

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. A-03/11-123  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals a decision by the Department for Disabilities, Aging and Independent Living (DAIL) denying her application for Choices for Care (CFC) services.

When the Human Services Board originally heard petitioner's case, Board action ended in a tie vote. Petitioner appealed her decision to the Vermont Supreme Court.

The Vermont Supreme Court reversed and remanded the case to the Board. In re Appeal of Charlotte Rumsey, 2012 VT 74 (E.O. 2012). In addition to dealing with compliance to 1 V.S.A. § 172, the Court remanded for proper findings based on the evidence adduced at hearing on June 30, 2011.

On September 14, 2012, the petitioner filed a Motion asking for consideration of the Hearing Officer's original recommendation. DAIL opposed the Motion. On September 21,

2012, the Hearing Officer made an Entry Order denying petitioner's Motion because the original Recommendation needed to be reworked consistent with the Vermont Supreme Court decision.

Procedural History and Record

The petitioner received a denial from DAIL dated November 19, 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 January 10, 2011. On January 25, 2011, the Commissioner issued a decision upholding the clinical determination that petitioner was ineligible for CFC.

The petitioner requested a fair hearing in a letter dated March 1, 2011. A telephone status conference was held on April 5, 2011 to discuss pre-hearing issues and the case was scheduled for hearing on April 26, 2011.

On April 26, 2011, petitioner came to the hearing with her case manager, MS, from the local Area Agency on Aging. Petitioner asked for a continuance to seek legal representation. DAIL did not object and the hearing was continued.

A telephone status conference was held on June 2, 2011 to schedule the hearing.

The hearing was held on June 30, 2011. The petitioner presented testimony from (1) herself, (2) Dr. H, petitioner's treating doctor (by telephone), (3) OH, case management supervisor from the local area agency on aging, and (4) RB, petitioner's friend for over twenty years. DAIL presented testimony from BKS, Long Term Care Clinical Supervisor (LTCCC).

The following Exhibits were admitted at hearing:

1. Department's 1, VT DAIL CFC Clinical dated November 18, 2010.
2. Department's 2, Letter of Denial dated November 19, 2010.
3. Department's 3, Commissioner's Review Letter dated January 25, 2011.
4. Petitioner's 1, Clinical Assessment of Need for Assistance with Activities of Daily Living (ADLs)-CR completed by Dr. D on June 15, 2011.
5. Petitioner's 2, Affidavit of MS dated June 28, 2011.

Issue

The petitioner seeks CFC services under either the highest or high needs program based upon the provisions for special circumstances. The issue is whether the petitioner

meets the clinical eligibility requirements for either highest needs pursuant to CFC Reg. IV.B.1.c or high needs pursuant to CFC Reg. IV.B.2.b.vii.

The following Findings of Fact are based on the evidence from the June 30, 2011 hearing.

FINDINGS OF FACT

1. The petitioner was seventy-four years old at the time of hearing. Petitioner lives with her dog. Petitioner receives health insurance through Medicare.

2. The petitioner is diagnosed with a chronic seizure disorder (grand mal seizures), osteoarthritis of her knees and ankles, cerebral vascular disease, depression, anxiety, and obesity. Petitioner uses a wheelchair and a walker.

3. MS is a DAIL certified case manager employed by the local Area Agency on Aging. MS is familiar with the CFC program and the criteria used by DAIL to determine eligibility.

MS is petitioner's case manager and has worked with petitioner since 2005. An affidavit from MS was admitted into evidence at hearing.

4. OH is a case management supervisor employed by the local Area Agency on Aging. She supervises MS. As part of

her supervision in petitioner's case, OH visited petitioner in her home approximately three times since the fall of 2010. OH testified at hearing.

5. Dr. H is petitioner's treating physician. Dr. H began treating petitioner in 1983. As of the hearing, he last saw petitioner on June 15, 2011. Dr. H testified by telephone at hearing.

6. RB has known petitioner for twenty years and is a friend. RB visits petitioner two to three times per week and is on the telephone with petitioner on other days. RB and her husband help petitioner with chores. RB testified at hearing.

7. BKS is a Long Term Clinical Care Coordinator (LTCCC) employed by DAIL. She has worked as a LTCCC for over four years.

BKS's duties include assessing whether CFC applicants meet the clinical eligibility criteria for the CFC program. As part of her assessment, she does a home interview with applicants during which she questions the applicants about their need for help with activities of daily living (ADLs) and instrumental activities of daily living (IADLs) and asks

about their health including behaviors.<sup>1</sup> BKS also asks applicants to demonstrate some ADLs. Her decision is based on the application and what she observes and learns during this visit. Her interviews last from one to two hours.

BKS did the clinical assessment of petitioner. BKS testified at hearing.

8. BKS did petitioner's clinical assessment on November 18, 2010. MS was present for part of the assessment. BKS was at petitioner's home for approximately 1.5 to 2 hours.

