

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: February 21, 2019

AGENCY: MAP
FH #: 7914824M

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 March 18, 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 Plan

No appearance by Centers Plan for Healthy Living

ISSUE

Was the Managed Long Term Care Plan's November 2018 determination to deny the Appellant's request for twenty-four hour live-in Personal Care Services to work two, twelve hour shifts and provide care over twenty-four hours a day, seven days a week 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 78, resides alone and has been in receipt of Medicaid through the above-referenced Managed Long-Term Care Plan ("Plan") that includes a Personal Care Services ("PCS") authorization for 9 hours daily, 7 days per week.

2. The Appellant requested an increase in her PCS authorization to twenty-four hours daily by a live-in personal care aide to work two, twelve-hour shifts and provide care over twenty-four hours a day, seven days a week.

3. Because the Appellant cannot be left alone safely yet does not have any PCS-appropriate needs that would justify twenty-four-hour live-in care, her health and safety in the home cannot be maintained via the provision of PCS and she needs a higher level of care.

4. On November 26, 2018, the Plan denied the Appellant's request (internal appeal), and determined that the Appellant was not eligible for a Personal Care Assistant (PCA) to work two, twelve-hour shifts and provide care over twenty-four hours a day, seven days a week.

5. On February 21, 2019, the Appellant requested this fair hearing.

APPLICABLE LAW

Section 505.14(a)(1) of the revised Regulations defines "Personal Care Services" to mean Personal care services means assistance with nutritional and environmental support functions and personal care functions, as specified in 18 NYCRR §§ 505.14(a)(5)(i)(a) and 505.14(a)(5)(ii)(a). Such services must be essential to the maintenance of the patient's health and safety in his or her own home, as determined by the social services district in accordance with Section 505.14; ordered by the attending physician; based on an assessment of the patient's needs and of the appropriateness and cost-effectiveness of services specified in 18 NYCRR § 505.14(b)(3)(iv); provided by a qualified person in accordance with a plan of care; and supervised by a registered professional nurse.

Section 505.14(a)(2) and (a)(4) of the revised Regulations provides, in part, 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.

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.

The notice of adoption from these recent changes notes that, “to a large extent, the proposed regulations merely clarify the Department’s longstanding policies and would thus be unlikely to increase State Medicaid costs....The proposed regulations must be consistent with the principles articulated in the *Strouchler* preliminary injunction decision and the Department’s GIS 12 MA/026.”

That preliminary injunction found that the regulation recognized a valid distinction between those tasks that are “completed *by the patient with help* and those that are completed *for the patient*” but that denominating this “total” and “some” assistance allowed the City “to adopt a strained interpretation of that [which] conflicts with the plain language of the regulation.” Moreover, because the regulation stated “that split-shift care is only available if the assistance is needed at times that ‘cannot be predicted,’” it allowed the City to deny split-shift to those who needed it because of frequent need.

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:

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.

**NYS DEPARTMENT OF HEALTH
OFFICE OF HEALTH INSURANCE PROGRAMS**

Guidelines for the Provision of Personal Care Services in Medicaid Managed Care

I. Scope of the Personal Care Benefit

- a. As required by federal regulations, the personal care services benefit afforded to MCO enrollees must be furnished in an amount, duration, and scope that is no less than the services furnished to Medicaid fee-for-service recipients.[42 CFR §438.210]...
 - i. The assessment process should evaluate and document when and to what degree the member requires assistance with personal care services tasks and whether needed assistance with tasks can be scheduled or may occur at unpredictable times during the day or night. The assessment process should also evaluate the availability of informal supports who may be willing and available to provide assistance with needed tasks and whether the member's day or nighttime needs can totally or partially be met through the use of efficiencies and specialized medical equipment including, but not limited to, commode, urinal, walker, wheelchair, etc. A care plan must be developed that meets the member's scheduled and unscheduled day and nighttime personal needs.

