

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-03/16-226
)
Appeal of)
)

INTRODUCTION

Petitioner appeals the denial of Medicaid "high needs" or "highest needs" Choices for Care eligibility by the Department of Disabilities, Aging and Independent Living ("DAIL" or "Department"). The following is based on an evidentiary hearing held May 26, 2016.

FINDINGS OF FACT

1. Petitioner is sixty-nine years old. He has several health conditions - including diabetes, high blood pressure, arthritis, and psychiatric diagnoses - and is currently receiving Choices for Care ("CFC") services in the "moderate needs" category. Seeking additional assistance, petitioner applied for CFC in the "high" or "highest" needs category and was assessed for eligibility by DAIL on December 3, 2015.

2. The assessment was performed in petitioner's home by the DAIL long-term clinical care coordinator who is also a registered nurse.

3. CFC eligibility determinations involve an assessment of an applicant's functional performance in nine areas of activities of daily living ("ADLs") within their home: dressing, bathing, personal hygiene, mobility in bed, toilet use, use of adaptive devices, transferring, mobility, and eating. Applicants are assessed as to their functional ability based on a scale starting with "independent" to "[needs] supervision" to "[needs] limited assistance" to "[needs] extensive assistance" and finally to "total dependence."

4. Petitioner's assessment concluded that he is "independent" in the areas of toilet use, bed mobility, transferring, mobility, personal hygiene and use of adaptive devices; and needs "supervision" in the areas of eating, bathing and dressing. He was not assessed to need limited or extensive assistance in any area.

5. DAIL's assessment process involves a determination of a person's functional ability for each ADL. In the area of bathing - which is the main area of dispute here - DAIL determines whether a person needs assistance in the process of washing oneself, or the specific act of bathing. If a person needs assistance in transferring into the shower to bathe, that would not result in a determination that a person

needs physical (i.e. extensive) assistance in the specific area of bathing, although it could result in a determination that the person needs "limited assistance" in that area.

6. The assessment form utilized by the Department contains the following guidance for each level of need, with respect to bathing:

- independent: no help at all.
- supervision: oversight/cueing only.
- limited assistance: physical help limited to transfer only.
- extensive assistance: physical help in part of bathing activity.
- total dependence: full assistance every time

7. Petitioner's treating physician testified at hearing that, in his opinion, petitioner needs extensive assistance in bathing and would benefit from such assistance because of his risk of falling. Petitioner has fallen in his apartment (in the living area not the bathroom) as recently as December of 2015 and went to the emergency room.

Petitioner's physician is not of the opinion that he needs assistance with the act of washing - acknowledging that petitioner can reach his hair and his back, and does not have

significant problems bending and reaching - but instead that he needs assistance with stabilizing himself in the shower while bathing. His physician could not opine as to whether a shower or bath chair would be beneficial to petitioner.

Petitioner's physician has not observed petitioner in his home nor is he familiar with his bathroom and shower setup.

8. Petitioner submitted a form filled out by his physician indicating he needs "extensive assistance" in the areas of transferring and mobility (as well as bathing).¹ In these (transferring and mobility) areas, the physician hand wrote that petitioner "needs a 4-wheeled walker all the time." At hearing, the physician confirmed that his opinion as to petitioner's functionality in these areas was based upon his need to use a 4-wheeled walker to transfer and ambulate - and that he was able to perform these functions with the walker.

9. Petitioner also submitted his written reassessment for CFC "moderate needs" eligibility dated May 5, 2015. This reassessment indicates that petitioner was "independent" in the areas of transferring and mobility, and needs "extensive

¹ The form filled out by the physician is not the same as the assessment tool used by DAIL staff to perform CFC assessments of eligibility. The form was apparently sent to the physician by petitioner's attorney, and it tracks the same areas of function that the assessment tool uses, which are described above in paragraph 3.

assistance" in the area of bathing. The only elaboration on the reassessment tool in the area of bathing is a note that "3.6.13 client reports shower is ADA compliant. VCIL has put in but with lip per CM. Observed this and tub bench. Client reports he is able to sit on bench and shower himself. Capable of doing own bathing per [CFC assessor]." Neither party called the person who did the reassessment from May 5, 2015, to testify.²

10. In the form referenced above in paragraph 8, petitioner's physician also indicated, in a section asking whether "there are special circumstances that adversely affect his safety," that he is "at risk for falls [and] confusion with medications"; checked "no" to whether "his health and welfare will be at imminent risk if services are not provided"; and checked "yes" to whether "his health condition will be at imminent risk or worsen if services are not provided," commenting that "his ADLs will decrease."

