

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-02/16-109
)
Appeal of)
)

INTRODUCTION

Petitioner appeals the decision by the Department of Disabilities, Aging and Independent Living ("DAIL" or "Department") affirming the discontinuation of her services by the Franklin County Home Health Agency. The sole issue is whether petitioner's appeal should be dismissed as out of time. The following is based on telephone status conferences held February 26 and March 4, 2016, as well as records submitted by the Department.

FINDINGS OF FACT

1. Petitioner is eligible for Choices for Care ("CFC") services under the "moderate needs" category. CFC is a Medicaid-based program. In connection with her eligibility, petitioner received caregiver services in her home from the Franklin County Home Health Agency ("FCHHA").

2. After a home visit by a caregiver with FCHHA on September 24, 2015, the caregiver reported what was construed by the agency as an immediate safety concern with continuing

to provide services in petitioner's home. After further review by supervising staff at FCHHA, a determination was made to immediately discharge petitioner from services as of September 25, 2015.

3. In connection with this decision, FCHHA made attempts to visit petitioner's home to inform her of this decision. Her caseworker was able to make contact with petitioner in her home on September 28, 2015. At that time, petitioner was given a written notice which stated that she had been discharged as a client of FCHHA, effective immediately, and stating that "advance notice was not provided due to imminence of harm."

4. The notice included the following information about appealing the decision:

You may appeal this change by requesting a Commissioner's review of the decision within 15 days of receiving this written notice, by contacting [Address and phone number of the DAIL Commissioner's Office].

5. Petitioner did not contact the DAIL Commissioner's Office until October 30, 2015, to request an appeal. Petitioner states this delay was because she had difficulty keeping up with her paperwork and was under medication, but offered no specificity or medical evidence as to the latter.

6. After petitioner filed her appeal, DAIL requested information from FCHHA about the nature of the appeal. It appears that FCHHA (inaccurately) provided information to DAIL regarding its discontinuation of physical therapy to petitioner on June 2, 2015, and provided no information regarding its complete discharge of her from services on September 28.

7. DAIL mailed petitioner a letter dated November 9, 2015, scheduling her appeal for a Commissioner's hearing on December 9, 2015. Petitioner did not appear for this hearing. Petitioner contends that she never received the November 9 letter and instead was informed by someone in the Commissioner's office that the appeal was scheduled on December 10. Petitioner's contention is belied by the fact that she included the November 9 letter in the appeal paperwork she filed with the Board, and therefore that contention is found to lack credibility.

8. DAIL subsequently issued a decision by letter dated December 9, 2015, upholding "the decision to discontinue physical therapy services." One of the grounds of the decision is that petitioner failed to file the appeal within the 15-day deadline. The decision provides further that:

You have the right to appeal my decision by requesting a fair hearing with the Human Services Board pursuant to 3 V.S.A. § 3091 and Section 21 of the Regulations. The request for a fair hearing with the Human Services Board must be made within thirty (30) days of the date of this letter and can be made by writing to the Human Services Board at [Board address] or calling the Board at [phone number].

9. Petitioner does not dispute receiving the December 9 letter nor that there was a subsequent delay in her appeal to the Board. She contacted an AHS representative on January 14, 2016, expressing disagreement and dissatisfaction with her discharge from FCHHA. It is not entirely clear from the record what Department or program representative petitioner contacted, although it appears to have been a health care programs customer service agent. At the time, this contact was not forwarded to the Board. Petitioner subsequently wrote directly to the Board with a letter of appeal received on February 5, 2016.

10. DAIL represents that petitioner's CFC eligibility has not been terminated, and has referred the petitioner to a potential service provider with which she may be able to resume services (the FCHHA records reflect that petitioner was also referred to another agency at the time of her discharge from services). Petitioner first made contact with the referral agency during the pendency of this appeal, but

had not yet successfully arranged for services. During the telephone status conferences, petitioner was visiting her sister in California, planning to return to Vermont in mid-March, and looking for a service provider.

ORDER

Petitioner's appeal is dismissed as untimely.

REASONS

Appeals from a reduction or termination of home health agency services are governed by specific regulations pertaining to such services. *See Vermont Regulations for the Designation and Operation of Home Health Agencies*, promulgated pursuant to 33 V.S.A. Chapter 63, Subchapter 1A, and 18 V.S.A. Chapter 221 (effective July 1, 2007). These regulations clearly provide that home health agency decisions may be appealed to the DAIL Commissioner and "shall be made within fifteen (15) days of receiving the written notice." *Id.* § 21.1(a) (Section XXI, Appeals). The resulting Commissioner's review decision must be appealed to the Human Services Board "within thirty (30) days of receiving the written notice of determination or the written notice of the decision of the Commissioner." *Id.* § 21.1(c). Board rules also instruct that "timeliness for appeals is based on the

statutes and/or regulations governing a particular program.”
Fair Hearing Rule 1000.2.

Under the above time limitations, petitioner's appeal to the Commissioner's office was well beyond the 15-day period for requesting appeals. In addition, even construing petitioner's January 14, 2016 contact with an Agency representative as an appeal (which it should have been), her appeal to the Board is beyond the 30-day limit in the rules. While the home health agency unfortunately provided inaccurate information to DAIL, this is not an error which tolls the appeal period and was, in any event, superseded by petitioner's failure without good cause to attend the Commissioner's review hearing, wherein the nature of the appeal could have been explained.

The Board has consistently upheld, in the substantiation context, the jurisdictional requirement for petitioners to meet the timeline for requesting an administrative review as well as the 30-day time limit for appeal of the administrative review decision to the Board. See e.g. Fair Hearing No. A-05/11-293 (related to an administrative review) and Fair Hearing No. M-10/13-785 (related to a Board appeal). The analysis here should be no different, given the clear

time limits established by regulation, and the lack of any basis in the record for tolling the applicable time limits.¹

As such, petitioner's appeal should be dismissed as untimely. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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¹ It is noted that Choices for Care regulations as well as Global Commitment (the Medicaid waiver under which the CFC program operates) Managed Care rules provide different time limits for appeals. However, even assuming these time limits would allow petitioner's appeal to proceed, they are not applicable. CFC regulations for Board appeals pertain to eligibility, service authorizations, and variances. See *CFC Regulations*, § XII. Likewise, the Global Commitment managed care rules are not applicable to "provider decisions." See *Medicaid Covered Services Rules*, § 7110.2.2. Rather, the specific rules related to home health care agency actions should apply.