



BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS JUN 08 2017
STATE OF GEORGIA

D [REDACTED] C [REDACTED]
Petitioner,

Kevin Westray
Kevin Westray, Legal Assistant

v.

Docket No.: [REDACTED]
[REDACTED]-OSAH-DCH-SOURCE-44-Malihi

DEPARTMENT OF COMMUNITY HEALTH,
Respondent.

Agency Reference No.: [REDACTED]

INITIAL DECISION

I. Introduction

Petitioner D [REDACTED] C [REDACTED] appealed the decision by the Department of Community Health (“DCH”) to terminate her participation in the Service Options Using Resources in Community Environments (“SOURCE”) Program. The hearing on this matter took place on May 11, 2017. Murti Bhakta, Esq., and C. Talley Wells, Esq., represented Petitioner. Malcolm Wells, Esq., represented DCH. For reasons indicated herein, DCH’s action is **REVERSED**.

This record is sealed to protect medical records of Petitioner referenced in hearing exhibits or other documents that were submitted for this hearing. Release of any documents other than this decision can occur only upon review and redaction of Petitioner’s name from the record. Neither Petitioner nor Respondent is authorized to utilize any documents exchanged pursuant to this litigation without redaction of the name of individuals referenced.

II. Findings of Fact

A. SOURCE Program Overview

1. DCH offers home- and community-based (“HCB”) services, including personal support services and alternative living services, to aged and physically disabled individuals through its SOURCE Program. This benefits program is part of DCH’s Elderly and Disabled Waiver, which is intended to furnish HCBs to Medicaid recipients who, in the absence of such services, would require Medicaid-covered care in a nursing facility. (Exhibit R-3 at p. 26¹). See also 42 C.F.R. § 441.301(b)(1)(iii).
2. To be eligible for the SOURCE Program, an individual must meet certain requirements, including the following: (1) the individual must be elderly or physically disabled; and (2) the individual must require an “intermediate nursing home level of care.” (Exhibit R-3 at p. 26).

¹ The page citations for Respondent’s exhibits use the numbering that appears at the bottom of each page in Respondent’s Exhibits Book, which totals 181 pages.

3. Following an initial finding of an individual's eligibility for SOURCE benefits, DCH conducts annual re-evaluations. As part of this process, a licensed practical nurse evaluates the participant's current physical and cognitive functioning using an assessment tool called a "Minimum Data Set Health Care" ("MDS Assessment"). The nurse evaluates the participant's need for assistance with activities of daily living ("ADLs"), such as bathing, dressing, toileting, walking, or feeding, and instrumental activities of daily living ("IADLs"), such as housekeeping, meal preparation, taking medications, and using the telephone. The nurse's findings are then documented on the MDS Assessment. (Testimony of Regina Darrisaw, Kathryn Hardin; Exhibit P-J; Exhibit R-3 at pp. 24, 37-38).

4. Information gathered in the MDS Assessment is applied to a rubric found in Appendix I of DCH's SOURCE policy manual to determine an individual's appropriate level of care. Appendix I sets forth specific level-of-care criteria in three categories: medical status, mental status, and functional status. To meet the requirements for a nursing home level of care, an individual must meet at least one criterion from the medical status category (Column A), plus either at least one criterion from the mental status category (Column B) or at least one of the first four criteria in the functional status category (Column C). (Testimony of Stephanie Dixon, Lorrie Stewart; Exhibits P-L and P-M).

B. Petitioner's Participation in SOURCE

5. Petitioner is a thirty-four-year-old woman who has been blind since 2009, as a result of contracting meningitis. Petitioner also has suffered hearing loss, though her hearing presently "comes and goes" as it gradually returns. Petitioner currently lives in an apartment with her five-year-old daughter, who is disabled and receives assistance from her own aide.² (Testimony of Petitioner, Hillary Hanshaw; Exhibit P-J at p. 1).

6. Petitioner initially became a SOURCE participant in 2011. Following a two-year period of ineligibility, she once again received SOURCE benefits starting in 2014. As part of her benefits, Petitioner receives assistance from an aide who visits her home for six hours a day on weekends and five hours a day on Saturdays and Sundays. (Testimony of Petitioner, Amena Romelus; Exhibit P-J, Note Detail).

