



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

FILED

Nov 09, 2023, 1:06 pm

OFFICE OF FAIR HEARINGS

[Redacted]

PETITIONER,

AHCA Case No.: 23-FH1853

Plan ID No.: [Redacted]

vs.

SUNSHINE STATE HEALTH PLAN, INC.,

RESPONDENT.

_____ /

[Redacted]

PETITIONER,

AHCA Case No.: 23-FH1854

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 September 18, 2023, at 1:00 p.m. Eastern Standard Time (“EST”).

APPEARANCES

For the Petitioner:

[Redacted]

Petitioner’s Authorized Representative

For the Respondent:

Kimberly Bouchette
Clinical APP Coordinator
Sunshine State Health Plan, Inc.

STATEMENT OF ISSUE

The first 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.

The second issue is whether Petitioner proved by a preponderance of the evidence that Respondent's decision to deny Petitioner's request for respite care services was incorrect.

PRELIMINARY STATEMENT

All parties appeared telephonically. Petitioner's Authorized Representative, [REDACTED] [REDACTED] appeared on behalf of the Petitioner.

Kimberly Bouchette ("Ms. Bouchette"), Clinical APP Coordinator for Sunshine State Health Plan, Inc. ("Sunshine"), appeared on behalf of Respondent. Dr. John Carter ("Dr. Carter"), Long Term Care Medical Director for Sunshine, attended as a witness for Respondent. The following attended on behalf of Sunshine but did not testify: Katie Maldonado, Utilization Review for Sunshine; Ivelisse Rivera, Case Manager for Sunshine; Andrea Hoffman, LTC Coordinator for Sunshine; and Natalie Pariag, Case Manager for Sunshine.

Lee Ann Williams, Medical Health Care Program Analyst for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared as an observer.

Jeanette, translator number 400838, appeared to provide Spanish translation services for Petitioner.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one-hundred and fifty-eight (158)-page evidence packet. The one-hundred fifty-eight (158)-page packet is identified in the Office of Fair Hearings' document management system as file title "MFH packet [Petitioner].pdf". Absent an objection from the Petitioner undersigned admitted

the one-hundred and fifty-eight (158)-page packet into evidence as Respondent’s Composite Exhibit 1 (“RCE 1”)

Prior to the hearing, Petitioner sent to the Office of Fair Hearings a three (3)-page evidence packet. This packet is identified in the Office of Fair Hearings’ document management system as file titles “23-FH1853 and 23-FH1854 Evidence.pdf.” Absent an objection from the Respondent, the undersigned admitted the three (3)-page packet into evidence as Petitioner’s Composite Exhibit 1 (“PCE 1”).

FINDINGS OF FACT

1. Petitioner is an enrolled Recipient of Sunshine. RCE 1 at 1. Sunshine is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida. *Id.* at 104.

2. Petitioner is [REDACTED]. *Id.* at 13. Petitioner lives with [REDACTED]. *Id.*

3. According to the Florida Department of Elder Affairs: 701B Comprehensive Assessment (“701B”), completed on June 26, 2023, Petitioner is diagnosed with: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 72, 77-79.

4. Petitioner’s needs for assistance with activities of daily living (“ADLs”) are as follows [REDACTED]

[REDACTED], Petitioner

needs assistance (but not total help); and for using [REDACTED]
[REDACTED]. *Id.* at 75.

5. Petitioner’s needs for instrumental activities of daily living (“IADLs”) are as follows:
Petitioner needs total assistance (cannot do at all) for [REDACTED]
[REDACTED]
[REDACTED], Petitioner needs assistance but not total help. *Id.* at 76.

6. Petitioner’s current plan of care includes 28 hours of personal care services, weekly, and 6 hours of homemaker services, weekly. *Id.* at 39

7. Petitioner requested 40 additional hours per week of personal care services and a one-time, 90 hours per week of in-home respite care services. On February 2, 2023, Respondent issued a Notice of Adverse Benefit Determination (“NABD”), which approved an additional 16 hours per week of personal care services and denied the balance of Petitioner’s request. *Id.* at 4-

5. The NABD explained the basis of the denial as follows in pertinent part:

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 40 hours per week of personal care services and the addition of 90 hours one time of in home respite care services is partially approved. The Recipients present care plan includes 12 hours per week of personal care services and six hours per week of homemaker services. Based on the assessment of the Recipients care needs and household and caregiver status, Sunshine Health will approve an extra 16 hours per week of personal care services and will deny the remaining requested 24 hours per week of personal care services and will deny the request for 90 hours of one-time in-home respite care services. The Recipient is reported to be on medication. The administration of medication is out of the scope of a home health aide. The updated care plan approved by Sunshine health will include 28 hours per week of personal care services and six hours per week of homemaker services. This decision was made with Sunshine Health Policy LT.UM.09 Long Term Care Ancillary Service Criteria.

