



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

FILED

Nov 12, 2020, 11:45 am

OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 20-FH [REDACTED]

Plan ID No.: [REDACTED]

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 21, 2020, at [REDACTED]

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner's Authorized Representative

For the Respondent:

Melissa Layne

Senior Manager for Member Appeals

Sunshine State Health Plan, Inc.

STATEMENT OF ISSUE

The issue is whether Petitioner proved by a preponderance of the evidence that Respondent's decision to deny Petitioner's request for eighty-four (84) hours of additional personal care services was incorrect.

PRELIMINARY STATEMENT

All parties appeared telephonically. Petitioner's Authorized Representative and daughter, [REDACTED] ("[REDACTED]") appeared on behalf of the Petitioner. Petitioner's son, [REDACTED] ("[REDACTED]"), attended as a witness for Petitioner.

Melissa Layne, Senior Manager for Member Appeals for Sunshine State Health Plan, Inc. ("Sunshine") appeared on behalf of Respondent. The following attended as witnesses for Respondent: Dr. Veronica McCloskey ("Dr. McCloskey"), Medical Director for Sunshine; Marion Crabb, Case Manager for Sunshine; Christina Martin, Long Term Care Case Manager Supervisor for Sunshine; and Kathrine Caloje, Long Term Care Supervisor for Sunshine.

Marielisa Amador, 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 fourteen (14)-page evidence packet. The evidence packet included: an e-mail from [REDACTED], dated October 14, 2020; a letter, dated October 14, 2020, from [REDACTED] ("[REDACTED]"); an After Visit Summary, dated February 15, 2012; a fax cover sheet, dated October 19, 2020, with two (2) pages of documents; an e-mail from [REDACTED], dated October 20, 2020; and a letter from [REDACTED], dated October 16, 2020. Absent an objection from the Respondent, the undersigned admitted the fourteen (14)-page packet into evidence as Petitioner's Composite Exhibit 1.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred and twenty-four (124)-page evidence packet. The evidence packet included: a table of contents; a Medicaid Fair Hearing Summary; a Notice of Adverse Benefit Determination ("NABD"), dated June 25, 2020; a Plan of Care ("POC"), dated June 22, 2020; a POC, dated

September 22, 2020; a Florida Department of Elder Affairs 701B Comprehensive Assessment (“701B”), dated June 22, 2020; a 701B, dated September 11, 2020; an eleven (11)-page fax from [REDACTED], dated August 6, 2020; a Request for an Appeal or Grievance Form, dated August 6, 2020; a Standard Appeal Acknowledgment, dated August 13, 2020; a Notice of Plan Appeal Resolution (“NPAR”), dated September 5, 2020; a 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, the undersigned admitted the one hundred and twenty-four (124)-page 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 [REDACTED]-years old. See page 13 of Respondent’s Composite Exhibit 1. Petitioner lives alone. *Id.* at 50.
3. Petitioner is diagnosed with bed sores, high blood pressure, high cholesterol, heart problems; frequent bladder incontinence, frequent bowel incontinence, kidney problems, COPD, osteoporosis, mixed hyperlipidemia, Vitamin D deficient, pre-diabetic, metabolic syndrome, chronic atrial fibrillation, pulmonary emphysema, age related debility, dyspnea, renal cyst, left adrenal nodule, uterovaginal prolapse, carotic stenosis, state 3 chronic kidney disease, brain tumor, and tumor on left eye. *Id.* at 55 – 56. Petitioner is diagnosed with dementia. *Id.* at 58. Petitioner “presents with periods of confusion.” *Id.* at 51. Petitioner “needs supervision as to her dementia as member lets anyone into her home.” *Id.* at 58. Petitioner is “forgetful or easily

confused” nearly every day. *Id.* at 58. Petitioner has been prescribed a CPAP machine, but cannot put the mask on by herself. *See* page 11 of Petitioner’s Composite Exhibit 1.

4. Petitioner was admitted to the Emergency Room on the following dates: [REDACTED], 2020, for elevated blood pressure; [REDACTED] 2020 – [REDACTED] 2020, for UTI and dehydration; [REDACTED] 2020 – [REDACTED] 2020, for UTI; and [REDACTED] 2020 – [REDACTED] 2020, for UTI.

