

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



FILED

Jul 26, 2023, 12:00 pm
OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 23-FH1008

[REDACTED]

vs.

HUMANA MEDICAL PLAN, INC.,

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on May 30, 2023, at 9:00 a.m. Eastern Standard Time (“EST”).

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner

For the Respondent:

Joshua Mitchell
Grievance and Appeals Fair Hearing Specialist
Humana Medical Plan, Inc.

STATEMENT OF ISSUE

The issue is whether Respondent proved by a preponderance of the evidence that Respondent’s decision to terminate Petitioner’s adult companion care services was correct.

PRELIMINARY STATEMENT

All parties and witnesses appeared telephonically. Petitioner appeared. Petitioner’s

[REDACTED] attended as a witness for Petitioner.

Joshua Mitchell, Grievance and Appeals Fair Hearing Specialist for Humana Medical Plan, Inc. (“Humana or Respondent”), appeared as a representative for Humana. Dr. Wayne Sherman, (“Dr. Sherman”), Long Term Care Medical Director for Humana, attended as a witness for Respondent.

Doris Rivera, Medical/Health Care Program Analyst for the Agency for Health Care Administration (“Agency” or “AHCA”), appeared as an observer.

Petitioner did not introduce any exhibits at the Fair Hearing. Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a two hundred and sixty-seven (267)-page evidence packet. The evidence packet appears in the Office of Fair Hearings’ document management system as file titles “Evidence Packet 23-FH1008_Part1.pdf,” and “Evidence Packet 23-FH1008_Part2.pdf.” Absent an objection from the Petitioner, the undersigned admitted the two hundred and sixty-seven (267) pages of evidence as Respondent’s Composite Exhibit 1 (“RCE-1”).

FINDINGS OF FACT

1. Petitioner is an enrolled member of Humana Long Term Care plan. *See* page 1 of RCE-1. Humana is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida.
2. Petitioner is [REDACTED]. *Id.* at 28. Petitioner lives with [REDACTED]. *Id.* at 29.
3. Petitioner is diagnosed with the following: [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] *Id.* at 34 - 35.

Petitioner is [REDACTED]. *Id.*
at 37.

4. As provided in the Florida Department of Elder Affairs: 701B Comprehensive Assessment (“701B”), which was taken on March 7, 2023, Petitioner needs assistance for the following activities of daily living (“ADLs”): needs assistance (but not total help) for [REDACTED]
[REDACTED] *Id.* at 32.

Petitioner always has assistance with [REDACTED] ADLs. *Id.*

5. As provided in the 701B, Petitioner needs total assistance (cannot do at all) for the instrumental activities of daily living (“IADLs”) of [REDACTED]
needs assistance (but not total help with [REDACTED]
[REDACTED] *Id.* at 33. Petitioner always has
assistance with [REDACTED] IADLs. *Id.*

6. Petitioner’s primary caregiver is [REDACTED]. *Id.* at 44. [REDACTED] is the approved direct service worker (“DSW”) under the preferred direct option (“PDO”) program. *Id.* at 44. Petitioner was present during the 701B assessment, but [REDACTED] answered all the questions on [REDACTED] behalf because [REDACTED] speaks Lebanese and minimal English. *Id.* at 28, 46. As provided in the 701B, [REDACTED] assists Petitioner with all of [REDACTED] ADLs and IADLs, and [REDACTED] supervises Petitioner’s eating. *Id.* at 29, 32-33.

7. The 701B reports that Petitioner often changes or limits [REDACTED] activities out of fear of falling, and that there are things Petitioner wants to do but cannot because of physical problems. *Id.* at

31. The 701B further reports that Petitioner needs supervision; that [REDACTED] is diagnosed and [REDACTED] [REDACTED] and that [REDACTED] for social support. *Id.* at 37. According to the 701B, there is no one besides Petitioner's [REDACTED] primary caregiver, who could help Petitioner, if needed; and that [REDACTED] never participates in outdoor activities that interest [REDACTED]. *Id.* at 42.

8. A Plan of Care for Petitioner was reviewed on March 7, 2023, and signed on April 17, 2023, by the Care Coordinator and [REDACTED]. *Id.* at 52 – 72. In the Plan of Care, Petitioner's personal and care goals are to go outdoors (activity) once a week, with family assistance, and to continue to ambulate with the assistive device of a walker, and with the assistance of [REDACTED], several times a day. *Id.* at 52. Petitioner currently receives twenty-six (26) hours of personal care services weekly, provided by [REDACTED] as the Direct Services Worker ("DSW") under the Participant Direction Option ("PDO") program. Petitioner is unable to complete tasks without supervision and assistance due to [REDACTED] condition. *Id.* at 53. Petitioner receives seven (7) home delivered meals per week. *Id.* Petitioner also receives twenty-six (26) hours per week of personal care services, seven (7) hours per week of homemaker services, and personal emergency response system services, and incontinence supplies. *Id.* at 71.

