

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 18,334
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of Aging and Disabilities (DAD) denying parts of her request for variances of the maximum of hours of personal care services she receives under the Medicaid Waiver program. The issue is whether the Department's decision is consistent with the petitioner's needs based on her medical condition.¹

FINDINGS OF FACT

1. The petitioner has been a recipient of Medicaid Waiver services in her home for several years. Her primary diagnoses are hypertension, dysphasia, cerebral vascular accident with hemiparesis, insulin dependent diabetes mellitus, and aphasia with impaired memory. She is legally blind, and has poor balance, unsteady gait, and limited

¹ The petitioner joins with several other individuals who allege that the Department's adoption of the new guidelines violated the Administrative Procedures Act. That issue is the subject of a separate Order. (See Fair Hearing Nos. 18,289 et. al.)

ambulation and stamina. There is no issue in this matter that the petitioner's condition has not improved over the past several years.

2. The Medicaid Waiver program is administered by DAD, which evaluates initial and continuing eligibility for the program and also determines the level of services for each eligible recipient. The underlying purpose of the program is to provide in-home personal care services as an alternative to institutionalized nursing home care.

3. Pursuant to the terms of the waiver that governs the administration of the program in Vermont, DAD conducts an annual assessment of each participant through the formulation of a written individualized **Plan of Care**. These assessments are usually done in the home of the recipient by a trained case manager, who is usually a registered nurse. This individual fills out a **Personal Care Worksheet** in consultation with the recipient and/or the recipient's family and/or caregivers. DAD then reviews each worksheet and authorizes payment to the providers of the service in accordance with the number of hours that have been approved for each service under the individual's **Plan of Care**.

4. The types of services covered under the Medicaid Waiver program are divided into two categories, activities of

daily living (ADLs) and instrumental activities of daily living (IADLs). ADLS are dressing, bathing, grooming, bed mobility, toileting, continence/bladder & bowel, adaptive services, transferring, mobility, and eating. IADLs are phone use, meal preparation, medication, money management, heavy housekeeping, light housekeeping, shopping, travel assistance, and care of adaptive equipment.

5. For the period January 2002 through January 2003 the petitioner in this matter was approved for and received 49 hours per week of personal care services. For that year, and apparently in all past years, the petitioner's **Plan of Care** approved by DAD reflected all the hours that had been requested in her **Personal Care Worksheet**.

6. The worksheets in effect at that time contained "guidelines" for each ADL and IADL, but in most cases DAD admits that it routinely approved the level of service actually requested. For the year January 2002 through January 2003 the 49 hours a week of personal care services for which DAD approved the petitioner were consistent with what she had requested and been approved for in prior years.

7. In early 2003, facing a severe budget deficit, DAD revised its worksheets and procedures to correct "inequities" that DAD admits had developed in the program statewide. The

major change was to place "maximums" on the amount of time allowed for each ADL and IADL on the worksheet, and to require each recipient to request a "variance" for any requested service hours above the maximums. Most of the new maximums imposed by DAD were actually greater than the guidelines that had been in effect for each activity in past years. DAD represents that one of the purposes of the change in its forms was to make decisions statewide more uniform and to base them on each individual's actual medical need as opposed to lifestyle and/or personal preferences and habits.

8. DAD also represents that the changes in its worksheet resulted in many Medicaid Waiver recipients statewide being approved for either the same level of service or an increase over what they had received the year before. Unfortunately, this was not the case with the petitioner herein.

9. In January 2003 the petitioner's case manager submitted the petitioner's **Personal Care Worksheet** for the one-year period beginning January 23, 2003. The worksheet requested a total of 45 hours a week of services (which was 4 hours/week less than had been requested and approved the year before). DAD approved variances beyond the maximums for two ADLs with which the petitioner indicated she needs additional assistance, i.e. dressing and mobility. DAD denied the

petitioner's request for a variance in the area of transferring (20 minutes/day) above the maximum of 15 minutes/day. It appears that all of the petitioner's requests for other ADL assistance were within the maximums.

10. The petitioner's request for additional assistance with one IADL, meal preparation, though similar to the requested and approved amounts in past years, was in excess of the new maximum imposed by the new forms. In this area, the petitioner requested 90 minutes a week, but the Department granted only the guideline maximum of 60 minutes a day. It appears that all the other requests for IADLs were granted as being within the maximums.

11. The total number of hours approved for the petitioner by DAD for 2003-2004 were 40 per week, compared to the 45 hours she requested, and the 49 hours she had received the year before.

12. The basis of the petitioner's request for additional hours for transferring was the claim by her family and case manager that although she is ambulatory she needs "supervision" when she moves about the home because she is at risk of falling. The basis of her request for additional hours for meal preparation was based on special dietary needs and preferences for her and her family.