Id. at 8.

5. In regards to her activities of daily living (“ADLs”), Petitioner needs total assistance (cannot do at all) with bathing, and dressing; Petitioner needs assistance (but not total help) with eating, using the bathroom, transferring, and walking/mobility. *See* page 53 of Respondent’s Composite Exhibit 1. Petitioner wakes at least four (4) times during the night to use the bathroom. *See* page 11 of Petitioner’s Composite Exhibit 1. Further,

[t]he member does not understand the task of bathing and dressing due to dementia. Member requires that her food is cut up and her eating is supervised due to her tendency to choke. Member requires physical assistance transferring, requires one person assist with ambulation with a walker.

Bathing – Member requires total care. Needs help in and out of the shower, needs assistance with lathering body, setting water and proper temperature. Mbr has impaired vision and risk for falls. Mbr also has SOB.

Dressing – Needs clothes to be picked, laid out, needs assistance putting on all items.

Page 53 of Respondent’s Composite Exhibit 1.

6. In regards to her instrumental activities of daily living (“IADLs”), Petitioner needs total assistance (cannot do at all) with heavy chores, light housekeeping, managing medication, managing money, preparing meals, shopping, and using transportation. *Id.* at 54. Petitioner needs assistance (but not total help) with using the telephone. *Id.*

7. Petitioner's son assists with mowing the lawn and heavy chores. *Id.* at 54. [REDACTED] assists with shopping, coordination of benefits, scheduling appointments, transporting member to and from medical appointments, and recreational outings. *Id.* [REDACTED] manages Petitioner's medications. *Id.*

8. Petitioner's plan of care includes 84.25 hours of personal care services, weekly, and 13.75 hours of homemaker care services, weekly. *Id.* at 29. Petitioner formerly received Home Delivered Meals, but that service was terminated as of September 8, 2020. *Id.* at 29.

9. Petitioner requested an additional eighty-four (84) hours of personal care services, weekly. Petitioner's request was denied in the NABD dated June 25, 2020. *Id.* at 4 - 12. 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: The request for an extra 84 hours per week of Personal Care Services is denied for lack of medical necessity. Based

on the assessment, the member's currently approved services are adequate to meet the member's care needs. The member's present care plans includes 84.25 hours per week of personal care services and 13.75 hours per week of Homemaker Services. This decision was made with Sunshine Health Policy LT.UM.09 Long Term Care Ancillary Service Criteria.

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

10. Petitioner requested a plan appeal and received an NPAR dated September 5, 2020, upholding the denial. *Id.* at 86 - 92. The NPAR explained as follows:

The reason for our decision was:

The appeal to overturn the denial for addition of extra 84 hrs/wk Personal Care as Services is DENIED for lack of medical necessity. Based on the assessment, the member's currently approved services are adequate to meet the member's care needs. The member's present care plan includes 84.25 hours per week of Personal Care Services and 13.75 hours per week of Homemaker Services. This decision was made with Sunshine Health Policy LT.UM.09 Long Term Care Ancillary Service Criteria.

Page 86 of Respondent's Composite Exhibit 1.

11. On September 10, 2020, Petitioner's Authorized Representative requested a Fair Hearing due to a denial of eighty-four (84) hours of personal care services, weekly. On October 1, 2020, the undersigned issued an Order Scheduling Hearing by Telephone and Preliminary Instructions, setting the hearing for October 21, 2020, at [REDACTED].

12. Petitioner submitted a letter from [REDACTED], dated October 14, 2020, which stated as follows:

[Petitioner] was discharged from [REDACTED] on [REDACTED] 2020. At the time of her discharge, it was recommended that she have 24/7 supervision at home.

Page 2 of Petitioner's Composite Exhibit 1.

13. On October 15, 2020, Petitioner received surgery to remove two (2) toenails and to have a toe bandaged. See page 10 of Petitioner's Composite Exhibit 1.

14. Petitioner submitted a letter from Dr. Diana Galindo (“Dr. Galindo”), dated October 16, 2020, which stated as follows:

[Petitioner], ■ years old, is under my care and she has multiple comorbidities and signification debility that she would require 24/7 care at all times.

Page 5 of Petitioner’s Composite Exhibit 1.

