

Maria Mojica, Compliance Specialist for Sunshine State Health Plan, Inc. (“Sunshine”), appeared on behalf of Respondent. The following attended as witnesses for Respondent at all hearings: Melissa Layne, Senior Manager for Member Appeals for Sunshine; Cynthia Morisaki, LTC Supervisor for Sunshine; and Valerie Elisee, Care Coordinator for Sunshine. Dr. John Carter, Long Term Care Medical Director for Sunshine, attended the January 22, 2021, and February 4, 2021, hearings. Dr. Sapnalaxmi Amin (“Dr. Amin”), Medical Director for Sunshine, attended the February 22, 2021, hearing.

Doris Rivera, Medical/Health Care Program Analyst for the Agency for Health Care Administration (“Agency” or “AHCA”), appeared as an observer for the January 22, 2021, and February 22, 2021, hearings. Stephanie Lang, Registered Nurse Specialist, appeared as an observer for the February 4, 2021, hearing.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred and seventeen (117)-page evidence packet. The evidence packet included: a table of contents; a Medicaid Fair Hearing Summary; a Notice of Adverse Benefit Determination (“NABD”), dated October 13, 2020; a Long Term Care Person-Centered Care Plan (“POC”), dated September 14, 2020; a POC, dated December 11, 2020; Florida Department of Elder Affairs 701B Comprehensive Assessment (“701B”), dated September 14, 2020; a 701B, dated December 11, 2020; a Standard Appeal Acknowledgement, dated October 29, 2020; an Expedited Appeal Request Decision, dated October 29, 2020; a Notice of Plan Appeal Resolution (“NPAR”), dated November 24, 2020; Sunshine Health Policy and Procedure-LTC Ancillary Service Criteria-LT.UM.09; and Florida Administrative Code Rule (“Fla. Admin. Code R.”) 59G-1.010. Absent an

objection from the Petitioner, the undersigned admitted the one hundred and seventeen (117)-page packet into evidence as Respondent's Composite Exhibit 1.

Prior to the February 4, 2021 hearing, Respondent sent to the Office of Fair Hearings a twenty-eight (28)-page evidence packet. The evidence packet included: a 701B, dated December 11, 2020; and a POC, dated January 8, 2021. Absent an objection from the Petitioner, the undersigned admitted the twenty-eight (28)-page evidence packet into evidence as Respondent's Composite Exhibit 2.

Prior to the February 22, 2021 hearing, Respondent sent to the Office of Fair Hearings a twenty-seven (27)-page evidence packet. The evidence packet included: a 701B, dated January 8, 2021; and a POC, dated January 8, 2021. Absent an objection from the Petitioner, the undersigned admitted the twenty-seven (27)-page evidence packet into evidence as Respondent's Composite Exhibit 3.

FINDINGS OF FACT

1. Petitioner is an enrolled member of Sunshine. *See* page 2 of Respondent's Composite Exhibit 1. Sunshine is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida.
2. At the time of the hearing, Petitioner was [REDACTED] years old. *See* page 1 of Respondent's Composite Exhibit 3. Petitioner lives alone. *Id.* at 2. Petitioner's children "come by to assist with her care and rotate daily to provide assistance." *Id.*
3. Petitioner is diagnosed with dementia and has a hearing impairment in her left ear. *Id.* at 3.

4. Petitioner's needs for activities of daily living ("ADLs") are as follows: for bathing, dressing, and walking/mobility Petitioner needs assistance (but not total help); for eating, using the bathroom, and transferring, Petitioner needs supervision or prompting. *Id.* at 5. It can take up to two and a half hours to assist Petitioner with bathing, dressing, brushing teeth, grooming, and with eating breakfast. *Id.* Petitioner requires supervision to avoid falls. See page 5 of Respondent's Composite Exhibit 2. Petitioner is "weak and unable to do anything for herself without [Home Health Aide] assistance." *Id.* Further,

Member is able to express basic needs, able to feed herself when food is place[d] in front of her, she can use the bathroom with assistance of commode and also wear pullups. She can transfer and ambulate with the assistance of using a walker but requires supervision and someone behind her to prevent from falling. She is capable to assist with dressing herself such as raising her arms and pulling down overalls. When taking a bath, she requires someone to assist with lower extremities and rinsing her properly but can lather upper extremities when seated on a shower chair, Member requires assistance getting in and out [of the] shower. Member requires total assistance with heavy lifting, chores, shopping, managing medication and finances and transportation.

Page 5 of Respondent's Composite Exhibit 3.

5. Petitioner's needs for instrumental activities of daily living ("IADLs") are as follows: for heavy chores, light housekeeping, managing money, preparing meals, shopping, and managing medication, Petitioner needs total assistance (cannot do at all). See page 6 of Respondent's Composite Exhibit 3. For using the telephone and transportation, Petitioner needs assistance (but not total help). *Id.* Further,

[M]ember needs maximum and/or total assistance with shopping, cooking, meal prep, medicines and financial manages [sic]. [M]ember is also getting monthly incontinent supply. [M]ember's family is managing her medicine care at this time.