9. Petitioner's neurologist provider, Julio C. Cantero, M.D. ("Dr. Cantero"), provided a letter, dated March 28, 2023, stating as follows:

The patient named above is [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] This has been
deemed medically necessary as [REDACTED]
functioning as well as staying away from the hospital by doing it.

Sincerely,
Julio C. Cantero, M.D.

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10. In the Notice of Adverse Benefit Determination (“NABD”), dated March 14, 2023, Humana terminated Petitioner’s seven (7) hours of weekly of adult companion services as of March 24, 2023. The NABD explained the reason for the termination, 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.

....

- Other authority

The facts that we used to make our decision are:

This determination of the Medical Director has been made based on medical necessity (as defined by Florida law – specifically see checked box above) and reflects the application of the Plan’s approved review criteria and guidelines.

You currently receive 7 hours of direct service worker (PDO) Adult Companion Care (non-medical care for supervision and socialization) each week. The services

and items you receive are reviewed on a regular basis. The review is based on your current medical status.

You live your [REDACTED] helps to care for you and is your direct service worker (DSW). [REDACTED] does not work outside the home. You sometimes have [REDACTED] You do not leave your home without someone (wandering). The service of 7 hours of direct service worker (PDO) Adult Companion Care each week is being terminated. You live with others who should be able to meet your companionship needs.

....

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11. On April 3, 2023, Petitioner requested a plan appeal. *Id.* at 24. Subsequently, Petitioner received a Notice of Plan Appeal Resolution (“NPAR”), dated May 1, 2023, upholding the termination. *Id.* at 24 - 26. The NPAR explained the reason for the decision as follows:

The reason for the decision was based on the information received. You have requested that the 7 hours of direct service worker (PDO) adult companion care service that was terminated (stopped) be reconsidered (appeal).

[Petitioner] has several (multiple) medical problems. [REDACTED] does not have trouble making [REDACTED] needs known. [REDACTED]

The termination of 7 hours of direct service worker (PDO) adult companion care service each week is being upheld. [REDACTED] lives with others who should be able to meet [REDACTED] companionship needs.

This determination of the Medical Director has been made based on medical necessity and reflects the application of the Plan’s approved review criteria and guidelines, defined in Chapter 59G-1.010 (2.83) Florida Administrative Code.

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12. On May 2, 2023, Petitioner requested a Fair Hearing to challenge the denial of companion care services. On May 8, 2023, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for May 30, 2023, at 9:00 a.m. EST.

13. Dr. Sherman is a Long-Term Care Manager and Medical Director for Humana. Dr. Sherman's testimony established that Respondent's decision was based on the 701B assessment. Based on the assessment, a Plan of Care was made to ensure that Petitioner has adequate weekly home health care service hours, including twenty-six (26) hours of personal care services, and seven (7) home delivered meals. *Id.* at 53, 58. Dr. Sherman explained that the previously approved seven (7) hours of weekly adult companion care services were terminated because adult companion care is a non-medical care service that is not normally given to someone if they reside with someone who can give them companionship. In this case [REDACTED] is Petitioner's [REDACTED] DSW, who does not work outside of the home. Dr. Sherman concluded that since Petitioner already has someone in the house to help [REDACTED] with non-medical services, the seven (7) hours of weekly adult companion care services are not medically necessary for Petitioner.

[REDACTED] testified that Petitioner has [REDACTED] [REDACTED] that it is very important that Petitioner move and go for walks every day in order to stave off muscle deterioration from [REDACTED], Dr. Cantero. *Id.* at 8. [REDACTED] argues that [REDACTED] the only one there to help [REDACTED] who cannot walk or move without [REDACTED] assistance and supervision. [REDACTED] concluded that Petitioner needs the adult companion care services each week for supervision, especially for [REDACTED]

daily walks, so she maintains her functional capacity and remains healthy enough to stay at home and not in a medical nursing facility.

CONCLUSIONS OF LAW

14. 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).

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

16. Because Respondent terminated the adult companion care services, Fla. Admin Code R. 59-1.100(17)(g) assigns the burden of proof to Respondent. 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.)

17. 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 adult companion care services:

4.1 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:

...

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

...

4.2.1.1 Adult Companion Care

The provision of non-medical care, supervision when necessary to protect the health, safety, and well-being of the enrollee, or social enrichment of a functionally impaired enrollee. This includes assistance or supervision with meal preparation, laundry, and light housekeeping tasks incidental to the care and supervision of the enrollee.

...