15. As testified to by ■■■■■ at hearing, Petitioner’s care aide is present from approximately 8:00 a.m. until 12:00 p.m., and 2:00 p.m. until 11:00 p.m., Monday through Friday; and 8:00 a.m. until 11:00 p.m., on Saturday and Sunday.

CONCLUSIONS OF LAW

16. 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).

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

18. 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.)

19. The Florida Medicaid 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 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

...

4.2.1.9 Homemaker Services

The provision of general household activities (such as meal preparation) and routine household care (including laundry and pest control) by a trained homemaker, when the individual regularly responsible for these activities is temporarily absent or unable to manage these activities.

...

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.

20. 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.

21. 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.

22. 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

Pages 110 - 115 of Respondent's Composite Exhibit 1.

23. Petitioner requested an additional eighty-four (84) hours of personal care services, weekly. In the NABD, dated June 25, 2020, Respondent denied her request. See pages 4 – 12 of Respondent's Composite Exhibit 1. The NABD explains that "the member's currently approved services are adequate to meet the member's care needs." *Id.* 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 assistance 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."

24. As provided in the record, Petitioner needs total assistance (cannot do at all) with bathing, and dressing; and needs assistance (but not total help) with eating, using the bathroom, transferring, and walking/mobility. *Id.* at 53. In regards to her IADLS, Petitioner needs total

assistance (cannot do at all) with heavy chores, light housekeeping, managing medication, managing money, preparing meals, shopping, and using transportation. *Id.* at 54. Additionally, Petitioner suffers from dementia, has impaired vision, and is at risk for falls. *Id.* at 53. Petitioner's physician, [REDACTED], explained that "it was recommended that [Petitioner] have 24/7 supervision at home." See page 2 of Petitioner's Composite Exhibit 2. Petitioner's physician, Dr. Galindo, opined that Petitioner "would require 24/7 care at all times." *Id.* at 5.

25. As provided in section 4.1 of the LTC Policy, personal care services must be medically necessary. A component of medical necessity is that services 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." Here, Petitioner's receives ninety-eight (98) hours of combined services during the week, and those services are received daily. See ¶ 8, 15. Additionally, Petitioner receives some assistance each week from her children, who provide assistance with heavy chores, shopping, and managing medication. See page 54 of Respondent's Composite Exhibit 1. However, Petitioner is alone from 11:00 p.m. until 8:00 a.m., each day. Petitioner provided evidence from her provider that she may need twenty-four (24) care each day, however, she did not show how those hours were to be used. For example, Petitioner did not show which ADLs or IADLs were not being addressed by her current services, and how much time it took to provide for those ADLs and IADLs. Petitioner provided evidence that she needs assistance with toileting during the evening, but it was not established that toileting at night would necessitate eighty-four (84) hours of additional services per week. Lastly, Petitioner provided evidence that she may need supervision at night, however, this is unrelated to assistance with an ADL or IADL. Accordingly, the record indicates that there may be evidence for


the need of additional hours of care to provide supervision of the Petitioner, but the evidence does not show that eighty-four (84) additional hours are necessary to provide for Petitioner's ADLs or IADLs, which is the purpose of personal care services. Thus, Petitioner did not show that her request for an additional eighty-four (84) hours of personal care services were "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."

26. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned concludes that Petitioner did not prove by a preponderance of the evidence that Respondent's denial of eighty-four (84) additional hours of personal care services was incorrect.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

Respondent's denial of personal care services is **AFFIRMED**. Petitioner's appeal based on Respondent's denial is **DENIED**.

DONE AND ORDERED this 12th day of November, 2020, in Tallahassee, Leon County, Florida.

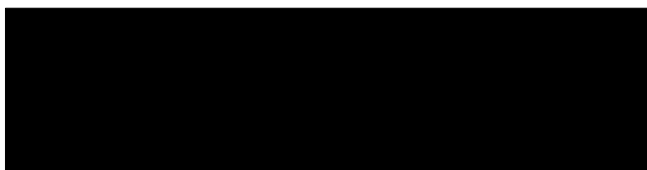
 Joseph Mabry
20-FH [REDACTED]
2020.11.12 11:36:17
-05'00'

JOSEPH MABRY, 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
SunshineHealth_MFH@centene.com

AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com