



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

FILED

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OFFICE OF FAIR HEARINGS

█

PETITIONER,

AHCA Case No.: 20-FH █

Plan ID No.: █

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 28, 2020, at █

APPEARANCES

For the Petitioner:

█
Petitioner

For the Respondent:

Trevor Mask
Director of External Relations
Sunshine State Health Plan, Inc.

STATEMENT OF ISSUE

The issue is whether Respondent proved by a preponderance of the evidence that Respondent's decision to reduce Petitioner's personal care services was correct.

PRELIMINARY STATEMENT

All parties appeared telephonically. Petitioner appeared on his own behalf. █

█, Petitioner's home health aide, appeared as a witness for Petitioner.

PRR0000821

Trevor Mask, Director of External Relations for Sunshine State Health Plan, Inc. (“Sunshine”) appeared on behalf of Respondent. The following attended as witnesses for Respondent: Dr. John Carter (“Dr. Carter”), Long Term Care Medical Director for Sunshine; Gabriel Schettini, Care Coordinator for Sunshine; Consuela Suarez, Supervisor of Long Term Care for Sunshine; and Melissa Layne, Senior Manager for Member Appeals for Sunshine.

Francisca, interpreter number 1540, of Global Interpreting Network appeared to offer translation services for Petitioner.

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

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a ninety-one (91)-page evidence packet. The evidence packet included: a table of contents; a Medicaid Fair Hearing Summary; a Notice of Adverse Benefit Determination (“NABD”), dated July 8, 2020; a Plan of Care (“POC”), dated July 1, 2020; a Florida Department of Elder Affairs 701B Comprehensive Assessment (“701B”), dated June 26, 2020; an Expedited Appeal Request Decision, dated July 9, 2020; Standard Appeal Acknowledgment, dated July 9, 2020; a Notice of Plan Expedited Appeal Resolution (“NPAR”), dated August 5, 2020; Sunshine Health Policy and Procedure-LTC Ancillary Service Criteria-LT.UM.09; and Florida Administrative Code Rule (“Fla. Admin. Code R.”) 59G-1.010. Absent an objection from the Petitioner undersigned admitted the ninety-one (91)-page packet into evidence as Respondent’s Composite Exhibit 1.

At the Fair Hearing, the record was held open until October 5, 2020, to allow Petitioner to submit medical records. On October 2, 2020, the Petitioner timely submitted four (4) pages of documents. The documents included: an e-mail, dated October 2, 2020; a fax cover sheet, dated

October 2, 2020; and a letter from [REDACTED] dated [REDACTED] 2020. The undersigned allowed Respondent until October 12, 2020, by 5:00 p.m., to offer an objection or a response to Petitioner's submission. Respondent did not submit anything in response to Petitioner's submission. Absent an objection from Respondent, the undersigned hereby admits Petitioner's documents as Petitioner's Composite Exhibit 1.

FINDINGS OF FACT

1. Petitioner is an enrolled member of Sunshine. Sunshine is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida.
2. Petitioner is sixty-one (61)-years old. *See* page 14 of Respondent's Composite Exhibit 1. Petitioner is diagnosed with muscular dystrophy, and suffers from constant bladder incontinence and occasional bowel incontinence. *Id.* at 29. Petitioner uses a wheelchair. *Id.*
3. In regards to his activities of daily living ("ADLs"), Petitioner needs assistance (but not total help) with bathing, dressing, using the bathroom, and transferring. *Id.* at 27. Petitioner needs supervision or prompting with walking/mobility. *Id.* Petitioner needs no assistance with eating. *Id.* In regards to his instrumental activities of daily living, Petitioner needs total assistance (cannot do at all) with heavy chores and light housekeeping. *Id.* at 28. For preparing meals, shopping, managing medication, and using transportation, Petitioner needs assistance, but not total help. *Id.* Petitioner uses an assistive device to use the telephone, and needs no assistance with managing money. *Id.*
4. Petitioner lives alone. *Id.* at 24. As testified to by Petitioner, there are no friends or family members that can assist Petitioner.

