STATE OF VERMONT

HUMAN SERVICES BOARD

In re	) Fair Hearing No. B-01/09-45
	)
Appeal of	)

INTRODUCTION

The petitioner appeals a decision by the Department for Disabilities, Aging, and Independent Living (DAIL) denying part of his request for a variance to increase his services under the Choices for Care (CFC) program. The issue is whether the petitioner has shown that he meets the criteria for the requested variance. The following decision is based upon stipulated exhibits, evidence adduced at hearing, and briefs.

FINDINGS OF FACT

1. The petitioner is a forty-five-year-old man who lives with his primary caregiver, T.W. The petitioner is a C6 level quadriplegic who has a neurogenic bowel and bladder,

episodes of autonomic dysreflexia[1], muscle spasms, and anxiety disorder and depression.

2. The petitioner is eligible for the highest needs CFC category and meets the criteria for total dependence for his Activities of Daily Living (ADLs) including the need for one person assist. ADLs include dressing, bathing, personal hygiene, bed mobility, toilet use, adaptive devices, transferring, mobility, and eating. The petitioner has four to six incidents per week of both bowel incontinence and urinary incontinence; he receives additional CFC services to address these needs. The CFC program funds personal care attendants who provide assistance with ADLs and IADLs[2] (Instrumental Activities of Daily Living).

3. The petitioner receives LNA (licensed nursing assistant) services through the Visiting Nurses Association (VNA). These services are paid through Community Medicaid. Petitioner is authorized to receive VNA services two hours daily, but he receives VNA services five days per week for 2 to 2.5 hours per day. The LNA is scheduled to arrive at 10:00

[1] Autonomic dysreflexia is a syndrome found in individuals with spinal injuries above T6. The symptoms include hypertension, bradycardia, severe headaches, and facial flushing. The primary causes include pressure on the bladder and/or bowel impaction. It is important to monitor the symptoms as medical intervention may be needed. This is a potentially life threatening condition.

[2] Meal preparation and medication management are considered separately from other IADLs.

a.m. but is not always on time. The petitioner is one stop on the LNA's daily schedule.

4. The present case was triggered by petitioner's CFC reassessment during November 2008 in which he requested an increase from 131 hours every two weeks to 158 hours every two weeks in CFC services (an increase of twenty-seven hours every two weeks). Petitioner is receiving 131 hours every two weeks during the pendancy of this case.[3]

5. The reassessment was completed by P.L. and B.G. P.L. is a registered nurse and a CFC assessor/case manager employed by the VNA. B.G. is a case manager employed by Champlain Valley Area Agency on Aging (CVAAA).[4]

The reassessment included an Independent Living Assessment (ILA) dated November 3, 2008 and signed by P.L. and a formal variance request signed by B.G. and dated November 9, 2008. Both B.G. and P.L. testified that they took VNA services into account when crafting petitioner's request.

6. Petitioner sought 158 service hours every two weeks or the following times[5] in his reassessment request (the chart

[3] Petitioner's current CFC services include waivers granted by DAIL. If no waivers had been granted, petitioner would receive 94 hours every two weeks.
[4] BG's caseload includes younger disabled individuals.
[5] The forms are based on minutes per activity/day; these figures are then converted into weekly minutes before being put into hours per two week period.

shows the specific increases sought for each service over past determinations):

Dressing	315 minutes per week (+110)
Bathing	150 (+60)
Personal Hygiene	330 (+170)
Bed Mobility	560 (+35)
Toilet Use	1050 (+140)
Adaptive Devices	105
Transferring	315
Mobility	320 (+40)
Eating	525 (+220)
Meal Prep	420
Medication Management	105
Urinary Incontinence	150 (+25)
Bowel Incontinence	150 (+25)
IADLs	240

