

STATE OF FLORIDA  
AGENCY FOR HEALTH CARE ADMINISTRATION  
OFFICE OF FAIR HEARINGS



**FILED**

Mar 01, 2021, 10:59 am

OFFICE OF FAIR HEARINGS

████████████████████,

PETITIONER,

AHCA Case No.: 20-FH ██████████  
Plan ID No. ██████████

vs.

SUNSHINE STATE HEALTH PLAN, INC.,

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on February 3, 2021, at ██████████.

**APPEARANCES**

For the Petitioner: ██████████  
Petitioner's Authorized Representative

For the Respondent: Kizzy Alleyne  
Senior Paralegal  
Sunshine State Health Plan, Inc.

**STATEMENT OF ISSUE**

The issue is whether Respondent proved by a preponderance of the evidence that Respondent's decision to reduce Petitioner's personal care services was correct.

## PRELIMINARY STATEMENT

All parties appeared telephonically. Petitioner's Authorized Representative and son, [REDACTED]

[REDACTED] (" [REDACTED] ") appeared on behalf of the Petitioner.

Kizzy Alleyne, Senior Paralegal for Sunshine State Health Plan, Inc. ("Sunshine") appeared on behalf of Respondent. The following attended as witnesses for Respondent: Dr. Michael Gervasi ("Dr. Gervasi"), Long Term Care Medical Director for Sunshine; Vanessa Deandrade, Case Manager Supervisor for Long Term Care for Sunshine; Laticia Hughes, Dr. Heather Lutz, Medical Director for Sunshine; and Shawntel Johnson, Long Term Care Coordinator, Suzanne Chillari, Long Term Care Case Manager for Sunshine; and Louise Gentry, Supervisor of Quality Improvement for Sunshine.

Suzanne Chillari, Medical/Health Care Program Analyst for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared as an observer. Stephanie Evans, Chief Fair Hearing Counsel of Office of Fair Hearings appeared as an observer.

Petitioner did not introduce any exhibits at the hearing. Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred and twenty-four (124)-page evidence packet. The evidence packet included copies of the following: a Medicaid Fair Hearing Table of Content; a Medicaid Fair Hearing Summary; a Notice of Adverse Benefit Determination ("NABD"), dated October 22, 2020; a 90 Day Care Plan Review, dated September 23, 2020, for Long Term Care Person-Centered Care Plan ("POC") for POC effective June 1, 2020; a POC Care Plan Review, dated December 17, 2020; a Florida Department of Elder Affairs 701B Comprehensive Assessment ("701B"), dated September 23, 2020; a 701B, dated December 10, 2020; a letter from [REDACTED] bearing fax date November 5, 2020; a progress

note from [REDACTED] dated [REDACTED] 2020; an Expedited Appeal Request Decision, dated November 3, 2020; a Standard Appeal Acknowledgement, dated November 3, 2020; a Notice of Plan Appeal Resolution (“NPAR”), dated December 2, 2020; a Sunshine Health Policy and Procedure-LTC Ancillary Service Criteria-LT.UM.09 (“LT.UM.09”); and Florida Administrative Code Rule (“Fla. Admin. Code R.”) 59G-1.010. Absent an objection from the Petitioner undersigned admitted the one hundred and twenty-four (124)-page evidence packet into evidence as Respondent’s Composite Exhibit 1 (“RCE1”).

### FINDINGS OF FACT

1. Petitioner is an enrolled member of Sunshine. Sunshine is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida.
2. Petitioner is [REDACTED]-years old. See RCE1 at 31. Petitioner lives with her son, [REDACTED]. See RCE1 at 36. As testified to by [REDACTED], [REDACTED] works 3:00 p.m. to 11:00 p.m., Monday through Friday, is an only child, and has no one else to assist with caring for Petitioner.
3. As reported on the 701B dated December 10, 2020, Petitioner is diagnosed with the following: anemia, osteoarthritis, high blood pressure, heart problems, incontinence of bladder and bowel, osteoporosis, hypothyroidism, and macular degeneration. RCE1 at 55-56. She also has a history of breast cancer and urinary tract infections. *Id.* Petitioner’s overall health is rated as poor, and compared to a year ago is much worse. *Id.* at 52. Petitioner has both vision and hearing problems. *Id.* [REDACTED] reports Petitioner’s condition as deteriorating.
4. In regards to her activities of daily living (“ADLs”), Petitioner needs assistance (but not total help) with bathing and dressing; uses assistive devices for using the bathroom, and walking/mobility; needs supervision and an assistive device for transferring; and can feed herself.

