

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: June 6, 2019

AGENCY: MAP
FH #: 7973694K

In the Matter of the Appeal of
[REDACTED]
from a determination by the New York City
Department of Social Services

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**DECISION
AFTER
FAIR
HEARING**

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 July 1, 2019, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[REDACTED]

For the Managed Long Term Care Plan

Debora Ferguson, Centers Plan for Healthy Living, Fair Hearing Representative

ISSUE

Was the Managed Long Term Care Plan's determination dated May 21, 2019 to provide the Appellant with a Personal Care Services authorization in the amount of live-in 24-hour personal care services correct?

FACT FINDING

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 91 has been in receipt of a Personal Care Services authorization from a Managed Long Term Care Plan, Centers Plan for Healthy Living.
2. The Appellant resides alone in a one bedroom apartment.

3. On October 17, 2018 a nursing assessor completed a Uniform Assessment System evaluation of the Appellant's personal care needs.

4. On March 20, 2019 a nursing assessor completed a Uniform Assessment System evaluation of the Appellant's personal care needs.

5. By notice dated May 21, 2019, the Managed Long Term Care Plan determined not to increase the Appellant's Personal Care Services authorization to continuous personal care services (24 hour care), but to continue to provide the Appellant with a Personal Care Services authorization in the amount of 7 days per week, 6 hours per day.

6. By letter dated June 26, 2019, [REDACTED] MD, states that the Appellant is wheelchair bound and home bound. The Appellant requires assistance with incontinence and help to prevent pressure ulcers. He developed decubital ulcers and needs to be turned every 2-3 hours to prevent worsening of the condition. The Appellant is at a high risk of falls.

7. On June 6, 2019, the Appellant requested this fair hearing.

APPLICABLE LAW

At a fair hearing concerning the denial of an application for or the adequacy of Public Assistance, Medical Assistance, HEAP, SNAP benefits 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. Except where otherwise established by law or regulation, in fair hearings concerning the discontinuance, reduction or suspension of Public Assistance, Medical Assistance, SNAP benefits or services, the social services agency must establish that its actions were correct. 18 NYCRR 358-5.9(a).

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.

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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. Such services must be essential to the maintenance of the patient’s health and safety in his or her own home....”

- (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.

- (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.

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.

DISCUSSION

The Appellant has been in receipt of a Personal Care Services authorization from a Managed Long Term Care Plan, Centers Plan for Healthy Living. The Appellant seeks an increase in hours. The Appellant currently receives 24 hours per day/ 7 days a week. The Appellant seeks 24 hours daily continuous care (split shift), 7 days per week.

The evidence establishes that on October 17, 2018 and again on March 20, 2019, a nursing assessor completed a Uniform Assessment System evaluation of the Appellant's personal care needs.

The evidence further establishes that by notice dated May 21, 2019, the Managed Long Term Care Plan determined not to increase the Appellant's Personal Care Services authorization to 24 hours daily continuous personal care services (split shift care), 7 days per week, but to continue to provide the Appellant with a Personal Care Services authorization in the amount of 24 hours per day/ 7 days a week.

18 NYCRR 505.14(a)(2) provides a new definition of "Continuous Personal Care Services" ("Split-Shift Care") as follows: 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.

The Managed Long Term Care Plan's notice dated May 21, 2019 was carefully reviewed. It indicated in part that the Appellant requires the same assistance in both assessments performed by the plan.

At the hearing, the Appellant's Representative testified that the Appellant needs maximum assistance with his activities of daily living. She suffers from dementia, COPD, congestive heart failure, hypertension, anxiety, depression, hallucinations, crying, incontinent and is awake most of the night. In addition, she has fallen 3 times in May and due to frequent UTIs needs to use the bathroom regularly. This assertion is supported by both the caretakers and her physician.

The evidence has been considered. The weight of the credible evidence establishes the Appellant needs assistance during such calendar day with toileting, turning, moving and skin care 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.

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The credible evidence establishes that the Appellant is entitled to a Personal Care Services authorization in the amount of 24 hour daily continuous personal care services (split-shift care), 7 days per week.

DECISION AND ORDER

The Managed Long Term Care Plan's determination dated May 21, 2019 to provide the Appellant with a Personal Care Services authorization in the amount of live-in 24-hour personal care services is not correct and is reversed.

1. The Managed Long Term Care Plan, Centers Plan for Healthy Living, is directed to provide the Appellant with an increased Personal Care Services authorization in the amount of 24 hour daily continuous personal care services (split-shift care) 7 days per week.

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

DATED: Albany, New York
08/09/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "Allen Chorney", with a large, stylized loop at the end.

Commissioner's Designee