



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

FILED

Oct 29, 2020, 9:10 am
OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 20-[REDACTED]

Plan ID No.: [REDACTED]

vs.

WELLCARE OF FLORIDA, INC.,

RESPONDENT.

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on October 2, 2020, at [REDACTED]

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner's Authorized Representative

For the Respondent:

Michelle Burgos
Regulatory Research Coordinator
Wellcare of Florida, Inc.

STATEMENT OF ISSUE

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

PRELIMINARY STATEMENT

All parties appeared telephonically. Petitioner's Authorized Representative and daughter, [REDACTED] (" [REDACTED] ") appeared on behalf of the Petitioner. Petitioner appeared to offer testimony.

PRR0000863

Michelle Burgos (“Ms. Burgos”), Regulatory Research Coordinator for Wellcare of Florida, Inc. (“Staywell”), appeared on behalf of Respondent. The following attended as witnesses for the Respondent: Nichole Vega, Regulatory Research Coordinator for Staywell; Dr. Maria Samerson (“Dr. Samerson”), Medical Director for Staywell; Brenda Lohman, Manager for Staywell; Rebecca Drake, Supervisor for Staywell; Markeisha Wallace-Watson, Case Manager for Staywell; and Carole Farrant, Supervisor for Staywell.

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

Prior to the hearing, Petitioner sent to the Office of Fair Hearings and Respondent a four (4)-page evidence packet. The evidence packet included: an e-mail from [REDACTED], dated September 10, 2020; a letter from [REDACTED] and a letter from [REDACTED]. Absent an objection from Respondent, the undersigned admitted the four (4)-page evidence packet as Petitioner’s Composite Exhibit 1.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred and three (103)-page evidence packet. The evidence packet included: a summary; a table of contents; an eligibility verification screen print; a prior authorization screen print; a Notice of Adverse Benefit Determination (“NABD”), dated July 20, 2020; an appeal request screen print; case notes; clinical notes; a Florida Department of Elder Affairs 701B Comprehensive Assessment (“701B”); Florida Administrative Code Rule (“Fla. Admin. Code R.”) 59G-1.010; Staywell Long Term Services and Supports (LTSS) – Florida, Policy Number: HS-500; the Florida Medicaid Statewide Medicaid Managed Long-term Care Program Coverage Policy (March 2017) (“LTC Policy”); Florida Medicaid MMA Contract, Section V.D.3.a(1).(2).(3).(4).(5); and Staywell

Member Handbook, pages 22, 35, 67, 69, and 73. Absent an objection from the Petitioner, undersigned admitted the one hundred and three (103)-page packet into evidence as Respondent's Composite Exhibit 1.

FINDINGS OF FACT

1. Petitioner is an enrolled member of Staywell. Staywell is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida.

2. Petitioner is seventy-nine (79)-years old. *See* page 29 of Respondent's Composite Exhibit

1. Petitioner is diagnosed with arthritis, multiple sclerosis, osteoporosis, and suffers from occasional bladder incontinence. *Id.* at 36. Petitioner does not display any of the following behaviors: forgetful or easily confused; gets lost or wanders off; physically aggressive or violent; intentionally injures or harms herself; expresses suicidal feelings or plans; or hallucinates, hears/sees things that are not there. *Id.* at 40. The 701B further reports that Petitioner does not need supervision, but also that Petitioner "[n]eeds assistance due to physical limitations due - should not be left alone, but not in relation to any type of mental deficiency or illness." Petitioner is confined to a wheelchair. *See* page 3 of Petitioner's Composite Exhibit 1.

3. Petitioner lives with [REDACTED]. *See* page 35 of Respondent's Composite Exhibit 1

4. Petitioner's activities of daily living (ADLs) are as follows: for bathing, dressing, using the bathroom, and walking/mobility, Petitioner needs total assistance (cannot do at all); for eating, Petitioner needs assistance (but not total help). *Id.* at 34. Petitioner's instrumental activities of daily living ("IADLs") are as follows: for heavy chores, light housekeeping, preparing meals, managing medication, and using transportation, Petitioner needs total assistance (cannot do at

all); for managing money and shopping, Petitioner needs assistance (but not total help); and for using the telephone, Petitioner uses an assistive device. *Id.* at 35.

5. As testified to by Ms. Burgos, Petitioner is currently approved to receive thirty-five (35) hours of personal care services, weekly, and twenty-one (21) hours of homemaker care services, weekly.

6. In the NABD, dated July 20, 2020, the Respondent terminated Petitioner's adult companion care services, which was twenty-one (21) hours, weekly. *Id.* at 9 – 18. The NABD explained the basis of the termination 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:

WellCare received your request for to continue 21 hours of adult companion care services. This request was denied because the information provided does not support that it is required to manage your medical condition(s). You do not live alone. You are able to communicate with others to express your needs. You do

not have a history of wandering outside of the home and getting lost. You are safe to be home alone for a period of time. Given this, adult companion hours are not indicated. The number of hours for hands-on assistance with personal care (such as bathing and dressing), and for homemaking tasks will continue, unchanged. This new total number of hours covers the time that your natural caregivers/family members are working outside of the home. Criteria: WellCare Clinical Coverage Guideline, Long Term Services and Supports (LTSS) – Florida.

Pages 9 – 10 of Respondent’s Composite Exhibit 1.

