STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 20,759
	)	
Appeal of	)	

INTRODUCTION

The petitioner applied for attendant care services through the Choices for Care Medicaid Waiver program operated by the Department of Aging and Independent Living (DAIL). As part of the application process, a Long-Term Care Clinical Coordinator conducted an in-depth interview with petitioner at petitioner's home. The Long-Term Care Coordinator found that petitioner was clinically eligible for nursing home care. At that point, the Long-Term Care Coordinator sent the petitioner's case to the Department for Children and Families (DCF), Disability Determination Unit (DDU), to determine whether petitioner was eligible for SSI-related Medicaid. The DDU reviewed petitioner's medical records and application. It does not appear that the DDU reviewed the clinical assessment from DAIL. The DDU determined that petitioner did not qualify for SSI-related Medicaid finding that petitioner has the residual functional ability to return to work. Petitioner appeals the decision by the DCF finding

her ineligible for SSI-related Medicaid. This decision is based upon the hearing testimony and documentary evidence.

FINDINGS OF FACT

1. Petitioner is a fifty-four-year-old woman who suffers from a combination of serious impairments including recurrent deep vein thrombosis (DVT) with pulmonary emboli, degenerative osteoarthritis of the lower back and lower extremities, herniated discs, carpal tunnel syndrome, sleep apnea, morbid obesity with past gastroplasty and a planned restructure of the gastroplasty, constant pain, multiple hernia surgeries and surgery for abscessed fistula. Petitioner is 5'11" and weighs approximately 347 pounds. Petitioner's current medications include:

Hydrocodone plus AP 7.5/500mg 1 tab 5x/day for pain
Amitriptylne 25mag 1 tab at bedtime for pain
Warfarin 5 mg 1/day blood thinner
Furosemide 40mg ½ to 1 tab in morning for fluid retention
Rozerem 8mg at bedtime for sleep
Crestor 10mg 1 tab/day for cholesterol
Metoprolol 100mg 1 tab 2 bid
Potassium 20mec. 1/day

2. Petitioner lives with her sister, S.K. S.K. brought petitioner to Vermont from Alabama during May 2006 after petitioner became homeless. S.K. takes care of petitioner.

3. Petitioner applied to the Choices for Care program on or about October 2, 2006. On February 13, 2007, the Department notified petitioner that she was denied Medicaid and denied eligibility for Choices for Care because DDU found that she did not meet the eligibility criteria for SSI-related Medicaid. Petitioner filed a timely appeal.

4. Eligibility for the Choices for Care program is based upon two criteria—(1) a clinical assessment that the applicant needs nursing home level care and (2) a determination that the applicant meets the eligibility criteria for SSI-related Medicaid (regulations discussed *infra*).

5. Petitioner was screened by B.S., Long-Term Care Clinical Coordinator (LTCCC). B.S. has been a R.N. for thirteen years and a nurse practitioner for ten years. B.S. testified that her practice is to meet with the applicant in his/her home within one month of the application date. The appointment normally lasts 1.5 hours. In addition, B.S. reviews medical information. B.S. uses the interview to determine what type of assistance the applicant needs with activities of daily living (ADL); she asks the applicant to demonstrate their abilities. ADLs include toilet use, bed

mobility, transferring (to/from bed, chair, standing), bathing, dressing, mobility, personal hygiene, etc.

6. On October 2, 2006, B.S. certified that petitioner's clinical eligibility status was the highest level. She found that petitioner would qualify for nursing home care. In particular, B.S. found that petitioner needed extensive assistance with ADLs involving weight bearing activities including toilet use, transferring, bathing, personal hygiene and needed limited assistance with bed mobility and dressing. In the clinical assessment, B.S. noted that petitioner had pain all of the time that impacted upon petitioner's energy and concentration. She also noted that petitioner had urinary incontinence one to three times daily. After completing the clinical assessment, B.S. testified that the case was sent to the DCF to determine petitioner's eligibility for SSI-related Medicaid.

7. DDU determined that the petitioner could walk or stand for two hours, sit for six hours, lift up to twenty pounds periodically and up to ten pounds frequently, and return to work as a computer clerk. Petitioner last worked as a computer clerk in 1994.