Id. at 4-5.

8. Petitioner requested a plan appeal on the denial of personal and respite care services.

Respondent issued a Notice of Plan Appeal Resolution (“NPAR”) dated April 14, 2023, upholding the denial. *Id.* at 101. The NPAR explained as follows in pertinent part:

On 04/07/2023, after consideration of the information you provided to Sunshine Health and support of your plan appeal, Sunshine Health hereby denies your plan appeal. As a result, [Recipient] will not receive the request for an extra 40 hours per week of 40 of personal care services and the addition of 90 hours of one-time in-home respite care services effective 04/07/2023.

The reason for our decision was based on medical necessity. On appeal Sunshine Health will deny the requested 24 hours per week of personal care services and will deny the request for 90 hours one time of in-home respite care services as not medically needed. Per assessment, their Recipient is reported to be on medication. The administration of medication is out of the scope of care of a Home Health Aide. The prior decision is upheld. The care plan provided by Sunshine Health will include: 28 hours per week of Personal Care Services and 6 hours per week of Homemaker Services. This decision was made with Sunshine Health Policy LT.UM.09 Long Term Care Ancillary Service Criteria. This decision was made by a Medical Director who is Board Certified in Internal Medicine.

Id. at 101.

9. On July 28, 2023, Petitioner requested a Fair Hearing to challenge the denial. On September 1, 2023, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for September 18, 2023, at 10:30 p.m., Eastern Standard Time.

10. At the Fair Hearing, [REDACTED] testified to the following:

- a. [REDACTED] has [REDACTED] and has [REDACTED].
- b. [REDACTED] is no longer able to work due to caring for [REDACTED].
- c. [REDACTED] believes [REDACTED] needs more help.

11. Dr. Carter is a Long-Term Care Medical Director for Sunshine. Dr. Carter testified to the following:

- a. 16 of the 40 hours requested of personal care were approved.
- b. Currently, the Recipient receives 28 personal care hours and 6 homemaker hours for a total of 34 hours per week of combined services.
- c. Petitioner's Care Plan is based upon the June 26, 2023, 701B assessment. [REDACTED] [REDACTED] is noted in 701B as the person answering the questions for the assessment.
- d. For ADLs, Petitioner needs assistance but not total help. ADLs were considered when the hours were approved. RCE1 at 136-137.
- e. The recipient lives at home with [REDACTED]. The [REDACTED] works part-time as documented on the 701B. RCE1 at 85. [REDACTED] suffers from [REDACTED] [REDACTED].
- f. Dr. Carter believes that the current plan is sufficient to meet the Recipients' needs and the requested hours are in excess of medical necessity.

- g. Petitioner is on medication and dispensing of medication is outside the scope of duties for a home health aide. Thus, respite care cannot be safely furnished.

12. In making its determination, Respondent relied upon the Sunshine Health Policy and Procedure LT.UM.09, which states in pertinent part as follows:

PURPOSE:

To establish clinical criteria on which to review Sunshine Health Long Term Care (LTC) line of business ancillary services for members residing in a home and community based environment. The goal of the ancillary services is to provide these supportive services in the home to address the member's cognitive and functional deficits, which may be a result of their medical conditions. The services will assist in maintaining the members in their home and community environment, in a safe manner, to avoid the risk for nursing home placement.

...