*Id.* at 53. In regards to her instrumental activities of daily living (“IADLs”), Petitioner needs total assistance with heavy chores, light housekeeping, managing money, preparing meals, shopping, and using transportation. *Id.* at 54. Petitioner needs assistance (but not total help) with using the telephone and managing medication. *Id.*<sup>1</sup>

5. Petitioner’s POC for the service period effective June 1, 2020, initially included, among other things, twenty-four (24) hours weekly of personal care services and nine (9) hours weekly of homemaker services. *Id.* at 20. Effective July 1, 2020, the personal care services were reduced to twenty-one (21) hours weekly. *Id.* The three hours weekly reduction from 24 hours to 21 hours is not at issue in this Fair Hearing.

6. As testified by Dr. Gervasi, Respondent employs routine quarterly reviews of care plans. In Petitioner’s case, this resulted in the NABD, dated October 22, 2020, wherein Respondent reduced Petitioner’s personal care services from twenty-one (21) hours weekly to fifteen (15) hours weekly. *Id.* at 4 through 12. 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

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<sup>1</sup> The 701B says that Petitioner needs no assistance with managing medication, but [REDACTED] testified uncontradicted that Petitioner’s mind is declining and she needs someone to manage her medications for her.

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 has looked at the member's present care needs and provided home services. The member's present care plan includes:

- 21 hours per week of Personal Care Services
- 9 hours per week of Homemaker Services
- 4 meals per week of Home Delivered Meals

Based on the assessment of the member's care needs and household caregiver status, Sunshine health will reduce the Personal Care Services from 21 hours per week to 15 hours per week, a reduction of 6 hours per week of Personal care Services.

The updated care plan by Sunshine Health will include:

- 15 hours per week of Personal Care Services
- 9 hours per week of Homemaker Services
- 4 meals per week of Home Delivered Meals

This decision was made with Sunshine Health Policy LT.UM.09 Long Term Care Ancillary Service Criteria.

*Id.* at 4 through 5.

7. Petitioner requested a plan appeal, and in support of the appeal submitted the November 5, 2020, letter from [REDACTED], and the attached Progress Note dated [REDACTED] 2020.

As of November 5, 2020, [REDACTED] had diagnosed and was actively treating Petitioner for the following: Alzheimer's disease with late onset, stage III chronic kidney disease, benign hypertensive renal disease, mild depression, anxious personality disorder, anemia, hypothyroidism, chronic fatigue, osteoporosis, and age-related osteoporosis without current pathological fracture. *Id.* at 71-72. By the NPAR dated December 2, 2020, Respondent upheld the reduction in Personal Care Services. *Id.* at 86 through 88.

8. Dr. Gervasi is a Medical Director at Sunshine. Dr. Gervasi testified that at the quarterly review of Petitioner's POC, a medical director for Sunshine determined that 15 hours weekly of personal care services would suffice, and upon appeal a second medical director concurred that 15 hours weekly would suffice for Petitioner. Dr. Gervasi did not testify that, or how, the POC's initial allocation of 21 hours weekly of personal care services was in error, or what, if any, change in circumstances from the initial determination to the quarterly review may have been a factor in the reduction in service. On cross examination, Dr. Gervasi was asked to explain how Sunshine decided the number of hours in this case and the basis for reducing the personal care service hours from 21 to 15 hours per week. Dr. Gervasi described the process, in general, as one where a medical director has discussions including the care coordinator, and from these discussions "they come up with a formula that is appropriate for that person's care. It's not a number that is just pulled out of the sky." Aside from this general description of the process, Dr. Gervasi did not testify to the particular formula, or its specific elements, arrived at in this case. There is no document in RCE1 bearing a formula, or containing another objective basis, for calculating the appropriate number of hours of personal care service for Petitioner.