13. Following a commissioner's review hearing in August 2003, the Department notified the petitioner that it had determined that the petitioner's need for supervision in transferring was not a covered item under the Medicaid Waiver program. The Department advised the petitioner of several alternative services available to her and her family that would either provide or obviate the need for this form of assistance. The Department also advised the petitioner of alternative services that would cover any claimed additional needs in the area of meal preparation.² Therefore the Department denied the petitioner's request for increases in time for transferring beyond the maximum of 20 minutes per day and for meal preparation beyond the maximum of 60 minutes a day.

14. The petitioner has not submitted any direct evidence rebutting the Department's assessment of her needs for transferring and meal preparation. The only medical evidence offered was the following opinion from her treating physician, dated March 4, 2004:

² Part of the problem identified in this area is the fact that the petitioner eats all or most of her meals with other family members who, themselves, have particular diets and food preferences. There is no evidence that it would take more than one hour per day to prepare only the petitioner's meals. The Department also advised the petitioner of the availability of meals on wheels to obviate part of her need for meal preparation.

In my opinion, based on the foregoing medical problems and impairments, [petitioner] needs excessive assistance with all activities of daily living, in particular dressing, transferring, mobility, meal preparation, shopping, travel assistance and management of her funds. It is also my opinion that [petitioner's] requests for a variances to her Medicaid Waiver Plans of Care on January 23, 2003 and January 27, 2004 (copies attached) to provide an additional five (5) hours of personal care services per week for the previous year and an additional three and three quarters (3.5) hours of personal care per week for the current year for assistance with her activities of daily living are medically necessary to enable her to live independently and at less cost than if she received care in an institutional setting.

15. Based on the above it is found that the limited variances granted by the Department are sufficient to meet the petitioner's reasonable and legitimate needs in the areas of transferring and meal preparation as required by her medical condition. It cannot be found that the amount of hours granted by the Department for the petitioner's personal care significantly impairs her ability to remain living in her home, as opposed to placing her in a nursing home. It cannot be found that the general opinions expressed by the treating physician meaningfully contradict the Department's well-considered assessment of the petitioner's *particular medical needs* in the areas of transferring and meal preparation.

ORDER

The Department's decision is affirmed.

REASONS

The federal statutes and regulations governing the Medicaid Waiver program allow states considerable latitude and discretion in determining eligibility and levels of service. See 42 U.S.C. § 1396n(c). Unlike many other benefit programs, initial eligibility for Medicaid Waiver services is not an entitlement. The amount of funding for the program is fixed on an annual basis. Participating states are allowed to maintain (and Vermont does so maintain) waiting lists of otherwise eligible individuals due to limited levels of funding. See *Boulet v. Celluci*, 107 F.Supp.2d 61 (D.Mass., 2000).

Given the limited nature of the funding for this program and the recognition that it cannot serve many eligible individuals, it is entirely reasonable, and arguably imperative, for DAD to attempt to ensure that program funds are distributed fairly and equitably among those who have been found eligible for services. In this case, DAD candidly admits that for several years it placed too much reliance on individual case managers to render uniform assessments of the needs of recipients statewide. The Department admits that before this year it did not carefully scrutinize individual personal care worksheets to determine whether the hours being

requested for each ADL and IADL were truly necessary in light of each recipient's medical condition. The Department maintains, and there appears no reason to dispute, that its new policy of imposing maximums on the levels of each service, and the necessity of requesting waivers to exceed those maximums, is reasonably intended to obtain more statewide oversight and uniformity in the provision of those services.

The Department further maintains that its maximums are based on the generous assessments of medical experts as to the time necessary to perform each covered ADL and IADL for most individuals who require assistance in those areas. Recognizing that individual needs may vary from recipient to recipient, however, the Department allows all recipients to request a waiver of the maximums to obtain the level of service for any ADL or IADL that is necessary for that individual recipient. In keeping with the purposes of the program and with its goal of statewide uniformity, DAD makes each waiver determination in light of a recipient's demonstrated medical need, rather than on the basis of individual lifestyle or habit.

The Department maintains that its new policy has actually resulted in increases of service for some recipients. Of course, this is little comfort to any recipient, like the

petitioner herein, who received a decrease in her overall level of services without any improvement or change in her medical condition. The only rationale the Department can offer for such a result is the candid admission that the petitioner for many years received a level of service that was not truly commensurate with her medical needs.

In regard to her specific waiver requests the petitioner admits that the Department has provided her with all due procedural considerations. Also, she has made no showing that the Department did not base its decision on a reasonable and accurate assessment of the petitioner's mobility and dietary needs and requirements as determined by all the available evidence regarding her underlying medical condition. Therefore, the Board must affirm the Department's decision in this matter.

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