11. In his testimony, petitioner's physician did not elaborate with any specificity as to how petitioner's "ADLs will decrease." He did specify that petitioner takes

² While there was disagreement between the parties regarding the implications of this assessment tool, it predates DAIL's December 2015 assessment, as well as the most recent assessment by petitioner's physician, and thus is not determinative here. In any event, in and of itself the May 2015 reassessment form carries little weight.

numerous medications and could become confused and take the wrong medication(s), increasing risks to his health and safety. There was no evidence submitted of such events occurring. Petitioner's physician also specified that petitioner's pain medications could cause dizziness, and his blood pressure and diabetes medications could cause low blood pressure, increasing his risk of falling. However, his physician emphasized that this will not necessarily happen to petitioner, though he is at increased risk of such events.

12. Petitioner testified that his CFC moderate needs care attendant helps him bathe once per week, by securing him with a long "gate-belt" which fits around his upper body while his care attendant holds the ends and petitioner walks into his shower and sits on his tub bench.³ Petitioner indicated that he is nervous and frightened to step into his shower on his own. Despite petitioner's arthritis, he did not indicate that he needs assistance with washing himself once he is on his shower bench.

³ Petitioner's moderate needs CFC eligibility normally covers assistance with certain household chores, not ADLs. There is a limited amount of moderate needs "flexible funding" which allows petitioner (at his choice) to receive assistance with ADLs - the amount of funding apparently limits this assistance to once per week. Petitioner is seeking more frequent assistance with bathing that he could be eligible for under the high or highest needs CFC program.

13. DAIL's assessment of petitioner in his home lasted approximately 60 to 90 minutes. The assessor observed petitioner transferring back and forth between his bed and his wheelchair, and between his wheelchair and his walker. She inspected the setup and facilities in his home, including his bath and shower, which she described as a walk-in shower with a shower bench. She observed him in his wheelchair, moving his footrest on his wheelchair, and without significant challenges reaching or grabbing for things, which she translated to sufficient functional ability to bathe himself. She acknowledged that he is at risk for falling, but in her opinion is able to transfer back and forth between his walker and his shower chair. She assessed him as needing "supervision" in the area of bathing because he has anxiety about performing this function and "could benefit" from having another person present.

14. DAIL's assessor did not find that petitioner has any "special circumstances" which would cause imminent risk to his health or safety, or his health to worsen, if high or highest needs services are not provided. In her opinion, the moderate needs services petitioner currently receives are sufficient to meet his needs.

15. The respective testimony of the Department's assessor and petitioner's physician is found to be largely consistent, as they both view petitioner as independent in the areas of transferring and mobility (with the use of his walker), as able to independently perform the specific act of of bathing or washing, as at a higher than normal risk of falling, and as someone who would benefit from the presence of another person while bathing. This is also consistent with petitioner's testimony that he is highly anxious about showering, and that he receives periodic assistance from his personal care worker to get into the shower and on to his shower bench, but did not testify he needed assistance to wash himself.⁴

16. To the extent petitioner's evidence and the Department's evidence are inconsistent, it is found that the testimony of the Department's assessor carries far more weight than petitioner's evidence. DAIL's assessor observed petitioner in his home along with his bath and shower setup. Petitioner's physician had no specific knowledge as to his bath and shower setup, and could not provide an opinion as to whether a shower bench would make a difference - but clearly

⁴ It is noted that petitioner explicitly declined to argue that any anxiety he may feel or suffer from is a basis for CFC high or highest needs eligibility.

testified that petitioner could transfer independently using his walker. In this respect the opinion of petitioner's physician carries significantly less weight, if any, than that of DAIL's assessor.