1. Determinants for Services

When considering the level of support the member requires and which of the ancillary services may support the member's cognitive, functional, environmental, and social needs, several elements are to be considered. The review for the medical necessity of the ancillary services includes consideration of the member's support needed due to ADL deficits, living situation, and supervision needs.

a) Activities of Daily Living (ADL's)/Instrumental Activities of Daily Living (IADL's)

- Independent where member is able to provide the task without support, with or without assistive devices
- Minimal functional impairment where the ADL's require one of the following:
 - Supervision
 - At least minimum assistance
 - Member ambulates with assistance of a person or a device
 - Member transfers require at least minimum assistance

b) Living situation consideration

- Lives alone.
- Lives with family (with consideration of the number of days and hours that family members are not available to assist the member).
- Lives with non-family (with consideration of the number of days and hours that non-family members are not available to assist the member).

7. Personal Care Services

In accordance with Rule 59G-4.215, F.A.C., for member under the age of 21 years. To provide assistance with ADLs and IADLs, including assistance with preparing of meals, and housekeeping chores which are incidental to the care furnished or are essential to the health and welfare of the member. The scope and nature of these services do not otherwise differ from personal care services furnished to persons under the age of 21 years. 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. Personal care services include but may not be limited to 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 not administer any medications, but may bring medications to the member and remind the member to take the medicine 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.

9. Respite Care

The provision of services on a short-term basis due to the absence of, or need to relieve, the Recipient's natural supports on a planned or an emergency basis. Services are provided to Recipients unable to care for themselves. Respite care does not substitute for the care usually provided by a registered nurse, a licensed practical nurse or a therapist. Respite care is provided in the home/place of residence, Medicaid licensed hospital, nursing facility or assisted living facility.

In-home Respite Care services are to provide short-term, temporary relief to the informal, unpaid caregiver in order to support and preserve the primary caregiving relationship. The service provides general supervision, meal preparation, and hands-on assistance with personal care that are incidental to supervision during the period of service delivery. Respite services can be provided on a planned or emergency basis and shall only be furnished in the Recipient's home. The provider must be awake during the provision of respite

services and the services shall not be provided overnight. Recipient must reside in a non-facility based setting with his or her informal, unpaid primary caregiver.

...

RCE 1 at 133-147, 152.

CONCLUSIONS OF LAW

13. The Agency's Office of Fair Hearings has jurisdiction over the subject matter of this proceeding and the parties pursuant to Florida Statutes ("Fla. Stat.") § 409.285(2)(2019). This order is the final administrative decision of AHCA under Fla. Stat. § 409.285(2)(a).

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

15. Because Petitioner is requesting additional services, Fla. Admin. Code R. 59-1.100(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.)

16. 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 and respite 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 Services

In accordance with Rule 59G-4.215, F.A.C., for Recipient 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 Recipient. The scope and nature of these services do not otherwise differ from personal care services furnished to persons under the age of 21 years. 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 Recipient, rather than the Recipient's family.

4.2.1.15 Respite Care

The provision of services on a short-term basis due to the absence of, or need to relieve, the Recipient's natural supports on a planned or an emergency basis.

...

LTC Program Policy p. 8-9.

17. The Florida Medicaid Definitions Policy ("Definitions Policy"), incorporated by reference in Fla. Admin. Code R. 59G-1.010, defines "Medically Necessary" or "Medical Necessity" as follows:

- 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:
 4. 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;
 5. 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
 6. 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:

3. Enable the enrollee to maintain or regain functional capacity; or
4. 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.

Definitions Policy at page 7.

Personal Care Services

18. In an NABD dated February 2, 2023, Petitioner's request for 40 additional personal care hours was denied. See ¶7. While 16 hours of the request were approved, the remaining hours were denied based on not meeting medical necessity criteria. See ¶7. The NABD did not specify which of the medically necessary criteria was not met.

19. Florida Medicaid LTC plans cover services that meet all of the following: are determined medically necessary; do not duplicate another service; and meet the criteria as specified in the LTC Policy. See ¶ 15. Section 4.2.2.6 of the LTC Policy defines personal care services as intended “[t]o 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.” See ¶ 16.

20. The Definitions Policy states that all 5 criteria of medical necessity must be met. Among the criteria, the personal cares services must “[b]e 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.” See ¶17.

21. In his testimony, Dr. Carter explained the basis for the denied hours was the most recent 701B from June of 2023. The Recipient’s ADLs and IADLs listed in the 701B were reviewed. The 701B states:

[F]or [REDACTED],
Petitioner needs assistance (but not total help); for using [REDACTED]
[REDACTED], Petitioner uses [REDACTED] Petitioner’s
needs for instrumental activities of daily living are as follows: (“IADLs”). Petitioner
needs total assistance (cannot do at all) for [REDACTED]
[REDACTED]
[REDACTED], Petitioner needs assistance but not total
help.

