Scottish Parliament Region: Central Scotland

Case 200502797: Lanarkshire NHS Board

Summary of Investigation

Category

Health: NHS funded continuing care

Overview

The complainant (Mr C) raised concerns about the fact that his grandmother (Mrs A) was not provided with NHS funded continuing care by Lanarkshire NHS Board (the Board). Mr C also raised concerns that the Scottish Government's policy on NHS funded continuing care was unclear and did not appear to allow for somebody living in the community to be assessed under the policy.

Specific complaint and conclusion

The complaint which has been investigated is that the Board failed to appropriately assess Mrs A for NHS funded continuing care (*not upheld*).

Redress and recommendations

The Ombudsman has no recommendations to make.

Main Investigation Report

Introduction

1. The complainant (Mr C) complained about the fact that his grandmother (Mrs A)'s care home costs were not funded as NHS continuing care by Lanarkshire NHS Board (the Board). Mr C considered that Mrs A, who suffered from vascular dementia, was wrongly being charged for her care in a care home (Care Home 1) since her admission in April 2003 when she should have been entitled to full NHS continuing care funding as her primary need was for healthcare. Mr C also considered that the Board had not taken into account the impact of recent English case law in their decision.

2. Mr C raised his concerns with the Board on 24 January 2004. They responded on 4 February 2004 and explained that the relevant English case law did not apply in Scotland. They suggested that Mr C should complain to the local authority as they were responsible for residential care. Mr C did this and the local authority explained that NHS funded continuing care was only available when a person's health needs required long-stay admission to hospital. They informed Mr C that this was a clinical decision taken by the Board.

3. Mr C raised his concerns with the Board again on 27 August 2004. They responded on 21 September 2004 explaining that the clinical decision reached was that Mrs A did not require NHS funded continuing care. Mr C asked for details of any assessment of Mrs A which had been carried out and the criteria which were used to perform the assessment. The Board referred Mr C to the Scottish Executive Health Department (SEHD)1 policy, the MEL (1996)22 (the MEL). They said that according to that policy, Mrs A did not qualify for NHS funded continuing care.

4. The Board explained that a consultant psychiatrist (Psychiatrist 1) had assessed Mrs A in May 2003 when there had been some difficult behaviour relating to her dementia including aggressiveness and wandering tendencies. They stated that although Psychiatrist 1 accepted that Mrs A had a degree of behavioural disorder related to her dementia, this was not serious enough to

[1] On 3 September 2007 Scottish Ministers formally adopted the title Scottish Government to replace the term Scottish Executive. The latter term is used in the report as it applied at the time of the events to which the report relates.

necessitate Mrs A being cared for in an NHS long-term care setting. The Board explained that this was reserved for patients with extremely difficult behaviours who are unresponsive to medication.

5. Mr C continued to follow-up on whether any formal assessment had been made of Mrs A's requirement for NHS funded continuing care. The Board explained that they did not have an eligibility criteria template but considered the options for care in the context of individual patient need.

6. Mr C complained to the Ombudsman on 16 January 2006.

7. The complaint from Mr C which I have investigated is that the Board failed to appropriately assess Mrs A for NHS funded continuing care.

8. As the investigation progressed, I identified issues concerning the clarity, accessibility and transparency of the process for assessing eligibility for NHS funded continuing care. These issues have also been identified in other investigations previously conducted by the Ombudsman's office (case 200500976, 200502634, 200501504 and 200602124). Mr C also complained about the Scottish Government Health Directorate (SGHD)'s failure to review their policy on NHS funded continuing care despite being aware of the difficulties associated with it. I have also investigated that complaint (case 200600528).

9. Mr C's complaint was originally submitted to the office in January 2006. I very much regret that the process of considering this complaint has taken much longer than it should have done. I apologise to Mr C and the Board for that.

Background Legislation, Case Law and Guidance

10. The National Health Service (Scotland) Act 1978 (the 78 Act), section 1, outlines the general duty of the Secretary of State (now the Scottish Ministers) to promote a comprehensive and integrated health service and to provide or secure the effective provision of services for that purpose. Section 36 of the 78 Act relates specifically to the provision of nursing and other services considered necessary to meet all reasonable requirements (see Annex 3). The duty placed on local authorities in Scotland by the Social Work (Scotland) Act 1968 (the 68 Act) is to promote social welfare by making available advice, guidance and assistance as appropriate (this will include the provision of

residential and other establishments). Both the 68 Act and the 78 Act are relevant to the decisions in this case.

11. Each NHS board in Scotland has a duty to meet the healthcare needs of people in its geographical area who require continuing healthcare. This care is commonly referred to as NHS funded continuing care and can be provided in a number of settings but is paid for entirely by NHS boards.

