

STATE OF VERMONT

HUMAN SERVICES BOARD

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

INTRODUCTION

The petitioner asks the Human Services Board to reopen the above case pursuant to Fair Hearing Rule No. 1000.4(K). The Department for Disabilities, Aging and Independent Living (DAIL) opposes the petitioner's Motion.

The issue is whether there is good cause to reopen petitioner's case.

DISCUSSION

Case History

The petitioner had appealed a decision by DAIL that she did not meet the eligibility criteria for either the highest or high needs Choices for Care (CFC) program. The CFC program allows individuals who need nursing home level care the option of receiving that care in their homes, in a community setting, or in a nursing home.

The petitioner based her case on a catchall provision of the CFC program found at CFC Reg. IV.B.i.c (highest needs) or CFC Reg. IV.B.2.b.vii (high needs).

The thrust of the catchall sections is that an individual's health and welfare is at imminent risk if CFC services are not provided or services are stopped. The meaning of the catchall provisions is a case of first impression for the Human Services Board.

The Hearing Officer recommended that DAIL's decision be affirmed. The Hearing Officer read the catchall provisions in pari materia with the purpose of the CFC program and the CFC regulations. The Hearing Officer determined that the evidence did not rise to the level of care contemplated for nursing home level care.

The Human Services Board heard argument at the August 3, 2011 meeting. The Board adopted the Hearing Officer's Findings of Fact. The Board voted three to three whether to affirm DAIL's decision. The Board members disagreed about the meaning of the catchall provisions found in the regulations.

In cases of a tie vote, the decision of the Department below stands. The Order was entered on August 9, 2011.

Motion to Reopen

Petitioner filed a Motion to Reopen based on Fair Hearing Rule No. 1000.4(K). Petitioner asks the Board to interpret her Motion using the criteria found in Vermont Rules of Civil Procedure (V.R.C.P.) 60(b). In particular, petitioner argues that the Board should make specific findings whether petitioner's condition poses an imminent risk to her health and welfare and the Board should avoid a tie vote by having the entire Board rehear the recommendation.

The Hearing Officer set up a timeline for DAIL to respond to the Motion.

DAIL filed opposition to the petitioner's Motion arguing that the petitioner did not show good cause to reopen the case and that the petitioner is rehashing the arguments made and considered by the Board.

Legal Discussion

The Board updated and added to the Fair Hearing Rules pursuant to the Vermont Administrative Procedures Act; the current rules went into effect September 1, 2008. The Board added Fair Hearing Rule No. 1000.4(K) to address Motions to Reopen the Board's Order; the rule states:

Within 30 days of the Board's issuance of any order, a party may move the Board to reopen and reconsider that order. Motions to reopen shall be referred to the hearing officer for recommendation as to disposition in accordance with the above rules. Such motions shall be granted only upon a showing of good cause by the moving party.

In the past, the Board interpreted Motions to Reopen using the criteria found in V.R.C.P. 60(b). Fair Hearing No. 11,281. The Board looks to the Rules of Civil Procedure for guidance and continues to look to V.R.C.P. 60(b) for guidance as to good cause to reopen an Order.

The pertinent section of V.R.C.P. 60(b) states:

On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . ., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied . . .; or (6) any other reason justifying relief from the operation of the judgment.

The petitioner's motion is based on V.R.C.P. 60(b)(6). At issue is whether reopening a Court's decision is necessary to prevent hardship or an injustice. Miller v. Miller, 184 Vt. 464 (2008); Sandgate School District v. Cate, 178 Vt. 625 (mem. 2005); In re Merrill, 157 Vt. 150 (1991).

The Board adopted the Hearing Officer's findings of fact; however, the Board disagreed as to the interpretation

of the catchall provisions in the CFC program. The findings include the petitioner's specific condition and limitations. Whether petitioner's condition is such that she is at imminent risk to her health and welfare asks for a conclusion based on the meaning and application of the underlying regulations.

One reading of the catchall provisions is to read them in pari materia with the applicable statutory and regulatory provisions for the CFC program that tie CFC eligibility to a need for nursing home level admission. Another reading is to look at the catchall provisions alone and interpret them as written. Doing so leads to a broader interpretation of who is covered than the other CFC eligibility criteria and to a conclusion, in petitioner's case, that she faces imminent risk to her health and welfare.

Petitioner would like the full Board to consider her case noting the absence of rules dealing with tie votes by Board members. There is no guarantee if the case were reopened that all seven Board members would be present.

When Board rules are silent, the Board looks to the operation of the courts including the operation of the appellate courts in which a tie vote, in effect, keeps the decision below. In Board cases, the decision below is the

decision by the Department, not the recommendation of the hearing officer.

The petitioner has not put forward sufficient good cause to reopen this case. To reopen only delays an appellate review by the Vermont Supreme Court regarding the meaning of CFC Regs. IV.B.1.c and IV.B.2.b.vii.

Subsequent to DAIL's opposition, the petitioner submitted additional medical evidence from petitioner's treating neurologist including a report from an August 29, 2011 appointment. This evidence will not be reviewed. The neurologist has been treating petitioner since 1999 and his treatment records and opinion could have been submitted at hearing. Petitioner has not argued any excusable neglect in not seeking his records and opinion prior to hearing. V.R.C.P. 60(b)(2).

ORDER

The petitioner's Motion to Reopen is denied. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4(K).

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