

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



FILED

May 10, 2021, 11:10 am

OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 21-FH [REDACTED]

Plan ID No.: [REDACTED]

vs.

SUNSHINE STATE HEALTH PLAN, INC.,

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on April 7, 2021, at [REDACTED]

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner's Designated Authorized Representative

For the Respondent:

Maria Mojica
Compliance Specialist
Sunshine State Health Plan, 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 one hundred and seven (107) hours of additional personal care services was incorrect.

PRELIMINARY STATEMENT

All parties appeared telephonically. Petitioner's Designated Authorized Representative and wife, [REDACTED] appeared on behalf of the Petitioner. Dhamrojje "Dee" Persaud, Petitioner's home health aide appeared as a witness for Petitioner.

Maria Mojica ("Ms. Mojica"), Compliance Specialist for Sunshine State Health Plan, Inc. ("Sunshine") appeared on behalf of Respondent. The following attended as witnesses for Respondent: Dr. John Carter ("Dr. Carter"), Long Term Medical Director for Sunshine; Alshenetha Williams, Care Coordinator Supervisor for Sunshine; Louise Jeanty, Quality Improvement Supervisor for Sunshine; Stephanie Gunning, Case Management Supervisor for Sunshine; and Desirre Harrell, Care Coordinator for Sunshine.

Stephanie Lang, Registered Nurse Specialist for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared as an observer.

Prior to the hearing, Petitioner sent to the Office of Fair Hearings and Respondent three evidence packets; the first was a two (2)-page packet, the second was a five (5)-page packet, and the third was a one (1)-page packet. The 2-page packet included copies of the following: an email from [REDACTED] dated February 8, 2021; and a second email from [REDACTED] dated February 8, 2021. The 5-page packet included copies of the following: an email from [REDACTED] dated February 10, 2021; two photographs, undated; and two x-rays, undated. The 1-page packet included a copy of an email from [REDACTED] dated February 15, 2021. Absent an objection from the Respondent, the undersigned admitted: the two (2)-page packet into evidence as Petitioner's Composite Exhibit 1 ("PCE1"), the five (5)-page packet into evidence as Petitioner's Composite Exhibit 2 ("PCE2"), and the one (1)-page packet into evidence as Petitioner's Exhibit 3 ("PE3"). At

the Fair Hearing, the undersigned ordered, without objection from Respondent, that the record would remain open for a specified period of time to allow Petitioner to submit a previously prepared letter from Petitioner's nurse practitioner referenced in [REDACTED]. On April 9, 2021, this Office received a timely three (3)-page submission from Petitioner which included: an email from [REDACTED] dated April 9, 2021; a copy of a letter from [REDACTED] dated January 31, 2021; and a letter from [REDACTED] dated April 8, 2021. The January 31, 2021, letter, being compliant with the purpose for which the record was held open, will be admitted into evidence as Petitioner's Exhibit 4 ("PE4"). The April 8, 2021, letter, will be excluded and not admitted into evidence.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred and nineteen (119)-page evidence packet. The evidence packet included copies of the following: a table of contents; a Medicaid Fair Hearing Summary; a Notice of Adverse Benefit Determination ("NABD"), dated September 15, 2020; a Plan of Care ("POC"), dated September 10, 2020; a POC, dated November 12, 2020; a Florida Department of Elder Affairs 701B Comprehensive Assessment ("701B"), dated [REDACTED] 2020; a 701B, dated [REDACTED] 2020; a fax cover page from All About You Home Visiting Clinicians, dated October 1, 2020; a six (6)-page Patient Chart for Petitioner, dated October 1, 2020; an Expedited Appeal Acknowledgement, dated October 6, 2020; Notice of Plan Expedited Appeal Resolution ("NPAR"), dated October 8, 2020; a Sunshine Health Policy and Procedure-LTC Ancillary Service Criteria-LT.UM.09; and Florida Administrative Code Rule ("Fla. Admin. Code R.") 59G-1.010(166). Absent an objection from the Petitioner, the undersigned admitted the one hundred and nineteen (119)-page 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 sixty-two (62)-years old. *See* RCE1 at 31. Petitioner lives with his wife, [REDACTED] his 18 year old daughter, and his 16 year old son. *See Id.* at 32.
3. Petitioner suffered a catastrophic stroke on [REDACTED] 2014. He is presently diagnosed with high blood pressure, diabetes, heart problems, constant incontinence of bladder and bowel, seizure disorder, acute bronchitis, MRSA, pneumonia, dysphagia, contracture left hand, vascular dementia, spasmordic torticollis, unspecified psychosis not to a substance or unknown physical condition, disorder of urea cycle metabolism, unspecified restlessness and agitation, other specified disorders of the brain, diarrhea, unspecified hyperlipidemia, insomnia, vitamin deficiency, nausea with vomiting, constipation, atherosclerotic heart disease, neurogenic bowel, neuromuscular dysfunction of bladder, anxiety, mood disorder, major depressive single episode disorder, and GERD. *Id.* at 55 – 56. Petitioner has stroke related cognitive defects. *Id.* at 58. Petitioner “is alert and oriented with confusion” and was “unable to participate in [the 701B] assessment.” *Id.* at 51. Petitioner is “forgetful or easily confused” nearly every day. *Id.* at 58. Petitioner can ingest nothing by mouth and is fed through a peg tube. *Id.* at 53. Petitioner has no recent hospitalizations but was admitted on August 21 – 26, 2019, for a seizure disorder. *Id.* at 51, 53. Petitioner uses a hospital bed and a wheelchair. *Id.* at 59. Petitioner uses a Hoyer lift to transfer to his wheelchair. PE4.
4. Petitioner’s current medications include: Alprazolam, Atorvastatin, Baclofen, Isosorb Mono Tab, Kepra, Lamictal, Lisinopril, Plavix, Seroquel, Protonix, and Aspirin. RCE1 at 61.