See ¶ 4-5.

22. Here, the current care plan for the Petitioner includes 28 hours of personal care and 6 hours of homemaker services. See ¶ 11. In addition, Petitioner lives with [REDACTED] who works part-time. See ¶11. Petitioner’s [REDACTED] is available to provide care for [REDACTED] outside of the service hours. See ¶ 11.

23. Respondent denied the request as being in excess of the medical necessity. See ¶11. Petitioner did not provide any evidence to support the need for additional personal care hours. The intent of LTC policy is to assist members with ADLs and IADLs. Petitioner provided no information as to which ADLs and IADLs are not being fully attended to with the current plan of care. Further, Petitioner did not provide specifics for what tasks the additional requested hours would be used for. See ¶10.

24. Petitioner has the burden of proof to show that the denial of the request for additional personal care services by Respondent was incorrect. See ¶14. To satisfy that burden, Petitioner must provide evidence to show that the requested additional personal care services are medically necessary. Here, Petitioner did not show that the requested services are not in excess of Petitioner's need. Therefore, Petitioner did not show that the requested personal care services are medically necessary.

25. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned finds that Petitioner did not prove by a preponderance of the evidence that Respondent's denial of Petitioner's request for additional personal care hours was incorrect.

Respite Care Services

26. In an NABD dated February 2, 2023, Petitioner's request for a one-time in-home approval of 90 hours of respite care was denied. See ¶ 7. The basis for the denial was explained as follows: "deny the request for 90 hours of one-time in-home respite care services. The Recipient is reported to be on medication. The administration of medication is out of the scope of a home health aide." See ¶ 7.

27. The LTC Policy defines respite care services as: “The provision of services on a short-term basis due to the absence of, or need to relieve, the Recipient’s natural supports on a planned or an emergency basis.” See ¶16.

28. Florida Medicaid LTC plans cover services that meet all of the following: are determined medically necessary; do not duplicate another service; [b]e reflective of the level of service that can be safely furnished, and meet the criteria as specified in the LTC Policy. See ¶ 15..

29. Petitioner is on daily medication. *Id.* at 83. Additionally, the 701B indicates that Petitioner needs total assistance with managing medication. See ¶5 and 21.

30. The 701B indicates that [REDACTED] is “in emotional and physical crisis”. RCE1 at 68. This is confirmed by [REDACTED]’ testimony regarding needing help and having to quit [REDACTED] job due to having to care for [REDACTED]. See ¶10.

31. As noted previously, the requested respite care was denied based on Petitioner needing daily medication which is not within the scope of services provided by a home health aide. See ¶8-9. Respondent did not list a specific prong of medical necessity to base their decision on the denial of respite care.

32. Here, 90 hours of one-time in-home respite care is not “reflective of the level of service that can be safely furnished” due to Petitioner needing total assistance with [REDACTED] daily medication. The respite caregiver would be unable to assist [REDACTED] with [REDACTED] medication leaving Petitioner without [REDACTED] medication for over three days.

33. Petitioner has the burden of proof to show why Respondent’s denial of Petitioner’s request was incorrect. See ¶14. Petitioner did not provide evidence to show that the request for 90 hours of one-time in-home respite care is medically necessary. See ¶10. Petitioner did not

provide evidence to show that Recipient's medication could be administered by [REDACTED] or another individual prior to respite care commencing. See ¶10.


34. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned finds that Petitioner did not prove by a preponderance of the evidence that Respondent's denial of Petitioner's request for 90 hours of one-time in-home respite care was incorrect.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

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

Respondent's denial of respite care hours is **AFFIRMED**. Petitioner's appeal based on Respondent's denial is **DENIED**.

DONE and ORDERED this 9th day of November 2023, in Tallahassee, Leon County, Florida.

 Lynne Ringers
23-FH1853 23-FH1854
2023.11.09 08:12:51
-05'00'

LYNNE RINGERS, 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]
[REDACTED]

Sunshine
SunshineHealth_MFH@centene.com

AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com

