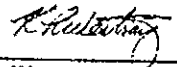


BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



MAR 4 2014


Kevin Westray, Legal Assistant

Petitioner, :
v. :
DEPARTMENT OF COMMUNITY : Docket No.:
HEALTH, : Walker
Respondent. :

INITIAL DECISION

I. INTRODUCTION

The hearing in this matter was held on _____¹ before the undersigned administrative law judge of the Office of State Administrative Hearings. The hearing's purpose was to review Respondent's decision to terminate Petitioner's benefits under a Medicaid program known as "SOURCE." Petitioner's mother, _____ appeared on his behalf as his representative. The Respondent Department of Community Health ("Department") was represented by Elizabeth Brooks, Esq. After careful consideration of the evidence and the arguments of the parties, the Department's decision to terminate Petitioner's benefits is hereby **REVERSED**.

¹ This hearing was originally set for _____ but the Office of State Administrative Hearings was closed by executive order due to poor weather and travel conditions. The reset hearing was conducted via telephone because Petitioner's representative lives out of state and could not travel to Georgia for a rescheduled hearing.

II. FINDINGS OF FACT

A. SOURCE Program

1.

The Department offers enhanced case management and home and community-based services ("HCBS") to eligible Medicaid members under a waiver program entitled Service Options Using Resources in Community Environments or "SOURCE." In the past, the benefits offered through the SOURCE program were part of the Georgia state plan for Medicaid. In 2008, the Department sought and received approval from the Centers for Medicare and Medicaid Services ("CMS") to remove the SOURCE program from the state plan and place it under the HCBS Waiver for Elderly and Disabled Individuals ("Waiver"). (Testimony of Lorrie Stewart; Exhibits R-2; R-3.)

2.

In order to be eligible for the SOURCE program under the Waiver, an individual must be (1) elderly or physically disabled and (2) meet the nursing home level of care. Under the first criterion, an individual is part of the Waiver's target group if he or she is either age 65 or older or has a physical disability. Under the second criterion, an individual meets the "nursing home level of care" if he or she would require care in a nursing facility but for the provision of HCBS. This is considered the intermediate nursing home level of care. (Testimony of Stewart; Exhibit R-1.)

3.

The Waiver's target population is the elderly and physically disabled. Although mental health conditions, such as schizophrenia or mental retardation, are not covered under the Waiver, "[c]ognitive loss (i.e. traumatic brain injury, dementia etc.) is covered in SOURCE." (Testimony of Stewart; Exhibit R-6).

4.

Once a member is determined to be eligible for SOURCE benefits, the Department conducts an annual reevaluation by a nurse. The nurse uses an assessment instrument entitled "MDS-HC Assessment" to determine an individual's current physical and cognitive functioning and his or her need for assistance with activities of daily living ("ADLs"), such as bathing, dressing, toileting, walking, or eating, and independent activities of daily living ("IADLs"), such as housekeeping, meal preparation, taking medications, and using the telephone. (Testimony of Stewart; Exhibits R-1; R-5.)

5.

After the nurse completes the reassessment, a team of medical providers from the Georgia Medical Care Foundation ("GMCF"), reviews the individual's case and determines whether he or she is still eligible for the SOURCE program. Specifically, the medical team reviews the information on the MDS-HC Assessment Tool and other documentation collected by the nurse and evaluates the applicant's eligibility under a rubric found in Appendix I of the SOURCE Manual. (Testimony of Stewart; Testimony of Gwendolyn Rollins.)

6.

Appendix I is a rubric used to determine whether an individual meets the intermediate nursing home level of care. (Exhibit R-1 at § 801.3 and Appendix I.) There are three columns in Appendix I – Medical Status, Mental Status and Function Status. As a baseline, the intermediate nursing home level of care criteria provides that services may be provided if, under the Medical Status column, an individual "[r]equires monitoring and overall management of a medical condition(s) under the direction of a licensed physician." In addition, the individual must have an additional medical need under the Medical Status column, such as nutrition management,

monitoring of vital signs, or management and administration of medications. Further, the individual also must have at least one documented impairment under either the Mental Status or Functional Status column to meet the intermediate nursing home level of care. An example of a "mental status" impairment that would meet the nursing home level of care in Appendix I is "[d]ocumented moderately or severely impaired cognitive skills with etiologic diagnosis for daily decision making." An example of a "functional status" impairment under Appendix I is the need for assistance with feeding. (Exhibit R-1 at § 801.3 and Appendix I.)

B. Petitioner's Enrollment in SOURCE

7.

