

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



FILED

Sep 11, 2023, 11:16 am

OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 23-FH1464

vs.

AGENCY FOR HEALTH CARE
ADMINISTRATION,

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on July 25, 2023 at 2:03 p.m. Eastern Standard Time ("EST").

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner's Authorized Representative

For the Respondent:

Chrissie Simmons
Medical/Health Care Program Analyst
Agency for Health Care Administration

STATEMENT OF ISSUE

The issue is whether the Petitioner proved by a preponderance of the evidence that Respondent's decision to deny twenty (20) hours of personal care services per week was incorrect.

PRELIMINARY STATEMENT

All parties appeared telephonically. The Petitioner's Authorized Representative and

[REDACTED]

appeared on behalf of the Petitioner.

Chrissie Simmons, Medical/Health Care Program Analyst for the Agency for Health Care Administration (“Agency or “AHCA”), appeared on behalf of Respondent. Dr. Chris Kunis (“Dr. Kunis”), Medical Director for Kepro Health Solutions (“Kepro”) attended as a witness for Respondent.

The Petitioner did not introduce any exhibits at the hearing. Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner an eighty-six (86)-page evidence packet and fifty-two (52)-page evidence packet. The eighty-six (86)-page evidence packet appears in the Office of Fair Hearings document management system as file title “58048165 FH 07.25.2023.pdf” and the fifty-two (52)-page evidence packet appears as “23-FH1464.PCS.Agency Evidence.pdf”. Absent an objection from the Petitioner, the undersigned admitted the eighty-six (86)-page evidence packet as Respondent’s Composite Exhibit 1 (“RCE 1”) and the fifty-two (52)-page evidence packet as Respondent’s Composite Exhibit 2 (“RCE 2”).

FINDINGS OF FACT

1. Petitioner receives Medicaid services on a fee-for-service basis from the Agency. Kepro is a Quality Improvement Organization contracted by the agency to review prior authorization requests for services. *See* RCE 2 page 2.
2. The Petitioner is [REDACTED]. *See* RCE 1 page 16. Petitioner is diagnosed as [REDACTED]. *Id.* *See* RCE page 61.
3. On June 1, 2023, the Petitioner requested eight (8) hours of personal care services, per day Monday through Friday. *See* RCE 1, page 26. When Petitioner requested the services, Petitioner’s needs were reported as follows:

Recipient is [REDACTED]. Recipient is on a regular diet, and requires meal set up and supervision during meals. [REDACTED] is continent of both [REDACTED] requires prompting and moderate assistance [REDACTED] and prompting and moderate assistance [REDACTED].

...

See RCE 1 page 17.

4. At the time of the Petitioner's request, Petitioner's [REDACTED] work schedule was reported as 9:00 a.m. to 6:00 p.m. as an independent contractor but now works from home because of [REDACTED] belief that the Petitioner cannot be left alone with home-health caregivers. See RCE pages 76-77, and [REDACTED] *Testimony*. At the time of the Petitioner's request, [REDACTED] work schedule was reported as 8:00 a.m. to 5:00 p.m., Monday through Friday, plus a commute time of between thirty (30) to sixty (60) minutes each workday. *Id.* at 79 and *Testimony of* [REDACTED].

5. In a Notice of Outcome ("NOO"), dated June 18, 2023, Respondent denied Petitioner's request for eight (8) hours of personal care services per day, Monday through Friday but partially approved four (4) hours of personal care services per day, Monday through Friday. See RCE at 26-

29. See also RCE page 20. In the NOO, Respondent explained the denial as follows:

[T]he requested services are not medically necessary under the following standard(s):

Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs.

The NOO further explained:

Submitted information does not support the medical necessity for requested frequency and/or duration.

Patient is [REDACTED]; attends school 3 hrs/ day M - F. Paren[t]s work M - F; [REDACTED] starts work at 9 am. Considering these PCS [personal care services] approved for 4 hours/ day M >, as approved before. No changes in medical/ social situation. PCS can not be approved for supervision.

...

See RCE 1 page 27.

6. Petitioner requested a reconsideration of the Respondent’s decision. In a Notice of Reconsideration (“NRD”), dated June 14, 2023, Respondent upheld its decision. See RCE pages 37-41.

7. On June 13, 2023, Petitioner requested a Fair Hearing to challenge the denial of personal care services. On July 6, 2023, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for July 25, 2023, at 2:00 p.m. EST.

8. On May 18, 2023, Livia Gadea, M.D. provided a prescription requesting Medicaid provide the Petitioner with eight (8) hours of home health personal care services for a period of one hundred and eighty (180) days. See RCE page 57.