#### **CONCLUSIONS OF LAW**

9. 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).

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

11. Because Respondent is reducing a previously approved service, Respondent bears the burden of proof. 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.)

12. The 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 personal care services:

**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)

...

#### **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

...

#### **4.2.2.6 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.

13. 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.

14. 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.

15. 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

...

*Id.* at 88 through 94.

16. The 90 Day Care Plan Review, dated September 23, 2020, provides that Petitioner was approved to receive twenty-one (21) hours per week of personal care services from July 1, 2020, through September 30, 2020. RCE1 at 20. In the NABD, dated October 22, 2020, Respondent reduced Petitioner's personal care services from twenty-one (21) hours weekly, to fifteen (15) hours, weekly. *Id.* at 4-12. Therefore, the issue is whether Respondent's reduction of Petitioner's personal care services was correct.

17. In the NABD, Respondent explained that the previously approved 21 hours weekly personal care services were not medically necessary and that its decision was "[b]ased on the assessment of the member's care needs and household and caregiver status . . . ." *Id.* at 4 through 5. At the Fair Hearing, Dr. Gervasi, *supra* ¶ 8, testified that a review of Petitioner's needs justified a reduction of personal care services from 21 hours to 15 hours per week, but the record does not support this contention.

18. 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), supervision, or assistive devices with all ADLs, except eating; and requires assistance (cannot do at all) with all IADLs, except for using the telephone and managing medication. *Id.* at 34 and 35; *and see* ¶ 4. Here, Dr. Gervasi testified that Petitioner only requires 15 hours of personal care service per week, but did not explain how he arrived at the figure. He said the process for determining the proper number of hours involves discussions by medical directors and care coordinators, who consider all of the member's needs, and the product of the discussions is a formula appropriate for each member. *See* ¶ 8. But Dr. Gervasi did not put into evidence the specific formula arrived at for Petitioner or its specific elements. For example, Dr. Gervasi did not explain how much time each ADL should take accomplish based on Petitioner's unique medical needs, nor did he explain how much assistance could be provided by Petitioner's son. He did not explain what impact or weight was given, if any, to [REDACTED] diagnosis of Alzheimer's and chronic kidney disease appearing in her Progress Note of [REDACTED] 2020,


which was submitted in support of Petitioner’s plan appeal. (¶ 7).<sup>2</sup> Both diagnoses appear to have been new as neither diagnosis appeared in the 701B dated September 23, 2020, and somehow failed to be included in the later 701B dated December 10, 2020. RCE1 at 49 et seq. Respondent bore the burden of proving to the undersigned how it determined that 15 hours weekly was the proper number of hours for Petitioner’s personal care services. Undersigned holds that there are too many gaps and omissions in Respondent’s evidence for it to have succeeded in shouldering its burden of proof.

19. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned finds that Respondent did not prove by a preponderance of the evidence that Respondent’s reduction of Petitioner’s personal care services from 21 hours weekly to 15 hours weekly was correct.

**IT IS THEREFORE ORDERED AND ADJUDGED THAT:**

Respondent’s reduction of personal care services is **REVERSED**. Petitioner’s appeal based on Respondent’s reduction of is **GRANTED**.

**DONE AND ORDERED** this 1st day of March, 2021, in Tallahassee, Leon County, Florida.

Michael J. Hauversburk  
20-FH [REDACTED]  
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**MICHAEL HAUVERSBURK, Hearing Officer**  
**Agency for Health Care Administration**  
**Office of Fair Hearings**  
**2727 Mahan Drive, Mail Stop #11**

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<sup>2</sup> Also unspecified is the influence of the statement found in both 90 Day POC Reviews (September 2020 and December 2020) that Petitioner “relies on her husband for support” even though he passed away on [REDACTED] 2019.

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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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