

David Jones, State Fair Hearing Coordinator for UnitedHealthcare Plan, Inc. (“United”) appeared on behalf of Respondent. Dr. Sloan Karver (“Dr. Karver”), Long Term Care Medical Director for United, 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 hearing. Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a two hundred and eighty-three (283)-page evidence packet. The evidence packet included: an e-mail from Deborah Havey-Levy, dated August 4, 2020; a summary of the instant case; a Notice of Adverse Benefit Determination (“NABD”), dated May 6, 2020; CSP – General Request Form, dated May 14, 2020; a letter from Respondent, dated May 14, 2020; a letter from Respondent, dated May 5, 2020; a letter from Respondent, dated May 15, 2020; a letter from Respondent dated May 18, 2020; a facsimile cover sheet, dated May 15, 2020, including 3 pages of documents; an e-mail from Laquinta Valentine, dated May 14, 2020; an e-mail from Linda Ross, dated May 14, 2020; an e-mail from Laquinta Valentine, dated May 14, 2020; a facsimile cover sheet, dated May 14, 2020, and five pages of documents; an e-mail from Laquinta Valentine, dated May 18, 2020; an e-mail from Laquinta Valentine, dated June 5, 2020; Print HSC History; a Department of Elder Affairs 701B Comprehensive Assessment (“701B”), dated May 4, 2020; an Appeal Review; a Notice of Plan Appeal Resolution (“NPAR”), dated June 5, 2020; a letter from Respondent in Spanish, dated May 18, 2020; an NPAR, in Spanish, dated June 5, 2020; Exhibit 2 (References) Cover Page –Long Term Care; Florida Administrative Code Rule (“Fla. Admin. Code R.”) 59G-1 in its entirety; the Florida Medicaid Definitions Policy (August 2017); the Florida Medicaid Statewide Medicaid Managed

Long-term Care Program Coverage Policy (March 2017) (“LTC Policy”); the Florida Medicaid Authorization Requirements Policy (June 2016); the Florida Medicaid Personal Care Services Coverage Policy (November 2016) (“PCS Policy”); the Florida Medicaid Private Duty Nursing Services Coverage Policy (November 2016); the Home Health Visit Fee Schedule (January 1, 2017); the Personal Care Services Fee Schedule (January 1, 2017); the Private Duty Nursing Services fee Schedule (January 1, 2017); the Participant Direction Option Manual; 42 C.F.R. § 441.480; the Florida Medicaid Hospice Services Coverage Policy (June 2016); 42 C.F.R. Part 418, Subpart C (Conditions of Participants: Patient Care); section 400.6105 of the Florida Statutes (2018); Fla. Stat. § 400.609; Fla. Stat. § 409.910; and Fla. Stat. § 400.462. Absent an objection from the Petitioner, the undersigned admitted the page packet into evidence as Respondent’s Composite Exhibit 1.

FINDINGS OF FACT

1. Petitioner is an enrolled member of United. United is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida.
2. As of the date of the Fair Hearing, Petitioner is eighty-seven (87)-years old. *See* page 64 of Respondent’s Composite Exhibit 1. Petitioner is diagnosed with the following: high blood pressure; frequent bladder incontinence; occasional bowel incontinence; kidney problems; thyroid problems; Alzheimer’s; and major depressive disorder. *Id.* at 70 through 71. Petitioner requires supervision. *Id.* at 73. As testified to by [REDACTED], Petitioner needs to be changed between four (4) and six (6) times per day.

3. Petitioner needs total assistance (cannot do at all) with all activities of daily living (“ADLs”). *Id.* at 68. Petitioner needs total assistance (cannot do at all) with all instrumental activities of daily living (“IADLs”). *Id.* at 69.

4. Petitioner currently receives fourteen (14) hours per week of personal care services. *Id.* at 88. As testified to by [REDACTED], Petitioner’s care aide provides care for two (2) hour each day, from around 9:00 a.m. until 11:00 a.m. As testified to by [REDACTED], the personal care aide bathes the Petitioner.

5. [REDACTED] is the only one who provides assistance to Petitioner, beyond the services provided by Respondent. *Id.* at 78. As testified to by [REDACTED], [REDACTED]’s mother and two children also live with her. As testified to by [REDACTED], [REDACTED] assists with care for her mother by cooking meals, taking her to the doctor, and managing her medication.