17. The evidence of petitioner's history of falls is limited both as to scope and nature. It is not known how often he has fallen and under what circumstances. There is no specific connection in the evidence between his risk of falling and his functional ability to bathe.

18. The evidence does not establish that petitioner needs "extensive" or physical assistance in bathing, transferring, mobility, or any other ADL. Nor did the evidence establish that petitioner's health is at imminent risk or that his health conditions would worsen if denied high or highest needs services.

ORDER

DAIL's decision is affirmed.

REASONS

The Department of Disabilities, Aging and Independent Living administers the CFC program, which falls under a Medicaid waiver intended to maximize independence and provide services which enable individuals to live in the community,

as feasible. Review of the Department's determination is de novo. The Department has the burden of proof at hearing if terminating or reducing existing benefits; otherwise the petitioner bears the burden. See Fair Hearing Rule 1000.3.0.4.

The CFC implementing regulations set out the eligibility criteria for the program. See *Choices for Care 1115 Long-term Care Medicaid Waiver Regulations* (effective February 9, 2009) (hereinafter "CFC Regulations"). An individual may be eligible under the "highest needs group" if they "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." *Id.* (emphasis in original). An individual may be eligible under the "high needs group" if they "require extensive to total assistance with at least one of the following ADLs: Bathing, Dressing, Eating, Toilet Use, [and] Physical Assistance to Walk." *Id.* In addition, high needs eligibility may be found for "[i]ndividuals whose health condition shall worsen if services are not provided or if services are discontinued" and high or highest needs eligibility may be found for "[i]ndividuals whose health and welfare shall be at imminent

risk if services are not provided or if services are discontinued." CFC Regulations, §§ IV.B.1.c and IV.B.2.b.vi/vii.

Moderate needs eligibility, which is not at issue here, is premised on meeting one of the following criteria:

- i. Individuals who require supervision or any physical assistance three (3) or more times in seven (7) days with any single ADL or IADL, or any combination of ADLs and IADLs.
- ii. Individuals who have impaired judgment or decision making skills that require general supervision on a daily basis.
- iii. Individuals who require at least monthly monitoring for a chronic health condition.
- iv. Individuals whose health condition shall worsen if services are not provided or if services are discontinued.

CFC Regulations, § IV.B.3.b.

The central dispute here revolves around the evidence as to petitioner's level of functioning. Petitioner argues that he has established he needs "extensive" assistance in the areas of bathing, mobility, and transferring. The term "extensive" is not defined in the regulations, but the Department has applied specific criteria to make that determination (which differs depending upon the ADL) within its assessment process. In any event, petitioner's physician agreed with the Department that petitioner - with the use of

his walker - can transfer independently and is independent with respect to mobility. In the area of bathing, the Department's assessment tool determines an applicant's functionality as to the bathing activity itself, and under that rubric extensive assistance means "physical help in part of [the] bathing activity." The evidence does not establish that petitioner needs physical assistance during the act of bathing. Even if it were determinative, the evidence does not establish that petitioner needs extensive assistance to get in and out of his shower. While petitioner's physician testified that he would benefit from another person stabilizing him to prevent a fall while showering, this is contravened by the evidence of petitioner's shower setup and independence in transferring.

Finally, the evidence is insufficient to establish that petitioner's health is at imminent risk or his health condition(s) will worsen if denied high needs CFC services. The evidence of petitioner's risk of falling is vague, highly limited, and certainly not specific to the area of bathing - if anything, an activity with respect to which petitioner's functional ability and shower setup equates to a lessened risk of falling. These circumstances are inapposite to those of a prior Board case cited by petitioner, where the

applicant had far more severe and specific problems with memory, incontinence, uncontrolled diabetes, obesity, sight, and medication management. See Fair Hearing No. M-10/11-632 (CFC eligibility based on the "imminent risk" or "health condition shall worsen" standard).

DAIL's denial of petitioner's CFC high or highest needs eligibility is otherwise consistent with the applicable rules and must be affirmed. See 33 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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