Petitioner is a thirty six year old man who has been enrolled in the SOURCE program since 2012, four years after the Department signed the Waiver mandating SOURCE services only be provided to the target population. SOURCE provides Petitioner with twelve hours of services per day. Prior to the onset of SOURCE services, hospital reports indicate Petitioner had been transported to the hospital via ambulance on multiple occasions as a result of his seizures. Although Petitioner lives with relatives, they are not present in the home during the day because they work outside of the home. His mother resides out of state. (Testimony of Exhibit P-1; Exhibit R-9.)²

8.

Petitioner was diagnosed with epilepsy when he was three years old. At age twelve, he began having generalized tonic-clonic seizures. Prior to the onset of these tonic-clonic seizures,

² sent medical records to the undersigned and to the Department of Community Health, stating "[p]lease find papers that I would like for the judge and you to read...." Although she did not formally tender them during the hearing, their contents were discussed by the parties, witnesses were questioned regarding their content, and no objection was lodged by Respondent; accordingly the undersigned will consider them entered as Exhibit P-1. See Ga. Comp. R. & Regs. r. 616-1-2-.02.

he exhibited no evidence of any developmental delay. Concomitant with experiencing the tonic-clonic seizures, at twelve years of age he suffered a cognitive loss and he was diagnosed as developmentally delayed. (Testimony of _____; Exhibit R-9.)

9.

In 2012, the Department determined that Petitioner was eligible for SOURCE and he was approved for SOURCE benefits. Although in 2012, years after the Waiver had been signed and implemented, the Department determined that Petitioner qualified for the Waiver, now the Department maintains that Petitioner cannot be a member of the target group because he is neither elderly nor physically disabled. It has concluded that it is Petitioner's developmental delay, and not the seizure disorder, that necessitates SOURCE services. (Testimony of Rollins.)

10.

In addition to not meeting the target population, the Department also found that Petitioner did not meet the intermediate nursing home level of care. In August of 2013, Nurse Debra Richardson conducted a routine reassessment of Petitioner's eligibility for SOURCE benefits. According to the MDS-HC Assessment completed by Ms. Richardson, Petitioner's functional status was impaired. He exhibited total dependence regarding meal preparation and managing his finances. He needed maximal or extensive assistance regarding ordinary housework, managing medications, and transportation. He needed supervision when bathing and with his personal hygiene. He was unable to use a telephone or shop. Respondent submitted the MDS-HC completed by Ms. Richardson as evidence during the hearing. (Exhibit R-6.)

11.

On November 8, 2012, Petitioner's neurologist, _____, issued a report assessing Petitioner's physical condition. The report noted that his seizures can be controlled

with medication, but that he needs assistance taking medication. Dr. [redacted] report also stated that “[Petitioner] is dependent for most ADLs except very basic.” On June 17, 2013, Dr. [redacted], issued another report. The report indicated that Petitioner’s most recent seizure had been the day before, on June 16, 2013, and that his seizures were not controlled unless he takes his medication. Medication must be taken twice a day. The report further noted that Petitioner had “[c]ompliance problems with medications (frequently hides or later spits out medications).” Respondent submitted both of these reports to the undersigned as evidence during the hearing that Petitioner was not in need of SOURCE services. (Exhibit R-9.)

12.

SOURCE Care Management Progress Notes indicate that Petitioner needs daily assistance with his IADLs and ADLS. Specifically, Petitioner’s case manager noted that Petitioner received assistance with meal preparation, bathing, dressing and taking his medication and that his aide “preven[ted] member from wandering” Progress Notes dated August 28, 2013 indicate that he had had a seizure two days prior to that date. Respondent submitted these Progress Notes as evidence during the hearing that Petitioner was not in need of SOURCE services. (Exhibit R-8.)

13.

At the hearing, Petitioner’s mother testified that Petitioner cannot prepare meals, prepare water for a bath or shower, shave or select his clothing. He cannot dial for assistance on the telephone and cannot be left alone because he wanders. Petitioner will not take his medication unless he is monitored and cued. If he misses a dose of medication, he can have up to two or three seizures a day. He is incontinent and cannot communicate during seizures. As Petitioner’s

family members work outside of the home, they are unable to monitor his medication.
(Testimony of)

14.

Petitioner's family physician, M.D., monitored Petitioner's medication levels on a routine basis. Dr. indicated that "when left unattended, wanders miles away from his home and often has seizures while away. This is very dangerous and jeopardizing to life." After reviewing the letter from Dr. Respondent's witness Lorrie Stewart, a DCH policy specialist, indicated she agreed that she believes Petitioner needs daily supervision but maintained that he did not meet the target population under the Waiver. (Testimony of ; Testimony of Stewart; Exhibit P-1)

15.

