



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

FILED

Feb 19, 2021, 8:40 am

OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 20-FH [REDACTED]

Plan ID No.: [REDACTED]

vs.

UNITEDHEALTHCARE OF FLORIDA, INC.,

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on January 21, 2021, at [REDACTED]

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner's Authorized Representative

For the Respondent:

Deborah Havey-Levy
Program Integrity Manager
UnitedHealthcare of Florida, Inc.

STATEMENT OF ISSUE

The issue is whether Petitioner proved by a preponderance of the evidence that Respondent's decision to deny Petitioner's request for 22.5 hours of additional personal care services was incorrect.

PRELIMINARY STATEMENT

All parties appeared telephonically. Petitioner's Authorized Representative and daughter,

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

Deborah Havey-Levy, Program Integrity Manager for UnitedHealthcare of Florida, Inc. (“Plan” or “United”), appeared on behalf of Respondent. Dr. Sloan Karver, Long Term Care Medical Director for UnitedHealthcare of Florida, Inc. (“Dr. Karver”), attended as a witness for Respondent.

Sheila Gonzalez, Medical Health Care Program Analyst / Fair Hearing Liaison for Agency for Health Care Administration (“Agency” or “AHCA”), attended as an observer. Stephanie Evans, Chief Fair Hearing Counsel for Agency, attended as an observer.

Prior to the hearing, Petitioner sent to the Office of Fair Hearings an eighteen (18)-page document packet in response to an Order to Show Cause, which packet included material of an evidentiary value. Without objection the 18-page document packet was admitted into evidence as Petitioner’s Composite Exhibit #1 (“PCE1”). PCE1 includes: an email/letter from [REDACTED] to Office of Fair Hearings, dated January 4, 2021; a copy of a letter from [REDACTED] of [REDACTED], dated December 4, 2020; a Designation of Authorized Representative for Medicaid Fair Hearing Participation, dated January 2, 2021; and a copy of a Durable Financial Power of Attorney, dated August 24, 2018. At the Fair Hearing, the record was held open without objection by Respondent until January 25, 2021, by 5:00 p.m., for Petitioner to submit copies of Petitioner’s prescriptions. On January 25, 2021, Petitioner timely submitted a nine (9) page document and it will be considered as additional hearing evidence and designated Petitioner Composite Exhibit #2 (“PCE2”). The PCE2 packet contains: an email/letter from [REDACTED] to the Office of Fair Hearings, dated January 25, 2021; and a copy of [REDACTED] Order Summary Report, dated [REDACTED] 2020.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a two hundred twenty-two (222)-page evidence packet. The evidence packet included: a Medicaid Fair Hearing Statement of Matters; a Notice of Adverse Benefit Determination, dated October 14, 2020 (“NABD”); a CSP – General Request Form – [REDACTED], dated November 16, 2020; a letter from UnitedHealthcare Community Plan addressed to Petitioner, dated November 17, 2020; A Print HSC History – HSR Production Environment, dated December 3, 2020; a Florida Department of Elder Affairs Form 701B Comprehensive Assessment, dated [REDACTED] 2020 (“the 701B”); an Appeal Review; a Notice of Plan Appeal Resolution, dated December 3, 2020 (“NPAR”); a copy of fax / letter from [REDACTED] to UHC Community and State Appeals, dated December 7, 2020; a copy of a letter from [REDACTED] of [REDACTED], dated December 4, 2020; UnitedHealthcare Community Plan Exhibit 2 (references) Cover Page – Long Term Care; a copy of Florida Administrative Code Chapter 59G-1 General Medicaid; Florida Medicaid Statewide Medicaid Managed Care Long-term Care Program Coverage Policy (March 2017); Florida Medicaid Authorization Requirements Policy (June 2016); a copy of the Florida Medicaid Personal Care Services Coverage Policy (November 2016); a copy of the Florida Medicaid Private Duty Nursing Services Coverage Policy (November 2016); a copy of the Home Health Visit Services Fee Schedule (January 1, 2017); a copy of the Personal Care Services Fee Schedule (January 1, 2017); a copy of the Private Duty Nursing Services Fee Schedule (January 1, 2017); a copy of a Participant Direction Option Manual; Electronic Code of Federal Regulations 42 C.F.R. §441.480; a copy of the Florida Medicaid Hospice Services Coverage Policy (June 2016); Electronic Code of Federal Regulations Title 42 Part 418 – Hospice Care Subpart C – Conditions of Participation; Patient Care; The Florida Senate 2018 Florida Statutes §400.6105 Staffing and

personnel; The Florida Senate 2018 Florida Statutes §400.609 Hospice services; The Florida Senate 2018 Florida Statutes §409.910 Responsibility for payments on behalf of Medicaid-eligible persons when other parties are liable; The Florida Senate 2018 Florida Statutes §400.462 Definitions; and a copy [second] of Florida Administrative Code Chapter 59G-1 General Medicaid. Absent an objection from the Petitioner, the undersigned admitted the two hundred and twenty-two (222) page evidence packet into evidence as Respondent's Composite Exhibit 1 ("RCE1").