7. Since rejoining the SOURCE program in 2014, Petitioner has undergone multiple re-evaluations. During one such re-evaluation in June 2015, Petitioner had an Appendix I form completed by Kathryn Hardin, a registered professional nurse and case manager for Pruitt Health. Ms. Hardin concluded that Petitioner had met the criteria for requiring an intermediate nursing home level of care after determining that she met the criteria under Columns A and C. With regard to Column C, Ms. Hardin cited Petitioner's blindness as the functional etiology that satisfied item #1, which referred to transfer and locomotion performance "require[ing] limited/extensive assistance by staff through help or one-person physical assist." Petitioner's blindness also was cited for item #5, which referred to Petitioner needing "[d]irect stand-by supervision or cueing with one-person physical assistance from staff to complete dressing and personal hygiene." (Testimony of Kathryn Hardin; Exhibit P-M).

² The record is silent as to the exact nature of the daughter's disability.

i. June 2016 Re-Evaluation

8. On or about June 23, 2016, Regina Darrisaw, a licensed practical nurse with Pruitt Health, completed an MDS Assessment as part of Petitioner's 2016 annual re-evaluation. When assessing Petitioner's ADLs, Ms. Darrisaw determined that Petitioner acted independently with regards to personal hygiene, dressing the upper and lower body, transferring to the toilet and toilet use, bed mobility, and eating. Petitioner also was independent and required no physical assistance, setup, or supervision for locomotion, which measures how she "moves between locations on same floor (walking or wheeling)." However, Ms. Darrisaw determined that Petitioner required the following:

- Limited assistance (defined as guided maneuvering of limbs or physical guidance without taking weight) with bathing, which included transfers in and out of the tub or shower; and
- Limited assistance with walking, which refers to how she "walks between locations on same floor indoors."

(Testimony of Regina Darrisaw; Exhibit P-J at pp. 3-4).

9. Also on the MDS Assessment, Ms. Darrisaw evaluated Petitioner's IADLs and determined that Petitioner could independently make or receive phone calls, and she maintained a capacity for handling her medications with supervision. However, she required the following assistance:

- Maximal assistance (defined as help throughout the task, but performing less than 50% of the task on her own) with ordinary housework such as dishes, dusting, and laundry;
- Extensive assistance (defined as needing help throughout task, but performing 50% or more of the task on her own) with meal preparation, which includes planning meals, assembling ingredients, cooking, and setting out food and utensils;
- Extensive assistance for shopping for food and household items;
- Limited assistance (defined as help on some occasions) with managing a full flight of stairs;
- Limited assistance with managing finances, which includes paying bills; and
- Limited assistance with managing public transportation.

(Testimony of Regina Darrisaw; Exhibit P-J at p. 3).

10. In her notes for the MDS Assessment, Ms. Darrisaw stated that Petitioner "requires assist[ance] with transfers into and out of tub," which she often receives from a sister who visits her. The notes also stated that Petitioner received personal support service for assistance "with meals, errands, laundry and daily household chores." Additionally, Ms. Darrisaw completed an in-home addendum, which specified that Petitioner "always" needed the assistance of personal support services for bathing and food preparation, among other tasks. (Testimony of Regina Darrisaw; Exhibit P-J, Note Detail; Exhibit P-K at unnumbered p. 4).

11. Based on the MDS Assessment completed by Ms. Darrisaw, another Appendix I form was completed by Ms. Hardin on or around June 30, 2016. This time, Ms. Hardin only identified that Petitioner met item #5 in Column C. Petitioner did not meet item #1—which refers to assistance with transfer and locomotion—though a handwritten note below that item stated “Recent fall.” At the hearing, Ms. Hardin testified that Petitioner no longer met item #1 in 2016 because blindness could not be considered a “functional disability” for purposes of SOURCE eligibility. Rather, Ms. Hardin stated that functional disabilities involve a person being unable to care for themselves or manage day-to-day functions. As item #5, by itself, did not satisfy Column C,³ Appendix I accordingly did not show that Petitioner required the intermediate nursing home level of care. (Testimony of Kathryn Hardin; Exhibit P-L).

ii. Review by GMCF

12. Stephanie Dixon is a registered professional nurse who serves as a medical review nurse for the Georgia Medical Care Foundation (“GMCF”), the vendor DCH uses to validate level of care. Ms. Dixon reviewed both Petitioner’s MDS Assessment and Appendix I from June 2016 to determine whether Petitioner met the intermediate level of nursing home care. (Testimony of Stephanie Dixon; Exhibits P-J, P-K, P-L; Exhibit R-1 at pp. 24, 35).

