services Board.

3. In Fair Hearing No. 21,164, the Board reversed and remanded the case to DAIL after finding that DAIL did not do a full review of petitioner's eligibility since DAIL stopped its inquiry after determining that petitioner's doctor could request certain services through Medicare while petitioner's shoulder healed.

4. The Secretary reversed the Board's decision and the petitioner subsequently appealed the decision to the Vermont Supreme Court.

5. While petitioner's case was pending before the Vermont Supreme Court, the petitioner was found eligible for the Attendant Service Program (ASP) administered by DAIL. Specifically, she was found eligible for Medicaid Participant

Directed Attendant Care (Medicaid-PDAC)¹. As a result, petitioner withdrew her Vermont Supreme Court appeal of the CFC denial.

6. Petitioner remarried. Due to the change in her household income, petitioner lost her Medicaid eligibility on or about June 25, 2010.

7. DAIL sent petitioner a Closure Notice on August 26, 2010 explaining that her Medicaid-PDAC would close immediately since she lost her Medicaid.

8. At the time DAIL closed petitioner's Medicaid-PDAC, petitioner received 5.75 hours/day assistance towards her Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs).²

Current CFC Application

9. Petitioner applied for CFC on or about September 3, 2010.

¹The Attendant Services Program differs from the CFC program. First, an applicant can qualify for the Attendant Services Program even though the applicant does not need nursing home level care provided the applicant has a disability affecting his/her ability to do ADLs. Second, a panel of consumers makes the decisions. Third, the Medicaid-PDAC is based on community Medicaid income and resource standards in contrast to the CFC program that has more liberal income and resource standards.

²DAIL provided testimony that the assessor who evaluated participants' abilities to do ADLs and IADLs (including petitioner's Medicaid PDAC) for the committee that determined the amount of services was terminated from her position due to incompetence.

10. Petitioner's case was assigned to M.K., a Long Term Care Clinical Coordinator (LTCCC) employed by DAIL.

11. On or about September 3, 2010, M.K. went to petitioner's home and completed an assessment of petitioner's ability to do her ADLs and IADLs. M.K. asked petitioner to demonstrate certain ADLs and asked petitioner to explain what she could and could not do. Petitioner's daughter was present in the home and observed part of the assessment.

12. On the CFC Clinical Assessment³, M.K. made the following observations about petitioner's ability to do her ADLs:

a. Toilet Use. Independent. M.K. noted that she watched petitioner walk into the bathroom, turn on the light, and sit down onto the toilet lid. M.K. noted that petitioner said she was able to do her toileting on her own.

b. Eating. Petitioner self-reported that she could eat independently.

c. Bed Mobility. M.K. noted petitioner was slow but demonstrated her ability to get into bed, position herself and then get out of bed. M.K. noted that the bed is higher than most beds.

d. Transferring. M.K. noted that petitioner's daughter got up to assist the petitioner getting up from the chair but M.K. asked the daughter to let her mother demonstrate on her own. M.K. noted that petitioner moved slowly due to pain from significant arthritis but that petitioner could independently transfer.

³A portion of a CFC Clinical Assessment is attached that includes the ADLs and the rankings used to determine functional ability.

e. Bathing. M.K. noted that petitioner's daughter bathes petitioner but that M.K. thought this was from petitioner preference rather than inability to do so.

f. Dressing. M.K. noted that petitioner demonstrated putting on and taking off her shoes. M.K. believes that petitioner has the range of motion to dress herself.

g. Mobility. M.K. noted that petitioner can walk independently but that she walks slowly and uses the furniture for support.

h. Personal Hygiene. M.K. had petitioner extend her arms out to the side to shoulder level and then raise above shoulder level with her arms bent at the elbow. M.K. concluded that petitioner would be able to brush her hair. M.K. rated petitioner as able to do her personal hygiene.

13. DAIL sent petitioner a CFC denial on September 20, 2010. Petitioner requested a Commissioner's Review. The Commissioner's Review was held on September 28, 2010. The Commissioner's Review was issued on November 15, 2010 stating that petitioner's needs did not rise to nursing home level of care. Petitioner appealed this decision to the Human Services Board.

14. Petitioner submitted an assessment by Dr. Max Bayard dated June 20, 2011. Dr. Bayard began treating petitioner during April 2011. Dr. Bayard used the same format that DAIL uses in its assessments. Dr. Bayard's assessment differs from M.K. as follows:

- a. Toilet Use. Petitioner needs extensive assistance because she has trouble with her balance.
- b. Bed Mobility. Petitioner needs limited assistance getting up and down from the bed due to hip pain.
- c. Transferring. Petitioner needs extensive assistance in that she needs help up from a seated position due to decreased strength and poor balance.
- d. Dressing. Petitioner needs limited assistance due to left shoulder pain.
- e. Bathing. Petitioner needs extensive assistance because she has fallen getting into and out of the bathtub and because she cannot reach her back.
- f. Meal preparation. Petitioner needs extensive assistance because she is unable to carry dishes and unable to stir food due to hand pain, weakness, and lack of coordination.

