

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: January 3, 2019

AGENCY: MAP
FH #: 7888094M

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 January 28, 2019, 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")

Debra Ferguson, Fair Hearing Representative

ISSUE

Was the determination of the Appellant's Managed Long Term Care Plan, Centers Plan for Healthy Living, to deny the Appellant's request for an increase in personal care service hours from 84 hours per week (12 hours per day, seven days per week) to 24 hours daily, seven (7) days continuous care by more than one personal care aide ("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, age 94, has been enrolled in a Managed Long Term Care Program and has been receiving care and services, including Personal Care Services, through a partially capitated Managed Long Term Care Health Plan operated by Centers Plan for Healthy Living.

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2. The Appellant receives personal care services in the amount of 84 hours per week (12 hours per day, seven days per week).

3. The Appellant's representative requested that the Appellant's personal care hours be increased to 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift").

4. On October 30, 2018, a nurse from Centers Plan for Healthy Living completed a Uniform Assessment System New York Assessment (Comprehensive) Report (UAS Report) of the Appellant's personal care needs.

5. On November 12, 2018, Centers Plan for Healthy Living issued a notice titled "Initial Adverse Determination Denial Notice" which set forth Centers Plan for Healthy Living's determination to deny the Appellant's request for an increase in personal care hours to 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift") because the health care service is not medically necessary. The Plan stated that the personal care services that were authorized for the Appellant are appropriate and that the hours safely meet the Appellant's personal care needs.

6. On November 20, 2018, Centers Plan for Healthy Living issued a notice titled "Final Adverse Determination Denial Notice" which set forth Centers Plan for Healthy Living's determination to deny the Appellant's request for an increase in personal care hours to 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift") because the services are not medically necessary; also, the Appellant's request was denied because the Appellant did not meet the criteria.

7. On January 3, 2019, the Appellant requested the present hearing.

APPLICABLE LAW

Part 438 of 21 Code of Federal Regulations (CFR) pertains to provision of Medicaid medical care, services and supplies through Managed Care Organizations (MCOs), Prepaid Inpatient Health Plans (PIHPs), Prepaid Ambulatory Health Plans (PAHPs) and Primary Care Case Managers (PCCMs), and the requirements for contracts for services so provided.

Section 438.210 of 21 CFR Subpart D provides, in pertinent part:

- (a) Coverage - Each contract with an MCO, PIHP, or PAHP must do the following:
 - (1) Identify, define, and specify the amount, duration, and scope of each service that the MCO, PIHP, or PAHP is required to offer.
 - (2) Require that the services identified in paragraph (a)(1) of this section be furnished in an amount, duration, and scope that is no less than the

amount, duration, and scope for the same services furnished to beneficiaries under fee-for-service Medicaid, as set forth in Sec. 440.230.

- (3) Provide that the MCO, PIHP, or PAHP--
 - (i) Must ensure that the services are sufficient in amount, duration, or scope to reasonably be expected to achieve the purpose for which the services are furnished.
 - (ii) May not arbitrarily deny or reduce the amount, duration, or scope of a required service solely because of diagnosis, type of illness, or condition of the beneficiary;
 - (iii) May place appropriate limits on a service
 - (A) On the basis of criteria applied under the State plan, such as medical necessity; or
 - (B) For the purpose of utilization control, provided the services furnished can reasonably be expected to achieve their purpose, as required in paragraph (a)(3)(i) of this section; and
- (4) Specify what constitutes “medically necessary services” in a manner that:
 - (i) Is no more restrictive than that used in the State Medicaid program as indicated in State statutes and regulations, the State Plan, and other State policy and procedures; and
 - (ii) Addresses the extent to which the MCO, PIHP, or PAHP is responsible for covering services related to the following:
 - (A) The prevention, diagnosis, and treatment of health impairments.
 - (B) The ability to achieve age-appropriate growth and development.
 - (C) The ability to attain, maintain, or regain functional capacity.
- (b) Authorization of services. For the processing of requests for initial and continuing authorizations of services, each contract must require:
 - (1) That the MCO, PIHP, or PAHP and its subcontractors have in place, and

follow, written policies and procedures.

- (2) That the MCO, PIHP, or PAHP:
 - (i) Have in effect mechanisms to ensure consistent application of review criteria for authorization decisions; and
 - (ii) Consult with the requesting provider when appropriate.
- (3) That any decision to deny a service authorization request or to authorize a service in an amount, duration, or scope that is less than requested, be made by a health care professional who has appropriate clinical expertise in treating the enrollee's condition or disease....