...

Aides makes bed, housekeeping chores est 2 – 3 hrs; sweeping, cleaning [bathroom], washing dishes, & takes out trash. Laundry is done 2-3x/week. Time frame is 2-4 hrs/day. [W]ashing/drying/folding/putting up. [T]akes 30 mins walks

in [wheelchair] unable to walk using walker due to pain in knee & to prevent falls. Meal preps: breakfast and lunch. Breakfast: 15 mins to prep and lunch to prep and lunch is 30-45 mins. Member takes up to a 1hr to eat breakfast/lunch. Dinner is covered by family. Shopping is weekly by family, med management is weekly by family. Transportation is daily by family.

Page 6 of Respondent's Composite Exhibit 3.

6. For the period of March 1, 2020, through February 28, 2021, Petitioner was approved to receive the following: fifty-six (56) hours of personal care services, weekly; fourteen (14) hours of homemaker services, weekly; one (1) case of pull-ups, monthly; and one (1) case of wipes, monthly. See page 29 of Respondent's Composite Exhibit 1.

7. In the NABD, dated October 13, 2020, Respondent reduced Petitioner's personal care services from fifty-six (56) hours per week to forty-six (46) hours per week. See pages 4 – 12 of Respondent's Composite Exhibit 1. The NABD explained the basis of the reduction as follows:

We determined that your requested services are not medically necessary because the services do not meet either of the reasons checked below: (See Rule)

...

- Meet all of the following criteria for all extended state plan services used for the purposes of maintenance therapy and all other home and community-based services:
 1. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
 2. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide; and
 3. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider;

and one of the following:

1. Enable the enrollee to maintain or regain functional capacity; or
2. Enable an enrollee receiving long-term services and supports to have access to the benefits of community living, to achieve person-centered goals, and live and work in the setting of their choice.

The facts that we used to make our decision are: Sunshine Health looked at the member's present care needs and provided home services and supplies.

...

Based on the assessment of the member's care needs and household and caregiver status, Sunshine Health will reduce the Personal Care Services from 56 hours/week to 46 hours/week. This decision was made with Sunshine Health Policy LT.UM.09 Long Term Care Ancillary Service Criteria.

Pages 4 – 6 of Respondent's Composite Exhibit 1.

8. Petitioner requested a plan appeal and received an NPAR dated November 24, 2020, upholding the reduction of personal care services from fifty-six (56) hours per week, to forty-six (46) hours per week. *Id.* at 79 – 85. The NPAR explained as follows:

The reason for our decision, the reduction of 10 hours per week of Personal Care Services, from 56 hours per week to 46 hours per week, is denied for lack of medical necessity. Based on the assessment, the member's currently approved services are adequate to meet the member's care needs. The member's present care plan includes 46 hours per week of Personal Care Services and 14 hours per week of Homemaker Services. This decision was made with Sunshine Health Policy LT.UM.09 Long Term Care Ancillary Service Criteria.

Pages 79 - 80 of Respondent's Composite Exhibit 1.

9. On December 1, 2020, Petitioner requested a Fair Hearing to challenge the reduction of personal care services. On December 29, 2020, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for January 22, 2021, at

██████████ The hearing was reconvened on February 4, 2021, and February 22, 2021.

10. Petitioner has six (6) adult children. Each child spends an evening with Petitioner each week. Each Sunday, all of Petitioner's children spend the evening with her. Petitioner receives approximately thirty-five (35) hours of personal care services that are paid for out-of-pocket.

11. Dr. Amin is the Long Term Care Medical Director for Sunshine. Dr. Amin testified that the reduction of personal care services from fifty-six (56) hours, weekly, to forty-six (46) hours weekly, was felt to be appropriate because of Petitioner's informal supports.

12. LT.UM.09 provides as follows in regards to personal care services:

7. Personal Care Services

A service that provides assistance with eating, bathing, dressing and personal hygiene, and other activities of daily living. The service includes assistance with preparation of meals, but does not include the cost of meals. The service may also include housekeeping tasks such as bed making, dusting and vacuuming, which are incidental to the care furnished or are essential to the health and welfare of the member, rather than the member's family. Personal care services include the following:

- a. Assistance to the member to complete personal hygiene (bathing, grooming, mouth care, etc.)
- b. Assistance with bladder and bowel requirements that include assisting the member to and from the bathroom or with bedpan routines
- c. Assisting the member in following through with physician orders
The Personal Care Provider cannot administer any medications, but may bring medications to the member and remind the member to take the medications at specific times
- d. Assisting with food, nutrition, and diet activities, including preparing meals, when required and other incidental services, (i.e. housekeeping chores) essential to the health and welfare of the member
- e. Performing household services (changing bed linen or arranging furniture), when such services are essential to the member's health and comfort.