MLTC Policy 16.07 provides guidance to plans about the appropriate use of task-based assessment tools for Personal Care Services (PCS) and Consumer Directed Personal Assistance Services (CDPAS). The Policy notes that a task-based tool usually lists instrumental activities of daily living (IADL's), e.g. light cleaning, shopping, and simple meal preparation, and activities of daily living (ADL's), e.g. bathing, dressing, and toileting. This tool may also indicate the level of assistance the enrollee requires for the performance of each IADL or ADL and the amount of time needed to perform each task or the daily or weekly frequency for that task. DOH has not approved the use of any particular task-based assessment tool. However, a plan may use such a tool as a guideline for determining an enrollee's plan of care.

The Policy provides guidelines for use of a task-based assessment tool. Examples are provided in the Policy.

- A task-bases assessment tool cannot be used to establish inflexible or "one size fits all" limits on the amount of time that may be authorized for an IADL or ADL or the frequency at which such tasks can be performed. An individualized assessment of each enrollee's IADL's and ADL's must be conducted. Plans must permit the assessments of time, and frequency, for completion of tasks to deviate from the time, frequency, or other guidelines

in the tool whenever necessary to accommodate the enrollee's individualized need for assistance.

- When an enrollee requires safety monitoring, supervision or cognitive prompting to assure safe completion of one or more IADL's or ADL's, the task-based assessment tool must reflect sufficient time for such safety monitoring, supervision or cognitive prompting for the performance of those particular IADLs or ADLs. Safety monitoring, supervision and cognitive prompting are not, by themselves, independent or "stand-alone" IADLs, ADLs, or tasks. All time that is necessary for the performance of any needed safety monitoring, supervision and cognitive prompting should be included in the time that is determined necessary for the performance of the underlying IADL or ADL to which such safety monitoring, supervision or cognitive prompting relates. It is noted that if a plan has previously characterized safety monitoring, supervision or cognitive prompting as an independent stand-alone task not linked to any IADL or ADL, the plan must not delete the time it has allotted for these functions. Instead, the plan must determine if the time it has allowed for these underlying IADL's or ADL's includes sufficient time for any needed safety monitoring, supervision or cognitive prompting relating to that particular IADL or ADL and, if not, include all needed time for these functions.
- Plans cannot use task-based assessment tools to authorize or reauthorize services for enrollees who need 24-hour services, including continuous services, live-in 24-hour services, or the equivalent provided by formal services or informal caregivers. A task-based assessment tool may be suitable for enrollees who are not eligible for 24-hour services but inappropriate for enrollees who are eligible for 24-hour care.
- All plans, including those that use task-based assessment tools, must evaluate and document when and to what extent the enrollee requires assistance with IADLs and ADLs and whether needed assistance can be scheduled or may occur at unpredictable times during the day or night. All plans must assure that the plan of care that is developed can meet any unscheduled or recurring daytime or nighttime needs that the enrollee may have for assistance. The plan must first determine whether the enrollee, because of the enrollee's medical condition, would be otherwise eligible for PCS or CDPAS, including continuous or live-in 24-hour services. For enrollees who would be otherwise eligible for services, the plan must then determine whether, and the extent to which, the enrollee's need for assistance can be met by voluntary assistance from informal caregivers, by formal services, or by adaptive or specialized equipment or supplies.
- A task-based assessment tool cannot arbitrarily limit the number of hours of Level I housekeeping services to eight hours per week for enrollees who need assistance with Level II tasks. The eight hour weekly cap on Level I services applies only to persons whose needs are limited to assistance with housekeeping and other Level I tasks. Persons whose needs are limited to

housekeeping and other Level I tasks should not be enrolled in a MLTC plan but should receive needed assistance from social services districts.

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. 18 NYCRR 358-5.9(a).