6. As testified to by [REDACTED], [REDACTED] works Monday through Friday, from 9:00 a.m. until 6:00 p.m, and works on weekends occasionally. As testified to by [REDACTED], [REDACTED] was diagnosed with three (3) herniated discs. As testified to by [REDACTED], [REDACTED] was prescribed physical therapy, three (3) times per week for her herniated discs, but has been unable to attend physical therapy because she provides care for Petitioner. Dr. Karver testified that [REDACTED] has used sixty-nine (69) hours of respite care since May. [REDACTED] explained that this was to enable her to see doctors and have tests performed on her herniated discs.

7. Petitioner requested nineteen (19) hours, weekly, of personal care services. In the NABD, dated May 6, 2020, Respondent approved nine (9) hours of personal care services, weekly, and

denied the remaining ten (10) hours of Petitioner's request. *Id.* at 4 through 11. The NABD explained the basis of the denial 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.

The facts that we used to make our decision are: Your assessment tells us that you need help with bathing, dressing and using the bathroom.

You are getting 5 hours a week of personal care to help you.

You live with family that helps you.

I will approve 9 more hours a week of personal care to meet your needs.

In my clinical opinion, your personal care needs can be met by the approved services and supports. These hours can be split to meet your needs during the day.

...

Id. at 6 and 7.

8. Petitioner requested a plan appeal and received an NPAR dated June 5, 2020, upholding the denial. The NPAR explained as follows:

You asked for more personal care. You would like 10 more hours a week. You need help with daily activities. We have decided that what you asked for cannot be approved. This does not meet Florida Medicaid rules. Based on my professional judgment, we are not approving these extra hours because they are in excess of needs. You have 14 hours a week of personal care approved by personal care approved by the health plan. You have family that can help some. These should meet your personal care needs. This is why we cannot approve what you asked for. Please talk about this with your doctor.

...

Id. at 91 and 92.

9. In support of her appeal, [REDACTED] submitted a letter that explained the need for additional personal care services. The letter states as follows:

My aunt requires 24-hour supervision and a room to herself (which I provide in my home). Due to her defecating and urinating in diapers, the smell can be repulsive, aside from some disgusting behaviors such as sticking her hands in her diapers full of feces and hand painting it. She also has obsessive behaviors. For example, she constantly chants (day and night) random made up words, she habitually rattles the bed rails and she frequently attempts to get up on her own due to dementia. **She has lit a match and dropped it into a wastebasket; she took scissors and cut up sheets; she has wandered in the house and found cleaning products to open.** Obviously, this is not the kind of patient for which I could easily rely on others (friends, neighbors), and in particular, my mother or children, for which to care or be responsible.

She has fallen various times. On one occasion, last year, she cracked her head open requiring multiple stitches. She spent hours on the floor bleeding because I had gone out to take my kids to their (specialized) private school located over 10 miles away driving in morning rush hour traffic. In another fall, she fractured her femur and shoulder, and was in Rehabilitation care for 3 months until she healed as much as possible. One of her legs is now shorter than the other and any walking she does is uneven and unbalanced. In an additional fall, she lost several teeth. [Emphasis in original]

...

Id. at 49.

10. Dr. Karver is the Long-Term Care Medical Director at United. Dr. Karver testified that based on her clinical judgment, fourteen (14) hours of personal care services are sufficient to meet Petitioner's needs.

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 Fla. Stat. § 409.285(2)(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 LTC Policy, incorporated by reference in Fla. Admin. Code R. 59G-4.192, governs Long-Term Care services available under Florida Medicaid. The LTC Policy provides the following with respect to personal care services:

1.1 Description and Program Goal

Under the Statewide Medicaid Managed Care Long-Term Care (LTC) program, managed care plans (LTC plans) are required to provide an array of home and community-based services that enable enrollees to live in the community and to avoid institutionalization.

...

1.3.1 Activities of Daily Living (ADLs)

ADLs include:

- Bathing
- Dressing
- Eating (oral feedings and fluid intake)
- Maintaining continence (examples include taking care of a catheter or colostomy bag or changing a disposable incontinence product when the recipient is unable to control bowel or bladder functions)
- Toileting
- Transferring

...

1.3.9 Instrumental Activities of Daily Living (IADLs)

When necessary for the recipient to function independently, including:

- Grocery shopping
- Laundry
- Light housework
- Meal preparation
- Money Management
- Personal hygiene
- Transportation
- Using the telephone to take care of essential tasks (examples include paying bills and setting up medical appointments)

...

