

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-08/12-472
)
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) benefits. The issue is whether the petitioner meets the eligibility criteria for either the highest or high needs program.

Petitioner appealed the July 30, 2012 Notice of Decision from DAIL. Her appeal was docketed with the Human Services Board on August 1, 2012. A telephone status conference was held on September 4, 2012.

The case was heard on September 27, 2012. The parties stipulated to the entry of Petitioner's exhibits as follows:

- A. Independent Living Assessment (clinical only) dated July 27, 2012.
- B. Independent Living Assessment (full), dated September 21, 2011.
- C. Denial Letter, dated September 23, 2011.
- D. Notice of Decision, dated December 9, 2011.
- E. Denial Letter dated December 9, 2011.
- F. Notice of Decision, dated February 1, 2012.

G. Denial Letter dated February 29, 2012.

H. Notice of Decision, dated July 30, 2012.

The petitioner presented testimony from (1) EQ, petitioner's grandmother and primary caregiver and (2) DB, direct services coordinator from Vermont Center for Independent Living (VCIL). DAIL presented testimony from BKS, a Long-Term Care Clinical Coordinator (LTCCC) employed by DAIL. The parties stipulated to BKS's qualifications as a LTCCC. The petitioner did not appear at the hearing.

The decision is based upon the evidence adduced through the hearing process.

FINDINGS OF FACT

1. The petitioner is a twenty-one-year-old woman whose primary disability is cerebral palsy. The petitioner lives with her maternal grandparents; she came to their home approximately four years ago. Her maternal grandmother, EQ, is petitioner's primary caregiver.

The petitioner had a difficult childhood. Her mother died from cancer when petitioner was thirteen years old. She lost her mother's advocacy on her behalf. Petitioner remained with her father in Canada; her father was verbally abusive to petitioner based on her disability. When

petitioner turned seventeen, she came to her grandparents in Vermont.

The petitioner obtained her GED and high school diploma. She is presently a part-time student at the community college. By report, petitioner is a good student. Petitioner receives assistance with note taking as an accommodation to her disability.

2. This appeal comes from a denial for CFC eligibility dated July 30, 2012. Petitioner tried to obtain services administered by DAIL through the CFC and the Attendant Services Programs over the past year to no avail; the earlier decisions were not appealed.

3. EQ has a two-story home. The bathroom and petitioner's bedroom is on the second floor. The home has a stair glide that petitioner uses to get up to the landing before the stairs turn and continue to the second floor. Then, petitioner crawls up or down the remaining stairs to the second floor.

4. DB is a Direct Services Coordinator at VCIL. She supervises the peer counselor who is assigned to petitioner. DB listened over the telephone to the CFC assessment performed on July 27, 2012.

5. BKS is a LTCCC employed by DAIL. She performed the most recent assessment of petitioner on July 27, 2012 and made the determination that petitioner did not meet CFC criteria for either the highest or high needs program.

6. Petitioner's cerebral palsy affects her in a number of ways. Petitioner has spasticity in her lower limbs. She uses two canes to help get to her feet and for some transfers from a chair to a wheelchair or another position. Petitioner can use her canes for standing and ambulation for ten to fifteen minutes. Petitioner has little or no balance placing her at risk for falling. The spasticity also affects her arms and hands.

Petitioner has scoliosis. EQ described that petitioner has a pocket in her kidney leading to urinary incontinence. EQ described some bowel incontinence when petitioner has diarrhea.

7. BKS conducted the CFC assessment on July 27, 2012 in petitioner's home. EQ was present for the assessment. As part of the assessment process, BKS asked petitioner to demonstrate her ability to do ADLs.

In particular, BKS observed petitioner transfer independently off the sofa, out of the stair glide, and into bed and move around in bed. BKS observed petitioner ambulate

with her canes and saw that she was unsteady. In terms of the other ADLS, BKS relied on the information provided by petitioner and EQ.

8. Toilet Use. To use the toilet, the petitioner uses a riser on the toilet that she can back up into position over the toilet. Petitioner is able to use the toilet and get off and on the toilet on her own. Petitioner's lack of flexibility means that she is unable to reach behind herself to clean up after a bowel movement; she needs help cleaning up bowel movements.