12. Each NHS board also has a duty to ensure any necessary arrangements are in place for in-patients prior to discharge. Responsibility for making these arrangements will vary according to the particular needs of each patient. The decision to discharge is made by the doctor responsible for the patient's care and is a clinical decision. In some cases it will also involve joint working between hospital staff, the GP and social services staff (in fulfilment of their obligations under the 68 Act). Where there are costs involved in meeting the particular needs identified these can be met in a number of ways including self-funding by the patient (or the patient's family), local authority funding (which will vary according to need and circumstance) or NHS funded continuing care as appropriate.

13. A circular was issued in 1996, the MEL, by the then Scottish Office Department of Health, setting out both the responsibilities of the NHS to arrange discharge and the criteria for NHS funded continuing care. Annex A of the MEL states that (health boards) should arrange and fund an adequate level of service to meet the needs of people who because of the 'nature, complexity or intensity of their healthcare needs will require continuing in-patient care … in hospital … or in a nursing home'.

14. The MEL sets out in greater detail a number of criteria which all health boards must cover for their locality. Paragraph 16 of the MEL sets out the nature of the assessment of health needs which is to be carried out. Paragraph 20 sets out the eligibility criteria for NHS funded continuing care. Paragraph 5 of Annex A to the MEL sets out similar general principles. As relevant to Mrs A's situation the conditions can be summarised as applying to those circumstances where either: a patient needs ongoing and regular specialist clinical supervision on account of the complexity, nature or intensity of his or her health needs; a patient requires routine use of specialist healthcare equipment or treatments requiring the supervision of NHS staff; or a patient has

a rapidly degenerating or unstable condition which means they will require specialist medical or nursing supervision.

15. At the time the MEL was issued, similar guidance was issued for England and Wales. The situation in England and Wales has developed significantly since 1996 as a result of a number of important judgements by the Court of Appeal and the High Court in England including the Coughlan Judgement (see Annex 4) and reports issued by the Health Services Ombudsman for England in January 2003 and December 2004. These developments attracted considerable media attention as a result of which the NHS in Scotland received a number of complaints about continuing care funding. The SEHD of Service Policy and Planning issued a letter (DKQ/1/44) to all NHS Chief Executives on 13 June 2003, outlining the process for handling such complaints. In summary, during the time this complaint was being pursued by Mr C, the position with regard to guidance issued by the SEHD on NHS funded continuing care in Scotland remained limited to that set out by the MEL.

16. On 7 February 2008, the SGHD issued a circular entitled CEL 6 (2008) (the CEL). This provides revised guidance on NHS funded continuing care and replaces the previous guidance contained in the MEL. The CEL states that its purpose is not to alter existing NHS responsibilities for continuing healthcare but to update and clarify guidance to take account of the legislative and policy changes in care provision since 1996. The criteria for eligibility for NHS funded continuing care remain the same as in the MEL (see paragraph 13 of this report). However, the CEL does provide for assessments to be made in the community in circumstances other than discharge from hospital; specifically by a GP, community nurse or social worker. The CEL is clear about what information about the assessment should be recorded in a patient's medical records and clarifies that, due to the level of specialist treatment required, it is expected that NHS funded continuing care will generally be provided in a hospital ward, hospice or contracted in-patient bed.

Investigation

17. Investigation of this complaint involved obtaining and reviewing Mrs A's clinical and nursing home records and the Board's complaints file. I have also sought the views of a clinical adviser to the Ombudsman (the Adviser). I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and the Board were given an opportunity to comment on a draft of this report.

Complaint: The Board failed to appropriately assess Mrs A for NHS funded continuing care

18. Mrs A lived in her own home until she was unable to safely manage there and was admitted to Care Home 1 on 20 April 2003. She had frequent falls and other health problems which precipitated admissions to hospital either for treatment in Accident and Emergency or for in-patient treatment. Mr C became aware of the Coughlan judgement (see Annex 4) and considered that Mrs A's medical condition was such that she met the criteria for NHS funded continuing care. Mr C raised this with the Board on 24 January 2004.

19. Mrs A was referred to the local authority social services by her GP on 25 June 2002. He was concerned about her safety and wellbeing as she lived alone and he felt she was at risk. She was visited at home by social services on 2 September 2002. Mrs A's first contact with psychiatric services due to her dementia was an assessment by a consultant psychiatrist (Psychiatrist 2) on 9 October 2002. It is noted in her records that she had problems with failing memory; was not eating well when at home alone; was fully mobile, continent and able to dress herself. A provisional diagnosis of Alzheimer's disease was made and Mrs A was referred to the Old Age Psychiatric Day Hospital (the Hospital) for further assessment. Following a community care assessment on 11 October 2002, Mrs A was offered home care services but these were declined by Mrs A.