The clinical assessment focuses on an applicant's ability to do ADLs and IADLs. Looking at petitioner's ADLs and IADLs, BKS rated petitioner as needing supervision for toilet use, mobility in bed, bathing, dressing, mobility, and personal hygiene. She rated petitioner as needing no assistance with eating and transfers. Meal preparation was done by others and medication management was done with help. BKS noted that petitioner had bladder incontinence one to

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<sup>1</sup>ADLs include toilet use, eating, mobility in bed, transfer, bathing, dressing, mobility, and personal hygiene. Meal preparation and medications management are IADLs that are looked at separately from other IADLs such as shopping, cleaning, money management, etc. An applicant's assessment looks at the applicant's ability to do each ADL and ranks whether the applicant is independent or needs supervision, limited assistance, extensive assistance or is totally dependent on others.

three times per day and bowel incontinence less than once per week. BKS did not feel there were any cognitive issues.

BKS observed petitioner get into and out of bed without assistance, observed her use a walker, and observed her transfer into and out of her chair. BKS relied on petitioner's assessments about her ability to do ADLs. According to BKS, petitioner told BKS that she could do her ADLs as long as she took her time.

9. The clinical assessment does not address special circumstances that can lead to eligibility although an applicant may not meet the criteria for eligibility based solely on ADLs.

10. Petitioner minimizes the difficulties she has caring for herself.

Petitioner minimized her difficulties to BKS meaning that BKS relied on information that did not provide a complete picture for an assessment.

Petitioner minimized her difficulties caring for herself during her testimony at hearing.

11. Petitioner has set up her house to better address her needs. Petitioner spends a great part of each day in her recliner that is located just outside her kitchen. Petitioner has her medications, Kleenex, magazines and

trashcan within reach of her recliner. Petitioner does not cook; her stove is covered with books. Petitioner receives Meals on Wheels and has received food assistance through the local Area Agency on Aging.

At times, petitioner has received homemaker services paid by the local Area Agency on Aging but these services are contingent on whether the Agency has discretionary funding.

12. Petitioner has limited her actions based on her fear of falling whether due to a seizure or her lack of equilibrium or vertigo or her unstable gait when she walks. As a result, petitioner bathes infrequently, has unclean clothing and lives in an unclean house.

13. Petitioner's witnesses set out their concerns based on their observation and knowledge of petitioner. Their observations focus on petitioner's danger of falling, lack of hygiene, and the condition of her home. Their concern is that petitioner is not safe in her home. All of petitioner's witnesses testified credibly about petitioner's condition.

Based on these problems, petitioner needs help with bathing/personal hygiene and maintaining the cleanliness of her home. The question of whether these services should be provided through the CFC highest or high needs program is dealt with below in the Reasons.



14. The petitioner suffers from grand mal seizures two to three times per week. There are times when petitioner has had incidents such as during the spring of 2011 when she had grand mal seizures for three days in a row.

Petitioner normally has an aura prior to a seizure and has time to get into bed before the seizure starts. Being in bed prevents falls. But, if petitioner voids during a seizure, her bedding becomes soiled. An example is RH finding petitioner in bed. The bed had no sheet, smelled of urine, and feces were on the mattress.

Petitioner limits her activities because she fears falling during a seizure. Petitioner also fears falling because she feels dizzy upon standing up or bending over.

15. Petitioner has daily urinary incontinence and weekly bowel incontinence. Petitioner bathes infrequently because she fears falling.

OH described visiting petitioner during October 2010 and finding that petitioner had a body odor consistent with not bathing and shampooing for some time. MS stated that petitioner does not bathe more than once per week. On another occasion, petitioner told RH that she had not bathed for two weeks. Petitioner's neighbors reported to Dr. H of finding petitioner lying in a urine soaked bed; his concern

is that poor hygiene can lead to infection. These witnesses testified credibly about petitioner's hygiene and their testimony is accepted as findings.

Petitioner is in need of assistance with bathing on a daily basis.

16. Petitioner is unable to keep her home and clothing clean.

OH and MS described their concerns for petitioner. They have seen a slow steady decline in petitioner's abilities to care for herself. Simple chores such as making a bed or bathing can take petitioner hours.

RB described visits to petitioner and finding dog urine and feces on the floor. Petitioner is not always able to leash the dog and then take the dog out because she finds bending difficult. RB's husband bags and takes out the Depends that are left in the bathroom.

These witnesses testified credibly and their testimony is accepted as findings.

Petitioner is in need of homemaker services.

17. Petitioner has and is experiencing a slow and steady decline in her functioning. She has constricted her activities from going to the senior center, church, shopping to rarely going out.

Petitioner does not always get her mail. She lost her VPharm benefits because she did not understand that a review was due and, at other times, has not paid her premium in a timely manner causing gaps in her coverage.