7. In the waiver request, B.G. noted that she responded to DAIL instructions that case managers spend more time observing an individual's care before completing the reassessment. B.G. observed T.W. and/or the LNA perform the following ADLS: transfers, range of motion exercises, use of assistance devices, bed mobility, meal preparation, eating, and parts of personal hygiene. She obtained information from petitioner, T.W., and the LNA regarding other ADLs and IADLs. She included how long a particular task took and how spasms affected the completion of an ADL[6]. She described the task. For example, she described how petitioner's socks were put on to deal with ingrown toenails (petitioner had three at that

[6] For purposes of this decision, urinary incontinence and bowel incontinence are being grouped with the ADLs.

time) and a pressure ulcer on one heel, how petitioner's boxers and pants were put on, etc. There were several tasks in which the PCA worked with the LNA; B.G. noted the times for the PCA working alone versus the time when the PCA worked with the LNA.

8. In the waiver request, B.G. noted certain changes that she took into consideration. B.G. wrote that petitioner's treating doctor indicated an increase in the baseline of petitioner's spasms. When petitioner has a spasm, the PCA or LNA has to interrupt the particular task and deal with the spasm. The following includes pertinent information from the waiver request.

B.G. added five minutes per dressing to deal with spasms. As a result, one person dressing petitioner uses 25 minutes.

The frequency of the PCA bathing petitioner changed from two times per week to every other day in order to maintain skin integrity and prevent yeast infections. B.G. requested an additional five minutes for each bathing to deal with the additional time caused by petitioner's spasms. She explained how spasms could be triggered by slight variations in water temperature.

B.G. noted that range of motion exercises were to be done daily to help prevent contractures and deal with spasms. The

PCA is responsible for range of motion exercises on the two days the LNA is not present or an additional forty minutes per week.

B.G. requested an additional five minutes per day for bed mobility to deal with spasms. Petitioner is in bed from 7:00 p.m. to 10:00 a.m. and he needs to be repositioned every three hours.

Petitioner's bowel program starts at 8:50 a.m. when he is still in bed. Bowel impaction is a cause of autonomic dysreflexia. To minimize autonomic dysreflexia and spasms, petitioner's bowel program is scheduled for the same time each day. Many times suppositories are used; their use can trigger a spasm leading to more time to complete the program.

Petitioner's urinary program includes changing the daytime urinary bag every two hours and changing the nighttime bag every three hours. B.G. wrote that emptying the urinary bag takes ten minutes. Petitioner seeks a variance increase of 150 minutes per day or twenty minutes more than previously granted; the variance is for both the bowel and urinary program.

B.G. based her variance request on twenty minutes per meal (sixty minutes for three meals/day) and fifteen minutes

(snacks and beverages/day). She noted that it took the PCA twenty-three minutes to feed petitioner the day she was there.

Petitioner is incontinent four to six times per week. B.G. used twenty-five minutes per episode of urinary incontinence at six times per week and thirty minutes per episode of bowel incontinence at five times per week in her calculations. Past variances used twenty-five minutes per episode for five episodes per week for each type of incontinence.

9. DAIL found petitioner eligible for 131 service hours every two weeks; these services include waivers for personal hygiene, bed mobility, toilet use, mobility, urinary incontinence, and bowel incontinence. DAIL's decision did not change the CFC decision from the prior year and continued services at the following amount:

Dressing	205 minutes per week
Bathing	90
Personal Hygiene	160
Bed Mobility	525
Toilet Use	910
Adaptive Devices	105
Transferring	315
Mobility	280
Eating	315
Meal Prep	420
Medication Management	105
Urinary Incontinence	125
Bowel Incontinence	125
IADLs	240

10. On or about December 8, 2008, DAIL sent a letter of decision to petitioner that his requested service plan had not been approved because (a) the time required for some activities was more than determined necessary, (b) the request included duplicate time, and (c) there were other services or supports to provide some of the services. Petitioner filed a request for fair hearing on or about January 23, 2009. A status conference was held on March 9, 2009. The evidentiary hearing was held on April 22, 2009. The record was kept open until May 22, 2009 for briefing.

