

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: April 16, 2018

AGENCY: MAP

FH #: 7740435R

In the Matter of the Appeal of	:
	: DECISION
	AFTER
	: FAIR
	HEARING
from a determination by the New York City	:
Department of Social Services	:

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on May 10, 2018, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For the Managed Long Term Care Plan (Centers Plan for Healthy Living)



No appearance

ISSUE

Was the determination of the Managed Long Term Care Plan dated April 25, 2018 to deny the Appellant's request for personal care service hours in the amount of 24 hours per day split-shift, correct?

FINDINGS OF FACT

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, , resides with her husband, . The Appellant has been in receipt of a Medical Assistance authorization and is enrolled as a participant in the Centers Plan for Healthy Living Managed Long Term Care Plan (hereinafter referred to as "the Plan"). The Appellant has been in receipt of a Personal Care Services authorization (hereinafter referred to as "PCS services") in the amount of 24 hours a day, 7 days a week, live-in services.

2. The Appellant filed an application with the Plan to increase her authorization for PCS services to 24 hours a day for continuous care by more than one personal care aide (“split-shift”).

3. By means of a Managed Long Term Care Action Taken Denial, Reduction or Termination of Benefits notice dated March 5, 2018, the Plan denied the Appellant’s request for an increase in hours to 24 hours a day, split-shift.

4. By means of an MLTC Appeal Upheld Resolution dated April 25, 2018, the Plan notified the Appellant of the Plan’s determination to deny the Appellant’s request for personal care service hours in the amount of 24 hours per day, split-shift.

5. On April 16, 2018, this hearing was requested.

APPLICABLE LAW

Social Services Law §365-a(2) provides that “Medical assistance” shall mean payment of part or all of the cost of medically necessary medical, dental and remedial care, services and supplies, as authorized in this title or the regulations of the department, which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with such person’s capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with this title and the regulations of the department.

Social Services Law §365-a(2)(k) provides that such care, services and supplies shall include care and services furnished by an entity offering a comprehensive health services plan, including an entity that has received a certificate of authority pursuant to sections forty-four hundred three, forty-four hundred three-a or forty-four hundred eight-a of the public health law (as added by chapter six hundred thirty-nine of the laws of nineteen hundred ninety-six) or a health maintenance organization authorized under article forty-three of the insurance law, to eligible individuals residing in the geographic area served by such entity, when such services are furnished in accordance with an agreement approved by the department which meets the requirements of federal law and regulations.

The United State Department of Health and Human Services (Health Care Finance Administration) has granted the State of New York a waiver under Section 1115 of the Social Security Act to permit the operation of a demonstration waiver program for Managed Care Programs in which certain eligible Medicaid recipients are subject to mandatory enrollment. An “Operational Protocol” (Protocol) has been approved by the Health Care Finance Administration as required by the Terms and Conditions governing the demonstration waiver. Such Protocol details the day-to-day operations of the program.

GIS 11 MA/009 provides that effective August 1, 2011, personal care services for non-dual eligible individuals are the responsibility of Managed Care Organizations and are now part of the Medicaid Managed Care Benefits Package under the Medicaid Managed Care Contract.

Pursuant to Social Services Law §365-a(2)(e) Medicaid provides personal care services, including personal emergency response services, shared aide and an individual aide, subject to the provisions of subparagraphs (ii), (iii), and (iv) of this paragraph, furnished to an individual who is not an inpatient or resident of a hospital, nursing facility, intermediate care facility for the mentally retarded, or institution for mental disease, as determined to meet the recipient's needs for assistance when cost effective and appropriate, and when prescribed by a physician, in accordance with the recipient's plan of treatment and provided by individuals who are qualified to provide such services, who are supervised by a registered nurse and who are not members of the recipient's family, and furnished in the recipient's home or other location.

Social Services Law §365-a(2)(e)(iv) provides that personal care services pursuant to this paragraph shall not exceed eight hours per week for individuals whose needs are limited to nutritional and environmental support functions.

18 NYCRR 505.14(a) governs the scope of personal care services available under the Medicaid Program for both fee-for-service and Medicaid Managed Care.

Section 505.14(a)(1) of the Regulations defines Personal Care Services to mean some or total assistance with personal hygiene, dressing and feeding; and nutritional and environmental support functions. Such services must be essential to the maintenance of the patient's health and safety in his or her own home.