13. Additionally, Ms. Dixon reviewed a form identified as Appendix NN, which is an “Annual Medical Exam & Report for SOURCE Waiver Applicant, Determination of Functional/Cognitive Impairments.”⁴ According to Ms. Dixon, Appendix NN was completed by Petitioner’s unnamed physician. In response to the question, “Does the SOURCE member have any IADL/ADL functional impairments/limitations which require(s) nursing home level of care?” the physician wrote “NOT APPLICABLE.” The physician signed the form on January 31, 2017, though the signature itself is illegible. No physician testified at the hearing about examining Petitioner or completing Appendix NN. (Testimony of Stephanie Dixon; Exhibit R-7 at p. 137).

14. Based upon her review of the MDS Assessment, Appendix I, and Appendix NN, Ms. Dixon concluded that Petitioner did not meet the requisite level of care for SOURCE benefits.⁵ At the

³ Appendix I specifies that if item #5 is the only criteria in Column C that is satisfied, another criteria in the same column must be satisfied. (Testimony of Stephanie Dixon; Exhibit P-L).

⁴ Ms. Dixon testified that a completed Appendix NN is not necessary for every annual re-evaluation. The form may be requested by DCH, a nurse from GMCF, or the SOURCE agency as a source of additional information. Ms. Dixon did not recall which party requested the Appendix NN form in this case. (Testimony of Stephanie Dixon).

⁵ At the hearing, DCH presented evidence of an MDS Assessment completed for Petitioner in December 2016, this time by licensed professional nurse Hillary Hanshaw. However, the testimony of Ms. Dixon, the GMCF review nurse, makes clear that she relied on the MDS Assessment and Appendix I from June 2016 in making the benefits decision at issue in this case. The record remains unclear as to how or whether the December 2016 MDS Assessment played any role in this decision. For the purposes of thoroughness, this Court notes that the December 2016 assessment found the Petitioner to be independent in all ADLs except for the following, which required supervision (defined as oversight/cueing): bathing, personal hygiene, dressing the upper and lower body, walking, and locomotion. As for IADLs, Petitioner required maximal assistance with ordinary housework; extensive assistance with meal preparation and shopping; and limited assistance with managing public transportation. Also, although Petitioner did not perform the use of stairs during the assessment, Ms. Hanshaw determined she had the capacity to use the stairs with limited assistance. (Testimony of Hillary Hanshaw, Stephanie Dixon; Exhibit R-5 at p. 120-21).

hearing, Ms. Dixon testified that, while blindness can be considered a physical limitation, a blind person is not considered functionally disabled if he or she can otherwise walk without a person's assistance. Further, although the Appendix I noted a "Recent fall," Ms. Dixon did not find any evidence of an injury requiring hospitalization or that would lead to nursing home care. Furthermore, Ms. Dixon testified that "the most important part" of the MDS Assessment was the section regarding the ADLs. (Testimony of Stephanie Dixon.)

15. On or about February 8, 2017, DCH notified Petitioner in writing that her benefits would be terminated for the following reasons:

. . . [A]pplicant does not meet Column C (functional status). The applicant is physically able and is compensated in her functional ability with the use of slower movements and an assistive device. This is evidenced by the applicant's ability to walk a distance of 150-299 feet. She has no foot problems that limit her walking and has had no falls. The applicant is able to perform Activities of Daily Living (ADLs) to include bathing, personal hygiene, dressing of the upper/lower body, walking, locomotion, transfer toilet, toilet use, bed mobility and eating independently or with supervision only. These ADLs do not require limited/extensive assistance through help or one-person physical assist. Applicant is continent of bowel and bladder, and has no skin breakdown. Her pain is controlled. The applicant has no dyspnea. The applicant has had no hospitalizations or ER visits. In addition, A MEDICAL EXAM & REPORT FOR SOURCE WAIVER APPLICANT DETERMINATION OF FUNCTIONAL/COGNITIVE IMPAIRMENT FORM was completed by the applicant's physician on 1/31/2017. The physician determined that there was no medical or surgical procedures that have contributed to the need for nursing home level of care. The physician determined that there were not any IADL/ADL functional impairments/limitations which require nursing home level of care for this applicant. With the assistance of assistive devices, the functional loss of vision of this applicant is compensated and therefore, the diagnosis of legal blindness does not constitute a level of care that meets nursing home placement.

