


STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: July 13, 2018

AGENCY: Suffolk
FH #: 7791567K

In the Matter of the Appeal of	:
	: DECISION
	AFTER
	: FAIR
	HEARING
from a determination by the Suffolk County	:
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 September 20, 2018, in Suffolk County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For the Social Services Agency

Ms. Debra Ferguson, Centers Plan for Healthy Living; Fair Hearing Representative

ISSUE

Was the Managed Care Plan's determination to deny Appellant's request for an increase in Personal Care Services from twelve hours, seven days per week to twenty-four hours per day consisting of two twelve-hour split shifts, seven days per 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 96, has been in receipt of a Medicaid Personal Care Services Authorization for twelve hours per day, seven days per week through the Managed Care Plan.

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2. On or about April 10, 2018, the Managed Care Plan received a request for an increase in Personal Care Services for Appellant to twenty-four hours daily consisting of twenty-four-hour continuous care by more than one personal care aide in the form of two twelve-hour split shifts.

3. The Appellant has a history of hypertension, lower extremity edema, severe osteoarthritis of multiple joints, atherosclerotic heart disease, urinary incontinence, fecal urgency, urinary tract infections, insomnia, abnormalities of gait and mobility requiring a wheelchair and scooter and even has some forgetfulness.

4. On April 18, 2018, the Managed Care Plan nurse completed a Uniform Assessment System (UAS) level of care report for the Appellant stating that the Appellant lives alone and is totally dependent with regard to meal preparation, housework and total dependence with bathing, toileting and dressing lower body, that she requires extensive assistance with eating and locomotion. The nurse from the Managed Care Plan recommended an increase in hours. Specifically, "based current assessment FA recommends an increase in PCA services to meet member's needs".

5. By notice dated April 25, 2018, the Managed Care Plan advised Appellant of its initial adverse determination to deny the request for increased Personal Care Services and to continue services at twelve hours daily.

6. On June 25, 2018, [REDACTED], the Appellant's physician detailed the specific needs and risk of infections of the Appellant and medical necessity of the requested increase in Personal Care Services for Appellant from twelve hours daily to continuous twenty-four-hour care by more than one personal care aide (split shift services).

7. By notice dated July 2, 2018, the Managed Care Plan advised Appellant of its final adverse determination to deny the request for increased Personal Care Services and to continue services at twelve hours daily.

8. On July 18, 2018, [REDACTED], the Appellant's physician detailed the Appellant's specific needs from hypertension, lower extremity edema, severe osteoarthritis of multiple joints and the medical necessity of the requested increase in Personal Care Services for Appellant from twelve hours daily to continuous twenty-four-hour care by more than one personal care aide (split shift services).

9. On July 13, 2018, the Appellant's Representative requested this fair hearing.

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.

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 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.

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

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

Section 505.14(a)(3)(iii) of the regulations provides that Personal care services, including continuous personal care services and live-in 24-hour personal care services as defined in paragraphs (2) and (4), respectively, of this subdivision, shall not be authorized to the extent that the patient's need for assistance can be met by the following:

- (1) voluntary assistance available from informal caregivers including, but not limited to, the patient's family, friends, or other responsible adult;
- (2) formal services provided or funded by an entity, agency or program other than the medical assistance program; or

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

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- 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

At the hearing, the Appellant's Counsel stated that the Appellant's Attorney in Fact is in regular contact with the Appellant who is ninety-six years old but who is unavailable to attend this fair hearing. Counsel acknowledged that the facts in this case are not at issue. The Appellant's Counsel conceded that the only issue to be decided is an issue of law, which determined the increase in Personal Care Services. Therefore, the in-person testimony of the Appellant is not required for the issuance of this decision pursuant to the order in Varshavsky v. Perales.

The Appellant's Counsel noted the letters from the Appellant's two physicians dated June 25, 2018 and July 2, 2018 as well as the recommendation by the UAS done by the Managed Care nurse on April 18, 2018 recommend for an increase of personal care hours supports their contention.

In order to not disadvantage the Managed Care Plan representative, an adjournment was granted for review of the recent medical documentation of the specific needs of the Appellant and if the recommended increase in Personal Care Services is medically necessary.

When the hearing was reconvened, the Appellant's Counsel noted that the Appellant is incontinent at night and has developed infections due to being in her own urine and feces. Counsel noted that the physicians and her care giver have submitted letters detailing such. Counsel noted the Managed Plan's care giver, in her statement notes her observation in the morning of the Appellant's condition. The care giver noted that this occurs in the bed while the Appellant, who requires extensive assistance with locomotion, is alone and in need due the urgency to eliminate. The care giver stated that in either case, the Appellant requires bathing, for which she is totally dependent, as well as changing of the Appellant's clothes and bedsheets.

The Managed Care Plan stated that the notice at issue denied the request for increased personal care services and the Managed Care Plan had determined based on the UAS that the Appellant's condition has not changed and current hours are sufficient to meet the Appellant's nighttime needs.

The fair hearing representative from the Managed Care Plan stated that the physician from the Managed Care Plan reviewed the medical documentation and maintains that the increase in Personal Care Services is not medically necessary. On inquiry, the representative was unsure if the plan's medical director had reviewed the July 2, 2018 letter and the UAS recommendation and after a recess she testified that he did and maintained that the determination of the Managed Care Plan was correct.

MLTC Policy 16.07 provides, in part, that 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.

Based on a complete review of the record, the Appellant's Counsel established changes in circumstance which warrant an increase of Appellant's Personal Care Service hours. The statements of the Appellant's Counsel and her nephew were detailed, consistent and corroborated by submitted medical documentation.

In this case, the Managed Care Plan did not establish a basis for the denial of the request for the increase in Personal Care Services. The Managed Care Plan's assertion that the Appellant's nighttime needs are not as frequent as described by the care giver was unsupported by the record. In contrast, the care giver's statements regarding the frequency, unpredictability, and extent of the Appellant's nighttime needs were consistent, detailed and supported in part by confirming documentation from the Appellant's physician as well as the Appellant's daytime needs.

Therefore, the Managed Care Plan's determination to deny the Appellant's request for an increase in Personal Care Service hours from twelve hours, seven days per week to twenty-four hours per day in the form of two twelve-hour split shifts, seven days per week was not correct and is reversed.

DECISION AND ORDER

The Managed Care Plan's determination to deny the Appellant's request for an increase in Personal Care Service hours from twelve hours, seven days per week to twenty-four hours per day in the form of two twelve-hour split shifts, seven days per week was not correct and is reversed.

1. The Managed Care Plan is directed to provide the Appellant with Personal Care Services in the amount of twenty-four hours per day consisting of two twelve-hour split shifts, seven days per week
2. The Managed Care Plan is directed to provide timely and adequate notice of any determination to change Appellant's Personal Care Services authorization.

Should the Managed Care 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 Managed Care Plan promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, the Managed Care Plan must comply immediately with the directives set forth above.

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DATED: Albany, New York
09/26/2018

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "Richard A. Gurbuck". The signature is written in a cursive style with a large, stylized 'R' and 'G'.

Commissioner's Designee