11. B.G. testified at hearing. B.G. usually meets with the petitioner once per month. She has been petitioner's case manager for over three years. B.G. testified that the ILA was accurate. B.G. testified that it is her understanding that waiver requests need to explain why an individual is requesting a certain specific amount of time for a particular waiver request.

B.G. became emotional during her testimony. She has strong feelings that petitioner's needs are not being met by either DAIL or the VNA.

B.G. testified that petitioner is authorized for VNA services seven days per week. It is B.G.'s understanding that petitioner only receives VNA services five days per week

and that the services are not consistent. When computing petitioner's CFC requests, B.G. looked to the time VNA spent with petitioner rather than the full time allotted for the VNA. Petitioner testified that it was her understanding after speaking with the Department that she should consider the actual time expended by the VNA in petitioner's care.

12. P.L. works for the VNA. He is a nurse and his duties include assessment and case management for CFC recipients. P.L. has worked with the petitioner since 2005.

He met with B.G., petitioner, and T.W. to complete the latest reassessment paperwork. He has not observed petitioner's care. He testified that he found B.G.'s waiver request to be detailed and consistent with his understanding of petitioner's needs.

P.L. testified that the time requests for CFC services address unmet needs or those needs that are not met by family, friends, LNAs, or other services.

P.L. explained that petitioner's medical condition can complicate providing CFC services. Petitioner has autonomic dysreflexia which can result in increased blood pressure and is potentially life-threatening. When petitioner has an episode of autonomic dysreflexia, services must be stopped to monitor his condition.

P.L. testified that petitioner's spasms can slow the process of care. He said that if an individual went into a leg spasm while being dressed, the spasm needs to be stopped by placing a hand on the spasm before proceeding.

P.L. testified that VNA does not have the staffing to do the full level of services that petitioner needs.

13. T.W. testified. Petitioner lives in T.W.'s home. T.W. has provided care as a personal care attendant (PCA) since 2005.

T.W. testified that the LNAs are scheduled seven days per week for two hours per day but that the LNAs come five days per week for 1.75 to 2 hours per day. The LNAs are scheduled to come at 10:00 a.m. but are not always on time. When the LNAs are late, petitioner may stay in bed longer and have his program delayed unless T.W. gets petitioner out of bed. T.W. works with the LNAs; T.W. testified that doing so is more efficient because the LNA is scheduled for only a two hour block of time.

T.W. testified that petitioner's bowel program takes longer when he has an episode of autonomic dysreflexia. She described petitioner as having a flushed face, headache, abdominal spasms and pain, and high blood pressure. She

monitors petitioner's blood pressure, repositions petitioner, puts his head upright, and stops the bowel program.

T.W. testified that when petitioner has spasms, she puts pressure on the area until the spasm subsides and then returns to the ADL. She testified that spasms added five minutes to an ADL. She also testified that when petitioner is incontinent, it takes 40 to 45 minutes to transfer the petitioner, undress him, clean him, and then get him dressed.

T.W. testified that she provides uncompensated care for petitioner.

14. Petitioner testified and described his spasms. He testified that he has leg spasms in the morning when he is being dressed, he has abdominal spasms during the day, and that during the end of his day (4:00 p.m. until his bedtime of 10:00 p.m.) he has spasms. Being moved can set off spasms. He stated that to stop the spasm, someone has to hold onto his leg or push down on his stomach until his muscles are firm.

Petitioner described his bowel program as "awful". If he is lucky, he can sleep through it. Otherwise, petitioner described abdominal pain, headaches, and feeling very cold.

15. P.B. is a Long-Term Clinical Care Coordinator (LTCCC) employed by DAIL. She conducted an in-person assessment of petitioner on or about November 19, 2005 to

determine whether petitioner was eligible for the CFC program. P.B. has since reviewed petitioner's annual reassessments; these reviews have not included meeting with petitioner.