7. Petitioner requested a plan appeal. On August 14, 2020, Respondent issued a Notice of Plan Appeal Resolution upholding the termination. *Id.* at 2.

8. On August 19, 2020, Petitioner requested a Fair Hearing to challenge the termination of adult companion care.

9. Petitioner’s physician, [REDACTED], drafted a letter, dated August 25, 2020, that states as follows:

Please be informed that I am the attending provider for [Petitioner] who has asked me to write this letter. [Petitioner] has been diagnosed with chronic, progressive Multiple Sclerosis. She is a quadriplegic and confined to a wheelchair. Because of this, she requires assistance with all of her activities of daily living and constant supervision.

Page 2 of Petitioner’s Composite Exhibit 1.

10. On September 17, 2020, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for October 2, 2020, at [REDACTED]
[REDACTED]

11. [REDACTED] works a full time job, outside of her home. See page 47 of Respondent’s Composite Exhibit 1. As testified to by [REDACTED], Ms. Warred leaves for work at 7:00 a.m. and returns at 7:00 p.m. in the evening. [REDACTED] works Monday through Saturday. As testified to by [REDACTED], [REDACTED]’s husband leaves for work at 6:30 a.m. and returns at 6:30 p.m. [REDACTED]

████████ husband works Monday through Saturday. As testified to by ██████████, Petitioner's aide does not arrive until 10:00 a.m. each day, and a caregiver is present each day. ██████████ rated her employment as "moderate difficulty" when factored into caring for Petitioner. See page 48 of Respondent's Composite Exhibit 1. ██████████ described caring for Petitioner as providing "a lot of [mental or emotional] strain". *Id.*

12. Dr. Samerson is a Medical Director for Staywell. Dr. Samerson testified that when the decision was made, it was based upon belief that ██████████ and her husband worked only forty (40) hours each week. Dr. Samerson testified that because Petitioner was receiving fifty-six (56) hours of combined homemaker and personal care services, there did not appear to be a need for adult companion care services.

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 terminating or reducing a previously approved service, Fla. Admin Code R. 59-1.100(17)(g) assigns the burden of proof to Respondent. 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 adult companion 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

...

4.2.1.1 Adult Companion Care

The provision of non-medical care, supervision when necessary to protect the health, safety, and well-being of the enrollee, or social enrichment of a functionally impaired enrollee. This includes assistance or supervision with meal preparation, laundry, and light housekeeping tasks incidental to the care and supervision of the enrollee.

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. In the NABD, dated July 20, 2020, the Respondent terminated Petitioner's twenty-one (21) hours, weekly, of adult companion care services. See pages 9 – 18. 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. The NABD explained that Petitioner's request was not medically necessary because Petitioner "does not live alone" and that it is safe for her to be left alone for "a period of time". *Id.* at 10.

20. As provided in the LTC Policy, adult companion care is to provide "non-medical care, supervision when necessary to protect the health, safety, and well-being of the enrollee, or social enrichment of a functionally impaired enrollee." Petitioner suffers from multiple sclerosis. *Id.* at 36. Dr. Samerson testified that the Respondent's decision was made upon belief that [REDACTED] and her husband worked only forty (40) hours each week. See *supra* ¶ 12. However, as shown by the record, Petitioner's daughter and son-in-law work more than forty (40) hours, weekly, and Petitioner is now left alone six (6) days a week, from at least 7:00 a.m. until 10:00 a.m., when her aide arrives. See *supra* ¶ 11. This totals eighteen (18) hours.



21. There is conflicting evidence of whether Petitioner needs supervision. For example, the 701B provides both that Petitioner needs no supervision, but that “[Petitioner] should not be left alone, but not in relation to any type of mental deficiency or illness.” *Id.* at 40. However, Petitioner’s physician provided a letter stating Petitioner needed “constant supervision.” See page 2 of Petitioner’s Composite Exhibit 1. The record does not show why she needs supervision; for example, it was not established that she hallucinates, intentionally harms herself, wanders off, or is unable to use the telephone in an emergency. See pages 35 and 40 of Respondent’s Composite Exhibit 1.

22. As Respondent bears the burden of proof, Respondent must show that it is not medically necessary for Petitioner to receive the terminated services. As discussed above, Petitioner has some credible evidence, such as the letter from her physician and the conflicting language in the 701B, that non-medical supervision is necessary for her; the evidence also indicates that she is alone for a substantial period of time. Although Respondent asserted, in the NABD, that she could be left alone for a “period of time” no specific amount of time was provided. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned concludes that Respondent did not show by a preponderance of the evidence that its termination of twenty-one (21) hours, weekly, of Petitioner’s adult companion care was correct.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

Respondent’s termination of Petitioner’s adult companion care is **REVERSED**. Petitioner’s appeal based on Respondent’s termination is **GRANTED**.

DONE AND ORDERED this 29th day of October, 2020, in Tallahassee, Leon County, Florida.

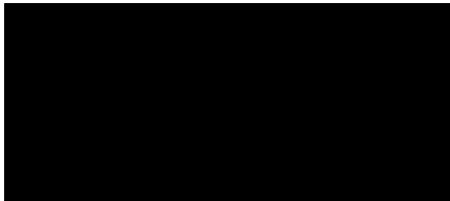
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NOTICE OF A RIGHT TO JUDICIAL REVIEW

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.

Copies Furnished To:



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