18. Petitioner's health and welfare are at risk if she does not receive services through CFC high needs program.

ORDER

The Department's decision that petitioner is not eligible for the CFC high needs program is reversed.

REASONS

The petitioner presents a difficult case. Petitioner needs services to maintain her independence in a safe manner. The issue is whether she meets the criteria for the Choices for Care (CFC) highest needs or high needs program.

The CFC highest and high needs program gives individuals who would otherwise be in a nursing home the option of receiving personal care services in their home or community setting. CFC services include help with ADLs and help with IADLs as well as case management, lifeline, and companion services.

This decision only looks at petitioner's eligibility for the highest or high needs CFC program, not any other program that might be available in the community.

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 authorized DAIL to obtain a Medicaid 1115 waiver to allow individuals the choice between "home and community based care or nursing home care". 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 clinical and financial eligibility criteria.

Clinical Eligibility Criteria

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

Most CFC cases focus on whether the applicant needs extensive or total assistance with certain ADLS. There are other criteria for eligibility in the regulations including a special circumstances provision for those who do not meet the other eligibility criteria.

The petitioner argues that she is eligible for CFC under special circumstances citing to CFC Reg. §IV.B.1.c (highest needs) or § IV.b.2.b.vii (high needs).

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; the provisions petitioner relies on are underlined.

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           | Verbally Aggressive Behavior   |
| Resists Care        | Physically Aggressive Behavior |
| Behavioral Symptoms |                                |

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:

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|---|---------------------------|
| Stage 3 or 4 Skin Ulcers                        | Ventilator/Respirator     |
| IV Medications                                  | Naso-gastric Tube Feeding |
| End Stage Disease                               | Parenteral Feedings       |
| 2 <sup>nd</sup> or 3 <sup>rd</sup> 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 is not arguing that she is eligible based on the criteria dealing with ADLs, impaired decision-making, problematic behaviors, or the need for skilled nursing care. Petitioner points to a special circumstances category for those who need nursing home level care but do not fit into the other categories.

Petitioner's claim under the special circumstances category was one of first impression for the Board. Since then, the Board reviewed the special circumstances category in Fair Hearing No. M-10/11-632.

In Fair Hearing No. M-10/11-632, the petitioner suffered from a combination of physical and mental impairments that impacted her ability to care for herself. The Board found that the petitioner presented sufficient evidence to meet the

criteria for high needs based on needing services to prevent her health conditions from worsening and to prevent imminent risk of harm. The Board stated:

Petitioner's diabetes is and has been poorly controlled. As a result, she experiences a range of side effects including neuropathies of her legs and arms and decreased sensation to her perianal area. Her treating physician calls petitioner's neuropathies one of the most severe examples he has seen in many years of his practice. Her condition is complicated by obesity, incontinence, and problems seeing and hearing. Memory problems are documented, as is depression. Assessing her condition means looking at all of these moving parts.

The practical result is that she is unsteady on her feet. She is incontinent daily. She cannot clean herself on the toilet. The method petitioner created to clean herself puts her at risk because she cannot feel the water temperature putting her at risk of scalding and skin breakdown; this risk was documented in her hospital discharge from August 2011. She is at risk of falling and cannot safely transfer herself into and out of the bathtub.

Medication management is key to bringing petitioner's diabetes under control, or at least, preventing continuing complications. Petitioner's sight and memory interfere with her ability to take her medications properly.

In Fair Hearing No. M-10/11-632, the petitioner needed assistance with toileting and personal hygiene as continuing with her present system created a health risk to her. In addition, she faced health risks if she did not receive help with medication management.

Here, petitioner's situation is challenging. The people and professionals who know petitioner and who testified paint a picture of an individual in decline who is limited in her ability to care for herself, in part, due to the impacts of her medical conditions on ambulation, balance, reaching and vertigo, and, in part, due to the limits petitioner puts on herself because of her fear of falling.

Petitioner needs limited assistance with bathing and personal hygiene. She could use help with meal preparation and a service to do her cleaning, laundry, grocery shopping, and keep her on top of her correspondence.

But, the question remains whether she meets the clinical criteria for the CFC highest or high needs program. Another way to look at petitioner's case is whether she needs the level of care found in a nursing home.

DAIL crafted regulations in the highest needs program tying special circumstances to an emergent situation such as the loss of a spouse, loss of housing, or abuse or situations that create traumatic impacts for a person. Petitioner does not fall within the type of situations underlying the special circumstances criteria for the highest needs program.

The high needs regulations look at whether the petitioner's health would worsen without services or whether

there is imminent risk to petitioner's health and welfare if services are not provided.

The evidence shows that petitioner's health and welfare are negatively impacted if services are not provided.

Petitioner is unable to keep herself and her home clean. Her ability to care for herself continues to decline. Her situation is unhygienic implicating her health and welfare.

In conclusion, the Department's decision that petitioner is not eligible for the CFC high needs program is reversed.

3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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