P.B. testified that she looks at an individual's functional ability and looks at whether there are other services meeting those needs in order to avoid duplication of services. She looks at what the individual can do for himself/herself and what the individual is unable to do. She testified that it is not part of her assessment to consider how long it takes to do a task. P.B. did not describe how DAIL calculated the times they used in granting petitioner's specific variance requests.

P.B. testified that she worked with T.M., another LTCCC, on the assessment. She consulted with M.T-W., her supervisor, and D.O'V., her clinical supervisor. She testified that the requests were greater than what CFC provides so she sought review and clarification. She felt there were inconsistencies in the materials submitted on behalf of petitioner. She spoke with C.McK., VNA skilled nurse, and with B.G. She reviewed the LNA task sheet. The DAIL notes indicate that T.W. was unhappy with the VNA due to changes in LNA personnel, inconsistent care including being too much in a hurry.

P.B. testified that she was informed by B.G. and T.W. that there was no change in petitioner's condition and that she felt there was no change in his condition. P.B. testified that she granted variances for dressing, bathing, toileting, transfers, and mobility. She testified that she approved the same amount of services as the prior year although she believes there is some duplication of services with the VNA. She testified that she believed petitioner's services could not be reduced if his condition remained the same as the prior year.

16. D.O'V. testified on behalf of DAIL. He is the clinical supervisor for all DAIL Medicaid programs including the CFC program. His duties include checking the medical appropriateness of care, the medical necessity of care, and clinical supervision of DAIL staff.

D.O'V. described the LTCCC's task as reviewing an individual's functional needs to determine eligibility and allocation of services. He testified that the review is based on functional needs, not unmet needs.

D.O'V. testified that he was asked by the LTCCCs to review petitioner's case. He testified that he found inconsistencies because other services were available but he did not provide any detail about the alleged inconsistencies.

He testified that although he would have decreased services, he approved the current level of services because a decrease would cause hardship to petitioner since certain other services were not provided and the current level of services was working for petitioner.

He was asked whether the management of spasms should be factored into the CFC services. He testified that management of spasms was outside the scope of PCA services and not part of the functional assessments.

17. T.M. testified. She is a LTCCC and consulted with P.B. regarding petitioner's reassessment. Her testimony corroborates P.B.'s testimony.

ORDER

DAIL's decision is affirmed in part and reversed in part.

REASONS

Choices for Care Program

The Choices for Care (CFC) program is a Medicaid waiver program that allows individuals who need nursing home level of care the choice whether to remain in their own home or enter a nursing home. As a Medicaid program, the CFC program is a remedial program whose provisions are to be liberally

construed. Christy v. Ibarra, 826 P.2d 361 (Court of Appeals Co. 1991).

The general policy of the CFC program "shall be based on person-centered planning, and shall be designed to ensure quality and to protect the health and welfare of the individuals receiving services." CFC 1115 Long-term Care Medicaid Waiver Regulations (CFC Regulations) Section I.A. As a result, each individual's case turns on information specific to the individual.

Once an individual is eligible, the individual is reassessed on a regular basis. CFC Regulations Sec. VII.B. The individual's case manager submits an Independent Living Assessment (ILA) to DAIL. The ILA includes a personal care worksheet that addresses the level of care and time requested for each ADL and for two IADLs (meal preparation and medication management); the remaining IADLs are aggregated.

The ILA lists maximum time limits for each ADL depending on the level of need. Recognizing that the program maximums may not meet an individual's needs, the regulations set out guidelines for requesting a variance. CFC Regulations Sec. XI.

The criteria for variance requests are found at CFC Regulations Sec. XI which states:

> A. The Department may grant variances to these regulations. Variances may be granted upon determination that:
>
> > 1. The variance will otherwise meet the goals of the Choices for Care waiver; and
> >
> > 2. The variance is necessary to protect or maintain the health, safety or welfare of the individual. The need for a variance must be documented and the documentation presented at the time of the variance request.
> >
> > . . .
>
> C. Variance requests shall be submitted in writing, and shall include:
>
> > 1. A description of the individual's specific unmet need(s);
> >
> > 2. An explanation of why the unmet need(s) cannot be met; and
> >
> > 3. A description of the actual/immediate risk posed to the individual's health, safety or welfare.
> >
> > (emphasis added)

Burden of Proof

The parties agree that petitioner is severely disabled and needs total assistance for his ADLs. The parties agree that petitioner needs variances but they disagree as to the scope of specific variances.