Section 505.14(a) of the Regulations provides in part that:

(2) Some or total assistance shall be defined as follows:

- (i) Some assistance shall mean that a specific function or task is performed and completed by the patient with help from another individual.
- (ii) Total assistance shall mean that a specific function or task is performed and completed for the patient.

(6) Personal care services shall include the following two levels of care, and be provided in accordance with the following standards:

- (i) Level I shall be limited to the performance of nutritional and environmental support functions.

Note: Effective April 1, 2011 Social Services Law §365-a(2)(e)(iv), which is reflected in this regulation, was amended to provide that personal

care services pursuant to this paragraph shall not exceed eight hours per week for individuals whose needs are limited to nutritional and environmental support functions.

- (ii) Level II shall include the performance of nutritional and environmental support functions and personal care functions.
 - (a) Personal care functions shall include some or total assistance with the following:
 - (1) bathing of the patient in the bed, the tub or in the shower;
 - (2) dressing;
 - (3) grooming, including care of hair, shaving and ordinary care of nails, teeth and mouth;
 - (4) toileting; this may include assisting the patient on and off the bedpan, commode or toilet;
 - (5) walking, beyond that provided by durable medical equipment, within the home and outside the home;
 - (6) transferring from bed to chair or wheelchair;
 - (7) preparing meals in accordance with modified diets, including low sugar, low fat, low salt and low residue diets;
 - (8) feeding;
 - (9) administration of medication by the patient, including prompting the patient as to time, identifying the medication for the patient, bringing the medication and any necessary supplies or equipment to the patient, opening the container for the patient, positioning the patient for medication and administration, disposing of used supplies

and materials and storing the medication properly;

- (10) providing routine skin care;
- (11) using medical supplies and equipment such as walkers and wheelchairs; and
- (12) changing of simple dressings.

Section 505.14(a)(2) provides that *continuous personal care services* means the provision of uninterrupted care, by more than one personal care aide, for more than 16 hours in a calendar day for a patient who, because of the patient's medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24-hour personal care aide would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

In Rodriguez v. City of New York, 197 F.3d 611 (2d Cir. 1999), cert. denied, 531 U.S. 864, the Plaintiffs were Personal Care Services recipients who alleged that they would be in receipt of inadequate service not meeting legal requirements, without the provision of safety monitoring as an independent task in their Personal Care Services authorizations. The district court had ruled in favor of the Plaintiffs, but the Court of Appeals held that the Agency is not required to provide safety monitoring as an independent Personal Care Services task in evaluating the needs of applicants for and recipients of Personal Care Services. Local Agencies were advised of this decision in GIS message 99/MA/036.

Section 505.14(c)(9) of the Regulations provides that each local social services department shall have a plan to monitor and audit the delivery of personal care services provided by arrangements or contracts.

New York City has received approval to deliver Personal Care Services through a Task Based Assessment methodology. Service delivery is task oriented, not time oriented, and the client continues to receive service in accordance with assessed needs.

GIS 12 MA/026 provides that the Department has been directed by the U.S. District Court for the Southern District of New York, in connection with the case of Strouchler v. Shah, to clarify the proper interpretation and application of 18 NYCRR 505.14 with respect to the availability of 24-hour, split-shift personal care services for needs that are predicted and for Medicaid recipients whose only nighttime need is turning and positioning. It is the Department's policy that 24-hour split-shift care should be authorized only when a person's nighttime needs cannot be met by a live-in aide or through either or both of the following: (1) adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers, wheelchairs, and insulin pens, when the social services district determines that such equipment or supplies can be provided safely and cost-effectively; and (2) voluntary assistance

available from informal caregivers or formal services provided by an entity or agency. When a person's nighttime needs cannot be met by the use of adaptive or specialized equipment or supplies or voluntary assistance from informal caregivers or formal services, a determination must be made whether the person needs 24-hour split-shift care (included within the regulatory definition of "continuous personal care services") or live-in 24-hour personal care services. Under Section 505.14, this depends on whether the person needs "some" or "total" assistance with toileting, walking, transferring, or feeding, and whether these needs are "frequent" or "infrequent", and able to be "scheduled" or "predicted". The intent of the regulation is to allow the identification of situations in which a person's needs can be met by a live-in aide and still allow the aide to have an uninterrupted five hours for sleeping. The Department is considering changes to the regulations to better achieve this goal. In the meantime, the Department provides the following clarifications:

1. The fact that a person's needs are predictable does not preclude the receipt of 24-hour split-shift care, if the person has a documented medical need for the tasks to be performed with a frequency that would not allow a live-in aide to perform them and still obtain an uninterrupted five hours of sleep.
2. The need for turning and positioning and/or the need for diaper changes, by themselves, neither preclude nor justify the receipt of 24-hour split-shift care. In order to receive 24-hour split-shift care, the person must have a documented medical need for those tasks to be performed so frequently that a live-in aide cannot provide them and still obtain an uninterrupted five hours of sleep.
3. A person with a documented medical need for turning and positioning may, if otherwise appropriate, qualify for either 24-hour split-shift care or live-in care depending on the frequency at which turning and positioning is required at night, regardless of whether the person has a nighttime need for transferring.
4. When determining whether a person requires 24-hour split-shift care or live-in care, the local professional director must consider whether the physician's order and other required assessments document the following:
 - The existence of a medical condition that directly causes the person to need frequent assistance with personal care services tasks during the night;
 - The specific task or tasks with which the person requires frequent assistance during the night;
 - The frequency at which the person requires assistance with these tasks during the night;
 - Whether the person requires similar assistance with these tasks during the daylight hours and, if not, why not;

- The informal supports or formal services that are willing, able and available to provide assistance with the person's nighttime tasks;
- The person's ability to use adaptive or specialized equipment or supplies to meet his or her documented medical need for assistance with nighttime tasks; and whether the person's physician has documented that, due to the person's medical condition, he or she could not safely use the equipment or supplies; and,
- Whether a live-in aide would likely be able to obtain an uninterrupted five hours of sleep were live-in services to be authorized.

DISCUSSION

Evidence presented at the hearing on May 10, 2018 establishes that the Appellant, [REDACTED], resides with her husband, [REDACTED]. The Appellant has been in receipt of a PCS services in the amount of 24 hours a day, 7 days a week, live-in services, currently provided by three different aides.

The Appellant filed an application with the Plan to increase her authorization for PCS services to 24 hours a day for continuous care by more than one personal care aide ("split-shift").

By means of a Managed Long Term Care Action Taken Denial, Reduction or Termination of Benefits notice dated March 5, 2018, the Plan denied the Appellant's request for an increase in hours to 24 hours a day, split-shift.

By means of an MLTC Appeal Upheld Resolution dated April 25, 2018, the Plan notified the Appellant of the Plan's determination to deny the Appellant's request for personal care service hours in the amount of 24 hours per day, split-shift with two aides. The April 25, 2018 notice to the Appellant states that "You are a 93-year-old woman who lives with her husband. She is not self-directing, and he does not participate in her care. Her medical history includes osteoarthritis, dizziness, and high blood pressure. Her son has requested an increase in level II PCA (Personal Care Aide) services to two split 12-hour shifts. The reason given for this request was a need for 24-hour supervision due to a decline in the member's health. The member is currently receiving 24-hour live-in PCA assistance. A New York State (NYS) Uniform Assessment (UAS) was performed on 2/14/18. The member was noted to require maximal assistance with most activities of daily living. ("Maximal assistance" means that she needed physical help to complete most parts of this task, like having someone to lean on or help her lift a body part, but she could complete some parts of the task by herself. She walks with a walker or uses a wheelchair. She is often incontinent. These physical support needs would be met with 9 hours of PCA level II services 7 days a week according to the NYS assessment. (It should be noted that this assessment showed no decline since an earlier assessment.) However, we have allowed for 24-hour live-in assistance (twenty-four (24) hours a day, seven (7) days/week of live-in service of Level II Personal Assistance services to provide the member with human assistance with her Activities of Daily Living at all times including toileting/going to the

bathroom 1-2 times during the night. We have received a letter from the member's doctor stating that the member needs to be turned and positioned every 2 to 4 hours. She has a history of having developed a pressure ulcer (bedsore). However, the member is presently not totally dependent upon others to move in bed, is ambulatory, and has not had a recent ulcer with the current plan of care. Our review of this information shows that an increase in level II PCA services to two split 12-hour shifts is not medically necessary. The member's current needs are being met with 24-hour live-in assistance. The denial is upheld."