15. Petitioner testified at hearing. She explained that she has dizzy spells and problems with balance. She uses the furniture for support when she walks in her home. She does not use a cane or walker. Petitioner stated she has fallen in her home. Petitioner explained that she needs help getting into and out of the bathtub and that she needs help getting dressed. She indicated that she needs help getting out of chairs due to pain. Because her hands are weak, the petitioner is unable to carry items.

16. Petitioner's daughter testified. She currently cares for the petitioner. She described helping petitioner with bathing because petitioner cannot lift her leg to get

into and out of the bathtub. The daughter then bathes the petitioner. The daughter indicated that she dresses petitioner because petitioner is unable to do buttons or zippers due to her rheumatoid arthritis. The daughter indicated that she sees petitioner fall three to four times per month.

17. Dr. Bayard testified. Petitioner has been his patient for a short period of time. Dr. Bayard saw petitioner for a general checkup and then saw her for the assessment submitted in this case. When he completed the assessment, he based his answers on information the petitioner provided him and petitioner's medical records.

Dr. Bayard testified that a MRI showed petitioner has significant back problems that are consistent with leg weakness. He indicated that petitioner couldn't lift her left leg to get into bed without assistance or to get into and out of the bathtub without assistance. He noted that petitioner receives medication for vertigo but that he has not assessed this condition. He testified that petitioner cannot stand for a prolonged time and that her carpal tunnel syndrome made it difficult for petitioner to grip plates.

18. M.K. testified. M.K. explained that she bases her assessment in part on observations of the applicant and how

the applicant responds to requests to demonstrate his/her functional abilities.

In this case, M.K. met with the petitioner and her daughter in the kitchen. She asked petitioner to show her petitioner's bedroom. M.K. explained that she observed petitioner get off the kitchen chair and stand on her own then walk to the bedroom. Petitioner used pieces of furniture as support as she walked into the bedroom. M.K. noted that petitioner's bed was high. She asked petitioner to get into bed. M.K. described petitioner taking off her shoes, getting herself onto the bed, changing from lying down on her back to her side, getting off the bed and then putting on her shoes. M.K. then described petitioner's activities consistent with her written report.

19. There are difficulties with the conclusions reached by both M.K. and Dr. Bayard. M.K.'s assessment does not consider the impact of petitioner's rheumatoid arthritis on her ability to grasp and hold. M.K.'s assessment does not consider the impact of petitioner's arthritis on her leg weakness and ability to maneuver into and out of a bathtub. As a result, M.K. tends to overestimate some of petitioner's functional abilities.

Dr. Bayard's assessment is based on limited history with the petitioner and tends to underestimate petitioner's functional abilities based on not reading the criteria properly. For example, Dr. Bayard found that petitioner needed extensive assistance with bathing because she needed help getting into and out of the bathtub and could not reach her back. The rating system does not include reaching the back for bathing or shampooing. The rating criteria accord limited assist for physical transfer into and out of the bathtub.

20. The evidence shows that petitioner has difficulty grasping with her hands and carrying items with her hands. The evidence shows that petitioner has difficulty lifting her left leg making it difficult for her to get into and out of the bathtub on her own. Petitioner needs some assistance getting up from a seated position due to weakness and/or dizziness at times but that this assistance is not weight-bearing assistance.

The evidence does not show that petitioner needs extensive assistance or total assistance for any of her ADLs.

ORDER

The Department's decision is affirmed.

REASONS

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 the use of home health care and services rather than 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 at Choices for Care 1115 Long-term Care Medicaid Waiver Regulations (CFC Reg.). The

CFC program provides personal care services to those elderly or physically disabled Vermonters who meet the eligibility criteria.

Eligibility Criteria

The petitioner is seeking eligibility through either the highest needs or the high needs criteria.

The eligibility criteria need to be read in pari materia with the regulations as a whole. The purpose of the CFC program is to allow individuals who need nursing facility level care the option of receiving that care in their homes or other community settings. CFC Reg. I.

The eligibility criteria are found below:

IV.B.1 Highest Needs Group

b. Individuals who apply and meet any of the following eligibility criteria shall be eligible for and enrolled in the Highest Needs group:

i. Individuals who require extensive or total assistance with at least one of the following Activities of Daily Living (ADLs): toilet use, eating, bed mobility; or transfer, and require *at least* limited assistance with any other ADL.