At the close of petitioner's case, DAIL made a Motion to Dismiss on the grounds that the petitioner's condition had not

changed, and, as a result, he did not meet his burden of proof. A ruling was not made at hearing, in part, because all the evidence admitted at hearing (stipulated exhibits) had not been reviewed, and, in part, to have the parties address the legal issues in writing.[7]

There appears to be some confusion as to the burden of proof and standards before the Board. The Board rules address the burden of proof of the parties in Fair Hearing Rule 1000.3.O.4 (the successor to Fair Hearing Rule No. 11). Fair Hearing Rule No. 1000.3.O.4 states:

> The burden of proving facts alleged as the basis for decisions to terminate or reduce benefits, services or assistance, or to revoke or fail to renew a license, shall be on the office or department by a preponderance of evidence, unless otherwise provided by law. Otherwise, the burden of proof by a preponderance of evidence shall be on the appellant.

The Board first addressed the burden of proof in CFC cases in a series of cases where DAIL reduced services after a participant's reassesment. DAIL had argued that the petitioner had the burden of proof to show why his/her services should not be reduced. The Board ruled that DAIL had the burden of proving by a preponderance of evidence that there was a basis or change justifying a reduction of services. One example of a basis to reduce services is an

[7] For judicial economy, testimony was taken from DAIL's witnesses.

improvement in a person's medical condition and functional abilities so that the person no longer needs the same level of services or the same time for a PCA to do an ADL. This basis did not exist in the fair hearings then before the Board and no other justification was shown by DAIL to reduce services.[8] Fair Hearing Nos. 20,148 & 20,676; 20,711, and 20,798. See In Re Marcella Ryan, 2008 VT 93 (E.O. 2008)(Department has the burden to prove that a reduction in service hours will meet petitioner's needs).

The Board first addressed the burden of proof in cases where a requested variance increase was denied in Fair Hearing No. 20,798 by finding that the burden of proof shifted to the petitioner to show whether DAIL had abused its discretion in denying the particular variance requested. In Fair Hearing No. A-07/08-310, the Board reviewed whether the petitioner demonstrated the necessity for each of her requests.

Petitioner's Case

DAIL's argument that petitioner does not meet his burden of proof if his underlying condition remains the same does not address the underlying issues and how the Board should rule on those issues.

[8] These services can include previously granted variances.

The initial question in these cases is whether DAIL has abused its discretion in denying the requested variance. The regulation allowing a variance is permissive in contrast to regulations in which an individual is eligible for a service if he/she meets certain criteria.[9] If there has been an abuse of discretion, the issue becomes whether the individual has shown by a preponderance of the evidence that they meet the underlying criteria in the variance regulation.

An abuse of discretion can occur when a governmental department does not take into account the law and facts in a particular matter or is not consistent in applying regulations across cases.

The problem in this case is that DAIL's testimony raises more questions than answers regarding how they reached decisions determining the time allowed for variance requests for particular ADLs. One witness said she would not consider how long it takes to perform a particular ADL. Another witness testified that unmet need is not the criteria. Yet, the regulation speaks to unmet need.

The lack of criteria and the lack of testimony explaining the specifics of how DAIL determined how much time to give for

[9] An example of such regulations are the Medicaid prior authorization regulations in which a petitioner can rebut a decision that he/she does not meet the criteria for a specific service.

a variance to specific ADLs such as personal hygiene, toilet use or incontinence can be considered an abuse of discretion.

Ordinarily, a finding an abuse of discretion leads to determining whether the petitioner met his burden of proof of showing the necessity for his particular requests. But, there are problems in doing so.

