



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

FILED

Nov 16, 2023, 10:33 am
OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 23-FH2078

Plan ID No.: [REDACTED]

vs.

FLORIDA COMMUNITY CARE, LLC,

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on October 10, 2023, at 10:01 a.m. EST.

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner’s Authorized Representative

For the Respondent:

Jill Bennett, Esq.
Florida Community Care, LLC

STATEMENT OF ISSUE

The issue in this matter is whether Petitioner proved by a preponderance of the evidence that Respondent’s decision to deny Petitioner’s request for an additional one hundred and thirty-two (132) hours per week of personal care services was incorrect.

PRELIMINARY STATEMENT

All parties appeared telephonically. [REDACTED] (“[REDACTED]”), the Petitioner’s Authorized Representative appeared and testified on Petitioner’s behalf.

Jill Bennett, Esq., (“Ms. Bennett”) appeared on behalf of the Respondent. Frank Astor, M.D., (“Dr. Astor”) Chief Medical Officer, and Sally Ingeno, (“Ms. Ingeno”) Clinical Appeals Specialist both testified on behalf of the Respondent.

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

Prior to the hearing and as part of the Petitioner’s hearing request, the Petitioner submitted a ten (10) page composite exhibit consisting of letters and photographs submitted on behalf of the Petitioner. Counsel for the Respondent objected to the letters dated after August 16, 2023. The Petitioner’s proposed ten (10) page document package was admitted into evidence over the objection of the Respondent, is identified as “Petitioner’s Composite Exhibit 1”, and appears in the Office of Fair Hearings case management system as “23-FH2078 Evidence.pdf”.

Prior to the Fair hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred and forty (140)-page evidence packet that was admitted into evidence without objection, is identified as “Respondent’s Composite Exhibit 1”, and appears in the Office of Fair Hearings’ case management system as “23-FH2078 Evidence Package [Petitioner]_opt.pdf”.

FINDINGS OF FACT

1. Petitioner is an enrolled member of Florida Community Care, LLC (“Community Care” or “Respondent”). See Respondent’s Composite Exhibit 1, page 15. Community Care is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida.

2. As of the date of the Fair Hearing, the Petitioner was [REDACTED] ([REDACTED]) [REDACTED] and lives [REDACTED]. See Respondent's Composite Exhibit 1, page 23. The Petitioner has

three (3) adult children that all live out-of-state. See Respondent's Composite Exhibit 1, page 27.

3. Petitioner health conditions consists of the following: [REDACTED]. See

Respondent's Composite Exhibit 1, pages 28 – 29. In addition, the Petitioner has been diagnosed

with [REDACTED], has had [REDACTED], and [REDACTED] most recent [REDACTED]. See Respondent's Composite Exhibit 1, page 25, 26

and 31.

4. As provided in the most recent Florida Department of Elder Affairs 701B Comprehensive Assessment, dated July 20, 2023 ("701B Assessment"), the Petitioner requires assistance with the Activities of Daily Living ("ADLs"), including total assistance (cannot do at all) with [REDACTED]

[REDACTED]. See Respondent's Composite Exhibit 1, page 26. The 701B also

reflects the Petitioner needs some assistance (but not total help) with [REDACTED]

[REDACTED]. *Id.* Finally, the 701B reflects the Petitioner never has assistance with the performance of [REDACTED] ADLs. *Id.*

5. As provided in the 701B Assessment with regards to the performance of the Instrumental Activities of Daily Living ("IADLs"), the Petitioner requires total assistance with [REDACTED]

[REDACTED]

[REDACTED]. Respondent's

Composite Exhibit 1, page 27. The 701B reflects the Petitioner never has assistance with the

performance of [REDACTED] IADLs with the exception of [REDACTED] for which [REDACTED] always has assistance. *Id.*

6. Immediately before the request for additional hours of personal care services per week, the Petitioner was approved for and receiving seventeen (17) hours per week of personal care services, twenty-six (26) hours per week of homemaker services, ten (10) hours of adult companion care per week, seven (7) home delivered meals per week, and was provided a [REDACTED] (“[REDACTED]”). See Respondent’s Composite Exhibit 1, pages 46-50.

