

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

JUN 07 2021

Agency for Health
Care Administration

[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 May 12, 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 and wife,

[REDACTED] appeared on behalf of the Petitioner. [REDACTED]

[REDACTED] Social Worker for [REDACTED] appeared as a witness for Petitioner.

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

Marielisa Amador, Medical/Health Care Program Analyst 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 a ten (10)-page evidence packet. The evidence packet included copies of the following: a New Fax coversheet dated May 3, 2021; a UPS Store fax coversheet directed to the undersigned; a letter dated May 3, 2021, from [REDACTED] explaining the documents; and excerpts from [REDACTED] [REDACTED] “Hospice Resource Manual and Care Guide”. Without objection from Respondent, the undersigned admitted the ten (10)-page evidence packet into evidence as Petitioner’s Composite Exhibit 1.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a two hundred sixty-seven (267)-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 February 10, 2021; a CSP-General Request Form dated February 23, 2021; an expedited appeal denial letter dated February 24, 2021; a Physical Therapy Plan of Care for certification period December 4, 2020, to January 14, 2021; a Physical Therapy Clarification Order dated December 4, 2020; an Occupational Therapy Plan of Care for certification period December 7, 2020, to January 3, 2021; an Occupational Therapy Clarification Order dated December 7, 2020; a Speech Therapy Plan of Care for the certification period of December 4, 2020, to December 31, 2020; a Speech Therapy Clarification Order dated December

4, 2020; a POC Response History dated February 10, 2021; [REDACTED]
[REDACTED] Progress Notes dated [REDACTED] 2021; two copies of a fax coversheet dated February
8, 2021, 5:17:11 p.m., from [REDACTED] to [REDACTED] and attached [REDACTED]
[REDACTED] Chart Details; fax coversheet from [REDACTED] to [REDACTED] dated February 8,
2021; [REDACTED] Summary Report dated [REDACTED] 2021;
[REDACTED] e-mail, subject: FL Appeal Case [REDACTED] e-mail from [REDACTED] to
[REDACTED] subject appeal, dated February 24, 2021; e-mail from [REDACTED] to [REDACTED]
[REDACTED] regarding appeal being upheld/denied; a Print HSC History dated April 29, 2021; a Florida
Department of Elder Affairs 701B Comprehensive Assessment dated November 3, 2020; an
Appeal Review dated February 23, 2021; a Notice of Plan Appeal Resolution (“NPAR”) dated
February 26, 2021; Chapter 59G-1, Florida Administrative Code; Florida Medicaid Statewide
Managed Care Long-Term Care Program Policy (March 2017)(“LTC Policy”); Florida Medicaid
Authorization Requirements Policy (June 2016); Florida Medicaid Personal Care Services
Coverage Policy (November 2016); Florida Medicaid Private Nursing Services Coverage Policy
(November 2016); the Home Health Visit Services Fee Schedule (January 1, 2017); Personal Care
Services Fee Schedule (January 1, 2017); Private Duty Nursing Services Fee Schedule (January 1,
2017); Participant Direction Option Manual; Florida Medicaid Hospice Service Coverage Policy
(June 2016); 42 C.F.R. § 441.480; 42 C.F.R. Part 418, Subpart C (Conditions of Participation:
Patient Care); section 400.6105, Florida Statutes (2018); section 400.609, Florida Statutes (2018);
section 400.462, Florida Statutes (2018); and section 409.910, Florida Statutes (2018). Without
objection from Petitioner, the undersigned admitted the two hundred sixty-seven (267)-page -
page evidence packet into evidence as Respondent’s Composite Exhibit 1.

FINDINGS OF FACT

1. Petitioner is an enrolled member of United. United is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida.
2. Petitioner receives Medicaid benefits as an enrollee in United's Long Term Care program. Respondent's Composite Exhibit 1 at 83.
3. Petitioner is a dual enrollee of Medicare and Medicaid. *Id.*
4. Petitioner requested forty-two (42) hours of personal care services per week. In an NABD dated February 10, 2021, Respondent denied Petitioner's request stating, in pertinent part, as follows:

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

Meet all of the criteria as defined in Rule 59G-1.010(166), F.A.C., for all nursing facility services and mixed services; OR

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.

Your assessment tells us that you need help with cleaning your home, chores and preparing meals.

Your assessment tells us that you need someone with you at all times.

You asked for 42 hours a week of personal care.

You are getting this help at the nursing facility.

In my clinical opinion you may not be safe to be at home.

Id. at 5 and 6.

