



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

FILED

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OFFICE OF FAIR HEARINGS

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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 October 19, 2020, at ██████████

APPEARANCES

For the Petitioner: ██████████
Petitioner's Authorized Representative

For the Respondent: Maria Mojica
Compliance Specialist
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 from thirty-three (33) hours per week to twenty-five (25) hours per week was correct.

PRELIMINARY STATEMENT

All parties appeared telephonically. Petitioner's Authorized Representative and wife, ██████████ ("██████████") appeared on behalf of the Petitioner.

Maria Mojica, Compliance Specialist for Sunshine State Health Plan, Inc. (“Sunshine”) appeared on behalf of Respondent. Dr. John Carter (“Dr. Carter”), Long Term Care Medical Director for Sunshine; Melissa Layne, Senior Manager for Member Appeals for Sunshine; Mariana Banco-Thomas, Long Term Care Case Management Supervisor for Sunshine; Toni-Marie Scott, Case Manager for Sunshine; and Alshonica Williams, Care Coordinator Supervisor for Sunshine attended as witnesses for Respondent.

Doris Rivera, Medical/Health Care Program Analyst for the Agency for Health Care Administration (“Agency”), 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 one hundred and twenty-six (126)-page evidence packet. The evidence packet included a table of contents; a Medicaid Fair Hearing Summary, dated September 25, 2020; the Notice of Adverse Benefit Determination (“NABD”), dated August 4, 2020; a Long Term Care Person-Centered Care Plan, reviewed July, 28, 2020; a second Long Term Care Person-Centered Care Plan, reviewed August 28, 2020; a Florida Department of Elder Affairs 701B Comprehensive Assessment (“701B”), dated July 28, 2020; a second 701B, dated September 14, 2020; Petitioner’s plan appeal, dated August 12, 2020; a plan expedited appeal acknowledgment, dated August 24, 2020; a Notice of Expedited Plan Appeal Resolution (“NPAR”), dated August 27, 2020; Sunshine Health Policy and Procedure LT.UM.09, last revised November 2019; and Fla. Admin. Code R. 59G-1.010(166). Absent an objection from the Petitioner’s Authorized Representative, the undersigned admitted the one hundred and twenty-six (126)-page evidence packet into evidence as Respondent’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-six (66)-years old and diagnosed with constant dizziness, chronic hypoxic respiratory failure, brain cyst, interstitial lung disease, and exertional dyspnea. Respondent's Composite Exhibit 1 at 49 and 56.
3. Petitioner needs total assistance with bathing and dressing. Petitioner uses an assistive device for using the bathroom, transferring, and walking/mobility. *Id.* at 35. Petitioner always has assistance with these tasks. *Id.* at 36 and 53. Petitioner showers daily and takes thirty minutes due to Petitioner's bouts of dizziness. *Id.* Petitioner takes twenty minutes to get dressed due to shortness of breath with exertion. *Id.* Petitioner wakes every hour at night to toilet which takes Petitioner five to ten minutes each time. Petitioner takes five minutes to transfer from his bed to a wheelchair. *Id.*
4. Petitioner requires total assistance with heavy chores, light housekeeping, managing money, preparing meals, shopping and using transportation. *Id.* at 36. Petitioner requires some assistance with using the telephone and managing medication. *Id.* Petitioner always has assistance with these tasks. *Id.* at 36 and 54. Petitioner lives with his wife who acts as Petitioner's paid caregiver through the Patient Directed Option ("PDO"). *Id.* at 35. Petitioner's wife does not work outside of the home and spends eighty (80) hours per week caring for Petitioner. *Id.* at 63 through 64. Petitioner's wife reports that she has little difficulty with the following: her relationship with Petitioner, family, and friends; her physical health; her finances; and time for

herself to do things she enjoys. *Id.* at 64. She is confident in her ability to continue to provide care and reports no difficulty with her functional abilities. *Id.*

5. Prior to August 15, 2020, Petitioner's plan of care included thirty-three (33) hours per week of Personal Care services and seven (7) hours of Homemaker services per week. *Id.* at 25.

6. Respondent reduced Petitioner's Personal Care services to twenty-five hours per week in an NABD dated August 4, 2020. The reduction was effective August 15, 2020, and 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: Sunshine Health has looked at the member's present care needs and provided home services. The member's present care plan includes 33 hours per week of Personal Care 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 33 hours per week to 25 hours per week, a reduction of 8 hours per week of Personal Care Services. The updated care plan approved by Sunshine Health will include 25 hours per week of Personal Care Services. This decision was made with Sunshine Health Policy LT.UM.09 Long Term Care Ancillary Service Criteria.

Id. at 4 through 5.

7. Petitioner requested a plan appeal and received an NPAR dated August 27, 2020, upholding the denial. The NPAR explained as follows:

On August 26, 2020, after consideration of the information you provided to Sunshine Health in support of your expedited plan appeal, Sunshine Health hereby DENIES your plan appeal. As a result, [REDACTED] will not receive 33 hours per week of personal care (the person who helps bathe and dress you), effective August 26, 2020.

The reason for our decision was Based [sic] on the assessment of the member's care needs and household and caregiver status, the reduction of Personal Care Services from 33 hours/week to 25 hours/week is upheld. The presently approved Personal Care 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.

Id. at 88.

8. [REDACTED] requested a Fair Hearing on behalf of Petitioner on September 8, 2020. On September 22, 2020, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for October 19, 2020, at [REDACTED]

9. During the hearing, Dr. Carter testified that Petitioner's Personal Care services and Homemaker services were reviewed, and that Petitioner's Personal Care services were reduced because Petitioner lives with his wife who provides care for Petitioner.