7. On July 20, 2023, the Petitioner requested an additional one hundred and thirty-two (132) hours per week of personal care services. See Respondent’s Composite Exhibit 1 page 52. On July 24, 2023, the Respondent issued their Notice of Adverse Benefit Determination (“NABD”), wherein they approved an additional twenty (20) hours per week of personal care services per week, for a new total of thirty-seven (37) hours per week of personal care services. See Respondent’s Composite Exhibit 1, pages 52-60. The NABD explained the basis of the decision 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 requested service is not a covered benefit.
- Other authority <<explain and cite authority>> The facts that we used to make our decision are:

Partial Approval- Personal Care

This request for Personal Care, CPT Code: T1019 (Personal Care), Frequency: 7 Days/Week – 132 hours a week is partially approved and partially denied. After a complete review of your plan of care and all documents in our possession justifying personal care service hours, I find that you do not require as many personal care services as requested. There is no medical necessity to attribute to 132 hours of personal care service at this time.

We can approve 37 hours a week of Personal Care hours based on a calculation of need. Therefore 37 hours are approved and 95 hours are denied, based on medical necessity requirements.

Please work with your case manager to best distribute these hours through the days and week to meet your needs.

Id.

8. On August 3, 2023, the Petitioner requested a plan appeal and received a Notice of Plan Appeal Resolution ("NPAR"), dated August 16, 2023, providing the Petitioner with an additional five (5) hours of personal care services per week, and denying the remaining requested hours of personal care services per week. See Respondent's Composite Exhibit 1, pages 86-90. The NPAR states, in pertinent part:

On 08/15/2023, after consideration of the information you provided to Florida Community Care in support of your plan appeal, Florida Community Care hereby PARTIALLY DENIES your plan appeal. As a result, [Petitioner] will not receive Personal Care: Total hours per week: 132, effective 07/24/2023. She will receive 42 hours per week of personal care services effective 8/16/2023.

Id.

9. On August 23, 2023, Petitioner requested a Fair Hearing to challenge the denial of additional personal care services. On September 20, 2023, the Hearing Officer issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for October 11, 2023, at 10:00 a.m. EST.

10. At the Fair hearing, the Petitioner's Authorized Representative testified that [REDACTED] asked for the additional personal care hours because [REDACTED] health continues to deteriorate. *See also, See Respondent's Composite Exhibit 1, pages 68-69 and Petitioner's Composite Exhibit 1, pages 2-3.* The Authorized Representative testified that the Petitioner has no natural supports, that [REDACTED] three (3) children all live out-of-state, that the Petitioner is [REDACTED], and that [REDACTED] ability to perform the ADLs has deteriorated. The Authorized Representative also testified that the Petitioner is now unable to [REDACTED] without assistance, that [REDACTED] continues to worsen and because of this, it takes longer to perform the ADLs.

11. Ms. Ingenio testified that based on the Petitioner's comprehensive 701B assessment, the applicable Medicaid rules and regulations, along with the Respondent's Home and Community Based Assessment Tool found in Respondent's Composite Exhibit 1, pages 138-140, the Petitioner is receiving the appropriate number of personal care service hours per week, and that the additional hours sought by the Petitioner are in excess of the Petitioner's needs and therefore not medically necessary.

12. Frank Astor, M.D., the Chief Medical Officer for Sunshine testified on behalf of the Respondent and stated the forty-two (42) hours per week of personal care services are individualized, specific, and consistent with symptoms or confirmed diagnosis of the Petitioner's illness and are not in excess of the patient's needs. Dr. Astor further testified the approved hours are reflective of the level of service that can be safely furnished and that the additional hours would be primarily for the convenience of the Petitioner's family. Finally, Dr. Astor testified the HCBS Assessment Tool utilized by the Respondent is based on the Petitioner's 701B assessments and that the Petitioner's current forty-two (42) hours of personal care service hours per week are appropriate.

13. A September 6, 2023, letter by Dr. Paul Winner, DO, of Palm Beach Neurology recommends the Petitioner obtain "24/7" home health aide care. See Respondent's Composite Exhibit 1, page 70 and Petitioner's Composite Exhibit 1, page 4. An additional physician letter dated September 26, 2023, from Dr. Freddy Avni, M.D. also recommends the Petitioner "receive 24/7 assistance". See Respondent's Composite Exhibit 1, page 71 and Petitioner's Composite Exhibit 1, page 5.

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 section 409.285(2), Florida Statutes (2019). This order is the final administrative decision of AHCA under section 409.285(2)(a).

