



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

FILED

Dec 01, 2020, 12:09 pm  
OFFICE OF FAIR HEARINGS

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PETITIONER,

AHCA Case No.: 20-FH █

Plan ID No.: █

vs.

WELLCARE OF FLORIDA, INC.,

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on November 10, 2020, at █

**APPEARANCES**

For the Petitioner:

█

Petitioner

For the Respondent:

Michelle Burgos  
Research Regulatory 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 seven (7) hours, weekly, of Petitioner's personal care services was correct.

**PRELIMINARY STATEMENT**

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

PRR0001252

Michelle Burgos, Regulatory Research Coordinator for WellCare of Florida, Inc. (“Staywell”) appeared on behalf of Respondent. The following appeared as witnesses for the Respondent: Nicole Vega, Regulatory Research Coordinator for Staywell; Brenda Lohman, Manager for Stayell; Dr. Charise Andrews (“Dr. Andrews”), Medical Director for Staywell; Erica McPeck, Long Term Care Specialist; Necheli Toussant, Long Term Care Supervisor for Staywell; Diondru Okwuasba, Manager for Long Term Care for Staywell; and Carrole Farrant, Operations Supervisor for Staywell.

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 one hundred and twenty-four (124)-page evidence packet. The evidence packet included: a summary; a list of supporting documents; eligibility verification screen print; prior authorization request screen print; a Notice of Adverse Benefit Determination (“NABD”), dated September 9, 2020; appeal request screen print; an Expedited Appeal Determination, dated September 22, 2020; Case Notes; Clinical Notes; a Request for Medical Information, dated September 22, 2020; a Florida Department of Elder Affairs 701B Comprehensive Assessment (“701B”), dated August 18, 2020; Clinical Review Template; Medical Director Case Review Form, dated September 3, 2020; a Notice of Plan Appeal Review Form (“NPAR”), dated October 8, 2020; Florida Administrative Code Rule (“Fla. Admin. Code R.”) 59G-1.010; WellCare Clinical Guideline Long Term Services and Supports (LTSS)-Florida Policy HS-500; the Florida Medicaid Statewide Medicaid Managed Long-term Care Program Coverage Policy (March 2017) (“LTC Policy”); Medicaid MMA Contract Section

V.D.3.a(1)(2)(3)(4)(5); and the Staywell Florida Medicaid Member Handbook. Absent an objection from the Petitioner 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 Staywell. Staywell is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida.

2. Petitioner is fifty-nine (59)-years old. *See* page 42 of Respondent's Composite Exhibit 1. Petitioner suffers from continues nerve pain in his hands and arms due to a motor vehicle accident in 2010. *Id.* at 47. Petitioner is diagnosed with acid reflux/GERD, osteoarthritis, high blood pressure, high cholesterol, diabetes, and fibromyalgia.

3. Petitioner's activities of daily living ("ADLs") are as follows: for bathing, Petitioner needs supervision or prompting. *Id.* at 47. Petitioner's instrumental activities of daily living ("IADLs") are as follows: for preparing meals, Petitioner needs total assistance (cannot do at all); and for heavy chores, light housekeeping, shopping, and using transportation, Petitioner needs assistance (but not total help). *Id.* at 48. Petitioner requires assistance with chores and housekeeping due to bilateral hand pain and contractures. *Id.* 48. Petitioner requires supervision for bathing. *Id.* at 53. As testified to by Petitioner, it takes approximately one (1) hour to take a shower. As testified to by Petitioner, he has fallen twice while bathing in the past ten (10) years.

4. Petitioner currently receives twenty-one (21) hours of homemaker services, weekly. *Id.* at 68.

5. In the NABD, dated September 9, 2020, Respondent terminated Petitioner's seven (7) hours of personal care, 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 to continue 7 hours of personal care services each week. This request was denied because the information provided does not support that it is required to manage your medical condition(s). You are able to dress, transfer, toilet, walk and bathe without hands-on assistance from another person. You are able to communicate with others to express your needs. You do need help with some light housekeeping tasks. Given this, the personal care hours will be discontinued (stopped). Your hours for homemaking tasks will continue, unchanged. Criteria: WellCare Clinical Coverage Guideline, Long Term Services and Supports (LTSS) – Florida

Page 10 of Respondent's Composite Exhibit 1.

6. Petitioner requested a plan appeal and received an NPAR dated October 8, 2020, upholding the termination of seven (7) hours, weekly, of personal care services. *Id.* at 78 – 85.

The NPAR explained as follows:

The facts that we used to make our decision are: You are able to dress, eat, use the bathroom, transfer and express needs. The reasons for this decision are based on a set of standards. This included Wellcare Clinical Coverage Guideline for Long Term Services and Supports (LTSS) – Florida HS-500.

Page 78 of Respondent's Composite Exhibit 1.