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(Testimony of Stephanie Dixon; Exhibit R-8 at 175-76).⁶

C. Testimony

16. Lorrie Stewart, a registered professional nurse and SOURCE policy specialist, testified at the hearing. She stated that Petitioner did not meet the requisite level of care because she could walk and get up and down, and thus did not demonstrate a physical functional impairment. Ms. Stewart attested that, under current SOURCE policy, neither blindness nor hearing qualifies as a physical functional impairment because "physical" refers to muscles, bones, or nerves. She also noted that only ADLs are part of the rubric of Appendix I, whereas IADLs are not. Ms. Stewart

⁶ This full explanation for the termination appears to more closely match the determinations made in the December 2016 MDA Assessment, as opposed to the June 2016 assessment and Appendix I. However, as noted in footnote 5, *infra*, the reviewing nurse testified that she relied on the June 2106 evaluations.

further testified that, “for years” prior to 2014, a number of individuals were mistakenly receiving SOURCE benefits by mistake, but the ineligibility issue has been corrected in subsequent evaluations. (Testimony of Lorrie Stewart).

17. Also at the hearing, Petitioner testified that due to her blindness, she requires personal assistance with cooking, cleaning, taking her medication, and reading her bills. Petitioner also stated that she uses a cane in one hand, but that she also relies on her aide to guide her to the transport vehicle for doctors’ appointments, walk her to the store to get money orders for her rent payments, help her pick out items while grocery shopping, and assist her with carrying laundry to the apartment complex’s laundry unit. Furthermore, Petitioner attested that she cannot dress on her own and needs assistance getting in and out of the shower, as she has previously fallen in the bathroom. Petitioner conceded that she is familiar with the layout of her house and can function during the hours when her aide is not present. However, she noted that she cannot function if items are moved around, and she testified that additional training for her blindness would not benefit her in light of her hearing loss. (Testimony of Petitioner).

18. Two additional witnesses testified to Petitioner’s current living status. Amena Romelus, a certified nursing assistant who had worked with Petitioner for approximately two to three weeks, testified that she assisted Petitioner with “everything a normal person can do,” including paperwork, grocery shopping, errands, laundry, and rent payments. Ms. Romelus further stated that, although Petitioner is capable of warming up her own food with a microwave, Ms. Romelus has to put the meals together and set them out for her. Additionally, Palace Porter, Petitioner’s godmother, testified that she visits Petitioner twice a week. She reiterated Petitioner’s testimony as to Petitioner’s need for assistance in cooking, cleaning, and reading. (Testimony of Amena Romelus, Palace Porter).

III. Conclusions of Law

1. This matter concerns DCH’s termination of Petitioner’s benefits. Therefore, DCH bears the burden of proof. Ga. Comp. R. & Rags. 616-1-2-.07(1). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Rags. 616-1-2-.21(4).

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. 42 C.F.R. § 431.10(b)(1). In Georgia, that agency is DCH. O.C.G.A. § 49-2-11(f).

3. Within the broad federal rules applicable to Medicaid, DCH 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. DCH is further authorized, under Georgia law, 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” O.C.G.A. § 49-4-142(a). In making these determinations, DCH has discretion in choosing what services will be offered through its Medicaid waiver programs and which individuals will be included in the intended target group for the waiver services. See Susan J. v. Riley, 616 F. Supp.

2d 1219, 1240 (M.D. Ala. 2009).

4. As noted above, DCH offers HCB services, including personal support services and alternative living services, to aged and physically disabled individuals through its SOURCE program. Part II Policies and Procedures for Service Options Using Resources in Community Environments (revised Jan. 1, 2017) (“SOURCE Manual”) § 601.⁷ To be eligible for SOURCE, an individual must meet the target population guidelines and require intermediate nursing home level of care. SOURCE Manual § 801.3. The target population consists of “physically disabled individuals who are functionally impaired, or who have acquired a cognitive loss, that results in need for assistance in the performance of the activities of daily living (ADLs) or instrumental activities of daily living (IADLs).” Id. § 701.