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

16. The burden of proof in this proceeding is governed by Fla. Admin. Code R. 59G-1.100(17)(g), which provides as follows:

The burden of proof is on the party asserting the affirmative of an issue, except as otherwise required by statute. The burden of proof is on the Agency or plan, whichever is applicable, when the issue presented is the suspension, reduction, or termination of a previously authorized service. The burden of proof is on the recipient or enrollee when the issue presented is the denial or a limited authorization of a service. The party with the burden of proof shall establish its position to the satisfaction of the Hearing Officer by a preponderance of the evidence.

17. Because Petitioner is requesting new services, 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.)

18. The 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 homemakers:

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
- [redacted] 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.

...

6.2 Specific Criteria

In order to receive LTC services, services must be documented on an individual plan of care based upon a comprehensive needs assessment. The comprehensive assessment includes the completion of the 701-B Comprehensive Assessment and the LTC Supplemental Assessment. [emphasis supplied]

LTC Policy at pages 1 – 8. The Personal Care Services Policy also provides general guidelines as to timeframes for the rendition of personal care services and states in-parts as follows:

Personal Care Task	General Time Allowances
Bathing	

Full-body Bath: Tub, shower or sponge/bed bath.	Up to 30 minutes. May rotate with partial bath based on recipient's needs
Partial Bath: A sponge bath includes, at a minimum, bathing of the face, hands, and perineum.	15–20 minutes per partial bath
Dressing	
Laying out clothing, handing and retrieving clothing, putting clothes on and taking them off, including handling fasteners, zippers, and buttons.	15 minutes
Application of prosthetic devices or application of therapeutic stockings.	May add 15 minutes for applying hose and/or Prosthesis
Grooming and Skin Care	
Brushing teeth, denture care, shaving, washing and drying face and hands. Applying lotion to non-broken skin.	15–30 minutes
Shampoo and comb hair, basic hair care, basic nail care.	15 minutes
Positioning	
Moving recipient to and from a lying position, turning side to side, and positioning recipient in bed.	10 minutes/every 2 hours when medically indicated
Transfers	
Moving recipient into and out of a bed, chair, or wheelchair. May include the use of assistive devices.	15 minutes/every 2 hours when medically indicated
Toileting and Maintaining Continence	
Includes transfer on or off the toilet, bedside commode, urinal, or bedpan. Includes cleaning the perineum and cleaning after an incontinent episode. Includes taking care of a catheter or colostomy bag or changing a disposable incontinence product.	15–45 minutes
Eating	

Taking in food by any method. Extra time may be allowed for preparing a special diet.	30 minutes per meal
Delegated Medical Monitoring and Activities	
Non-skilled medical tasks that are delegated to the aide by the RN, in accordance with Florida laws and practice acts. The tasks include, but are not limited to, assisting recipient with pre-poured medications, monitoring vital signs, and measurement of intake/output.	15–30 minutes day for all monitoring tasks performed

PC Policy, pages 3 – 8, and 10.

19. The LTC Policy also provides the following regarding 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.

LTC Policy at pages 2 – 3.

20. The Florida Medicaid Definitions Policy (August 2017) (“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.

Definitions Policy at page 7.

21. The Petitioner requested an additional one hundred and thirty-two (132) hours per week of personal care services. *See supra* ¶ 7. The additional personal care services requested by the Petitioner were denied based on medical necessity. *See supra* ¶ 7 and 8. Specifically, Respondent determined that the services do not meet the criteria that the services “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”. *See supra* ¶ ¶ 7, 8, 18 and 19.

22. Section 4.1 of the LTC Policy provides that Florida Medicaid LTC plans cover services that: (a) are determined medically necessary, as defined in the LTC Policy; (b) do not duplicate another

service; and (c) meet the criteria as specified in the LTC Policy. See supra ¶ 18. Further, in order to receive LTC services, services must be documented on an individual plan of care based upon a comprehensive needs assessment. The comprehensive assessment includes the completion of the 701-B Comprehensive Assessment and the LTC Supplemental Assessment. *Id.*

23. The evidence presented reflects that Respondent’s denial of an additional one hundred and thirty-two (132) hours per week of personal care services is warranted under the circumstances of this case. As provided in the LTC Policy, personal care is 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.” See supra ¶¶ 18 and 19.

