



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

FILED

May 04, 2021, 10:25 am

OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 21-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 March 4, 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 personal care services was incorrect.

PRELIMINARY STATEMENT

All parties appeared telephonically. Petitioner's Authorized Representative ("DAR") and nephew, [REDACTED] [REDACTED] appeared on behalf of the Petitioner.

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

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

Antonio, Interpreter #257599 with Language Sign Solutions, appeared and served as the translator until he was disconnected. Darnyka, Interpreter #252663 with Language Sign Solutions, appeared and served as translator for the balance of the hearing.

Prior to the hearing, Petitioner sent to the Office of Fair Hearings and Respondent an eight (8)-page evidence packet. The evidence packet included copies of the following: proof of certified mailing; a narrative letter from [REDACTED]; photocopies of ID for Petitioner; photocopy of ID for [REDACTED]; letter from [REDACTED] with [REDACTED], dated January 12, 2021; and letter from [REDACTED] with [REDACTED] dated January 12, 2021. Without objection from Respondent, the undersigned admitted the eight (8)-page evidence packet into evidence as Petitioner’s Composite Exhibit #1 (“PCE1”).

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a two hundred and thirty (230)-page evidence packet. The evidence packet included copies of the following: a Medicaid Fair Hearing Statement of Matters; a Notice of Adverse Benefit Determination (“NABD”), dated December 29, 2020; CSP – General Request Form, dated January 5, 2021; an email from Jennifer Lewald, dated January 6, 2021; a Print HSC History, dated [REDACTED] 15, 2021; a Florida Department of Elder Affairs Form 701B, dated August 7, 2020; an Appeal Review; a second copy of an Appeal Review; a Notice of Plan Appeal Resolution (“NPAR”),

dated January 7, 2021; a letter from UnitedHealthcare to ██████████, dated ██████████ 15, 2021; an NPAR, dated ██████████ 15, 2021; Florida Administrative Code Rule (“Fla. Admin. Code R.”) 59G-1 in its entirety; the Florida Medicaid Statewide Medicaid Managed Long-term Care Program Coverage Policy (March 2017) (“LTC Policy”); the Florida Medicaid Authorization Requirements Policy (June 2016); the Florida Medicaid Personal Care Services Coverage Policy (November 2016) (“PCS Policy”); the Florida Medicaid Private Duty Nursing Services Coverage Policy (November 2016); the Home Health Visit Fee Schedule (January 1, 2017); the Personal Care Services Fee Schedule (January 1, 2017); the Private Duty Nursing Services Fee Schedule (January 1, 2017); the Participant Direction Option Manual; 42 C.F.R. § 441.480; the Florida Medicaid Hospice Services Coverage Policy (June 2016); 42 C.F.R. Part 418, Subpart C (Conditions of Participation: Patient Care); Fla. Stat. § 400.6105 (2018); Fla. Stat. § 400.609; Fla. Stat. § 409.910; Fla. Stat. § 400.462, and a second copy of Florida Administrative Code Rule (“Fla. Admin. Code R.”) 59G-1 in its entirety . Absent an objection from the Petitioner, the undersigned admitted the two hundred and thirty (230)-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. The material facts of this case are undisputed. The outcome turns on a question of law: whether United is obliged to provide additional requested personal care services after Petitioner is admitted to hospice care. Petitioner is a dual enrollee of Medicare and Medicaid. RCE1 at 15. Petitioner receives Medicaid benefits as an enrollee in the Long Term Care program through

United. *Id.* [REDACTED] testified that Petitioner receives her Medicare benefits through [REDACTED].

2. Dr. Karver established that United is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida. Petitioner is, and has been, an enrolled member of United. Petitioner was receiving through United, 14 hours per week of personal care services, 7 hours per week of homemaker services, and 5 units of home delivered meals per week.¹ In [REDACTED] 2020, Petitioner was admitted to hospice care with [REDACTED], with “a terminal diagnosis of ES Heart Disease and a past medical history significant for Heart Failure, HTN, CKD, Anemia, UTI, Parkinson, Syncope, Hypothyroidism, and functional decline.” PCE1 at 7 of 8. As a matter of policy, United does not discontinue providing services when recipients are placed in hospice care, but does not approve any new services after the recipient is placed in hospice. In this case, United continued to provide the previously approved services.

3. Petitioner was dissatisfied with the care provided by [REDACTED], the hospice provider. On December 28, 2020, Petitioner requested United to provide 14 hours per week of additional personal care services. In the NABD dated December 29, 2020, United denied Petitioner’s request, and explained its reasoning, to wit:

We made our decision because:

...

¹ At the time of the hearing, Petitioner was [REDACTED] years old and needs total assistance with all of her Activities of Daily Living (“ADLs”) and all of her Instrumental Activities of Daily Living (“IALDs”). RCE1 at 28. She is suffering from Acid Reflux/GERD, Arthritis – Type OA, High Blood Pressure, Heart Problems, Constant Incontinence of Bladder and Bowel, Kidney Problem or Renal Disease / End Stage, Hypothyroidism, Coronary Arteriosclerosis, Retinitis Pigmentosa, and Diaphragmatic Hernia. *Id.* at 30-31 [Form 701B].