20. Mrs A attended the Hospital on 17 December 2002 when she was diagnosed with vascular dementia in the light of a brain scan which had been carried out. Mrs A's main problems are noted as impairment to long and short term memory, disorientation to time, place and person, impaired concentration span and confusion. Mrs A was referred to community psychiatric nursing for follow-up and to social work to organise home-help and respite care. On 18 December 2002, Mrs A was admitted to a care home (Care Home 2) for respite care and remained there until 20 April 2003 when she was transferred to Care Home 1. There is no reference in the records available that any assessment for NHS funded continuing care was made at any stage prior to the admission to Care Home 1.

21. Mrs A was thereafter regularly admitted to hospital because of wounds which she sustained following falls including a fractured neck of right femur and elbow. The records from Care Home 1 show that Mrs A suffered from poor

sleep, restlessness and wandering, falls and unsteadiness on her feet, with occasional aggression and resistance to care. The changes made in her drug treatment did not seem to make much difference to these problems.

22. The social work community care initial review summary dated 7 January 2003 states that Mrs A had been in Care Home 2 for two weeks and was settled and causing no management problems. This review also refers to a discussion with Psychiatrist 1. The Adviser stated that this suggests that Mrs A's care needs were being considered and decided upon in a multi-disciplinary way before she was admitted to care.

23. As Mrs A's time at Care Home 1 unfolded, it became clear that she presented with problematic behaviours of attempting to or actually escaping and hitting out from early on in her time there. She also had falls which the Adviser considers may have resulted from a combination of physical problems together with an inability to remember that she was liable to fall and how to be careful to reduce the risk.

24. The MEL criteria for NHS funded continuing care include the need for ongoing regular specialist clinical supervision because of the complexity, nature or intensity of health needs, the need for specialist healthcare or treatment requiring regular supervision, or a rapidly degenerating or unstable condition.

25. The Adviser stated it was a fine judgment whether the frequency, intensity or nature of Mrs A's complex of problems (falling, escaping and aggression) met criteria for NHS funded continuing care in either the MEL or the CEL. He advised that he considered the following matters relevant:

- there is a cumulative quality to the events which is quite obvious in retrospect but may well have been less so in the midst of her care;
- there is nothing in the papers examined to show that NHS staff, nursing home staff or social work staff wanted NHS funded continuing care to be provided;
- continuing care in NHS facilities would not have abolished the risk of falls, escapes or violence altogether; however, continuing NHS services may have had easier access to multi-disciplinary teams with occupational therapy and physiotherapy. Nursing observation may be easier in NHS premises, depending on the layout of the building; and

- the major risks, both in terms of potential severity and frequency, were of escape and falls and these are not necessarily only manageable in continuing NHS facilities.

26. The Adviser stated that the information available demonstrates that Mrs A failed to meet the criteria of 'frequent, not easily predictable', 'rapidly degenerating or unstable condition', or 'the need for use of specialist healthcare or equipment requiring supervision of NHS staff' set out in the MEL. The Adviser concluded that Mrs A did not meet criteria for NHS funded continuing care as set out either in the MEL or the CEL.

Conclusion

27. In considering any complaint about the NHS this office has to reach a view on whether the person on whose behalf the complaint is made has been caused injustice or hardship by clinical failings, maladministration or service failure.

28. Based on the clinical advice that I received, I have seen no evidence of clinical failings in the Board's dealings with Mrs A.

29. If the Board had failed to act in accordance with the MEL in this instance, this would constitute maladministration which might have caused injustice to Mrs A. The MEL system for assessing eligibility addressed only those being discharged from NHS care. This does not cover Mrs A's situation as she was not an NHS in-patient.

30. Mrs A's circumstances (being admitted to a nursing home from the community) are not unusual. The lack of provision in the MEL for assessment in such cases caused difficulty for Mr C. The Board cannot be held responsible for a lack of provision in the MEL because the MEL was not their responsibility. In this respect, I do not consider that there has been any maladministration by the Board.

31. Section 5(2) of the Scottish Public Services Ombudsman Act 2002 defines service failure as any failure in a service provided by an authority or 'any failure of the authority to provide a service which it was a function of the authority to provide'. If someone has needs which are complex, intense and of a nature that would be beyond what a local authority ought to provide under its duties in terms of the 68 Act, then the relevant health board has a responsibility under the 78 Act to provide such medical, nursing and other services as they consider

necessary to 'meet all reasonable requirements' (see Annex 3). If the interpretation and application of the MEL acted as an impediment to the provision of self-evidently 'necessary services' through NHS funded continuing care, it would be reasonable for this office to conclude that there had been service failure. On the evidence available to me in this case, I cannot reach such a conclusion and, therefore, cannot conclude that Mrs A was entitled to NHS funded continuing care. I, therefore, do not uphold this complaint.