4.1 General Criteria

Florida Medicaid LTC plans cover services that meet all of the following:

- Are determined medically necessary, as defined in this rule
- Do not duplicate another service
- Meet the criteria as specified in this policy

...

4.2.2.6 Personal Care

In accordance with Rule 59G-4.215, F.A.C., for enrollees under the age of 21 years. To provide assistance with ADLs and IADLs, including assistance with preparation of meals, and housekeeping chores which are incidental to the care furnished or are essential to the health and welfare of the enrollee. The scope and nature of these services do not otherwise differ from personal care services furnished to persons under the age of 21 years.

15. 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.

16. 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.

17. Petitioner requested nineteen (19) hours weekly of personal care services. Respondent approved nine (9) hours weekly of personal care services, but denied the remaining ten (10) hours. Respondent indicated on the NABD that Petitioner did not meet all of the criteria of medical necessity, but did not specify which medical necessary criteria was the basis for its decision. *Id.* at 6 and 7.

18. As provided in the LTC policy, personal care services are to provide assistance with ADLs and IADLs. According to the 701B, Petitioner needs total assistance with all ADLs and IADLs. *Id.* at 68 and 69. Furthermore, Petitioner also suffers from frequent bladder incontinence and occasional bowel incontinence. *Id.* at 70. [REDACTED] testified, *supra* ¶ 2, that Petitioner needs to be changed between four (4) to six (6) times per day. Appendix 9.1 of PCS Policy, which is incorporated by reference in Fla. Admin. Code R. 59G-4.215, provides the general time allotted for personal care tasks. The times allotted for the tasks applicable to the Petitioner are as follows: a full body bath is allotted up to 30 minutes; dressing is allotted 15 minutes; grooming and skin care is allotted between 15 and 30 minutes; toileting is allotted between 15 and 45 minutes; and eating is allotted 30 minutes per meal. These activities total between approximately three (3) hours to three hours and thirty (30) minutes daily, provided that Petitioner receives three (3) meals per day. Moreover, Petitioner also requires total assistance with transferring, which further increases the amount of time needed to perform her ADLs and IADLs.

19. Respondent denied Petitioner's request for personal care services because Petitioner "live[s] with family that helps you." See *supra* ¶¶ 4 and 5. Petitioner's only caregiver in her home is her niece, [REDACTED]. In addition to caring for Petitioner, [REDACTED] also works a full time job, Monday through Friday (and occasionally on weekends), and takes care of her elderly mother, and her two teenage children. *Id.* Further, [REDACTED] has three (3) herniated discs, and has been prescribed physical therapy, but has been unable to begin her therapy due to her obligations with Petitioner. *Id.* Thus, although Petitioner does have a caregiver in her home, her ability to provide assistance is limited due to work, family, and health issues.

20. Moreover, Dr. Karver testified that fourteen (14) hours of personal care services were sufficient to meet Petitioner's needs. As testified to by [REDACTED], *supra* ¶ 4, Petitioner's personal care aide is present from approximately 9:00 a.m. until 11:00 a.m. each day. Thus, based on [REDACTED]'s work schedule, Petitioner is without care from 11:00 a.m. until 6:00 p.m., Monday through Friday, while [REDACTED] is working.


21. As personal care is to provide assistance with ADLs and IADLs, Petitioner has shown that his request is "individualized specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment." Petitioner has shown that her family is unable to provide care for her at during work hours, and that she needs complete assistance with all ADLs and IADLs she has shown that her request is not in "excess of [her] needs" and is not "intended for the convenience of the recipient, the recipient's caretaker, or the provider." Further, Petitioner's request may enable her to "live . . . in the setting of her choice." As such, Petitioner has shown that she has an unmet need for assistance with her ADLs and IADLs. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned finds that Petitioner proved by a preponderance of the evidence that Respondent's denial of an additional ten (10) hours of personal care services was incorrect.

22. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned finds that Petitioner proved by a preponderance of the evidence that Respondent's denial of personal care services was incorrect.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

Respondent's denial of personal care services is **REVERSED**. Petitioner's appeal based on Respondent's denial is **GRANTED**.

DONE AND ORDERED this 9th day of September, 2020, in Tallahassee, Leon County, Florida.

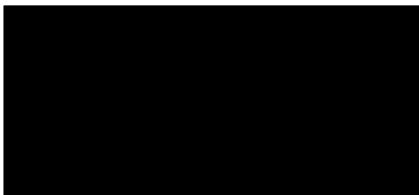
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NOTICE OF A RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

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