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 occurs frequently and is not easily altered:

Wandering
Resists Care
Behavioral Symptoms

Verbally Aggressive Behavior
Physically Aggressive Behavior

iii. Individuals who have at least one of the following conditions or treatments that require skilled nursing assessment, monitoring, and care on a daily basis:

- | | |
|---|---------------------------|
| Stage 3 or 4 Skin Ulcers | Ventilator/Respirator |
| IV Medications | Naso-gastric Tube Feeding |
| End Stage Disease | Parenteral Feedings |
| 2 nd or 3 rd Degree Burns | Suctioning |

iv. Individuals who have an unstable medical condition that require skilled nursing assessment, monitoring, and care on a daily basis related to, but not limited to, at least one of the following:

- | | |
|---------------------|----------------------|
| Dehydration | Internal Bleeding |
| Aphasia | Transfusions |
| Vomiting | Wound Care |
| Quadriplegia | Aspirations |
| Chemotherapy | Oxygen |
| Septicemia | Pneumonia |
| Cerebral Palsy | Dialysis |
| Respiration Therapy | Multiple Sclerosis |
| Open Lesions | Tracheotomy |
| Radiation Therapy | Gastric Tube Feeding |

c. The Department shall enroll an Individual in the Highest Needs group when the Department determines that the individual has a critical need for long-term care services due to special circumstances that may adversely affect the individual's safety. The Department may, with the consent of the individual, initiate such an action. An individual may also request such an action. Special circumstances may include:

- i. Loss of primary caregiver (e.g. hospitalization of spouse, death of spouse);
- ii. Loss of living situation (e.g. fire, flood);
- iii. The individual's health and welfare shall be at imminent risk if services are not provided or if services are discontinued (e.g. circumstances such as natural catastrophe, effects of abuse or neglect, etc.); or

iv. The individual's health condition would be at imminent risk or worsen if services are not provided or if services are discontinued (e.g. circumstances such as natural catastrophe, effects of abuse or neglect, etc.).

IV.B.2 High Needs Group

b. Individuals who meet any of the following eligibility criteria shall be eligible for the High Needs group:

i. Individuals who require extensive or total assistance on a daily basis with at least one of the following ADLs:

Bathing	Dressing
Eating	Toilet Use
Physical Assistance to Walk	

ii. Individuals who require skilled teaching on a daily basis to regain control of, or function with at least one of the following:

Gait Training	Speech
Range of Motion	Bowel or Bladder Training

iii. 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

iv. Individuals who exhibit at least one of the following behaviors requiring a controlled environment to maintain safety for self:

Constant or Frequent Wandering
Behavioral Symptoms
Physically Aggressive Behavior
Verbally Aggressive Behavior.

v. Individuals who have a condition or treatment that requires skilled nursing assessment, monitoring, and care on a less than daily basis including, but not limited to, the following:

Wound Care	Suctioning
Medication Injections	End Stage Disease
Parenteral Feedings	Severe Pain Management
Tube Feedings	

AND who require an aggregate of other services (personal care, nursing care, medical treatments or therapies) on a daily basis.

vi. Individuals whose health conditions shall worsen if services are not provided or if services are discontinued.

vii. Individuals whose health and welfare shall be at imminent risk if services are not provided or if services are discontinued.

Petitioner's Case

As an applicant for services, the petitioner has the burden of proof by a preponderance of evidence that she meets the eligibility criteria for either the highest or high needs CFC program.

Petitioner bases her eligibility upon her inability to take care of her ADLs or upon her functional capabilities.

Program eligibility is based upon needing extensive or total assistance with certain ADLs. In rating a person's need for functional assistance, DAIL has defined what

constitutes extensive or total assistance in their assessment forms.

Petitioner has certain limitations but these limitations do not reach the level of extensive assistance. Petitioner submitted an assessment from Dr. Bayard noting extensive assistance for bathing, toilet use, transferring and meal preparation. Her expert did not find the need for extensive assistance for any other ADL.

For example, petitioner needs help getting into and out of the bathtub due to weakness in her left leg. Under the CFC criteria, physical help with transferring into and out of the bathtub is limited assistance, not extensive assistance.

Extensive assistance for toilet use includes weight-bearing assistance from a personal care attendant or full assistance with not only transferring off and on a toilet but cleaning oneself and arranging clothes to be able to use the toilet. The evidence does not show that extensive assistance is needed.

Transferring describes the person getting out of and into chairs, beds, standing and how the person moves across surfaces. The evidence showed that petitioner may need assistance at times due to dizziness or weakness, but the evidence did not show that petitioner needed weight-bearing

or full assistance three or more times during a seven day period. Petitioner was able to demonstrate her ability to transfer to M.K.

Meal preparation is not an ADL but an IADL. Even if extensive assistance was needed for meal preparation, the regulations do not allow eligibility on that basis.

If petitioner's functional abilities decrease, petitioner can reapply for the CFC highest needs or high needs program.

In conclusion, the Department's decision is affirmed. 3
V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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