The petitioner meets the criteria for total dependence with one person assist. In looking through the petitioner's waiver request and the testimony at hearing, petitioner is receiving two person assist for a portion of his ADLs when the PCA acts in tandem with the LNA. Petitioner's CFC funding is not meant for time when the PCA assists the LNA.

In many cases, both Community Medicaid and CFC fund services that provide for coverage of a particular ADL because of the recognition that due to the severity of an individual's condition, the individual needs coverage from both entities. Although the PCA's assistance to the LNA may allow for greater efficiency by the LNA to meet the services in petitioner's VNA plan, the assistance skews a determination of how much time is then needed by the PCA to meet petitioner's service needs.

DAIL argues that the CFC program is the program of last resort as a Medicaid program. Petitioner receives services through Community Medicaid and CFC. These are both programs

of last resort; one program does not take precedence over the other.[10] The actual VNA services received do need to be factored into determining CFC services.

The record indicates certain changes such as a baseline increase in spasms as well as the impact of spasms and episodes of autonomic dysreflexia on meeting petitioner's ADLs. The record indicates there is no dispute as to the times needed for Adaptive Devices, Transferring, Meal Preparation, Medication Management, and IADLs (total of 1185 minutes per week).

In the waiver request, several of the requests note how long a particular task takes if one person does it as opposed to two. In those cases, the time for one person will be used for those times the LNA does not do the particular ADL. In discussing the ADLs below, the full weekly time is given.

Dressing. The petitioner documented a need for an extra five minutes per dressing due to his spasms and to protect his skin or 25 minutes each time. The LNA dresses the petitioner five days per week. The PCA undresses the petitioner five

[10] It is not clear how well these two programs are coordinated in petitioner's case. All parties and entities involved in petitioner's care should aim for better coordination for more seamless provision of services.

days per week and both dresses/undresses petitioner two days per week. Total of 225 minutes.

Bathing. The petitioner documented an increase in the number of times his PCA bathed him (an increase from two to three times per week). The petitioner documented the need for five minutes extra time over the maximum 45 minutes due to spasms. Total of 150 minutes.

Personal Hygiene. The LNA takes care of foot care, wound care, and lotion to legs five days per week. The PCA handles these tasks two days per week. The PCA handles the remainder of his personal hygiene. Using the breakdown by task in the waiver request, a total of 223 minutes.

Bed Mobility. The petitioner requests an additional 35 minutes per week but does not spell out an unmet need. Total of 525 minutes.

Toilet Use. Petitioner broke down his request between bowel program (80 minutes per day) and urine program (70 minutes per day to clean and empty seven urine bags). Petitioner explained the complicating factors of autonomic dysreflexia and spasms concerning his care. Total of 1050 minutes.

Mobility. Petitioner requested additional time of 40 minutes per week to cover the PCA doing petitioner's range of motion exercises two times per week. Total of 320 minutes.

Eating. The petitioner did not adequately set out how the current times for eating have led to unmet needs or other complications. Total of 315 minutes.

Incontinence Care. Petitioner is incontinent four to six times per week. His past variances have been based on an average of five episodes per week for both bowel and urinary incontinence at 25 minutes per episode. There is insufficient documentation that an increase in needed. Total of 125 minutes for bowel incontinence and 125 minutes for urinary incontinence.

The above times total 4243 minutes per week.

In terms of the information in the variance request, the LNA comes five days per week for two hours each day (120 minutes). Looking at the LNA's unassisted time, she does range of motion (20 minutes per day), dressing (25 minutes per day) and certain personal hygiene tasks (31 minutes per day). There are an additional 44 minutes per day or 220 minutes per week that are not accounted for in the materials provided at hearing. The additional 220 minutes the LNA spends needs to be deducted from the total request.

Based on the above calculations, petitioner is awarded a total of 134 hours every two weeks.

Accordingly, DAIL's decision is affirmed in part and denied in part consistent with the above decision. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

# # #