5. In regards to his activities of daily living (“ADLs”), Petitioner needs total assistance with ADLs (cannot do at all) with bathing, dressing, eating, using the bathroom, transferring, and walking/mobility. *Id.* at 53.

6. Regarding his instrumental activities of daily living (“IADLs”), Petitioner needs total assistance with all of his IADLs (cannot do at all) with heavy chores, light housekeeping, using the telephone, managing medication, managing money, preparing meals, shopping, and using transportation. RCE1 at 54. Petitioner is “total care assist.” *Id.* Petitioner’s nurse practitioner recommends “24/7 care” for Petitioner. PE4.

7. Petitioner’s wife, [REDACTED] manages Petitioner’s finances. *Id.* at 35. Otherwise, Petitioner has no caregiver. See “Caregiver Section” of Forms 701B; RCE1 at 45-47 and 63-65.

8. Petitioner’s plan of care includes 61 hours of personal care services, weekly, and 9 hours of homemaker care services, weekly. *Id.* at 29; *and see infra* ¶ 14.

9. Petitioner requested an additional one hundred and twenty-eight (128) hours of personal care services, weekly. Petitioner’s request was denied in the NABD dated September 15, 2020. *Id.* at 4 - 12. The NABD explained the basis of the denial 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: The request for an extra 128 hours per week of Personal Care Services is denied. 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 40 hours/week of Personal care Services + 9 hours/week of Homemaker Services. This decision was made with Sunshine Health Policy Lt.Um.o0 Long Term Care Ancillary Service Criteria.

RCE1 at 4 – 5.

10. Petitioner requested a plan appeal and received an NPAR dated October 8, 2020, partially denying the plan appeal. *Id.* at 81 - 87. The NPAR explained as follows:

The reason for our decision was:

The appeal to overturn the denial for addition of extra 128 hours per week of Personal Care Services is partially approved. Based on the assessment of the member's care needs and household and caregiver status, Sunshine health will approve an extra 21 hours per week of Personal Care Services and will deny the remaining 107 hours per week of Personal care Services. The updates care plan approved by Sunshine Health will include 61 hours per week of Personal Care Services and 9 hours per week of Homemaker Services. This decision was made with Sunshine Health Policy LT.UM.09 Long Term Care Ancillary Service Criteria.

RCE1 at 81.

11. On January 14, 2021, Petitioner's DAR requested a Fair Hearing due to a denial of one hundred and seven (107) hours of personal care services, weekly. On February 4, 2021, the undersigned issued an Order Scheduling Hearing by Telephone and Prehearing Instructions ("Scheduling Order"), setting the hearing for February 25, 2021, at [REDACTED]

[REDACTED] On February 8, 2021, Petitioner's DAR submitted an informal request to continue the Fair

Hearing. On February 12, 2021, the undersigned issued an Order Denying Petitioner's Request for Continuance for Petitioner's failure to comply with motion practice procedures set forth in the Scheduling Order and Fla. Admin. Code R, 59G-1.100(15)(b). Petitioner did not attend the Fair Hearing held February 25, 2021, and on March 10, 2021, following show cause proceedings for abandonment, the undersigned issued a new Order Scheduling Hearing by Telephone and Prehearing Instructions, setting the hearing for April 7, 2021, at [REDACTED]

12. [REDACTED] testimony established that Petitioner suffered a stroke on [REDACTED] 2014, that left him severely handicapped. Following his stroke, Petitioner spent seven years in a nursing home until [REDACTED] moved him home in 2020 due to the Covid pandemic. Petitioner's condition has declined over time. Petitioner's left hand is paralyzed and he cannot control his right hand and cannot use it functionally. Petitioner is nonverbal except for rare cases when he can say "hi". Petitioner is not capable of turning himself in bed and must be turned every two hours. On some days he is placed in his electric wheelchair with the use of a Hoyer lift.