8. S.K. testified and corroborated that the petitioner needs extensive assistance daily. S.K. described the care

she gives petitioner. S.K. explained that she helps petitioner in the morning with her hygiene. S.K. described how petitioner rocks six to seven times in order to be able to get out of bed. The petitioner has a walker, cane, and a wheelchair to help with mobility. S.K. testified that petitioner is not steady on her feet even with the use of the walker or cane. S.K. needs to pull down and up pajama bottoms and underwear for petitioner to be able to use the toilet. S.K. transfers petitioner to the toilet seat and helps clean her. S.K. assists with dressing. S.K. does the meal preparation and sees that petitioner takes her medications correctly. For bathing, S.K. transfers the petitioner in and out of the bathtub and helps wash the petitioner. S.K. arranges with family members so that the maximum time petitioner is alone is a half-hour. According to S.K., petitioner can help carry a loaf or two of bread from the truck to the house.

9. Petitioner's treating physician is Dr. Michael Corrigan. Dennis Smith, physician's assistant, works under Dr. Corrigan's supervision. Both have submitted documentation in support of petitioner's case. Petitioner has been under their care for over one year. Dr. Corrigan last saw petitioner on May 25, 2007 and submitted an

affidavit supplementing the records in the file. According to Dr. Corrigan, petitioner has recurrent DVTs with pulmonary emboli. The emboli (blood clots) can be life threatening; petitioner has an IVC filter to catch the clots. Petitioner has chronic pain which he characterized as five out of ten at rest and eight out of ten with activity (ten being the most pain). Petitioner has obstructive sleep apnea and hypertension. He explained that petitioner is morbidly obese and that the obesity negatively impacts petitioner's osteoarthritis of the lower back and lower extremities and petitioner's degenerative disc disease. According to Dr. Corrigan, petitioner has marked decrease in her ability to stand, walk, sit or lift for any length of time in excess of five minutes.

10. In addition to treatment from Dr. Corrigan, petitioner has had the following tests and referrals over the past year:

a) Vermont Radiologists. MRI performed April 3, 2007 showing L3-4 through L5-S1 degenerative disc disease and facet arthropathy.

b) Vermont Medical Sleep Disorder Center on March 18, 2007. Her BMI is 56. Their impression is dyssomnia, intrinsic sleep disorder, obstructive sleep apnea syndrome and periodic limb movement disorder.

c) Dr. Laura Spaulding, surgeon, at Fletcher Allen Health Center. Dr. Spaulding first saw petitioner on October 30, 2006 regarding gastroplasty. Dr. Spaulding recommended re-visional bariatric surgery to gastric by-pass. Petitioner has been going through the pre-surgery tests and is waiting for the surgery to be scheduled.

d) Dr. Patrick Forgione on August 16, 2006 for a consult for fistula repair due to chronic drainage from the fistula. Dr. Forgione found petitioner at too high risk for laparatomy due to her obesity. His report notes that petitioner had difficulty getting out of the chair due to obesity and osteoarthritis. He noted multiple past hernia surgeries.

e) Dr. Michael Kennedy at NW Medical/Surgical Associates during August and September 2006. Dr. Kennedy was consulted about the drainage from the periumbilical area. He noted multiple past hernia surgeries. He did not consider petitioner a good surgery risk.

f) Records from Northwest Medical Center spanning May 25, 2006 through September 13, 2006 documenting continuing problems with hernias.

g) Hospitalization at FAHC from December 6 to 9, 2006 due to infected mesh from multiple hemiorrhaphies. The medical team was able to partially remove the mesh.

11. Petitioner's 2004-2005 records from Alabama support the existence of petitioner's long-standing medical problems including:

a) Carpal tunnel syndrome.

b) Multiple surgeries for hernia repairs, drainage, and infections.

c) Degenerative changes to petitioner's left knee and disc disease.

d) Deep venous thrombosis.

e) History of gastric by-pass surgery when she was 37 years old.

f) Repeated notations from doctors placing work limitations on petitioner or keeping petitioner from working during 2004 and 2005.

