

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: October 24, 2018

AGENCY: MAP
FH #: 7849482K

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 November 16, 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)

Debra Ferguson, Fair Hearing Representative

ISSUE

Was the Agency's determination to deny the Appellant's request for an increase of personal care service hours from 56 hours per week (8 hours per day to 7 days per week) to live-in 24 personal care services 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 has been in receipt of a Medical Assistance authorization for herself and enrolled in a Managed Long-Term Care Plan, Centers Plan for Healthy Living (hereinafter, the Plan).

2. The Appellant, age eighty-eight, resides alone in an apartment building.
3. The Appellant's health conditions include, but not limited to, diabetes, hemiplegia, cerebral infarction, dizziness and giddiness, hypertension, gastro-esophageal reflux disease, hyperlipidemia, fatigue, urinary incontinence, shortness of breath, osteoarthritis, abnormalities of gait and mobility, sensorineural hearing loss and vitamin deficiency.
4. On March 8, 2018, a nurse, on behalf of the Agency, completed a Uniform Assessment System – Comprehensive Assessment (UAS) as well as a Client Task Sheet as part of a reassessment of the Appellant. The nurse recommended personal care services for the Appellant in the amount of 56 hours per week (8 hours per day for 7 days per week).
5. On July 26, 2018, a nurse, on behalf of the Agency, completed a Uniform Assessment System – Comprehensive Assessment (UAS) as well as a Client Task Sheet as part of a reassessment of the Appellant. The nurse recommended personal care services for the Appellant in the amount of 56 hours per week (8 hours per day for 7 days per week).
6. On August 8, 2018, a request to increase Appellant's personal care services to 24-hour live-in personal care services was submitted to the Plan.
7. The Appellant needs daily assistance with meal preparation, ordinary housework (cleaning, laundry, etc.), bathing, grooming (personal hygiene), dressing, walking, positioning (bed mobility) and eating. The Appellant needs daily assistance with toileting including at night.
8. By Initial Adverse Determination dated August 22, 2018, the Plan informed Appellant of its determination to deny the request to increase her personal care services from 56 hours per week to 24-live-in personal care services.
9. A request for an internal appeal was submitted to the Plan on Appellant's behalf.
10. By Final Adverse Determination dated October 12, 2018, the Plan informed Appellant of its determination to uphold its Initial Adverse Determination dated August 22, 2018.
11. On October 24, 2018, the Appellant's son requested this fair hearing.

APPLICABLE LAW

Section 358-5.9 of the Regulations provides that, at a fair hearing concerning the denial of an application for or the adequacy of Medical Assistance or services, the Appellant must establish that the Agency's denial of assistance or benefits was not correct or that the Appellant is eligible for a greater amount of assistance or benefits.

Section 505.14(a)(1) of the Regulations defines "Personal Care Services" to mean assistance with nutritional and environmental support functions and personal care functions. Additionally, Section 505.14(a)(1) states that 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)(5) 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.

(a) Nutritional and environmental support functions include assistance with the following:

- (1) making and changing beds;
- (2) dusting and vacuuming the rooms which the patient uses;
- (3) light cleaning of the kitchen, bedroom and bathroom;
- (4) dishwashing;
- (5) listing needed supplies;
- (6) shopping for the patient if no other arrangements are possible;
- (7) patient's laundering, including necessary ironing and mending;
- (8) payment of bills and other essential errands; and
- (9) preparing meals, including simple modified diets.

(b) The authorization for Level I services shall not exceed eight hours per week.

(ii) Level II shall include the performance of nutritional and environmental support functions specified in clause (i)(a) of this paragraph and personal care functions.

(a) Personal care functions 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) turning and positioning;
- (8) preparing of meals in accordance with modified diets, including low sugar, low fat, low salt and low residue diets;
- (9) feeding;
- (10) 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;
- (11) providing routine skin care;
- (12) using medical supplies and equipment such as walkers and wheelchairs; and

(13) changing of simple dressings.

(b) Before continuous personal care services or live-in 24-hour personal care services may be authorized, additional requirements for the authorization of such services, as specified in clause (b)(4)(i)(c) of this section, must be met.

Section 505.14(a)(2) of the Regulations 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.

Section 505.14(a)(4) of the Regulations provides that 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.

GIS 12 MA/026 entitled "Availability of 24-Hour Split-Shift Personal Care Services" provides, in part, the intent of 18 NYCRR 505.14 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.

GIS 12 MA/026 provides as follows concerning the availability of 24 hour, split-shift personal care services in connection with the case of Strouchler v. Shah:

Department guidelines provide 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.

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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.

The authorization of a personal care services authorization must be based, in relevant part, a physician's order, social assessment and a nursing assessment. 18 NYCRR 505.14(b)(2).

Pursuant to this GIS 13 MA/015, at a fair hearing to review the district's denial of a Medicaid application, the Medicaid applicant has the burden of proving that the district's denial was incorrect. When the applicant prevails, the fair hearing decision will reverse the denial. The district cannot deny the application based on the reason that was set forth in the agency's denial that was reversed. If no remaining eligibility factors need to be considered, the district must find the applicant eligible for Medicaid. When a fair hearing decision reverses the denial of a Medicaid application and one or more remaining eligibility factors need to be considered, the district must continue to process the application and issue a decision as soon as possible. In such cases, the applicant's original application date must be preserved.