13. [REDACTED] calculated the request for 128 additional hours per week of Personal Care Service by adding a number to the services already received to equate the total to 24 hours per day seven days a week. She said she relied on the professionals who saw and dealt with Petitioner who she says all agreed that he needed more care than he was receiving. [REDACTED] offered no testimony of the specific amount of time required to address each of Petitioner's ADLs and IADLs. [REDACTED] works full time and is not always home every evening. She suffers a degenerative condition in her left hand that interferes with her ability to handle and move Petitioner. Petitioner's two teenage children residing in the home (ages 18 and 16) are busy with school,

work, and sports. [REDACTED] says the children will not help, do not want to be involved, and will not go into their father's room.

14. Dr. John Carter testified for Respondent. Dr. Carter is a long term care medical director for Sunshine, and possesses board certifications in internal medicine, geriatric medicine, and hospice and palliative care medicine. Dr. Carter concurred that Petitioner needs total care for all of his ADLs due to the effects of the "catastrophic stroke" that he suffered. The revised POC includes a total of 70 hours per week of home care (61 hours per week of personal care and 9 hours per week of homemaker). Reviewing Petitioner's condition and considering that [REDACTED] works outside the home and has a medical condition with her hand, Dr. Carter determined that 70 hours per week, which averages 10 hours per day, together with the availability in the home of [REDACTED] and two teenage children, one of whom is 18 years old, is adequate to provide for Petitioner's ADLs and IADLs. Dr. Carter's determination was based on application of the criteria set forth in Sunshine's Long Term Ancillary Service Criteria LT.UM.09. See RCE1 at 88-118. Employing the Personal Care Service Determination Tables (see RCE1 at 108 et seq.), the reviewing medical director in this case calculated that 61 hours per week were medically necessary to assist Petitioner with his ADLs and IADLs which are the scope of Personal Care Services.

CONCLUSIONS OF LAW

15. 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).

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

17. 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.)

18. 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 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.

19. 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.

20. 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.

21. 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 110 - 115 of Respondent's Composite Exhibit 1.

23. Petitioner requested an additional one hundred and twenty-eight (128) hours of personal care services, weekly. In the NABD, dated September 15, 2020, Respondent denied his request. See RCE1 at 4 – 12; *supra* ¶19. The NPAR dated October 8, 2020, partially approved the Petitioner's appeal and provided 21 additional hours per week of personal care services [denying the balance requested of 107 hours per week], making as total of 61 hours per week of approved personal

care services. *Supra* ¶10. 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 assistance 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.”

24. As provided in the record, Petitioner needs total assistance with all his ADLs (cannot do at all) with bathing, dressing, eating, using the bathroom, transferring, and walking/mobility. *Id.* at 53; *supra* ¶15. Regarding his IADLS, Petitioner needs total assistance with all of his IADLs (cannot do at all) with heavy chores, light housekeeping, using the telephone, managing medication, managing money, preparing meals, shopping, and using transportation. *Id.* at 54; *supra* ¶16. Additionally, Petitioner suffers from numerous debilitating ailments. *Supra* ¶13. Petitioner’s nurse practitioner recommends “24/7 care” for Petitioner.

25. 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, Petitioner’s receives seventy (70) hours of combined services during the week, and those services are received daily. *See* ¶¶ 8, 14. Additionally, Petitioner lives with his wife, 18 year old daughter, and 16 year old son. [REDACTED]

testimony shows that the children are active, healthy, and capable of assisting with their father's care some of the time, but due to the family members' work and school schedules, and the children's refusal to participate in their father's care, Petitioner is alone from time to time. Petitioner provided evidence from his provider that he may need twenty-four (24) care each day, however, he did not show how those hours were to be used. For example, Petitioner did not show which ADLs or IADLs were not being addressed by his current services, and how much time it took to provide for those ADLs and IADLs. Petitioner provided evidence that he needs assistance with turning over in bed during the evening, but it was not established that this task at night would necessitate one hundred and seven (107) hours of additional services per week. Lastly, Petitioner provided evidence that he may need supervision at night, however, this is unrelated to assistance with an ADLs or IADLs. Accordingly, the record indicates that there may be evidence for the need of additional hours of care to provide supervision of the Petitioner, but the evidence does not show that one hundred and seven (107) additional hours are necessary to provide for Petitioner's ADLs or IADLs, which is the purpose of personal care services. Thus, Petitioner did not show that his request for an additional one hundred and seven (107) hours of personal care services were "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."

26. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned concludes that Petitioner did not prove by a preponderance of the evidence that Respondent's denial of one hundred and seven (107) additional hours of personal care services was incorrect.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

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

DONE AND ORDERED this 10th day of May, 2021, in Tallahassee, Leon County, Florida.

Michael J. Hauversburk

21FH [REDACTED]

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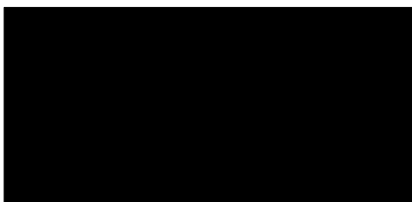


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NOTICE OF A RIGHT TO JUDICIAL REVIEW

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.

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