Section 438.236 of 21 CFR Subpart D provides, in pertinent part:

- (a) Basic rule: The State must ensure, through its contracts, that each MCO and, when applicable, each PIHP and PAHP meets the requirements of this section.
- (b) Adoption of practice guidelines. Each MCO and, when applicable, each PIHP and PAHP adopts practice guidelines that meet the following requirements:
 - (1) Are based on valid and reliable clinical evidence or a consensus of health care professionals in the particular field.
 - (2) Consider the needs of the MCO's, PIHP's, or PAHP's enrollees.
 - (3) Are adopted in consultation with contracting health care professionals.
 - (4) Are reviewed and updated periodically as appropriate.
- (c) Dissemination of guidelines. Each MCO, PIHP, and PAHP disseminates the guidelines to all affected providers and, upon request, to enrollees and potential enrollees.
- (d) Application of guidelines. Decisions for utilization management, enrollee education, coverage of services, and other areas to which the guidelines apply are consistent with the guidelines.

Section 438.400 of 21 CFR Subpart F provides in part:

- (a) Statutory basis. This subpart is based on sections 1902(a)(3), 1902(a)(4), and 1932(b)(4) of the Act.
 - (1) Section 1902(a)(3) requires that a State plan provide an opportunity for a

fair hearing to any person whose claim for assistance is denied or not acted upon promptly.

- (2) Section 1902(a)(4) requires that the State plan provide for methods of administration that the Secretary finds necessary for the proper and efficient operation of the plan.
 - (3) Section 1932(b)(4) requires Medicaid managed care organizations to establish internal grievance procedures under which Medicaid enrollees, or providers acting on their behalf, may challenge the denial of coverage of, or payment for, medical assistance.
- (b) Definitions. As used in this subpart, the following terms have the indicated meanings:

In the case of an MCO or PIHP- "Action" means--

- (1) The denial or limited authorization of a requested service, including the type or level of service;
- (2) The reduction, suspension, or termination of a previously authorized service;
- (3) The denial, in whole or in part, of payment for a service...

Section 438.402 of 21 CFR Subpart F provides in part:

- (a) The grievance system. Each MCO [Managed Care Organization] and PIHP [Prepaid Inpatient Health Plan] must have a system in place, for enrollees, that includes a grievance process, an appeal process, and access to the State's fair hearing system...

Section 4403-f of the Public Health Law pertains to Managed Long Term Care Plans.

Article 49 of the Public Health Law pertains to Utilization Review and External Appeal.

Section 505.14(a) of the Regulations provides:

- (2) 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.

(3) Personal care services, as defined in this section, can be provided only if the services are medically necessary and the social services district reasonably expects that the patient's health and safety in the home can be maintained by the provision of such services, as determined in accordance with this section.

(4) Live-in 24-hour personal care services means the provision of care by one personal care aide for a patient who, because of the patient's medical condition, needs assistance during a calendar day with toileting, walking, transferring, turning and positioning, or feeding and whose need for assistance is sufficiently infrequent that a live-in 24-hour personal care aide would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

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

(ii) Level II shall include the performance of nutritional and environmental support functions and personal care functions.

a. Personal care functions shall include 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.

General Information System message, GIS 97 MA/033, states in pertinent part that once the district has determined that the recipient is medically eligible for split-shift or live-in services and determined whether the recipient has informal or formal supports that are willing and able to provide hours of care, the district can assure that it is complying with the Mayer case by authorizing 24-hour split-shift personal care services for a recipient who is medically eligible for split-shift services, and who otherwise meets the fiscal assessment requirements, but has no informal or formal supports.

18 NYCRR 358-5.9(a) provides that, at a fair hearing concerning the denial of an application for or the adequacy of Public Assistance, Medical Assistance, HEAP, SNAP benefits or services, or an exemption from work activity requirements, the Appellant must establish that the Agency's denial of assistance or benefits or such an exemption was not correct or that the appellant is eligible for a greater amount of assistance or benefits

In Rodriguez v. City of New York, 197 F. 3rd 611 (Federal Court of Appeals, 2nd Circuit 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.

GIS 03 MA/03 states, in pertinent part, that social services districts should authorize assistance with recognized, medically necessary personal care services tasks. As previously advised, social services districts are **NOT** required to allot time for safety monitoring as a separate task as part of the total personal care services hours authorized (see GIS 99 MA/013, GIS 99 MA/036). However, districts are reminded that a clear and legitimate distinction exists between “safety monitoring” as a non-required independent stand-alone function while no Level

II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed.

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 either or both of the following: (1) adaptive for 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.

GIS 15 MA/24 provides in pertinent part that:

1. 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 of daily on interrupted sleep during the aide's eight hours of sleep.
2. Live-in 24 hour personal care services is a provision of care by a personal care aide for a patient who, because of the patient's medical condition, needs assistance during a calendar day with transferring, walking, toileting, turning and positioning, or feeding, and whose needs for assistance is sufficiently infrequent that a live-in 24 hour personal care aide would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

GIS 15 MA/24 further provides that the social assessment in live-in 24-hour PCS and CDPA cases would have to evaluate whether the individual's home has sleeping accommodations for an aide. If not, continuous PCS or CDPA must be authorized.