9. Ms. Schuster’s testimony established the following facts:

a. The Petitioner does not [redacted] and demonstrates [redacted] [redacted].

a. The Petitioner has been receiving Medicaid services since [redacted] [redacted] weighs approximately [redacted], and is capable of causing physical harm when [redacted] becomes combative through [redacted]. In addition, The Petitioner has a history of property destruction in the home.

b. The Petitioner’s [redacted] present a challenge for [redacted] to contract and retain qualified in-home therapists and is only receiving school-based behavioral therapies within

- school day.
- c. ■ testified as to ■ belief ■ can't leave the Petitioner home alone with an aide over concerns of physical harm to the aide, so ■ works from home. Otherwise, ■ would be at work eight (8) hours per day outside the home.
 - d. It takes longer to perform the Petitioner's Activities of Daily Living because of ■ maladaptive behaviors.
 - e. Supervising and caring for the Petitioner is a two (2) person job because of ■ age, ■ size, ■ strength, and ■ maladaptive behaviors.
10. Dr. Kunis a Medical Director at Kepro. Dr. Kunis' testimony established the following facts:
- a. Dr. Kunis stated the true nature of the services requested are for supervision and are not medically related.
 - b. Dr. Kunis explained that personal care services are intended to be directed towards medical needs, is analogous to nursing services, that the Petitioner is medically stable and has no other health issues.
 - c. Dr. Kunis' opinion is that Petition needs behavioral analysis therapy to reduce and control his maladaptive behaviors, which ultimately will reduce the time necessary for the Petitioner to perform ■ activities of daily living.
 - d. Dr. Kunis explained that if there is a change in medical circumstances, the Petitioner can submit a new request for services.
 - e. Dr. Kunis stated that the four (4) hours of personal care services are sufficient to assist in the completion of the Petitioner's activities of daily

living and that coupled with the three (3) hours on Monday through Friday the Petitioner is attending school, provides seven (7) hours of supervision for the Petitioner.

CONCLUSIONS OF LAW

11. 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).

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

13. 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.)

14. The Florida Medicaid Personal Care Services Coverage Policy (“Policy”) incorporated by reference in Fla. Admin. Code R. 59G-4.215, governs personal care services available under Florida Medicaid. The Policy provides the following with respect to personal care services and companion care services:

1.1 Description

Florida Medicaid personal care services provide medically necessary assistance, in the home or in the community, with activities of daily living (ADL) and age appropriate instrumental activities of daily living (IADL) to enable recipients to accomplish tasks they would normally be able to do for themselves if they did not have a medical condition or disability.

...

4.1 General Criteria

Florida Medicaid reimburses for services that meet all of the following:

- Are determined medically necessary

- Do not duplicate another service
- Meet the criteria as specified in this policy

...

4.2. Specific Criteria

Florida Medicaid reimburses for up to 24 hours of personal care services per day, per recipient, in order to provide assistance with ADLs and age appropriate IADLs when the recipient meets the following criteria:

- Has a medical condition or disability that substantially limits their ability to perform ADLs or IADLs and do not have a parent or legal guardian able to provide the required care
- Is under the care of a physician and has a physician's order for personal care services
- Requires more extensive and continual care than can be provided through a home health visit
- Requires services that can be safely provided in their home or the community

...

4.2.1 Parental Responsibility

Florida Medicaid reimburses for personal care services rendered to a recipient whose parent or legal guardian is not able to provide ADL or IADL care, and to supplement care provided by parents and legal guardians. Parents and legal guardians must participate in providing care to the fullest extent possible. Providers must offer training to enable parents and legal guardians to provide care they can safely render without jeopardizing the health or safety of the recipient when needed.

...

4.2.2 Services Provided by Independent Personal Care Providers

Personal care services provided by independent personal care providers must be:

- Supervised by the parent or legal guardian if provided by a non-home health agency when the recipient is under the age of 18 years.
- Supervised by the recipient, or their authorized representative, if the services are provided by a non-home health agency when the recipient is between the age of 18 and 21 years with no legal guardian.

...

4.3 Early and Period Screening, Diagnosis, and Treatment

As required by federal law, Florida Medicaid provides services to eligible recipients under the age of 21 years, if such services are medically necessary to correct or ameliorate a defect, a condition, or a physical or mental illness. Included are diagnostic services, treatment, equipment, supplies, and other measures described in section 1095(a) of the SSA,

codified in Title 42 of the United States Code 1396d(a). As such, services for recipients under the age of 21 years exceeding the coverage described within this policy or the associated fee schedule may be approved, if medically necessary.

See Respondent's Composite Exhibit 2, pages 40-42.

15. The Policy further addresses excluded services as follows:

5.1 General Non-Covered Criteria

Services related to this policy are not reimbursed when any of the following apply:

- The service does not meet the medical necessity criteria listed in section 1.0.
- The recipient does not meet the eligibility requirements listed in section 2.0.
- The service unnecessarily duplicates another provider's service.

5.2 Specific Non-Covered Criteria

Florida Medicaid does not reimburse for the following:

- A skill level other than what is prescribed in the physician order and approved plan of care (POC)
- Assistance with homework
- Babysitting
- Care, grooming, or feeding of pets and animals
- Certification of the POC by a physician
- Companion sitting or leisure activities
- Escort services
- Housekeeping (except light housekeeping to make the environment safe), homemaker, and chore services
- Nursing assessments related to the POC
- Professional development training or supervision of home health staff or other home health personnel
- Respite care to facilitate the parent or legal guardian attending to personal matters
- Services funded under section 110 of the Rehabilitation Act of 1973 or under the provisions of the Individuals with Disabilities Educational Act
- Services furnished by relatives as defined in section 429.02(18), F.S., household members, or any person with custodial or legal responsibility for the recipient. (Except when a recipient is enrolled in the Consumer- Directed Care Plus program)

- Services provided in any of the following locations:
 - Hospitals
 - Intermediate care facility for individuals with intellectual disabilities
 - Nursing facilities
 - Prescribed pediatric extended care centers
 - Residential facilities or assisted living facilities when the services duplicate those provided by the facility
- Services rendered prior to the development and approval of the POC
- Travel time to or from the recipients place of residence
- Yard work, gardening, or home maintenance work.

