

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 18,842
)
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.

FINDINGS OF FACT

1. The petitioner has been a recipient of Medicaid Waiver services in his home for several years. His primary diagnosis is quadriparesis. 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 September 2002 through September 2003 the petitioner in this matter was approved for and received 46 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 September 2002 through September 2003 the 46 hours a week of personal care services DAD approved the petitioner for were consistent with what he had requested and been approved for in prior years.

7. In early 2003 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 the purpose 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 actually resulted in a majority of 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. On August 28, 2003 the petitioner's case manager submitted the petitioner's **Personal Care Worksheet** for the one-year period beginning September 20, 2003. The worksheet requested a total of 45 hours a week of services (which was one hour less than had been requested and approved the year before). DAD approved payment for all the hours per week (10.3 hours) for the ADLs with which the petitioner indicated he needs assistance (dressing, bathing, grooming, transferring, mobility, and eating). All of the petitioner's requests for ADL assistance were within the maximums.

10. However, almost all of the petitioner's requests for assistance with IADLs, though similar to those requested and approved in past years, were well in excess of the new maximums imposed by the new forms. As a variance, the

Department granted the petitioner's requested amount for travel assistance (38 minutes/week), which was over the maximum (10 minutes/week). However, DAD denied all or part of the petitioner's requests for variances for the following IADL services that were also in excess of the maximums: meal preparation, money management, heavy housekeeping, light housekeeping, shopping, and care of adaptive equipment. In these areas (except light housekeeping, see *infra*) DAD granted only the maximums allowed on the form.

11. The total number of hours approved for the petitioner by DAD for 2003-2004 are 34.5, compared to the 45 hours he requested and to the 46 he had received the year before.

12. At the hearing in this matter, held on April 22, 2004¹, the petitioner and DAD agreed that the Department would reevaluate the petitioner's request for a variance in the area of meal preparation based on the petitioner's representation that he requires 5 meals a day rather than three. It was agreed that the petitioner could request a separate fair hearing if he remains aggrieved by the Department's ultimate decision in that area.

¹ The petitioner's services have continued at last year's level (46 hours a week) pending the resolution of this fair hearing.

13. Regarding the other IADLs in dispute, the petitioner offered only his own testimony as to whether the Department's maximums are unfair or inappropriate to his situation.² For shopping, DAD approved the maximum 2 hours per week. The petitioner requested a variance for 3.5 hours a week. The only justification for this request offered by the petitioner at the hearing was that he is difficult to fit, needs to try clothes on at home, and often returns items that don't fit, which entails extra trips for his caregiver. In this regard, however, it does not appear that the petitioner's medical condition places him in a situation substantially different from most other recipients in regard to clothes shopping. Thus, it cannot be found that the petitioner has demonstrated a unique or unusual medical need for extra shopping trips by his caregiver beyond the two-hours-a-week maximum that the Department has determined to be an adequate maximum for recipients statewide.

14. For money management, DAD approved the maximum of 15 minutes per week. The petitioner requested a variance for one hour. Again, at the hearing the petitioner did not describe

² DAD stated at the hearing that it can and does evaluate requests for waivers at any time. DAD agreed to review any future request by the petitioner based on any additional evidence he can submit as to his medical need for any requested level of service.

any personal circumstances based on his medical situation that would require an increased amount of time for his caregiver to write and mail checks, balance his checkbook, etc.

15. The three most significant IADLs in terms of the discrepancies between the hours requested and those approved were heavy and light housekeeping and care of adaptive equipment. For heavy housekeeping, the petitioner requested 4 hours a week. DAD granted the maximum of one hour. The only unusual need alleged by the petitioner in support of additional hours in this area was his representation that he frequently spends time gardening, and that his wheelchair tracks mud into the house, which requires additional sweeping and mopping. DAD has determined that the petitioner's gardening is primarily a hobby that, while certainly a legitimate and beneficial recreational activity, is not required to be covered by Medicaid Waiver personal care services. Therefore, any increases in hours for any otherwise-covered IADL caused by his gardening cannot be approved as necessary under his plan of care. There was no

medical evidence presented to controvert this assessment by the Department.³

16. For light housekeeping the maximum is 3 hours a week. The petitioner requested a variance for 7 hours a week. DAD approved a variance amount of 4 hours a week. The petitioner alleges he needs the time for extra laundry due to necessary care of his skin condition and additional dusting and air filter changing required to keep his allergies under control. DAD maintains, and the petitioner did not submit any credible evidence to rebut, that an additional hour a week over the maximum is sufficient to meet the petitioner's unusual needs in this regard.

17. As for care of adaptive equipment, DAD approved the maximum of 20 minutes a week. The petitioner requested a variance for 2 hours, 20 minutes a week. Again, the petitioner stated that the increased time was necessitated by the frequent cleaning and increased maintenance of his wheelchair due to his gardening. As was the case with heavy housekeeping (*supra*), DAD does not consider gardening to be a covered IADL.

³ DAD also maintains that the petitioner may be eligible for assistance with his gardening as a "Companion Service" to help with some of the costs that may be associated with this activity.

ORDER

The Department's decisions are 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 resulted in increases of service for more recipients than those who, after consideration of their requests for waiver, received decreases. Of course, this is little comfort to any recipient, like the petitioner herein, who received a substantial decrease in his level of his services without any improvement or change in his medical condition. The only rationale the Department can offer for such a drastic result is that the petitioner for many years received a level of service that was not truly commensurate with his medical need.

Of course, the petitioner need not, and certainly does not, accept this rationale. He argues strenuously that he has a legitimate medical need for the level of service he requested this year, which, he correctly points out, is the same the Department approved him for the past several years. Be that as it may, however, as a matter of law it must be concluded that the Department has provided the petitioner with all the procedural safeguards in considering his request for individual variances and that it based its decision on a reasonable and accurate assessment of the petitioner's needs and requirements as presented by all the available evidence regarding his underlying medical condition.

Inasmuch as the petitioner has not shown that the Department's decision in this matter is either contrary to applicable law or to the facts surrounding his actual medical needs and circumstances, the Board is bound to affirm. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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