24. With regard to the Petitioner’s ADLs, the 701B reflects the Petitioner needs total assistance (cannot do at all) with [REDACTED]. See supra ¶ 4. The Petitioner needs some assistance (but not total help) with [REDACTED]. *Id.* The Authorized Representative testified that the Petitioner’s ability to perform ADLs has declined and now requires more assistance to complete the ADL tasks. See supra ¶ 10.

25. Regarding IADLs, the Petitioner requires total assistance with [REDACTED] [REDACTED], [REDACTED] [REDACTED]. See supra ¶ 5. In addition, the 701B reflects the Petitioner requires supervision/prompts [REDACTED] while the Authorized Representative testified the Petitioner cannot [REDACTED] without assistance. See supra ¶¶ 5 and 10.

26. Appendix 9.1 of the Florida Medicaid Personal Care Services Coverage Policy (November 2016) (“PCS Policy”), which is incorporated by reference in Fla. Admin. Code R. 59G-4.215, provides general guidance concerning the time allotted for personal care tasks. *See supra* ¶ 18. The time allotted for tasks applicable for Petitioner would be as follows: a full body bath is allotted up to 30 minutes; dressing is allotted up to 15 minutes; grooming and skin care is allotted between 30 and 45 minutes; eating is allotted up to 30 minutes per meal; transferring (15 minutes/every 2 hours); and toileting is allotted up between 15 – 45 minutes. *Id.* As Dr. Astor testified, according to Petitioner’s documented needs in the 701B Assessment and with respect to the ADLs, the Petitioner needs total assistance with bathing dressing, and using the bathroom, and some assistance with eating, transferring, and walking. *See also supra* ¶ 6 and 18. The Authorized Representative did not provide a schedule of ALDs and/or any estimate of the time it takes to complete each ADL task. Allotting thirty (30) minutes of time for each of Petitioner’s ADLs ([REDACTED]) and taking into account Petitioner’s medical conditions, the current forty-two (42) hours of personal care services per week appears to be reasonable. Petitioner also has twenty-six (26) hours per week of homemaker services, which closely align with the documented IADL tasks that Petitioner needs assistance with. *See supra* ¶ 5 and 6. Dr. Astor and Ms. Ingenio provided credible and persuasive testimony that the approved services are adequate to meet Petitioner’s needs.

27. The September 6, 2023, letter from Dr. Paul Winner, DO, recommends the Petitioner receive “24/7 home aide care” and the September 26, 2023, letter from Freddy Auni, M.D. recommending “24/7 assistance”. *See supra* ¶ 13. However, Section 2.83 of the Definitions Policy mandates that “[t]he 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.” See supra ¶ 20. The letters from Dr. Winner and Dr. Auni, do not address or identify any unmet needs of the Petitioner relating to ADLs and IADLs, and do not, *in itself*, make “24/7” home health aide services for the Petitioner medically necessary. See supra ¶ ¶ 13, 19 and 20.

28. The Authorized Representative testified the Petitioner’s health is declining, including [REDACTED] ability to perform the ADLs, and that the Petitioner requires constant home-based services twenty-four hours per day, seven days per week (24/7). See supra ¶ 10. The Petitioner currently is currently approved for forty-two (42) hours of personal care services and the facts of this matter may support the approval of additional hours of home and community based care. See supra ¶ 4, 5 and 10. However, the Authorized Representative has not provided compelling evidence that an additional one hundred and thirty-two (132) hours of personal care services per week are medically necessary or that the currently approved forty-two (42) hours of personal care services, twenty-six (26) hours of homemaker services per week, and ten (10) hours of adult companion care services per week are insufficient to meet the Petitioner’s assistance with ADLs and IADLs.

29. Therefore, upon consideration of the testimony provided, Respondent’s Composite Exhibit 1, the Petitioner’s Exhibit 1, and the applicable laws and policies, the undersigned concludes that Petitioner did not demonstrate by a preponderance of the evidence that Respondent’s denial of one hundred and thirty-two (132) hours of personal care services per week was incorrect.

DECISION

Respondent's denial of an additional one hundred and thirty-two (132) additional hours per week of personal care services is **AFFIRMED**. Petitioner's appeal based on Respondent's denial in this matter is **DENIED**.

DONE and **ORDERED** this 16th day of November, 2023, in Tallahassee, Leon County, Florida.

Alan J. Leifer
Alan J. Leifer
23-FH2078
2023.11.16
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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]

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