...

Approval Criteria

Personal Care Services reviews include four (4) criteria:

- a) Activity of Daily Living (ADL) limitations
- b) Living situation
- c) Supervision needs
- d) Available Supports

...

Exclusions and Limitations for Personal Care services include but are not limited to:

- 1. Service must be provided at member's residence.
- 2. Member must reside in a non-facility based setting.
- 3. The provider must be awake during the provision of personal care services.
- 4. If services are required overnight, member must live alone and one of the following conditions must apply:

5. Services provided by Sunshine Health may not duplicate services that are provided under by another provider.
6. Escort services

Pages 103 – 109 of Respondent’s Composite Exhibit 1.

CONCLUSIONS OF LAW

13. The Agency’s Office of Fair Hearings has jurisdiction over the subject matter of this proceeding and the parties pursuant to Fla. Stat. § 409.285(2)(2019). This order is the final administrative decision of AHCA under Fla. Stat. § 409.285(2)(a).

14. This hearing was held as a de novo proceeding pursuant to Fla. Admin. Code R. 59G-1.100(17)(b).

15. Because Respondent is reducing a previously approved service, Fla. Admin Code R. 59G-1.100(17)(g) assigns the burden of proof to Respondent. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by “the greater weight of the evidence” (Black’s Law Dictionary at 1201, 7th Ed.)

16. The Florida Medicaid Statewide Medicaid Managed Care Long-term Care Program Coverage Policy (March 2017) (“LTC Policy”), incorporated by reference in Fla. Admin. Code R. 59G-4.192, governs Long-Term Care services available under Florida Medicaid. The LTC Policy provides the following with respect to home delivered meals, personal care services, and medical supplies:

1.1 Description and Program Goal

Under the Statewide Medicaid Managed Care Long-Term Care (LTC) program, managed care plans (LTC plans) are required to provide an array of home and community-based services that enable enrollees to live in the community and to avoid institutionalization.

...

1.3.1 Activities of Daily Living (ADLs)

ADLs include:

- Bathing
- Dressing
- Eating (oral feedings and fluid intake)
- Maintaining continence (examples include taking care of a catheter or colostomy bag or changing a disposable incontinence product when the recipient is unable to control bowel or bladder functions)
- Toileting
- Transferring

...

1.3.9 Instrumental Activities of Daily Living (IADLs)

When necessary for the recipient to function independently, including:

- Grocery shopping
- Laundry
- Light housework
- Meal preparation
- Money Management
- Personal hygiene
- Transportation
- Using the telephone to take care of essential tasks (examples include paying bills and setting up medical appointments)

...

1.3.16 Natural Supports

Unpaid supports that are provided voluntarily to the individual in lieu of home and community-based services and supports.

...

4.1 General Criteria

Florida Medicaid LTC plans cover services that meet all of the following:

- Are determined medically necessary, as defined in this rule
- Do not duplicate another service
- Meet the criteria as specified in this policy

...

4.2.1.9 Homemaker Services

The provision of general household activities (such as meal preparation) and routine household care (including laundry and pest control) by a trained homemaker, when the individual regularly responsible for these activities is temporarily absent or unable to manage these activities.

...

4.2.2.6 Personal Care

In accordance with Rule 59G-4.215, F.A.C., for enrollees under the age of 21 years. To provide assistance with ADLs and IADLs, including assistance with preparation of meals, and housekeeping chores which are incidental to the care furnished or

are essential to the health and welfare of the enrollee. The scope and nature of these services do not otherwise differ from personal care services furnished to persons under the age of 21 years.

17. The LTC Policy also addresses medical necessity:

1.3.14 Medically Necessary or Medical Necessity

For the purposes of this policy, the service must meet either of the following criteria:

(a) Nursing facility services and mixed services must meet the medical necessity criteria defined in Rule 59G-1.010, F.A.C.

(b) All other LTC supportive services must meet all of the following:

- Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs
- Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide
- Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider

And, one of the following:

- Enable the enrollee to maintain or regain functional capacity; or
- Enable the enrollee to have access to the benefits of community living, to achieve person-centered goals, and to live and work in the setting of his or her choice.

18. The Florida Medicaid Definitions Policy, incorporated by reference in Fla. Admin. Code R.

59G-1.010, defines "Medically Necessary" or "Medical Necessity" as follows:

The medical or allied care, goods, or services furnished or ordered must meet the following conditions:

- Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate pain
- Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs
- Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational

- Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide
- Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider

The fact that a provider has prescribed, recommended, or approved medical or allied care, goods, or services does not, in itself, make such care, goods or services medically necessary or a medical necessity or a covered service.