7. On September 22, 2020, Petitioner requested a Fair Hearing to challenge the termination of seven (7) hours per week of personal care services. On October 20, 2020, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for November 10, 2020, at [REDACTED]

8. Dr. Andrews is a Medical Director at Staywell. Dr. Andrews testified that she is a physiatrist, and explained that this focuses on physical medicine, rehabilitation, and function. Dr. Andrews testified that she has a sub-specialty in spinal cord injuries. Dr. Andrews testified that based on her review of Petitioner's needs, it was her opinion that Petitioner did not need the personal care hours, rather Petitioner needed supervision while he performed the ADLs on his own. Dr. Andrews testified that this supervision could be performed while the aide performed the homemaker services.

9. Petitioner lives with a roommate. *Id.* at 43. As testified to by Petitioner, Petitioner's roommate is seventy-nine (79) years old. As testified to by Petitioner, Petitioner's roommate is not strong enough to lift Petitioner, but can use a telephone. As testified to by Petitioner, Petitioner's aides assist him from approximately 10:00 a.m. each day until 1:00 p.m. Petitioner's aides grocery shop for him approximately once per week, for ninety (90) minutes. As testified to

by Petitioner, prior to the COVID-19 pandemic, Petitioner would go to the gym while his aides would perform homemaker tasks. As testified to by Petitioner, he goes for walks or sits while his aides are present.

### **CONCLUSIONS OF LAW**

10. 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).

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

12. Because Respondent is terminating a previously approved service, 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.)

13. 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

...

#### **4.2.1.9 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.

14. 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.

15. 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.

16. In the NABD, dated September 9, 2020, Respondent terminated Petitioner's seven (7) hours of personal care services. See pages 9 – 18 of Respondent's Composite Exhibit 1. In the NABD, it was explained that:

[T]he information provided does not support that [personal care services are] required to manage your medical condition(s). You are able to dress, transfer, toilet, walk and bathe without hands on assistance from another person.

Page 10 of Respondent's Composite Exhibit 1.

17. 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 needs supervision with bathing, but otherwise needs no assistance with his ADLs. *Id.* at 47. In regards to his IADLs, Petitioner needs assistance (but not total help) with heavy chores, light housekeeping, shopping, and using transportation. *Id.* at 48. Petitioner receives twenty-one (21) hours per week of homemaker services. *Id.* at 68. Petitioner's care aides' schedule is from approximately 10:00 a.m. until 1:00 p.m., each day. See ¶ 9. Petitioner's aides grocery shop for him approximately once per week, and it takes approximately ninety (90) minutes. *Id.* Petitioner lives with a roommate, that is unable to provide physical assistance, but can use a phone for an emergency. *Id.*

18. As Respondent bears the burden of proof, Respondent must show that it is not medically necessary for Petitioner to receive seven (7) hours of personal care services, weekly. 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 9. 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.” At the Fair Hearing, Dr. Andrews testified, *supra* ¶ 8, that Petitioner did not need assistance with his ADLs, but rather needed supervision while performing the ADLs on his own. This view is supported by the record, which shows Petitioner only needs supervision for bathing. See page 47 of Respondent’s Composite Exhibit 1. Here, it was shown that Petitioner’s aides are only outside of the Petitioner’s home for approximately ninety (90) minutes each week when grocery shopping. See ¶ 9. Thus, Petitioner has the opportunity to bathe each day while an aide is in the home providing homemaker services. Moreover, Petitioner has a roommate that can telephone for help in the event of an emergency. *Id.* Furthermore, there was no evidence shown that Petitioner’s aides have insufficient time to complete his IADLS with the allotted twenty-one (21) hours of homemaker services. As such, the record shows that seven (7) hours of personal care services are in excess of Petitioner’s needs.

19. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned concludes that Respondent proved by a preponderance of the evidence that Respondent’s termination of seven (7) hours of personal care services was correct.

**IT IS THEREFORE ORDERED AND ADJUDGED THAT:**

Respondent’s termination of Petitioner’s seven (7) hours of personal care services is **AFFIRMED**. Petitioner’s appeal based on Respondent’s termination of personal care services is **DENIED**.

**DONE** and **ORDERED** this 1<sup>st</sup> day of December, 2020, in Tallahassee, Leon County, Florida.



Joseph Mabry

20-FH [REDACTED]

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**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**

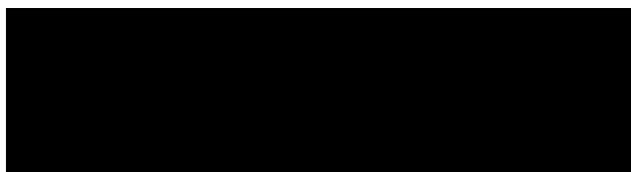
**Fax: (850) 487-1423**

**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:**



**Staywell**

**#AHCA\_Fair\_Hearing\_SAP\_Notify@wellcare.com**

**AHCA Medicaid Hearing Unit**

**MedicaidHearingUnit@ahca.myflorida.com**