5. Petitioner's former plan of care included the following services: thirty-six (36) hours of personal care services, weekly; six (6) hours of homemaker services, weekly; five (5) home delivered meals, weekly; and a personal emergency response system. *Id.* at 17.

6. In the NABD, dated July 8, 2020, Respondent reduced Petitioner's personal care services from thirty-six (36) hours, weekly, to twenty-eight (28) hours, weekly. *Id.* at 4 – 13. The NABD explained the basis of the reduction 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: Sunshine Health has looked at the member's present care needs and provided home services. . . . Based on the assessment of the member's care needs and household and caregiver status, Sunshine Health will reduce the Personal Care Services from 36 per week to 28 hours per week, a reduction of 8 hours per week of Personal Care Services.

Pages 4 – 5 of Respondent's Composite Exhibit 1.

7. Petitioner requested a plan appeal and received an NPAR dated August 5, 2020, upholding the denial. *Id.* at 53 – 59. The NPAR explained as follows:

The reason for our decision was: Based on the assessment of the member’s care needs and household and caregiver status, the reduction of Personal Care Services from 36 hours/week to 28 hours/week (which is a reduction of 8 hours/week of Personal Care Services) is upheld. The presently approved services are enough to meet the member’s care needs. This decision was made with Sunshine Health Policy LT. UM. 09 Long Term Care Ancillary Service Criteria.

Page 53 of Respondent’s Composite Exhibit 1.

8. On June 29, 2020, Petitioner requested a hearing due to a reduction of eight (8) hours of personal care services. On September 8, 2020, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for September 28, 2020, at [REDACTED]

9. Dr. Carter is the Long Term Care Medical Director at Sunshine. Dr. Carter testified that he was able to reach his determination based on the information found in the 701B. Dr. Carter testified that, in his opinion, the currently approved services would meet Petitioner’s needs.

10. Petitioner submitted a letter from his physician, dated [REDACTED] 2020, which stated as follows:

I am the primary care doctor of [Petitioner] since 2015 and is my moral obligation to help this request of my patient to keep at last [sic] 6 hours of help to survive this severe genetic condition.

He is a very nice man confined to a wheeling chair for the last 25 years mentally normal but without any hope of any improvement[.]

His condition has been worsening in addition of his legs paralysis he [can’t] use his arms he only can touch the wheeling chair control bottom with great difficulty and he every morning has to wait his help to leave the bed [and] be transfer to the wheeling chair.

Also the cooked meals that was receiving before was suspended and the person that help during the 6 hours is preparing the meal.

Nobody can imagine the necessity of help to this patient if you don't see him.

I believe that your help can relief [sic] this patient life and that your decision will be grateful by him.

Pages 3 – 4 of Petitioner's Composite Exhibit 1.

11. As testified to by Petitioner, Petitioner's aide's schedule is from 11:00 a.m. until 5:00 p.m. each day. As testified to by Petitioner, it takes approximately two (2) hours each day for bathing, between thirty (30) and forty (40) minutes each day for dressing, and between sixty (60) minutes and ninety (90) minutes each day for meal preparation. It can take up to an hour for toileting to ensure that his bowels have completely evacuated, and he is toileted at least twice per day. When the aide is not present, he will use the adult diapers for toileting. As testified to by Petitioner, Petitioner's aide does all of his grocery shopping, which takes approximately an hour, and is done two (2) or three (3) times each week.

12. [REDACTED] is Petitioner's care aide. As testified to by [REDACTED], the amount of services hours approved by Sunshine does not afford enough time to provide care for Petitioner.

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 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 Fla. Admin. Code R. 59G-1.100(17)(b).

15. Because Respondent is reducing a previously approved service, 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 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.

17. 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.

18. 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.

19. LT.UM.09 provides as follows in regards to personal care services:

7. Personal Care Services

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, rather than the member's family. Personal care services include 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 administer any medications, but may bring medications to the member and remind the member to take the medications 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.

...

Approval Criteria

Personal Care Services reviews include four (4) criteria:

- a) Activity of Daily Living (ADL) limitations
- b) Living situation
- c) Supervision needs
- d) Available Supports

...