After completing the MDS-HC, the Department completed an Appendix I, used by the Department and GMCF to assess whether or not an individual meets the intermediate nursing home level of care. On its face, Appendix I indicates that Petitioner **does** meet the intermediate nursing home level of care. The Medical Status Column of Appendix I indicates that Petitioner requires monitoring and management of a medical condition under the care of a physician for his seizure disorder and developmental delay. He also needs nutritional management, as well as management and administration of his medication. The Mental Status column noted that the etiology of his cognitive loss was the seizure disorder and documented moderately or severely impaired cognitive skills and behavior in resisting care. As to Functional Status, Appendix I indicated that Petitioner had documented deficits in both expressive and receptive language skills. Appendix I is signed by Debra Richardson, who had completed the MDS-HC assessment,

and by Sharon Filingham, the Source Care Manager, both of whom had first-hand knowledge of Petitioner's condition. (Exhibit R-6.)

16.

A team of medical providers from GMCF reviews the information provided by the Department and makes a determination as to whether an individual is still eligible for SOURCE. Specifically, the medical team reviews the information on the MDS-HC Assessment Tool, and other documentation collected by the nurse, and evaluates the applicant's eligibility under a rubric found in Appendix I of the SOURCE Manual. In this case, it does not appear anyone on the GMCF team of medical providers had had personal contact with Petitioner. (Testimony of Rollins.)

17.

The Appendix I submitted by the Department as an exhibit in this proceeding clearly indicated that Petitioner met the intermediate nursing home level of care. The Department did not prepare or submit a revised Appendix I. At the hearing, GMCF team leader Gwendolyn Rollins, stated that she had reviewed documents such as the Progress Notes, Physician's reports, and the MDS-HC Assessment, and disagreed with the conclusions generated by Appendix I. During her testimony, and contrary to every report or assessment tendered into evidence at the hearing, Ms. Rollins also offered that she believed that Petitioner was "independent" with his ADLs.

18.

On October 3, 2013, Respondent sent Petitioner Appendix Z, notifying him that it was terminating him from the SOURCE program because his primary diagnosis or needs are "related

to a developmental disability rather than medical needs” and that he did not “meet criteria for Intermediate Nursing Home Level of Care” (Exhibit R-4.)

19.

The Department must provide discharge planning to individuals it intends to terminate from SOURCE. During the hearing, the Department’s attorney stated that the Department agreed that Petitioner needed supervision, but maintained that this supervision should be obtained through the NOW and COMP program, available to individuals with mental health conditions. She offered that Ms. had been given the telephone number for this program, but no sworn testimony supported this assertion. Ms. denied receiving any information from the Department regarding discharge planning or the NOW and COMP program. The waiting list for NOW and COMP is quite long and priority given to older applicants, and it would not be available to Petitioner after his termination from the SOURCE program. No additional evidence regarding discharge planning was offered into evidence. (Testimony of Stewart; Exhibit P-1).

III. CONCLUSIONS OF LAW

1.

This matter concerns Respondent’s termination of Petitioner’s benefits; therefore, Respondent bears the burden of proof. Ga. Comp. R. & Regs. r. 616-1-2-.07. The standard of proof is a preponderance of evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21.

2.

Medicaid is a joint federal-state program that provides comprehensive medical care for certain classes of eligible recipients whose income and resources are determined to be insufficient to meet the costs of necessary medical care and services. 42 U.S.C. §§ 1396-1396v.

Each state is required to designate a single state agency to administer its Medicaid plan. In Georgia, that agency is the Department. 42 C.F.R. § 431.10(a); O.C.G.A. § 49-2-11(f).

3.

The Department offers HCBS to elderly and physically disabled individuals through its SOURCE program. The SOURCE program is now part of the Department's Elderly and Disabled Waiver, which was approved by CMS to furnish HCBS to Medicaid recipients who, in the absence of such services, would require Medicaid-covered care in a nursing facility. See 42 C.F.R. § 441.301(b)(1)(iii). "Once approved, the Waiver application becomes the controlling document." Susan J. v. Riley, 616 F. Supp. 2d 1219, 1240 (M.D. Ala. 2009).

4.

Within the broad Federal rules applicable to Medicaid, the Department is authorized to determine "eligible groups, types and range of services, payment levels for services, and administrative and operating procedures." 42 C.F.R. § 430.0. See also O.C.G.A. § 49-4-142(a) (the legislature authorized the Department to adopt and administer the state plan for Medicaid, including establishing "the amount, duration, scope and terms and conditions of eligibility for and receipt of such medical assistance..."). In making these determinations, the Department has discretion in choosing what services will be offered through their Medicaid waiver programs and who the intended target group for the waiver services will be. See generally Susan J. v. Riley, 616 F. Supp. 2d at 1240.

5.

Under the Waiver, the SOURCE program is limited to a target group of the "Aged" (over 65 years old) or "Disabled (Physical)." Although in 2012, the Department determined that Petitioner qualified for the Waiver, now the Department maintains that Petitioner cannot be a

member of the target group because, notwithstanding that without medication Petitioner suffers daily uncontrollable seizures for which he has been hospitalized on multiple occasions, these seizures can be controlled with medication.³

6.

