

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 18,457
)
Appeal of)

INTRODUCTION

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

FINDINGS OF FACT

1. The petitioner has been a recipient of Medicaid Waiver services in his home for several years. His primary diagnoses are cerebral palsy, peripheral vascular disease, diabetes mellitus, and arthropathy. He has limited use of his hands. 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

¹ The petitioner joins with several other individuals who allege that the Department's adoption of the new guidelines violated the Administrative

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 April 2002 through April 2003 the petitioner in this matter was approved for and received 38 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 his **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 April 2002 through April 2003 the 38 hours a week of personal care services for which DAD approved the petitioner were consistent with what he had requested and been approved for in prior years.

7. In early 2003, faced with 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 March 2003 the petitioner's case manager submitted the petitioner's **Personal Care Worksheet** for the one-year period beginning April 23, 2003. The worksheet requested a total of 38.25 hours a week of services (which was nearly the same as had been requested and approved the year before). DAD approved payment for all the hours per week for the ADLs with which the petitioner indicated he needs assistance (dressing, bathing, grooming, transferring, mobility, and eating). It appears that all of the petitioner's requests for ADL assistance were within the maximums.

10. However, the petitioner's requests for assistance with two IADLs, heavy and light housekeeping, though similar to those requested and approved in past years, were in excess of the new maximums imposed by the new forms. As a variance, the Department granted only part of the petitioner's requested amount for light housework (300 minutes/week out of 400 minutes/week requested), which was over the maximum (180 minutes/week). DAD also denied all of the petitioner's request for a variance for heavy housekeeping. In this area the petitioner requested 150 minutes a week, but the Department granted only the guideline maximum of 60 minutes a week.

11. The total number of hours approved for the petitioner by DAD for 2003-2004 were 34.75, compared to the 38.25 hours he requested, his requested amount being about the same as he had received the year before and in previous years.

12. The basis of the petitioner's request for additional hours for heavy and light housekeeping was set forth by his case manager in the following letter dated April 2, 2003:

The purpose of this letter is to request variances for my client, [petitioner], in the areas of Heavy Housework and Light Housekeeping. One hour per week for Heavy Housework and 3 hours a week for Light Housekeeping are not sufficient to meet [petitioner's] needs in those areas. [Petitioner] is severely, physically disabled due to Cerebral Palsy. He has extremely limited use of his

hands. As a result, [petitioner] spills and drops food and beverages a lot. His floors must be cleaned every day. His laundry is done two times a week. Recently, he has had problems with blood clots in his leg and has open sores on his legs. There are times that they bleed out on his sheets.

I consider [petitioner] to be a classic Home and Community Based Waiver client. He is someone who, with the proper reasonable supports, should be able to remain in his home. He had done this with Waiver services and done it very well. I feel that [petitioner] is a Waiver success story. Any cut in his hours would jeopardize this success and put him at risk for nursing home placement.

Because these services relate to maintaining [petitioner's] home, they cannot be met with Adult Day. Doing housework does not seem to be appropriate uses of LNA, Respite, or Companion services. [Petitioner] and I would appreciate any consideration you could give him in this matter.

13. Following a commissioner's review hearing in August 2003, the Department notified the petitioner that it had determined that the aide who fed him his meals could easily pick up spilled food and drink on the floor as the petitioner was eating, and that mopping the entire floor after each meal was a housekeeping preference of the petitioner, but not required as a matter of health and well-being. Therefore the Department denied the petitioner's request for an increase in time for heavy housekeeping beyond the maximum (60 minutes/week). The Department also determined that partially granting the petitioner's request for additional time for

light housekeeping (300 hours/week, out of 420 requested, but over the maximum of 180) was sufficient to accommodate the need to clean up after meals and to do the additional laundry required as a result of the petitioner's blood clots.

14. At the several hearings in this matter, the last of which was held on June 8, 2004, the petitioner did not offer any direct argument addressing his need for housekeeping. The only medical evidence offered was the following letter from his treating physician, dated March 9, 2004:

In my opinion, based on the foregoing medical problems and impairments, [petitioner] needs excessive assistance with all activities of daily living, in particular light and heavy housekeeping, meal preparation and eating. It is also my opinion that [petitioner's] request for a variance to his Medicaid Waiver Plan of Care on April 2, 2003 (copies attached) to provide an additional three and one-quarter (3.25) hours of personal care services per week for assistance with his activities of daily living is medically necessary to enable him to live independently and at less cost than if he received care in an institutional setting.

15. Based on the above it is found that the limited variance granted by the Department is sufficient to meet the reasonable housekeeping needs required by the petitioner's medical condition and does not significantly impair his ability to remain living in his home, as opposed to placing him 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 light and heavy housekeeping.

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 his overall level of services without any improvement or change in his 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 his medical need.

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

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