Petitioner uses a panty liner for bladder incontinence. DAIL defines bladder incontinence as soaking through the panties when pads or a continence program is used. There is some leakage, but the use of Depends or a similar product rather than a liner would deal with the leakage.

Petitioner does not need weight bearing assistance from her caregiver. Petitioner's needs do not rise to the level of either extensive or full assistance.

9. Eating. Petitioner is able to eat on her own. EQ provides assistance when petitioner is eating meat by cutting the meat into small pieces. Petitioner does not need weight bearing assistance or full caregiver assistance when eating.

Her needs do not rise to the level of either extensive or full assistance.

10. Mobility in Bed. Petitioner does not need assistance or oversight getting into and out of bed and positioning herself once she is in bed. Petitioner does not need weight bearing or full caregiver assistance with bed mobility; her needs do not rise to the level of either extensive or full assistance.

11. Transfer. Petitioner is able to independently move from a chair, her wheelchair, bed or a standing position. Petitioner does not need weight bearing assistance or full caregiver assistance to transfer; her needs do not rise to the level of either extensive or full assistance.

12. Bathing. Petitioner needs assistance getting into and out of the bathtub. Petitioner can bathe herself. Petitioner does not need weight bearing or full caregiver assistance for bathing; her needs do not rise to the level of either extensive or full assistance.

13. Dressing. EQ gives petitioner a choice of clothing. Petitioner is able to get her bra and tops on and is able to get her pants on. Petitioner dresses herself while sitting on the floor. Petitioner is unable to put boots on and has difficulty putting shoes on. Petitioner

needs limited assistance but she does not need weight bearing or full assistance with getting dressed; her needs do not rise to the level of either extensive or full assistance.

14. Mobility. Petitioner is able to move between locations within her home and is self-sufficient in her use of her wheelchair. Petitioner needs supervision on the stairs since the stair glide is only on part of the stairs. Petitioner does not need weight bearing or full assistance; her needs do not rise to the level of either extensive or full assistance.

15. Personal Hygiene. Petitioner is able to brush her teeth with EQ's supervision. Petitioner can take care of most of her personal hygiene. EQ clips petitioner's toenails because petitioner's spasticity prevents petitioner from doing so. Petitioner does not need weight bearing or full assistance doing personal hygiene; her needs do not rise to the level of either extensive or full assistance.

16. Petitioner does not meet the criteria for either the highest or high needs CFC program.

ORDER

DAIL's decision is affirmed.

REASONS

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 enacted Act 123 (2004) directing DAIL to obtain 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 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 petitioner bases her case upon the help she needs with her ADLs; the applicable 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.

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	

The rating system for ADLs is found on the Independent Living Assessments (ILA). The ILA is based on the assistance provided the week before the assessment. The general definitions are:

INDEPENDENT: No help at all OR help/oversight 1-2 times.

SUPERVISION: Oversight/cue 3+times OR oversight/cue + physical help 1 or 2 times.

LIMITED ASSIST: Non-wt bearing physical help 3+ times OR non-wt bearing help + extensive help 1-2 times.

EXTENSIVE ASSIST: Wt-bearing help or full caregiver assistance 3+ times.

TOTAL DEPENDENCE: Full caregiver assistance every time.

The petitioner has the burden of proof in initial eligibility cases for CFC services.

The crux is to show that the applicant needs either weight bearing assistance or is totally dependent on the caregiver to perform her ADLs. For example, in toileting, the applicant cannot place herself/himself on the toilet without the caregiver placing the applicant and supporting the applicant on the toilet. Or, with dressing, the

caregiver would have to physically support the applicant while putting on the applicant's clothing.

The petitioner has not met this burden in this case. Petitioner needs supervision and limited assistance with some of her ADLs, but she does not need the level of assistance contemplated in the highest and high needs CFC program. Petitioner may meet the moderate needs CFC program and can apply for this program as well as seeking services through Vocational Rehabilitation for assistance towards her vocational goals.

Based on the foregoing, DAIL's decision is affirmed. 3
V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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