12. Petitioner testified at the hearing. Her past work has included quality control at a foundry, housekeeping at a hotel, working in a chicken plant and meat processing plant, and computer clerk. Her last work was quality control at a foundry from June 1999 to March 2006. According to petitioner, she was on her feet examining pieces of scrap metal which included lifting pieces of scrap metal. The pieces weighed between five ounces to eighty or one hundred pounds. Every hour, she had to walk the length of the building (one hundred yards) to check on the number of molds. There were times she could not walk and her co-workers would take her paperwork in. The last problems she had occurred in December 2005 and February 2006. In December 2005, she was admitted to the hospital for DVTs. She returned to work in February 2006 for one week and then returned to the hospital for blood clots. According to petitioner, she can not return to the foundry, housekeeping, or factory work because she is

unable to stay on her feet, walk, lift, or do the other work duties. Petitioner testified that she could not return to her past work as a computer clerk. She worked for the military from April 1982 until September 1994. She kept a typed record of clothing issued to new recruits. According to petitioner, she kept falling asleep on the job due to her sleep apnea and was fired. According to petitioner, she can not return to a computer job because she cannot sit without pain, pain hurts her concentration, her carpal tunnel causes her hands to lock up, and her feet go numb if she is sitting for an hour.

13. Petitioner testified that she can stand for five minutes without pain. Using a cane or walker, she can walk from the house to the truck or approximately fifty feet. She has a cane she uses for short distances and a walker and wheelchair for longer distances. Dr. Corrigan just ordered the wheelchair for her. Even with the cane and walker, she feels wobbly. Her sister does the food shopping and cooking. Petitioner can help her sister carry a very light bag from the truck to the house. Petitioner uses a forced air machine at night for her sleep apnea. Even with the machine, she does not get a good night’s sleep and feels tired during the day. It takes petitioner five to ten minutes to get out of

bed and her sister is there to take her to the bathroom. Petitioner testified that she is constantly in pain. She has chronic back pain. She feels like someone is sticking pins in her feet and her feet will become numb. To relieve her legs, she returns to bed. Her bed reclines so her legs can be elevated. Her mind becomes so focused on the pain, she cannot concentrate.

ORDER

The Department's decision is reversed.

REASONS

The Choices for Care program is a Medicaid Waiver program that funds attendant care services for individuals who need nursing home level care. The Choices for Care program gives individuals the option of receiving nursing home level care in either the community or a nursing home.

Although DAIL administers the Choices for Care program, DAIL only determines whether a new applicant meets the clinical criteria. Financial eligibility is determined by DCF.

DAIL first determines whether the applicant meets the clinical criteria for highest need, high need, or moderate need. The pertinent regulation states:

> The [DAIL] shall determine whether an applicant or participant is eligible under any of three categories.
>
> 1. Highest Needs Group
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> b. Individuals who apply and meet any of the following eligibility criteria shall be eligible for and enrolled in the Highest Needs Group:
>
> i. Individuals who 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.
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> Choices for Care, 1115 Long-Term Care, Medicaid Waiver Regulations, Section IV.B.1.

DAIL conducted a clinical assessment of the petitioner. The LTCCC conducted an intensive home-interview and found that petitioner needed extensive assistance with two ADLs (toilet use and transferring) and at least limited assistance with four ADLs (bathing, personal hygiene, bed mobility and dressing). As a result, the LTCC concluded that the petitioner met the clinical criteria for the highest group.

Petitioner's application was next forwarded to DCF to determine whether petitioner met the Medicaid eligibility standards. Section IV.D.1 of the Choices for Care Medicaid Waiver Regulations state:

> D. Financial (Medicaid) Eligibility Standards

> 1. Highest Needs Group and High Needs Group
>
> . . .DCF shall determine eligibility for applicants of the Highest and High Needs groups according to DCF Supplemental Security Income (SSI)-related Medicaid regulations applicable to long-term care eligibility.

The SSI-related Medicaid regulations are found at M200 *et seq*. To qualify, applicants need to show that they are older than sixty-five years, blind, or disabled. To be considered disabled, the applicant must be found disabled by DDU or receiving social security disability benefits. M211.