See Respondent’s Composite Exhibit 2, pages 42-43.

16. States must provide Early and Periodic Screening, Diagnostic, and Treatment (“EPSDT”) services to Medicaid-eligible children under age 21 when requested under the Medicaid state plan. See 42 U.S.C. § 1396a(a)(43); 42 U.S.C. § 1396d(a)(4). According to 42 U.S.C. § 1396d(r)(5), EPSDT services mean, in relevant part, the following items and services:

Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illness and conditions discovered by the screen services, whether or not such services are covered under the state plan.

17. The Petitioner is under age 21, and therefore EPSDT applies to his request for services. However, a state may place medical necessity limitations on EPSDT services. See 42 C.F.R. §§ 440.230(a), (b), (d). Fla. Stat. § 409.905(2) limits EPSDT services with a medical necessity standard:

The [Agency] shall pay for early and periodic screening and diagnosis of a recipient under age 21 to ascertain physical and mental problems and conditions and all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems and conditions, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations.

18. The Definitions Policy (August 2017), incorporated by reference in Fla. Admin. Code R. 59G-1.010, provides the applicable definitions for Florida Statewide Medicaid Managed Care

policy. The Definition Policy provides the following definitions applicable to the instant case:

2.2 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

2.83 Medically Necessary or Medical Necessity

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.

See Respondent's Composite Exhibit 2, pages 17 and 23.

19. The Petitioner requested eight (8) hours of personal care services, daily. See supra ¶ 3. In the NOO, dated June 8, 2023, and again in the June 14, 2023, Reconsideration, Respondent partially denied Petitioner's request, approving four (4) hours of personal care services Monday

through Friday and denying four (4) hours of personal care services Monday through Friday. See supra ¶¶ 5 and 6. Respondent determined that Petitioner’s request for personal care services was not “[i]ndividualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment” and was “in excess of the patient’s needs.” *Id.*

20. As provided by the EPSDT requirements, the recipient must meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. See supra ¶ 17. As provided in section 2.83 of the Definitions Policy, a component of medical necessity is that services must be “[i]ndividualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient’s needs.” See supra ¶ 18. As provided in the PCS Policy, personal care services are intended to “provide medically necessary assistance . . . with activities of daily living (ADL) and age-appropriate instrumental activities of daily living (IADL).” See supra ¶ 14.

21. Livea Gadea, M.D., has recommended the Petitioner obtain eight hours of personal care services per day, Monday through Friday, for a period of one-hundred and eighty (180) days. However, 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. See supra ¶ 18.

22. As shown by the record, Petitioner needs assistance performing ADLs that includes

[REDACTED]

[REDACTED] See supra ¶ 3. Effective June 1, 2023, and through November 24, 2023, the Respondent approved personal care services for the Petitioner four (4) hours of personal care services per day, Monday through Friday, in recognition of these needs and as reflected in the record, any additional

personal care hours would amount to supervision of the Petitioner, which is outside the scope of medical necessity and personal care services required in this matter. *See supra* ¶¶ 6 and 10. The Petitioner did not offer testimony or evidence of any unmet needs regarding the activities of daily living or that the current approved hours are not in excess of the Petitioner’s needs.

23. As Petitioner bears the burden of proof, Petitioner must show that Respondent’s denial of personal care services was incorrect. *See supra* ¶ 13. Here, Petitioner is diagnosed with [REDACTED].

See supra ¶ 3, At the Fair Hearing, Dr. Kunis provided credible testimony that the Petitioner is medically stable, has no other health issues and that the Petitioner does not require services above what are offered with four hours per day Monday through Friday of personal care services (assistance with ADLs and IADLs). *See supra* ¶ 10. As such, the record supports Respondent’s determination that an additional four (4) hours of personal care services Monday through Friday are not “individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and [are] in excess of the patient’s needs.”

24. 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 the requested eight (8) hours, daily, of personal care services were medically necessary. Looking at all the evidence relevant to the particular needs of Petitioner, the Petitioner did not demonstrate that eight (8) hours, daily, of personal care services are necessary to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly, Petitioner did not prove by a preponderance of the evidence that Respondent’s denial of four (4) additional hours of personal care services Monday through Friday was incorrect.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

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

DONE AND ORDERED this 11th day of September, 2023, in Tallahassee, Leon County, Florida.

Alan J. Leifer
Alan J. Leifer
23-FH1464
2023.09.11
09:37:19 -04'00'

ALAN LEIFER, 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]

AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com