FINDINGS OF FACT

Following an evaluation of the testimony offered at the hearing and the documents admitted into evidence, undersigned makes the following findings of fact:

1. Petitioner receives Medicaid services on a fee-for-service basis from the Agency. eQHealth is a Quality Improvement Organization contracted by the Agency to review prior authorization requests for services.
2. Petitioner is [REDACTED] years old and legally blind. RCE1 at 20; PCE1 at 1. Immediately prior to the request for Personal Care Services, Petitioner was a resident at a nursing home facility. RCE1 at 13, 23; PCE at 1. Due to Covid-19 being extremely active in the facility, [REDACTED] chose to move Petitioner home to live with her. *Id.*; *Id.* Because she works full time and because [REDACTED] believes her father should not be left alone, [REDACTED] requested a total of 40 hours of services weekly on behalf of Petitioner. PCE1 at 1, 3; RCE1 at 13. The Respondent approved all 5 hours weekly of requested Homemaker services and 12.5 of 35 hours weekly of requested Personal Care services, but denied the 22.5 additional hours weekly of requested Personal Care services. RCE1 at 5. Petitioner appealed the Respondent's decision and the appeal was denied. RCE1 at 50.

3. The testimony of Dr. Karver and the contents of RCE1 show that Respondent's decision was substantially based on the information contained in the Form 701B of [REDACTED] 2020, a time when Petitioner was still a nursing home resident. The 701B shows that Petitioner is [REDACTED] years old (RCE1 at 23), has dementia (*Id.* at 25), and "has a medical history of transient cerebral ischemic attack, heart failure, type 2 diabetes, cerebral infarction, COPD, dementia, hypothyroidism, hyperlipidemia, hypertension, heart disease, chest pain, unsteadiness on feet, lack of coordination, legal blindness, hard of hearing, dyspnea, edema, allergic rhinitis, anxiety and coronary artery disease." *Id.* at 30. The 701B shows that Petitioner needs assistance (but not total help) with all of his activities of daily living ("ADLs"), i.e., bathing, dressing, eating, using the bathroom, transferring, and walking/mobility. *Id.* at 27. The 701B also shows that Petitioner needs total assistance with his instrumental activities of daily living ("IADLs"), i.e., heavy chores, light house keeping, using the telephone, managing money, preparing meals, shopping, managing medication, and using transportation. *Id.* Item 83 of the 701B states that Petitioner needs supervision. *Id.* at 32.

4. [REDACTED] testimony corroborated Petitioner's condition as set forth above. [REDACTED] works 40+ hours per week outside the home. She takes care of Petitioner's needs when she is home but believes Petitioner should have constant supervision in her absence, and her belief was the basis for requesting 35 total hours Personal Care service.

5. In the NABD dated October 14, 2020, Respondent partially denied Petitioner's request for Personal Care services by approving 12.5 of the requested hours but denying the additional 22.5 hours on the ground that the request for the additional hours did not meet the test for medical necessity. The NABD states in pertinent part:

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: Your assessment tells us that you need help with bathing, dressing and using the bathroom.

I will approve 12.5 hours a week of personal care to meet your needs.

You will be getting 5 hours a week of homemaker services to help you. The homemaker aide can clean your bedroom and bathroom so the personal care aide does not have to.

You live with family that helps you.

In my clinical opinion, your personal care needs can be met by the approved services and supports. These hours can be split to meet your needs during the day.

....

RCE1 at 5-6.

6. Petitioner requested a plan appeal and received an NPAR dated December 3, 2020, upholding the partial denial. The NPAR explained as follows:

CONCLUSIONS OF LAW

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

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

12. Because Petitioner is requesting a new service, Fla. Admin Code R. 59G-1.100(17)(g) assigns the burden of proof to Petitioner. 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.)

13. Petitioner framed his case through the testimony of [REDACTED] and the letter from [REDACTED], and sought to assert that the Agency erred in its partial denial of Personal Care service hours because Petitioner needs constant supervision in [REDACTED] absence. Petitioner's assertion is unfortunately inapposite. Generalized supervision is not a covered element of Personal Care service, and, as the discussion below demonstrates, it is in fact specifically excluded.

14. 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

...

4.2.1.9 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.* (Emphasis supplied).