DISCUSSION

In this matter, the uncontroverted evidence establishes the Appellant has been in receipt of a Medical Assistance authorization for herself and enrolled in a Managed Long-Term Care Plan, Centers Plan for Healthy Living (hereinafter, the Plan). It further establishes that on March 8,

2018, a nurse, on behalf of the Agency, completed a Uniform Assessment System – Comprehensive Assessment (UAS) as well as a Client Task Sheet as part of a reassessment of the Appellant. The nurse recommended personal care services for the Appellant in the amount of 56 hours per week (8 hours per day for 7 days per week). Again, on July 26, 2018, a nurse, on behalf of the Agency, completed a Uniform Assessment System – Comprehensive Assessment (UAS) as well as a Client Task Sheet as part of a reassessment of the Appellant. The nurse recommended personal care services for the Appellant in the amount of 56 hours per week (8 hours per day for 7 days per week).

The uncontested evidence establishes that on August 8, 2018, a request to increase Appellant's personal care services to 24-hour live-in personal care services was submitted to the Plan. By Initial Adverse Determination dated August 22, 2018, the Plan informed Appellant of its determination to deny the request to increase her personal care services from 56 hours per week to 24-live-in personal care services. A request for an internal appeal was submitted to the Plan on Appellant's behalf. Thereafter, by Final Adverse Determination dated October 12, 2018, the Plan informed Appellant of its determination to uphold its Initial Adverse Determination dated August 22, 2018.

At the hearing, the Appellant's son testified that he has personal knowledge of Appellant's health conditions and needs as he attends medical appointments with Appellant, speaks to Appellant's primary care physician and personal care aide and visits Appellant daily. The Appellant states that due to Appellant's prior stroke, she has right side paralysis in her right hand and arm. He stated that Appellant's personal care aide arrives at 9 a.m. and departs at 5 p.m., and he is unable to assist Appellant with her nighttime needs because he is employed full-time.

The Appellant's son also explained that Appellant resided with him until August 2018 as Appellant relocated to an apartment building for seniors. The Appellant's son testified that when Appellant resided with him, Appellant would wake up two to four times per night because Appellant needed to change her depends/diapers. He further testified that at night, he had helped Appellant transfer from the bed to a standing position, placed his hand on Appellant's back and arm to support her during her walk to the bathroom and pull-up Appellant's lower body clothing/garments.

Furthermore, the Appellant's son testified that Appellant has a history of falls of which the most serious occurred in April 2018 as she was hospitalized from April 5, 2018 until April 13, 2018, and discharged to a rehabilitation facility until July 16, 2018. The Appellant's son stated that because of the fall, Appellant suffered a compression fracture located in her spine. The Appellant's son also explained that Appellant was hospitalized from July 23, 2018 until July 24, 2018 due to abdominal pain. He also testified that since the July 26, 2018 Uniform Assessment, the Appellant has experienced three falls, the most recent being fifteen days prior to the present hearing. With regards to the most recent fall, the Appellant's son stated that Appellant fell in her bedroom during the night as she was attempting to walk to the bathroom to change her diaper. He explained that upon Appellant's personal care aide arrival to the home at 9 a.m., the personal care aide found Appellant on the floor and assisted Appellant. The Appellant's son's testimony is credible as it was consistent, detailed and bolstered by documentation.

Upon review of the documentation presented by both parties as well as Appellant's son's testimony, the evidence establishes the following. The Appellant, age eighty-eight, resides alone in an apartment building. The Appellant's health conditions include, but not limited to, diabetes, hemiplegia, cerebral infarction, dizziness and giddiness, hypertension, gastro-esophageal reflux disease, hyperlipidemia, fatigue, urinary incontinence, shortness of breath, osteoarthritis, abnormalities of gait and mobility, sensorineural hearing loss and vitamin deficiency. Additionally, the Appellant needs daily assistance with meal preparation, ordinary housework (cleaning, laundry, etc.), bathing, grooming (personal hygiene), dressing, walking, positioning (bed mobility) and eating. The Appellant needs daily assistance with toileting including at night.

The greater weight of the credible evidence establishes that Appellant is entitled to live-in 24-hour personal care services because the Appellant needs nighttime assistance with toileting, walking and transferring. Thus, the Plan's determination cannot be upheld.

DECISION AND ORDER

The Agency's determination to deny the Appellant's request for an increase of personal care service hours from 56 hours per week (8 hours per day to 7 days per week) to live-in 24 personal care services was not correct and is reversed.

1. The Plan is directed to immediately provide the Appellant with a Personal Care Services authorization for live-in 24 personal care (24 hour daily care via a "live-in" care giver).

Should the Plan 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 requested, the Appellant must provide it to the plan promptly to facilitate such compliance.

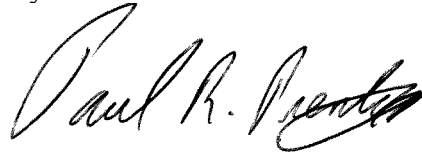
As required by Section 358-6.4 of the Regulations, the Plan must comply immediately with the directives set forth above.

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DATED: Albany, New York
11/29/2018

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "Paul R. Prentiss". The signature is fluid and cursive, with a large initial "P" and a stylized "R".

Commissioner's Designee