32. I would also note that Mr C raised the question of the application of the Coughlan judgement in Scotland as this case considered a similar argument in the English courts based on English legislation and guidance. However, as Mr C was correctly advised by the Board, the Coughlan case is not binding on courts in Scotland and cannot be considered as a statement of the law in Scotland.

Recommendation

33. Based on the conclusion that there has been no injustice or hardship caused by clinical failings, maladministration or service failure on the part of the Board, the Ombudsman has no recommendation to make.

Annex 1

Explanation of abbreviations used

Mr C	The complainant
Mrs A	The aggrieved, Mr C's grandmother
The Board	Lanarkshire NHS Board
Care Home 1	The care home in which Mrs A resided
SEHD/SGHD	Scottish Executive Health Department now Scottish Government Health Directorate
The MEL	The MEL (1996)22
Psychiatrist 1	A consultant psychiatrist
The 78 Act	The National Health Service (Scotland) Act 1978
The 68 Act	The Social Work (Scotland) Act 1968
The CEL	The CEL 6 (2008)
The Adviser	The clinical adviser to the Ombudsman
Psychiatrist 2	A consultant psychiatrist
The Hospital	The Old Age Psychiatric Day Hospital
Care Home 2	The care home where Mrs A was admitted for respite care

Annex 2

Glossary of terms

Alzheimer's disease	A neurological disorder characterised by slow, progressive memory loss due to a gradual loss of brain cells. Alzheimer's disease significantly affects cognitive (thought) capabilities and, eventually, affected individuals become incapacitated
Dementia	Symptoms including changes in memory, personality and behaviour, which result from a change in the functioning of the brain
Vascular Dementia	A form of dementia which occurs when blood vessels in the brain are blocked causing parts of the brain to be damaged by lack of blood

Annex 3

Summary of legislation, policies, case law and reports considered

National Health Service (Scotland) Act 1978	Section 36 states: (1) It shall be the duty of the Secretary of State to provide throughout Scotland, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions - (a) hospital accommodation, including accommodation at state hospitals; (b) premises other than hospitals at which facilities are available for any of the services provided under this Act; (c) medical, nursing and other services, whether in such accommodation or premises, in the home of the patient or elsewhere
Social Work (Scotland) Act 1968	Under section 12 A (which was inserted by the National Health Service and Community Care Act 1990) a local authority has a duty to promote social welfare by making available advice, guidance and assistance as appropriate (this will include the provision of residential and other establishments)
MEL 1996(22)	Sets out the responsibilities of the NHS to arrange discharge and the criteria for eligibility for NHS funded continuing care. Issued by the then Scottish Office Department of Health (now the SGHD)
SGHD Circular No. SWSG10/1998	Scottish Office: Community Care Needs of Frail and Older People (Integrating Professional Assessments and Care Arrangements)

SGHD Circular No. CCD 8/2—3	Choice of Accommodation – Discharge from Hospital
SEHD Letter DKQ/1/44	Directorate of Service Policy and Planning letter to all NHS Chief Executives on 13 June 2003, outlining the process for handling continuing care funding complaints
The Health Service Ombudsman for England	HC399 (2002 – 2003) & HC144 (2003 - 2004) Reports on NHS funding for long-term care
CEL 6 (2008)	This letter was issued on 7 February 2008 and provides revised guidance on NHS funded continuing care. It replaces the previous guidance contained in MEL (1996)22

Annex 4

List of Case Law (and brief summary conclusions)

R v North and East Devon Health Authority ex parte Pamela Coughlan [2000] 2 WLR 622 (the Coughlan Judemgent)	The court found that a local authority can provide nursing services but that this is limited to such services which are provided as ancillary to the accommodation provided by the local authority in fulfilment of a statutory duty The court also considered the eligibility criteria for NHS funded continuing care and noted that health department guidance could not alter a legal responsibility under the National Health Service Act 1977. In particular it drew attention to a danger of excessive reliance in the health department guidance on the need for specialist clinical input The court concluded that whether it is lawful to transfer care from NHS to local authority responsibility depends generally on whether the nursing services are incidental/ancillary to the local authority provision and of a nature which the local authority can be expected to provide
R (on the application of Maureen Grogan) v Bexley NHS Care Trust and Others [2006] EWHC 44	The court ruled that the eligibility criteria for NHS funded continuing care were unlawful as they contained no guidance as to the test or approach to be applied when assessing a person's health needs in determining eligibility