Pages 1 – 4, LTC Policy.

18. 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.

Pages 2 – 3, LTC Policy.

19. 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.

....

Page 7, Definitions Policy.

20. Respondent terminated Petitioner’s seven (7) hours per week of adult companion services, as of March 24, 2023. *See supra* ¶ 10. In the NABD, Respondent indicated that Petitioner did not meet all of the criteria of medical necessity but did not specify which prong of medical necessity was used to make its decision. *See supra* ¶ 10. In the NPAR, Respondent upheld the termination of the seven (7) hours of adult companion care services for Petitioner by

determining that “the member’s currently approved services are adequate to meet the member’s care needs.” *See supra* ¶ 11.

21. As provided in the LTC policy, adult companion care services are intended to provide “supervision when necessary to protect the health, safety, and well-being of the enrollee, or social enrichment of a functionally impaired enrollee.” *See supra* ¶ 18.

22. Respondent terminated Petitioner’s adult companion care services for the reason that “[y]ou live with [REDACTED] helps to care for you. You have trouble thinking clearly or remembering things. ... You live with others who should be able to meet your companionship needs.” *See supra* ¶ 11. Respondent’s assertion is reasonable in regards to whether Petitioner’s socialization needs are met. *See supra* ¶ 13. However, that does not fully address the supervisory function that adult companion care also provides. *See supra* ¶ 18.

23. As adult companion care services are to provide, among other things, supervision to protect the safety of the enrollee, the 701B assessment, relied upon by the Respondent in reaching its decision to terminate Petitioner’s adult companion care services, shows that the continuation of seven (7) hours of weekly adult companion care is “individualized specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment.” *See supra* ¶ 7. The 701B assessment reported that Petitioner often changed or limited [REDACTED] activities out of fear of falling, and that there are things Petitioner wants to do but cannot because of physical problems. *See supra* ¶ 7. The 701B states that Petitioner needs supervision; that [REDACTED] is forgetful or consumed several days per month; and that [REDACTED] [REDACTED] for social support and supervision. *See supra* ¶ 7. According to the 701B, there is no one besides Petitioner’s [REDACTED] primary

caregiver, who could help Petitioner, if needed; and that [REDACTED] never participates in outdoor activities that interest [REDACTED]. See *supra* ¶ 7. In the Plan of Care for Petitioner, [REDACTED] and care goals are to go outdoors (activity) once a week, with family assistance, and to continue to ambulate with the assistive device of a walker, and with the assistance of [REDACTED], several times a day. See *supra* ¶ 8. As Petitioner needs supervision to complete [REDACTED] personal and care goals set forth in the Plan of Care, and Petitioner's [REDACTED] sole caretaker to meet that need, Petitioner has shown that [REDACTED] request to continue adult companion care services is "not in excess of the patient's needs," is "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 is not "intended for the convenience of the recipient, the recipient's caretaker, or the provider." See *supra* ¶ 19. Further, Petitioner's request enables [REDACTED] to maintain functional capacity and may enable [REDACTED] to "live . . . in the setting of [REDACTED] choice." See *supra* ¶ 19. As such, Petitioner has shown that [REDACTED] has an unmet need for supervision. This unmet need for supervision is supported by which plan is bolstered by the recommendation of Petitioner's neurologist, Dr. Cantero, as part of [REDACTED] therapy, for "adult companion care to take [REDACTED] for walks and do some exercising once 1 hour/day. This has been deemed medically necessary as [REDACTED] has done much better and has kept [REDACTED] functioning as well as staying away from the hospital by doing it." See *supra* ¶ 9. Dr. Sherman did not provide any testimony or evidence to demonstrates that Petitioner's current personal care services would be sufficient to cover Petitioner's supervision needs if adult companion care services are terminated.

24. Upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned finds that Respondent has not proven by a preponderance of the

evidence that the seven (7) hours of weekly of adult companion care services at issue are no longer medically necessary. *See supra* ¶ 19.

25. Based on the testimony provided, evidence submitted, and applicable policies, the undersigned finds that Respondent has not proven by a preponderance of the evidence that Respondent's termination of seven (7) hours of adult companion care services per week was correct.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

Respondent's termination of Petitioner's adult companion care services is **REVERSED**.
Petitioner's appeal based on Respondent's termination of adult companion care services is **GRANTED**.

DONE AND ORDERED this 26th day of July, 2023 in Tallahassee, Leon County, Florida.



Debbie K. Winicki
23-FH1008
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DEBBIE WINICKI, Hearing Officer
Agency for Health Care Administration
Office of Fair Hearings
2727 Mahan Drive, Mail Stop # 11
Tallahassee, FL 32308-5407

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:

[REDACTED]
[REDACTED]
[REDACTED]

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