5. Petitioner timely appealed the NABD. In the NPAR dated February 26, 2021, Respondent denied Petitioner's appeal which states, in pertinent part, as follows:

We looked at your records. We have decided that what you asked for cannot be approved. This does not meet Florida Medicaid rules. You asked for personal care help. You would like 42 hours a week. You are under hospice care. Hospice is required to give any care needed to treat your illness or effects of illness. Based on my professional judgment, what you asked for is not covered. The health plan will cover any Medicare copayment for this service given through hospice. That is why we cannot approve what you asked for. Please talk about this with your doctor.

6. Petitioner timely requested a Fair Hearing, and a full evidentiary hearing was held and completed on May 12, 2021.

7. The following was established by [REDACTED] testimony at the hearing. Petitioner is a dual enrollee in Medicare and Medicaid. Petitioner entered hospice with [REDACTED] on [REDACTED] [REDACTED] 2021. Hospice services are being provided as a Medicare benefit. [REDACTED] testified that [REDACTED] will not provide the requested services unless Petitioner is in a crisis situation.

8. The following was established by [REDACTED] testimony at the hearing. [REDACTED] is a social worker for [REDACTED] testified that the services provided by [REDACTED] for [REDACTED]

each individual are based on the individual needs of the patient. Typically a skilled nurse visits the home weekly; however, if needed, a nurse is available to visit twenty-four (24) hours a day on an on-call basis. [REDACTED] indicated that sometimes the nurse will visit multiple times a day regardless of the time of day when the patient needs medical care. Ms. [REDACTED] further indicated that [REDACTED] provides aides to assist at home and the frequency of the aides visits depends on the needs of the patient and patient's family. [REDACTED] testified that the services provided by [REDACTED] are not set in stone, rather, they are based on the needs of the patient and patient's family. [REDACTED] supplies all necessary durable medical equipment and necessary medication. [REDACTED] testified the [REDACTED] has continuous nursing services available when medically necessary. [REDACTED] also provides respite services for a patient's family which involves bringing the patient into the [REDACTED] care center for five (5) days where twenty-four (24) hour a day care is provide. Ultimately, [REDACTED] testified that when support is needed, [REDACTED] will be there for a patient and the patient's family. [REDACTED] testified that while she has been with [REDACTED] she does not believe that it has ever provided a patient with the level of in home personal care services requested by the Petitioner and only provides such level of care at its care center. However [REDACTED] further testified that [REDACTED] provides a continuum of care in order to meet a patient's needs.

9. The following was established by Dr. Karver. Respondent's decision was based on the fact that hospice is in place. It is the hospice provider that is obligated to provide the hospice services, not Medicaid.

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, Florida Statutes. This order is the final administrative decision of AHCA under section 409.285(2)(a), Florida Statutes.

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. 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.

14. 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.

15. Section 409.910(1), Florida Statutes, states, in pertinent part, as follows:

It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnish to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid.

16. Section 400.609, Florida Statutes, sets forth the responsibility of hospice care programs in the State of Florida, stating, in pertinent part, as follows:

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).

17. In this case Petitioner requested forty-two (42) hours of personal care services per week. As established on the record by the evidence and testimony, Respondent denied the request because Petitioner is currently receiving hospice care as a Medicare benefit. *Supra* ¶¶ 5 and 9.

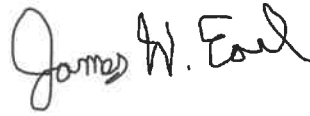
18. It is the clear intent of Section 409.910(1), Florida Statutes and Fla. Admin. Code R. 59G-1.052, that Medicaid is to be the payor of last resort and that any other source of payment for medical care is to be primary to Medicaid. *Supra* ¶¶ 14 and 15. Section 400.609, Florida Statutes, provides that hospice care and services provided in a private home shall be the primary form of care. *Supra* ¶16. The LTC Policy does not cover services that are duplicative of another service. *Supra* ¶ 13. The services that must be provided by hospice pursuant section 400.609, Florida Statutes, are broad enough to include the personal care services described by the LTC Policy. Furthermore, ██████████ described a continuum of hospice services sufficient to include personal care services. 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 personal care services needed by Petitioner after being admitted to hospice care, must be provided by the hospice care provider and not by Medicaid through its long term care program. The Medicaid long term care program is prohibited from providing a service duplicative of another service, in the instant case, hospice care.

19. 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 7th day of June, 2021, in Tallahassee, Leon County, Florida.



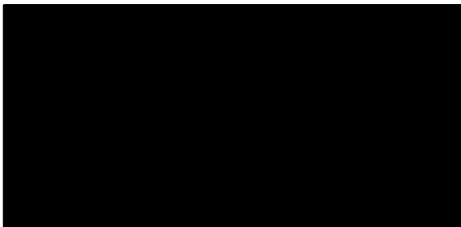
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NOTICE OF A RIGHT TO JUDICIAL REVIEW

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.

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