Exclusions and Limitations for Personal Care services include but are not limited to:

1. Service must be provided at member's residence.
2. Member must reside in a non-facility based setting.
3. The provider must be awake during the provision of personal care services.
4. If services are required overnight, member must live alone and one of the following conditions must apply:
5. Services provided by Sunshine Health may not duplicate services that are provided under by another provider.
6. Escort services

...

Page 77 - 83 of Respondent's Composite Exhibit 1.

20. In the NABD, dated July 8, 2020, Respondent reduced Petitioner's personal care services, from thirty-six (36) hours per week to twenty-eight (28) hours per week. See pages 4 – 13 of Respondent's Composite Exhibit 1. In the NPAR, dated August 5, 2020, it was explained that Petitioner's "presently approved services are enough to meet [his] needs." *Id.* at 53.

21. As provided in Respondent's policy, LT.UM.09, personal care services are to "provide assistance with eating, bathing, dressing, and personal hygiene, and other activities of daily living." Further, the policy provides that personal care provides with "preparation of meals" and "housekeeping tasks". As discussed in LT.UM.09, personal care services are determined, in part, based on: the recipient's ADL limitations; the recipient's living situation; the recipient's supervision needs; and the available supports. Moreover, 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.” As provided in the record, Petitioner requires assistance (but not total help) with bathing, dressing, using the bathroom, and transferring. *Id.* at 27. In regards to his IADLs, Petitioner requires assistance (cannot do at all) with heavy chores and light housekeeping, and needs assistance (but not total help) with preparing meals, shopping, managing medication, and using transportation. *Id.* at 28. Petitioner currently receives twenty-eight (28) hours of personal care services, weekly, and six (6) hours of homemaker care services, weekly. *Id.* at 5.

22. As Respondent bears the burden of proof, Respondent must show that it is not medically necessary for Petitioner to receive more than the reduced amount of services. 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 4. At the Fair Hearing, Dr. Carter testified, *supra* ¶ 9, that it was his opinion that the approved services are sufficient to meet Petitioner’s needs. One aspect of medical necessity is that the requested service must 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.” Respondent did not provide evidence of how long it should take to assist Petitioner with his ADLs or IADLs, though Petitioner provided the following estimates: two (2) hours for bathing, thirty (30) to forty (40) minutes for dressing; sixty (60) to ninety (90) minutes for meal preparation; one (1) hour to two (2) hours for toileting; and two (2) to three (3) hours for shopping. *See supra* ¶ 11. Petitioner is currently approved to receive thirty-four (34) hours of combined services, which is approximately four (4) hours and fifty (50) minutes each day. As provided by the record, Petitioner’s legs are paralyzed, and he cannot use his arms very well. *See page 3 of Petitioner’s*

Composite Exhibit 1. Furthermore, as testified to by Petitioner, *supra* ¶ 11, it takes approximately three and a half (3.5) hours each day to assist just with the ADLs of bathing, dressing, and toileting. Further, as testified to by Petitioner, *supra* ¶ 11, it takes between sixty (60) minutes and ninety (90) minutes each day to for Petitioner's aide to prepare meals. This totals between four and a half (4.5) hours of service and five (5) hours of service each day, which does not include grooming, laundry, heavy chores, or other tasks that the aide performs. Moreover, the record shows that the aide shops for Petitioner two (2) or three (3) times per week, and that this takes approximately an hour. *Id.* As provided by the record, Petitioner has no other caregivers, beyond what is provided by the Respondent. See ¶ 4. As such, the record indicates that Petitioner has a need for services beyond the amount approved (after being reduced).

23. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned concludes that Respondent did not prove by a preponderance of the evidence that Respondent's reduction of eight (8) hours of personal care services was correct.

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 **AFFIRMED**.

DONE AND ORDERED this 23rd day of October, 2020, in Tallahassee, Leon County, Florida.



Joseph Mabry
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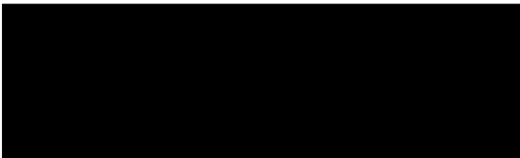
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NOTICE OF A RIGHT TO JUDICIAL REVIEW

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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