19. In the NABD, dated October 13, 2020, Respondent reduced Petitioner's personal care services, from fifty-six (56) hours per week to forty-six (46) hours per week. See pages 4 – 12 of Respondent's Composite Exhibit 1. In the NPAR, dated November 4, 2020, it was explained that forty-six (46) hours, weekly, of personal care services and fourteen (14) hours, weekly, of homemaker services were "adequate to meet the member's care needs." *Id.* at 79.

20. As provided in Respondent's policy, LT.UM.09, personal care services are to "provide assistance with eating, bathing, dressing, and personal hygiene, and other activities of daily living." Further, the policy provides that personal care provides with "preparation of meals" and "housekeeping tasks". As discussed in LT.UM.09, personal care services are determined, in part, based on: the recipient's ADL limitations; the recipient's living situation; the recipient's supervision needs; and the available supports. Moreover, as provided in the LTC Policy, personal care is to provide "assistance with ADLs and IADLs, including assistance with preparation of meals, and housekeeping chores which are incidental to the care furnished or are essential to the health and welfare of the enrollee." As provided in the record, Petitioner requires assistance (but not total help) with bathing, dressing, and walking/mobility; Petitioner needs supervision or prompting with eating, using the bathroom, and transferring. See ¶ 4. In regards to her needs for

IADLs, Petitioner requires assistance (cannot do at all) with heavy chores, light housekeeping, preparing meals, shopping, and managing medication. See ¶ 5.

21. As Respondent bears the burden of proof, Respondent must show that it is not medically necessary for Petitioner to receive more than the reduced amount of services. Respondent indicated on the NABD that Petitioner did not meet all of the criteria of medical necessity, but did not specify which medical necessary criteria was the basis for its decision. See ¶ 6. At the hearing, Dr. Amin testified, *supra* ¶ 11, that she felt the reduction was appropriate based on Petitioner's informal supports. Here, the record shows that Petitioner is approved to receive, from Respondent, forty-six (46) hours of personal care services, weekly, and fourteen (14) hours of homemaker care services, weekly. Further, Petitioner has approximately thirty-five (35) hours of personal care services, which are not provided by Respondent. *Supra* ¶ 10. Thus, Petitioner has approximately ninety-five (95) hours of combined services each week to provide for her ADLs and IADLs. Lastly, at least one of her children visit her each evening to provide dinner, and one of her children provides assistance on Saturday. *Id.* and ¶ 5. Without factoring in the assistance provided by her children, Petitioner has approximately 13.5 hours of services each day (11.5 hours of personal care and 2 hours of homemaker services). The estimated times to provide for Petitioner's housekeeping tasks such as making the bed, sweeping, cleaning the bathroom, washing dishes, taking out the trash, and laundry, is two (2) to four (4) hours each day, or approximately fourteen (14) to twenty-eight (28) hours each week. See ¶ 5. This will, at a minimum, exhaust all of Petitioner's homemaker service hours, and will leave Petitioner with between eighty-one (81) and sixty-seven (67) hours to assist with her ADLs. It is estimated that Petitioner requires two and a half hour hours of assistance for bathing, dressing, brushing teeth,

grooming, and eating breakfast, as well as between thirty (30) minutes and forty-five (45) minutes to prepare lunch. This totals to between three (3) hours and three (3) hours and fifteen (15) minutes each day, or between twenty-one (21) hours and almost twenty-three (23) hours each week. Further, Petitioner's family provides for her dinner and managing medication. See ¶ 4 and 5. Assuming twenty-three (23) hours is used each week, that would leave Petitioner with between fifty-eight (58) and forty-four (44) hours each week to provide with her walking/mobility and supervision with transferring and using the bathroom.



22. One aspect of medical necessity is that the requested service must be "individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs." Here, based on the timeframes discussed *supra* ¶ 21, and the natural support available to Petitioner through her children, it appears that Petitioner's ADLs and IADLs are being met. Based on the foregoing, Respondent demonstrated that Petitioner's previous amount of personal care was in excess of her needs, and thus not medically necessary.

23. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned concludes that Respondent proved by a preponderance of the evidence that Respondent's reduction of ten (10) hours per week of personal care services was correct.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

Respondent's reduction of Petitioner's personal care services is **AFFIRMED**. Petitioner's appeal based on Respondent's reduction of personal care services is **DENIED**.

DONE AND ORDERED this 24th day of March, 2021, in Tallahassee, Leon County, Florida.

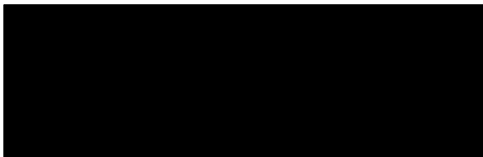
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NOTICE OF A RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

Copies Furnished To:



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