15. Rule 59G-4.215, F.A.C., referenced in LTC Section 4.2.2.6 Personal Care, immediately above, incorporates by reference the Florida Medicaid Personal Care Services Coverage Policy, which prescribes the scope and nature of personal care services. The PCS Policy includes the following:

1.3 Definitions

The following definitions are applicable to this policy. For additional definitions that are applicable to all sections of Rule Division 59G, F.A.C., please refer to the Florida Medicaid definitions policy.

...

1.3.2 Babysitting

Custodial care, daycare, afterschool care, supervision, or similar childcare unrelated to the services that are documented to be medically necessary for the recipient.

...

5.0 Exclusion

...

5.2 Specific Non-Covered Criteria

Florida Medicaid does not reimburse for the following:

...

- Babysitting

16. 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.

17. 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.

18. Petitioner requested thirty-five (35) hours weekly of personal care services. Respondent approved twelve and one-half (12.5) hours weekly of personal care services, but denied the remaining twenty-two and one-half (22.5) hours personal care services. Respondent indicated on the NABD that Petitioner did not meet three of the required criteria of medical necessity. *RCE1* at 5 and 6. Respondent further explained in the NPAR that 5 hours of homemaker services also approved will augment the 12.5 personal care hours and that these hours can be split and allocated to meet Petitioner's needs during the day. *Id.* at 50. In addition, Petitioner has family that can help, and that he can help himself some. *Id.*

19. As provided in the LTC policy, personal care services are to provide assistance with ADLs and IADLs. The record shows that Petitioner needs assistance (but not total help) with all of his ADLs and total assistance with his IADLs. *RCE1* at 26-28. As provided in the LTC policy, homemaker services are to provide assistance with general household activities that encompass many of the IADLs. Petitioner is approved to receive 12.5 hours/week personal care service plus 5 hours/week homemaker service which total 17.5 hours/weekly that may be allocated to meet Petitioner's daily needs.

20. As provided in section 4.1 of the LTC policy, personal care services must be medically necessary. A component of medical necessity is that services 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, there is little evidence shown that Petitioner specifically needs twenty-two and one-half (22.5) additional hours of personal care, weekly, to address his ADLs or IADLs. For example, Petitioner did not establish how long each ADL and IADL takes to perform, nor show that the approved twenty-one (12.5) hours of personal care were

insufficient to meet his needs. Here, the only evidence of additional care needed is Dr. Nordquist's letter, which opines that Petitioner "is visually impaired and cannot see enough to cook for himself or to dial the phone. He has memory impairment and does not remember his limitations and will often try to do more than he is capable of, leading to a dangerous and unstable situation, which is compounded by some of his medications which can cause gait instability . . . the patient requires a caregiver to provide supervision and assist with everyday tasks while the daughter is at work, approximately 8 hours a day Monday through Friday, or 40 hours a week." PCE1 at 3; RCE1 at 59. Although this is evidence that Petitioner may need an increase in his personal care services to assist with his ADLs, it does not fully establish that he needs an increase of twenty-two and one-half (22.5) hours.

21. Moreover, providing additional personal care hours solely for the purpose of "supervision" is excluded as a matter of law and would be violative of the scope and nature of Statewide Medicaid Managed Care Long-term Care Program Coverage Policy (Rule 59G-4.192, F.A.C.) which incorporates by reference the Florida Medicaid Personal Care Services Coverage Policy, which itself, in Section 5.2 specifically excludes generalized supervision.

22. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned finds that Petitioner did not prove by a preponderance of the evidence that Respondent's denial of an additional twenty-two and one-half (22.5) hours of personal care services was incorrect.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

Respondent's partial denial is **AFFIRMED**. Petitioner's appeal based on Respondent's reduction is **DENIED**.

DONE and ORDERED this 19th day of February, 2021, in Tallahassee, Leon County, Florida.

Michael J. Hauversburk
20FH [REDACTED]
2021.02.19 08:33:06 -05'00'

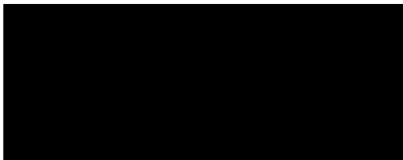


MICHAEL HAUVERSBURK, Hearing Officer
Agency for Health Care Administration
Office of Fair Hearings
2727 Mahan Drive, Mail Stop # 11
Tallahassee, FL 32308-5407
Office: (850) 412-3649
Fax: (850) 487-1423
Email: OfficeOfFairHearings@ahca.myflorida.com

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:



UnitedHealthcare of Florida, Inc.
UHC_Hearings@uhc.com

AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com