

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-08/11-473
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL) that she is no longer eligible for Choices for Care (CFC) services. The petitioner does not disagree with the decision to terminate her eligibility for Choices for Care (CFC) highest needs program but disagrees with the decision to deny eligibility for the CFC high needs program. The issue is whether petitioner's functional needs fell within the CFC high needs criteria.

Procedural History

DAIL sent petitioner a CFC Notice of Termination on July 11, 2011 notifying petitioner that her CFC eligibility would end July 22, 2011 because she no longer met the clinical

criteria for the program. Petitioner filed her appeal on August 3, 2011.¹

A telephone status conference was held on September 8, 2011. Petitioner indicated that she was seeking representation.

Petitioner's attorney entered an appearance on October 3, 2011. A telephone status conference was held on October 4, 2011. Petitioner raised a question as to the adequacy of the notice of termination.

The petitioner filed a Motion to Vacate Termination based on the adequacy of the notice. DAIL filed a response. In petitioner's argument, petitioner stated her condition had improved but that she met the criteria for high needs because she needed extensive assistance with bathing. Petitioner's argument shows an underlying understanding of the issues in her case.

A telephone status conference was held on December 5, 2011. The parties were informed that the Petitioner's Motion was not granted. The case was set for hearing on December

¹ Petitioner appealed after the operative date of the termination. As a result, petitioner has not received continuing benefits during the pendency of this case. Petitioner's case manager at the local agency on aging did not send petitioner's request for fair hearing in a timely manner. Petitioner's attorney indicated this would not be an issue at hearing.

28, 2011. Petitioner filed a Motion to Reconsider on December 23, 2011 but did not set out any grounds for reconsideration.

The hearing was rescheduled and held on February 7, 2012.

DAIL presented evidence through exhibits and the testimony of B.S., the Long Term Care Clinical Coordinator (LTCCC). Petitioner elected not to submit other evidence. Petitioner did not dispute the evidence presented by DAIL but disputed DAIL's interpretation of the CFC eligibility criteria.

The parties argued the meaning of the CFC eligibility requirements for the high needs program. The decision is based on the evidence adduced at hearing and the oral argument of the parties before the Board.

FINDINGS OF FACT

1. The petitioner is sixty-one years old and disabled. She resides with her husband. Petitioner's underlying medical conditions include asthma, arthritis, rotator cuff injury, degenerative joint disease and carpal tunnel syndrome.

2. Petitioner first became eligible for the CFC highest needs program in 2006.

3. DAIL annually reviews CFC recipient's continuing eligibility for CFC services. The review starts with the completion of the Independent Living Assessment (ILA). This is done by the recipient's case manager and/or a nurse from a non-profit agency providing medical care to the recipient during a meeting with the recipient in the recipient's home. The ILA is then reviewed by the LTCCC from DAIL. The LTCCC does a utilization review of the ILA. The completed utilization review includes comments from both the case manager and the LTCCC with the dates of each comment. The LTCC looks at whether there are medical changes or changes to functional ability. The LTCCC may speak to the case manager if there are questions.

4. Petitioner's case manager is M.M.S. from the local area agency on aging. She completed the ILAs for petitioner's annual recertifications.

5. B.S. is a LTCCC employed by DAIL. She did the utilization reviews for petitioner's case.

6. Petitioner's eligibility was based on her meeting the criteria regarding functional ability to do Activities of Daily Living (ADLs).

7. In June 2010, DAIL continued petitioner's eligibility as highest needs based on her June 22, 2010 utilization review. Petitioner was found to need extensive assistance with transfers on a daily basis and extensive assistance with bathing four days per week. Petitioner needed limited assistance with dressing, personal hygiene, toilet use, mobility and adaptive equipment and supervision for eating. The basis for petitioner's ongoing eligibility was the need for extensive assistance with transfers.

8. During May 2011, M.M.S. started the annual review process for petitioner by completing the ILA. Petitioner's functional needs had changed from the prior year. Petitioner was rated as (1) independent for bed mobility, toilet use and adaptive equipment; (2) supervision for eating; (3) limited assistance for transfers, personal hygiene and dressing; and (4) extensive assistance for bathing four days per week.

9. B.S. finished her utilization review on June 27, 2011. B.S. looked at the notes from M.M.S. and the notes from the nurse assisting in the ILA review with M.M.S. B.S. noted that the nurse indicated that petitioner had shoulder surgery that relieved petitioner's pinched nerve making it possible for petitioner to transfer with limited assistance rather than with extensive assistance. B.S. testified that

she spoke with M.M.S. during the review and let M.M.S. know that petitioner no longer met the CFC criteria. B.S. sent written notice of termination to petitioner on July 11, 2011.

10. B.S. testified that using the information from the ILA, she determined that petitioner no longer met highest needs because petitioner no longer needed extensive assistance with transfers.

11. B.S. testified that petitioner did not meet the high needs criteria because petitioner only needed extensive assistance with bathing four days per week rather than daily.

12. The evidence shows that petitioner no longer met the CFC criteria for highest needs.

ORDER

DAIL's decision is reversed.

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 clinical and financial eligibility criteria.

Eligibility Criteria

Petitioner was eligible for the highest needs group because she needed extensive assistance with transfers. CFC

regulation IV.B.1.b.i provided the basis for her eligibility because she needed extensive assistance with one of several enumerated ADLs (transfer, toilet use, eating or bed mobility) and limited assistance with another ADL.

Petitioner no longer needs extensive assistance with transfers. The petitioner does not dispute that she no longer meets the criteria for the highest needs group.

The petitioner argues that she meets the criteria for the high needs program because she needs extensive assistance with bathing. Petitioner has a full bath four days per week and uses a sponge bath for the remaining days of the week.

The applicable portion of the regulation states:

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	

DAIL argued that to qualify under the above regulation, an individual needs to have a medical reason requiring daily bathing and that petitioner does not have an underlying

medical reason justifying the need for daily bathing. DAIL points to petitioner electing to bathe four days per week.

Petitioner argued that "bathing" is an "activity of daily living" and that she needs extensive assistance with bathing. The petitioner argues that eligibility is based upon her functional needs not her coverage for a particular ADL. Petitioner argues that the regulations do not include that there be medical necessity for the daily coverage of a particular ADL.

The parties agree that petitioner needs extensive assistance with bathing. The functional need exists. How that functional need is met is a matter for the petitioner's service plan.

There is no wording within the regulations that an individual must have a medical need for a particular ADL to be exercised on a daily basis. DAIL is reading into the regulation a medical requirement not found in the above eligibility criteria.

DAIL's decision is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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