DISCUSSION

The Appellant requested an increase in her PCS authorization to twenty-four hours daily by a live-in personal care assistant to work two, twelve-hour shifts and provide care over twenty-four hours a day, seven days a week. On November 26, 2018, denied the Appellant's request (appeal), and determined that the Appellant was not eligible request for a Personal Care Assistant (PCA) to work two, twelve-hour shifts and provide care over twenty-four hours a day, seven days a week. The November 26, 2018, notice stated in part "the [Appellant] has had a slight increase in tasking needs and dementia is worsening but there are no demonstrated night needs other than safety/supervision (which is not covered) because she 'sundowns' and wanders".

At a hearing concerning the adequacy of services, the Appellant must establish that the MLTC erred in its determination.

The Appellant's representative testified that it is not safe for the Appellant to be alone at night. The Appellant's representative testified that the Appellant lives alone in a third-floor walkup and the PCA is with her mother from 10:00am through 7:00 PM. The Appellant's representative referenced several examples (Appellant put the stove on and forgot, the Appellant gets dressed and may try to go out, the Appellant left the apartment after the aide left for the night and the Appellant will open the door for anyone). The Appellant's representative testified that her mother's condition has gotten significantly worse and she just wants her mother to be safe. The Appellant's representative testified that she is without someone to watch over her when the PCA leaves.

The Appellant's representative(s) submitted letters from two of the Appellant's doctors a letter from one of the Appellant's neighbors and presented two witnesses at the hearing in support of her testimony.

The Appellant's representative(s) submitted a letter from the Appellant's Primary Care Physician dated March 14, 2019 which stated the Appellant suffers from frontotemporal dementia and the Appellant is: "at risk for significantly dangerous situations when left alone" and "When left unattended, she is often prone to leaving her apartment building, wandering off in the neighborhood by herself, potentially placing her in harm's way. Her family has also noticed other concerning findings lately, such as leaving the stove on when she is not in the kitchen, leaving items to burn, which could lead to a significant hazard". The doctor

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recommended a PCA to work two, twelve-hour shifts and provide care over twenty-four hours a day, seven days a week.

The Appellant submitted a letter from the Appellant's Neurologist, dated March 13, 2019 which stated the Appellant suffers from dementia and the Appellant has "very poor navigational abilities and gets lost even inside her own apartment. Nevertheless, she tries to wander out of her apartment frequently and family rely on observant neighbors to intercept her before she can get out of the building". The neurologist recommended a PCA to work two, twelve-hour shifts and provide care over twenty-four hours a day, seven days a week.

The evidence submitted by the Appellant's representative(s) was consistent with the need for standalone safety monitoring.

Although the Appellant's representatives raised issues that could be considered non-safety issues (occasional nighttime incontinence and the importance of the Appellant taking her medication(s)) these conditions do not necessitate more hours. With respect to the Appellant's incontinence there are other options (a commode and/or adult diapers) available to the Appellant that could address this issue. With respect to the Appellant taking her medication the issue is not that the Appellant is not provided with the medication in a timely fashion, the issue is that the Appellant sometimes refuses to take it. Additional hours would not resolve this issue.

The burden is on the Appellant to show that there are PCS-appropriate tasks that only can be met via a live-in aide, that is, frequent turning or toileting that cannot be scheduled. While the representative(s) did establish the need for continuous safety monitoring, they failed to establish the requisite *PCS-appropriate need* for live-in assistance. Stand-alone safety monitoring, apart from the provision of PCS assistance, is currently not a covered benefit under the PCS program. Therefore, the Plan's determination will not be disturbed.

DECISION

The Managed Long-Term Care Plan's November 2018 determination to deny the Appellant's request for twenty-four-hour live-in Personal Care Services to work two, twelve-hour shifts and provide care over twenty-four hours a day, seven days a week was correct.

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DATED: Albany, New York
03/27/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink that reads "Sadiga Holland". The signature is written in a cursive style with a large, stylized 'S' and 'H'.

Commissioner's Designee