10. At the hearing, [REDACTED] testified that Petitioner's conditions are worsening and the she provides constant care for Petitioner. [REDACTED] also testified that she acts as Petitioner plan provided caregiver through the Participant Directed Option.

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). 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 Respondent is reducing services, Fla. Admin Code R. 59G-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.

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)

...

1.3.16 Natural Supports

Unpaid supports that are provided voluntarily to the individual in lieu of home and community-based services and supports.

...

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 Personal Care Services Coverage Policy (November 2016) ("Personal Care Policy") addresses general time allowances for Personal Care tasks in Appendix 9.1:

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 minimum, bathing of the face, hands, and perineum. - 15–20 minutes per partial bath

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

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

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

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

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

Taking in food by any method. Extra time may be allowed for preparing a special diet. - 30 minutes per meal

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

(Reformatted from table in Personal Care Policy).

17. Respondent reduced Petitioner's Personal Care services on the basis that the current service level is not medically necessary. *Supra* ¶ 6. As provided in the LTC Policy, Personal Care services are intended 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. *Supra* ¶ 14.

18. Dr. Carter testified that the reduction in Petitioner's Personal Care services to twenty-five hours per week was based on a review of Petitioner's plan of care and current services. *Supra* ¶ 9. As shown in the evidence, Petitioner is also receiving seven (7) hours of Homemaker services, giving Petitioner thirty-two (32) hours of total care services, after the reduction. *Supra* ¶ 5. ■■■■ testified that Petitioner's conditions are worsening and that she provides constant care for Petitioner; the 701B shows she provides eighty (80) hours per week. *Supra* ¶ 4 and ¶ 10. The evidence shows that the Petitioner always has assistance with IADLs and ADLs in the 701Bs dated July 28, 2020, and September 14, 2020. *See supra* ¶ 3 through ¶ 4 and ¶ 14. Petitioner receives three and one half (3.5) hours of assistance bathing per week, two and one third hours of assistance with dressing (2.333), and five to ten minutes of toileting assistance per hour at night amounting to approximately two-thirds of an hour (.667) to one and one third of an hour (1.333),

assuming Petitioner sleeps eight (8) hours per day. *See supra* ¶ 3. Petitioner also receives assistance of at least one half (.5) hour per week transferring from his bed to the wheelchair. *Id.* Of Petitioner's ADLs that have some estimates of time spent, Petitioner is likely receiving at least seven (7) hours of assistance per week.

19. The component of medical necessity at issue is whether Petitioner's request is 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. *Supra* ¶ 16. Respondent reduced Petitioner's services citing that Petitioner lives with his wife who provides care and that the original level of Personal Care services approved were excessive as its reasoning. Respondent did not fully address how it arrived at the reduced amount of Personal Care services. The Personal Care policy addresses the time allowances for various Personal Care tasks. The 701B shows that Petitioner likely requires at least seven (7) hours of assistance with ADLs. The amount of assistance required by Petitioner with his ADLs is consistent with the general time allowances in the Personal Care Policy. It's known that Petitioner needs total assistance with IADLs that include heavy chores, light housekeeping, managing money, preparing meals, shopping and using transportation, but what is unknown is how much time is needed to assist Petitioner with those tasks, specifically if it justifies the remaining twenty-six (26) hours of Personal Care services that is not specifically accounted for.

20. The undersigned considered [REDACTED] testimony that she provides "constant care" for Petitioner which is a fair characterization of the eighty hours (80) per week reflected in the 701B. There is no indication on the record or in the evidence that [REDACTED] is an involuntary caregiver for Petitioner. As such, the record indicates that a reduction in Personal Care services does not


reflect a reduction in [REDACTED] ability to act as a natural support. This is also supported by the 701Bs dated July 28, 2020, and September 14, 2020, which show that Petitioner always as assistance with his IADLs and ADLs; [REDACTED] reports little to no personal difficulties; and [REDACTED] is confident in her ability to continue to care for Petitioner. Because [REDACTED] is available to provide care on a constant basis, including as a natural support, Respondent has met the burden of proof to show that the specific amount of Personal Care service hours reduced are not individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and in excess of Petitioner's needs.

21. Accordingly, the undersigned concludes that Respondent has proved by a preponderance of the evidence that Respondent's reduction of Personal Care services from thirty-three (33) hours per week to twenty-five (25) hours per week was correct.

22. **IT IS HEREBY ORDERED AND ADJUDGED:**

Respondent's reduction of services is **AFFIRMED**. Petitioner's appeal based on Respondent's reduction of Personal Care services from thirty-three (33) hours per week to twenty-five (25) hours per week is **DENIED**.

DONE and ORDERED this 7th day of December 2020, in Tallahassee, Leon County, Florida.



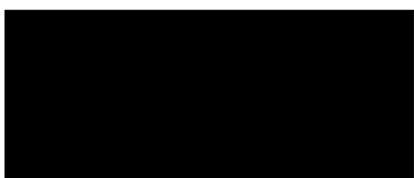
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CHARLES MARTIN, Hearing Officer
Agency for Health Care Administration
Office of Fair Hearings
2727 Mahan Drive, Mail Stop # 11
Tallahassee, FL 32308-5407
Office: (850) 412-3649
Fax: (850) 487-1423
Email: OfficeOfFairHearings@ahca.myflorida.com

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:



Sunshine State Health Plan, Inc.
SunshineHealth_MFH@centene.com

AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com