The issue is whether petitioner meets the definition of disability. M211.2 defines disability as follows:

> Individuals age 18 or older are considered disabled if they are unable to engage in any substantial gainful activity because of any medically determinable physical or mental impairment, or combination of impairments, that can be expected to result in death, or has lasted or can be expected to last for a continuous period of not fewer than 12 months. To meet this definition, individuals must have a severe impairment, which makes them unable to do previous work or any other substantial activity which exists in the national economy. To determine whether individuals are able to do any other work, the disability determination unit considers their residual functional capacity, age, education, and work experience.

Further, the DDU are charged with making determinations consistent with the requirements of the Social Security Administration. M211.4.

DDU is charged with looking at the combined effect of petitioner's medical conditions. 20 C.F.R. § 416.923. In doing so, they are to consider all symptoms including pain and other nonexertional impairments. Relevant factors include the petitioner's daily activities, her medications, and the scope of her treatment. 20 C.F.R. § 416.929. In terms of obesity, the Social Security Administration issued SSR 02-1p: Policy Interpretation Ruling Titles II and XVI: Evaluation of Obesity to ensure that DDU would consider the additional and cumulative impacts of obesity upon a person's underlying impairments.

In this case, DDU made a determination that the petitioner has the residual functional capacity to do light work or work in which (1) the petitioner lifts no more than twenty pounds and can frequently lift ten pounds and (2) the petitioner can sit for six hours and walk or stand for the remaining two hours. By assuming that petitioner could do light work, DDU determined that petitioner could return to one of her past jobs, computer clerk. In doing so, DDU ignored the combined impacts of petitioner's physical and nonexertional impairments upon her ability to engage in substantial gainful activity (work). In particular, DDU ignored the treating doctor's report, ignored the clinical

assessment by DAIL that documents the impacts upon petitioner's ADLs or her functional abilities[1], and ignored the totality of her condition.

The appropriate question in this case is whether the petitioner has the ability to engage in substantial gainful activity based on the combined impacts of her impairments considering her age, education, and past work activities. The evidence shows that petitioner does not have this ability.

Petitioner is fifty-four years old and has a long work history. Petitioner suffers from carpal tunnel syndrome that limits her ability to use her hands. Medical records from Alabama support the diagnosis. Petitioner has sleep apnea causing her to feel tired during the day. A recent examination from the Vermont Medical Sleep Disorders Center verifies the sleep apnea. Further, she testified that she lost her computer clerk job in 1994 after falling asleep on the job due to sleep apnea. Petitioner has herniated discs and osteoarthritis of the lower back and lower extremities. Medical records including MRI and X-ray reports from Vermont and Alabama document degenerative disc disease and

[1] It is troubling that DCF and DAIL were not communicating more effectively regarding the petitioner's limitations.

osteoarthritis. She testified to back pain and leg pain. In fact, she has been prescribed major pain medication but still feels pain. Her obesity compounds the disc disease and osteoarthritis. Petitioner is obese. Approximately 17 years ago, she had a gastric by-pass. Over the years, she has regained weight. The weight has compounded her recurring problems with hernias leading to multiple surgeries, drainage, and infections. Petitioner is now working with surgeons at FAHC to repair the gastric by-pass. Petitioner has recurrent deep vein pulmonary thrombosis with pulmonary emboli. Medical documentation from her treating physician and from Alabama show recurrent problems including past hospitalizations in Alabama. Petitioner's medical history is replete with serious conditions that meet the durational requirements for SSI-related Medicaid.

Further, petitioner has given compelling testimony that she is in constant pain, that she cannot walk or stand unaided, that she is unsteady using a walker or can, that the pain limits her concentration, that she cannot lift ten pounds frequently let alone infrequently, that she cannot sit for more than an hour without pain and numbness in her legs, and that she cannot take care of her basic needs. Her sister corroborates the petitioner's limitations.

The evidence supports a finding that petitioner is disabled and should be found eligible for SSI-related Medicaid. Once eligible for SSI-related Medicaid, petitioner will be eligible for attendant care services through Choices for Care. Accordingly, DCF's decision is reversed.

3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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