DISCUSSION

On November 20, 2018, Centers Plan for Healthy Living issued a notice titled “Final Adverse Determination Denial Notice” which set forth Centers Plan for Healthy Living’s determination to deny the Appellant’s request for an increase in personal care hours to 24 hours daily, seven (7) days continuous care by more than one personal care aide (“split-shift”) from 84 hours per week (12 hours per day, seven days per week) because the Appellant “did not meet the criteria.

At the hearing, the Appellant’s representatives stated that they requested 24 hours daily, seven (7) days continuous care by more than one personal care aide (“split-shift”) rather than 24-hour live-in personal care services because the Appellant resides in a one-bedroom apartment, and also a live-in personal care aide would not be able to obtain five hours of uninterrupted sleep during the aide’s eight hour of period of sleep due to the Appellant’s nighttime needs. Therefore, the Appellant’s representatives (on behalf of the Appellant) contended that 24 hours daily, seven (7) days continuous care by more than one personal care aide (“split-shift”) would be more appropriate to assist the Appellant with her nighttime needs.

Centers Plan for Healthy Living October 30, 2018 Uniform Assessment System (UAS) report lists the Appellant’s diagnoses as coronary heart disease, anxiety, depression, other dementia, urinary tract infection, cardiac arrhythmia, full incontinence of feces, dizziness and giddiness, diarrhea, and constipation. The October 30, 2018 UAS report states that the Appellant is totally dependent on others for preparation of meals, managing finances, ordinary housework, and shopping. The Appellant requires maximal assistance with managing medications, climbing and descending stairs, transportation, bathing, and dressing lower body. The Appellant requires extensive assistance with personal hygiene, dressing upper body, walking, locomotion, toileting, transferring to the toilet, and bed mobility. The Appellant requires limited assistance with eating. The UAS report indicates that the Appellant is frequently incontinent of bowel and bladder. The nurse noted that the Appellant is completely dependent on her personal care worker for cooking/meal preparation, housework, shopping, and requires significant physical weight bearing assistance with dressing lower body, bathing, walking up/down steps, and transportation due to weakness and dizziness. The Appellant requires some weight bearing assistance with dressing upper body, personal hygiene, toilet use, walking, transfers, bed mobility, and guidance with eating due to limited range of motion, dizziness, and an unsteady gait. The Appellant’s son pre-pours the Appellant’s medications and the personal care worker provides the Appellant with daily medication reminders to ensure medication compliance.

At the hearing, the Appellant’s representative stated that the Appellant requires assistance with toileting and transferring to the toilet due to bowel movements during the night. The Appellant’s representatives stated that the Appellant awakens three times during the night to use the toilet. The Appellant’s representative further indicated that the Appellant is incontinent of bladder and consequently she wears adult diapers. The Appellant’s representative stated that the Appellant soils her diapers during the night. The Appellant’s representative stated that the Appellant requires assistance with changing her diapers. The Appellant’s representative also

stated that the Appellant occasionally becomes hungry and/or thirsty at night, and she requires assistance with meal preparation or obtaining beverages.

The Appellant's representative stated that the Appellant's aide assists the Appellant from 9am to 9pm from Monday through Sunday. He stated that he has been assisting the Appellant from 9pm to 9am, but that he is unable to continue to assist the Appellant because his health is declining. Policy directives (see GIS MA/033) establishes that contribution of family members or friends is voluntary and cannot be coerced or required in any manner whatsoever. Therefore, the Appellant's representative's assistance is voluntary and it cannot be coerced whether or not he is physically capable of providing assistance to the Appellant.

The evidence in this case establishes that the Appellant requires 24-hour continuous personal care services. The Appellant's representatives credibly testified that the Appellant awakens three times per night to use the toilet and that she soils her adult diaper which she requires assistance to change. The UAS report establishes that the Appellant requires weight-bearing assistance with walking, toileting, transferring, and bed mobility which includes turning and positioning. Because the Appellant awakens during the night and requires assistance with transferring and toileting, an aide would not be able to obtain five hours of uninterrupted sleep due to the Appellant's nighttime needs. In addition, the Appellant resides in a one-bedroom apartment and she does not have any sleeping accommodations for an aide. Lastly, although the Appellant uses adaptive or specialized equipment and supplies such as a walker and adult diapers, she requires weight-bearing assistance while ambulating with the walker and she requires assistance with changing her diapers.

DECISION AND ORDER

The determination of the Appellant's Managed Long Term Care Plan, Centers Plan for Healthy Living, to deny the request for an increase in personal care service hours to 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift") was not correct and is reversed. Centers Plan for Healthy Living is directed to:

- 1 Authorize 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift").
- 2, Notify the Appellant and/or Appellant's representative of its compliance with this directive.

Should Centers Plan for Healthy Living need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant promptly in writing as to what documentation is needed. If such information is required, the Appellant must provide it to Centers Plan for Healthy Living promptly to facilitate such compliance.

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As required by Section 358-6.4 of the Regulations, Centers Plan for Healthy Living must comply immediately with the directives set forth above.

DATED: Albany, New York
02/21/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "T. A. Selekm", with a horizontal line above the first letter "T".

Commissioner's Designee