At the hearing on May 10, 2018, the Appellant's son (her representative at the hearing) and the Appellant's daughter appeared on the Appellant's behalf. As stated above, the Appellant's 24-hour live-in PSC services are currently being provided by three different aides. The Appellant's son submitted Live-In Attestation Forms from the three aides. [REDACTED] submitted two such attestation forms. [REDACTED] indicated on the form dated May 5, 2018 that the Appellant wakes up to urinate about four times during the night. [REDACTED] indicated on the form dated April 28, 2018 that the Appellant woke up four times to urinate on April 26, 2018, six times to urinate on April 27, 2018, and the same number of times to urinate on April 28, 2018. A Live In Attestation Form dated May 1, 2018 from a second aide, [REDACTED] stated that the Appellant is always waking up 5-6 times to go to the commode, and that the Appellant is unable to turn herself. A live in Attestation Form dated May 5, 2018 from [REDACTED] stated that the Appellant wakes up 5-6 times a night to use the commode, and that the Appellant has a bed sore on her bottom which the aide takes care of by turning the Appellant every two hours at night and day.

The Appellant's son stated at the hearing that the Appellant has to go to the bathroom from two to six times per night, and that she needs assistance to go to the commode, as she cannot go by herself. He also stated that the Appellant has bed sores, and has to be turned a few times during the night. In addition, he submitted two photographs which he identified as bed sores on the Appellant's lower back. He submitted a letter dated January 29, 2018 from [REDACTED], the Appellant's doctor, which states that the Appellant suffers from arteriosclerotic heart disease, cognitive impairment, and advanced degenerative joint disease, and "cannot be left without supervision and/or help as her risks of falling and injuring herself is very high." In addition, a letter dated March 28, 2018 from [REDACTED] was submitted, which states that the Appellant "has had multiple falls. A sleeping pill is contraindicated." The Appellant's son also stated that the Appellant's husband suffers from dementia and cannot hear and is unable to help the Appellant.

The MLTC Appeal Upheld Resolution dated April 25, 2018 from the Plan states that the Appellant is often incontinent, that the Plan received a letter from the Appellant's doctor stating that the Appellant needs to be turned and positioned every 2 to 4 hours, and that the Appellant has a history of having developed a pressure ulcer (bedsore). The Resolution states that the Appellant does not have a recent ulcer. In addition, the Resolution states that the Appellant will have assistance with her Activities of Daily Living "at all times including toileting/going to the bathroom 1-2 times during the night." However, the Plan failed to rebut the Appellant's testimony regarding bed sores and frequent unscheduled toileting, or to explain how the Appellant's needs would be met during the time period in which one 24-hour aide would be unavailable to assist the Appellant due to the requirement that the aide receive an uninterrupted

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five hours of sleep.

GIS 12 MA/ 026 provides, in pertinent part, that 24-hour split-shift care should be authorized only when a person's nighttime needs cannot be met by a live-in aide or through adaptive or specialized equipment or supplies or voluntary assistance from informal caregivers. Additionally, the fact that a person's needs are predictable does not preclude the receipt of 24-hour split-shift care, if the person has a documented medical need for the tasks to be performed with a frequency that would not allow a live-in aide to perform them and still obtain an uninterrupted five hours of sleep.

The record has been reviewed and considered. The weight of the credible evidence demonstrates the Appellant requires assistance with toileting and positioning to such a degree during the night that one aide cannot get the required five hours of uninterrupted sleep. Accordingly, the Agency's determination to deny the Appellant's request for personal care service hours in the amount of 24 hours per day split-shift cannot be sustained.

DECISION AND ORDER

The determination of the Managed Long Term Care Plan dated April 25, 2018 to deny the Appellant's request for personal care service hours in the amount of 24 hours per day split-shift, is not correct and is reversed.

1. The Plan is directed to authorize the Appellant for personal care service hours of 24 hours per day split-shift.

As required by Section 358-6.4 of the Regulations, Senior Health Partners must comply immediately with the directives set forth above.

DATED: Albany, New York
05/15/2018

NEW YORK STATE
DEPARTMENT OF HEALTH

By



Commissioner's Designee