At the hearing Respondent argued that Petitioner would only qualify as a member of the target population if he had suffered a cognitive loss. Even if the undersigned agrees with Respondent that Petitioner's seizure disorder, in and of itself, does not qualify Petitioner for SOURCE, his cognitive loss establishes him as a member of the target population. Respondent asserted that Petitioner would have had to have had cognitive function, and then lost this functioning, in order to qualify for SOURCE. Petitioner meets this requirement. The evidence at the hearing demonstrated that he was not born mentally retarded or developmentally delayed. At age twelve, when Petitioner developed clonic-tonic seizures, the evidence illustrated that he also suffered a cognitive loss. As his cognitive loss correlates with the onset of the seizures, Petitioner falls within the rubric established by Respondent for physical disability, and the undersigned concludes that he is within the target population identified in the Waiver.

7.

As Petitioner is a member of the target group, the next issue in this case is whether Petitioner qualifies for the intermediate nursing home level of care.⁴ Petitioner meets this requirement. Appendix I specifies that in order to qualify for the intermediate nursing home level of care, Petitioner must have two conditions in Column A, Medical Status, and one additional identified condition in either Column B, Mental Status or Column C, Functional

³ Petitioner receives disability payments from the Social Security Administration, but Respondent did not offer any evidence as to the Social Security Administration's determination of the nature of his disability.

⁴ As the Waiver states, services are available to those who: "(a) require the level(s) of care specified in Item 1.F and (b) meet the target group criteria specified in Appendix B." (Exhibit R-2, emphasis added.)

Status. Notwithstanding that the Department disavowed the Appendix I presented, the evidence at the hearing demonstrated that under Column A, Petitioner (1) requires management of a medical condition, his seizure disorder, and (2) requires monitoring of vital signs and laboratory studies.⁵ Thus, he only requires one other identified condition in either Column B or C to qualify for intermediate nursing home level of care. In Column B, Petitioner qualifies under two conditions: (1) deficits regarding his cognitive skills and (-2) problem behavior, such as wandering. Accordingly, without even considering any condition identified in Column C, an examination of the evidence presented as applied to Respondent's own rubric demonstrates Petitioner meets the necessary level of care.

8.

The Department agrees that the Petitioner needs daily supervision, cannot function independently, and is in danger when left unsupervised. The SOURCE Manual places an affirmative burden upon Respondent to "review other resources to meet the member's needs" and provide "appropriate discharge planning and referral assistance" to Petitioner if it seeks to terminate services. (R-1 at § 1406(b).)

9.

Even if the undersigned were to credit Respondent's arguments regarding Petitioner's failure to meet SOURCE requirements regarding the target population and/or the intermediate nursing home level of care, Respondent did not meet its burden regarding discharge planning. Although the SOURCE Manual does not detail specific requirements regarding discharge planning, by way of analogy, Medicaid requires that participating hospitals plan for each

⁵ Respondent suggested that because Petitioner had not visited a neurologist for several years, there was no evidence that he needed monitoring. However, Ms. [redacted] noted that his family physician was able to monitor the levels of medication needed to treat his seizures and had been doing so on a routine basis. In addition, Column A also indicated that Petitioner needed nutritional and medication management; however, only management of a medical condition and monitoring are necessary to qualify for the appropriate Level of Care.

patient's hospital discharge. Among other things, the regulations require hospitals to identify those patients who need a discharge plan and provide an evaluation to those patients and any others who request an evaluation. 42 C.F.R. § 482.43(a)-(b)(1). The evaluation must be timely so that arrangements for post-hospital care are made before discharge, and to avoid unnecessary delays in discharge. 42 C.F.R. § 482.43(b)(5). The hospital must transfer or refer patients to appropriate facilities, agencies, or outpatient services for follow-up or ancillary care. 42 C.F.R. § 482.43(d).

10.

In this case, Ms. testified that she did not receive referral assistance, and this assertion was not disproven by any sworn testimony at the hearing. There was no evidence offered that arrangements for care were made before discharge, or that the Department referred Petitioner to appropriate services. Even if the undersigned considers Respondent's attorney's assertions that she had advised Ms. to contact NOW and COMP as evidence, simply providing a number for NOW and COMP, a program with a lengthy waiting list which will not be able to assist Petitioner anytime in the near future, and possibly not for years, is not appropriate discharge planning.

IV. DECISION

For the foregoing reasons, Respondent's decision to terminate Petitioner's enrollment in the SOURCE Program is **REVERSED**.

SO ORDERED, March 5, 2014.



Ronit Walker
Administrative Law Judge