5. SOURCE providers have been given guidance in how to evaluate and re-evaluate level of care using Appendix I in the SOURCE policy manual. Per Appendix I, an individual must meet the requirements contained in Column A regarding medical status plus at least one item from Column B regarding mental status or one of the first four criteria from Column C regarding functional status. Id. § 801.3.

6. Here it is uncontested that Petitioner met the criteria for Column A but did not meet any criteria for Column B. Thus, the dispute rests on whether Petitioner satisfies one of the following criteria under Column C, for functional status:

1. Transfer and locomotion performance of resident requires limited/extensive assistance by staff through help or one-person physical assist.
2. Assistance with feeding. Continuous, stand-by supervision, encouragement or cueing required and set-up help of meals.
3. Requires direct assistance of another person to maintain continence.
4. Documented communication deficits in making self-understood or understanding others. . . .

Id.

7. As an initial matter, DCH argues that only Petitioner’s scoring on ADLs is applicable to evaluations of level of care in Appendix I, and that IADLs should not be considered. Despite testimony to that effect, however, the SOURCE policy manual makes clear that IADLs *are* relevant when evaluating SOURCE eligibility. See SOURCE Manual § 701 (referring to individuals who are functionally impaired and need assistance with ADLs *or* IADLs). Moreover, nothing in the manual explicitly limits a review of functional status or level of care to

⁷ The manual has since been revised in April 2017. However, DCH made its determination in the instant case prior in February 2017, which means the January 2017 version of the manual is applicable. Respondent provided a copy of this version as Exhibit R-3.

physician whether the applicant has “any *IADL/ADL* functional impairment/limitations which require(s) nursing home level of care.” (Emphasis added). Hence, this Court deems both the IADL and ADL assessments relevant to Petitioner’s level of care.

8. Upon review of the record, Petitioner does meet the intermediate nursing home level of care. Namely, her blindness and partial hearing loss has required at least limited assistance in transfer and locomotion, thus satisfying item #1 in Column C. Although the MDS Assessment rated Petitioner as independent with regards to locomotion, it found that she required limited assistance with walking, which Appendix I identifies as a type of locomotion. Furthermore, the MDS Assessment found that Petitioner required limited assistance for transfers in and out of the tub, as well as navigating stairs. These ratings align with Petitioner’s own assertion that, even with a cane, she still relies on personal guided assistance to move around. Additionally, DCH failed to show that Petitioner’s blindness does not result in the need for assistance with feeding and meal preparation. While Petitioner is apparently capable of warming up her own meals, she cannot select them herself and relies on her aide to set up her food for her. This need for assistance coincides with the MDA Assessment’s conclusion that Petitioner requires extensive service for meal preparation.⁹

9. This Court does not find persuasive DCH’s assertion that blindness and hearing loss do not constitute functional impairments because they do not involve the muscles, bones, or nerves. Appendix I only requires that the functional impairment be tied to an “etiologic diagnosis not related to a developmental disability or mental illness.” See SOURCE Manual § 801.3. Moreover, DCH did not present a compelling reason as to why it deemed Petitioner’s blindness ineligible as a functional status between 2015 and 2016, apart from DCH’s vague assertion that parties had been placed on SOURCE improperly for years. DCH has not pointed to any authority, nor has this Court found any, supporting the policy position curtailing the scope of functional disabilities for the purposes of SOURCE eligibility. Accordingly, DCH’s determination that Petitioner did not meet the intermediate nursing home level of care is unsupported by the evidence.

manual specifies that functional performance must be assessed by ADLs exclusively. Furthermore, item #4 in Column C of Appendix I refers to communication deficits, which do not appear to be covered by the listed ADLs in the MDS Assessment, but would be covered under the “phone use” IADL. See id. § 801.3.

⁹ Nothing in the evidence suggests that Petitioner satisfied items #3 and #4 in Column C, as the MDS Assessment rated her as independent with regard to continence and communication issues.

IV. Decision

IT IS HEREBY ORDERED that DCH's termination of Petitioner's participation in the SOURCE Program be **REVERSED**.

SO ORDERED, this 7^m day of June, 2017.

Michael

Michael Malihi
Administrative Law Judge