Other authority: F.A.C. 59G-4.192 – Statewide Medicaid Managed Care Long-Term Care Program Coverage Policy. A service cannot duplicate another service.

...

The facts that we used to make our decision are:

You are getting hospice care.

The services you asked for should be provided by hospice.

RCE1 at 5-6.

4. Petitioner requested a plan appeal and received an NPAR dated January 7, 2021, upholding the denial. The NPAR explained as follows:

UnitedHealthcare hereby denies your plan appeal.

...

We looked at your records. We decided that what you asked for cannot be approved. This does not meet Florida Medicaid rules. You asked for more personal care. You would like 14 more hours per week. You are under hospice care. Hospice is required to give care needed to treat your illness or effects of illness. . . . The health plan will cover any Medicare co-payment for this service given through hospice. This is why we cannot approve what you ask for. Please talk about this with your doctor.

RCE1 at 53-54.

5. On February 5, 2021, Petitioner made a timely request for a Medicaid Fair Hearing. At the Fair Hearing, [REDACTED] testified that Petitioner has no evidence that prove Respondent's reasoning in the NABD, *supra* ¶ 3, is incorrect.

CONCLUSIONS OF LAW

6. 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).

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

8. 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.)

9. 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.

10. Fla. Admin. Code R. 59G-1.052 sets forth Medicaid responsibility in relation to liability of third parties:

(6) Exhausting Third-Party Resources.

(a) Florida Medicaid is a payer of last resort. Providers must exhaust all TPL [third party liability] sources of payment, such as Medicare, TRICARE, private health insurance, AARP plans, or automobile coverage prior to submitting or resubmitting a claim for reimbursement to Florida Medicaid.

And see Section 409.910(1), Florida Statutes (“It is the intent of the Legislature that Medicaid be the payor of past resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid”).

11. Section 400.609, Florida Statutes, sets forth the responsibility of hospice care programs, and provides in pertinent part:

400.609. Hospice services

Each hospice shall provide a continuum of hospice services which afford the patient and the family of the patient a range of service delivery which can be tailored to specific needs and preferences of the patient and family at any point in time throughout the length of care for the terminally ill patient and during the bereavement period. These services must be available 24 hours a day, 7 days a week, and must include:

(1) SERVICES. -

(a) The hospice care team shall directly provide the following core services: nursing services, social work services, pastoral or counseling services, dietary counseling, and bereavement counseling services. Physician services may be provided by the hospice directly or through contract. A hospice may also use contracted staff if necessary to supplement hospice employees in order to meet the needs of patients during periods of peak patient loads or under extraordinary circumstances.

(b) Each hospice must also provide or arrange for such additional services as are needed to meet the palliative and support needs of the patient and family. These services may include, but are not limited to, physical therapy, occupational therapy, speech therapy, massage therapy, home health aide services, infusion therapy, provision of medical supplies and durable medical equipment, day care, homemaker and chore services, and funeral services.

(2) HOSPICE HOME CARE. - **Hospice care and services provided in a private home shall be the primary form of care.** The goal of hospice home care shall be to provide adequate training and support to encourage self-sufficiency and allow patients and families to maintain the patient comfortably at home for as long as possible. The services of the hospice home care program shall be of the highest quality **and shall be provided by the hospice care team.**

(Emphasis supplied).

12. Petitioner requested fourteen (14) additional hours weekly of personal care services. Respondent denied the request for all fourteen (14) hours, not on the basis of need, but on the basis that the hospice care is now the primary provider of services. RCE1 5-6 and 53-54; *supra* ¶¶ 3 and 4. The requested personal care services would be duplicative of the hospice care and contrary to the LTC Policy Section 4.1 General Criteria, which provides that services are covered that “[d]o not duplicate another service”. *Supra* ¶ 9.

13. Section 400.609, Florida Statutes, unambiguously provides that hospice care “provided in a private home shall be the primary form of care . . . and shall be provided by the hospice care team.” *Supra* ¶ 11. In addition to certain “core services,” hospice is required to provide “such additional services as are needed to meet the palliative and support needs of the patient and

family.” *Id.* The scope of these additional services is open-ended, and the non-exclusive list of services set forth in Section 400.609(1)(b) encompasses the types of services offered through Medicaid LTC in general and Personal Care Services in particular. *Supra* ¶¶ 9 and 11.

14. Because Medicaid is a payer of last resort, once Petitioner was admitted to hospice care, hospice care became the primary source of care for Petitioner. Any additional personal care services needed by Petitioner must be provided by the hospice care provider and not by Medicaid through its LTC program. The Medicaid LTC program is prohibited from providing a service duplicative of another service, in the instant case, hospice care. Petitioner’s DAR conceded at the hearing that Petitioner has no evidence to contradict this.

15. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned finds that Petitioner failed proved by a preponderance of the evidence that Respondent’s denial 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 4th day of May, 2021, in Tallahassee, Leon County, Florida.

Michael J. Hauversburk
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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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