


STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: April 12, 2019

AGENCY: Nassau

FH #: 7943562H

In the Matter of the Appeal of	:
	: DECISION
	AFTER
	: FAIR
	HEARING
from a determination by the Nassau 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 December 20, 2019, in Nassau County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For the Managed Long-Term Care Plan

Debra Ferguson, Agency Representative (October 31, 2019 only)
Managed Long-Term Care Plan appearance waived by the Office of Administrative Hearings on December 20, 2019.

ISSUE

Was the Managed Long-Term Care Plan's determination to deny the Appellant's representative's request for an increase in authorized personal care services hours for the Appellant from twenty-four hours per day by a "live in" aide, seven days per week, to twenty-four hours per day (continuous care by more than one person) split-shift, 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 ninety-one, is in receipt of a Managed Long-Term Care personal care services authorization in the amount of twenty-four hours per day by a “live in” aide, seven days per week, through Centers Plan For Healthy Living, a Managed Long-Term Care Plan (hereinafter referred to as “the MLTCP”).

2. The Appellant resides in the community with his spouse who is also in receipt of Managed Long-Term Care personal care services.

3. The Appellant suffers from: [REDACTED]

4. On December 5, 2018, the MLTC Plan completed a Uniform Assessment System - New York Assessment (Comprehensive) Report (UAS) of the Appellant’s need for personal care which determined that the Appellant required total dependence in meal preparation, maximal assistance with managing medications, stairs, shopping, transportation, bathing, personal hygiene, dressing upper and lower body, extensive assistance in locomotion, transferring to the toilet, and toilet use. The UAS also noted that the Appellant has frequent bladder incontinence and occasional bowel incontinence.

5. On or about March 1, 2019, the Appellant’s representative requested an increase in the Appellant’s MLTCP personal care services from twenty-four hours per day by a “live in” aide, seven days per week, to twenty-four hours per day (continuous care by more than one person) split-shift, seven days per week.

6. By Initial Adverse Determination notice dated March 13, 2019, the MLTCP advised the Appellant of its determination to deny the request to increase Personal Care Services for the Appellant from twenty-four hours per day by a “live in” aide, seven days per week, to twenty-four hours per day (continuous care by more than one person) split-shift, seven days per week. The notice stated that an increase in personal care services to twenty-four hours per day (continuous care by more than one person) split-shift was not medically necessary.

7. By Final Adverse Determination notice dated April 1, 2019, the MLTCP, advised upon appeal of its determination to affirm the Initial Adverse Determination on the grounds that the personal care hours are currently authorized to meet the Appellant’s personal care needs.

8. On April 12, 2019, 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.

FH# 7943562H

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....”.

- (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

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". GIS 12 MA/026

Reauthorization for personal care services requires similar assessments as for the initial authorization; however, a nursing assessment is not required for Level I services if the physician's order indicates that the patient's medical condition is unchanged. Reauthorization of Level II services must include an evaluation of the services provided during the previous authorization period and must include a review of the nursing supervisory reports to assure that the patient's needs have been adequately met during the initial authorization period.

When there is a change in the patient's services needs which results solely from a change in his/her social circumstances, including, but not limited to, loss or withdrawal of support provided by informal caregivers, the social services department must review the social assessment, document the patient's social circumstances and make changes in the authorization as indicated. A new physician's order and nursing assessment is not required.

When there is a change in the patient's services needs which results from a change in his/her mental status including, but not limited to, loss of his/her ability to make judgments, the social services department must review the social assessment, document the changes in the patient's mental status and take appropriate action as indicated.

When there is a change in the patient's services needs which results from a change in his/her medical condition, the social services department must obtain a new physician's order and a new nursing assessment and shall complete a new social assessment. If the patient's medical condition continues to require the provision of personal care services, and the nursing assessment cannot be obtained within five working days of the request from the local social services department, the local department may make changes in the authorization in accordance with the procedures specified in 18 NYCRR 505.14(b)(5)(iv)

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 Managed Care Plan.

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

At the hearing, the Appellant's representative stated that she is authorized to represent the Appellant at the fair hearing. Additionally, the Appellant's representative waived the Appellant's appearance and testimony at the hearing. Accordingly, pursuant to the Order in Varshavsky v. Perales, the Appellant's appearance and testimony is not necessary for issuance of this Decision After Fair Hearing.

At the hearing, the Appellant's representative provided documentation from the Appellant's physician which indicated that the Appellant frequently gets up during the night to use the bathroom and must constantly be assisted with activities of daily living, including assistance with getting to and from the toilet without falling, due to his dementia. The Appellant's representative also provided an independent home care needs assessment for the Appellant which indicated that over the past six months, the Appellant's health has declined because of his dementia. The Appellant's representative stated that due to the amount of times the Appellant wakes at night to use the bathroom, a "live-in" aide is unable to receive five continuous hours of uninterrupted sleep. The contentions of the Appellant's representative at the hearing were supported by medical documentation and were persuasive.

It should be noted, that the MLTCP's Final Adverse determination indicated that while some of the Appellant's medical conditions had improved, other conditions had declined. This statement is contradictory to the direct medical evidence that was provided to the MLTCP during the internal plan appeal process and at the hearing. As such, the MLTCP's determination to deny the Appellant's representative's request for an increase in authorized personal care services hours for the Appellant from twenty-four hours per day by a "live in" aide, seven days per week, to twenty-four hours per day (continuous care by more than one person) split-shift, seven days per week cannot be sustained at this time.

DECISION AND ORDER

The Managed Long-Term Care Plan's determination to deny the Appellant's representative's request for an increase in authorized personal care services hours for the Appellant from twenty-four hours per day by a "live in" aide, seven days per week, to twenty-four hours per day (continuous care by more than one person) split-shift, seven days per week was not correct and is reversed.

1. The MCLTP is directed to cancel the Initial Adverse Determination dated March 13, 2019 and its Final Adverse Determination dated April 1, 2019.
2. The MLTCP is further directed to authorize personal care services in the amount of twenty-four hours per day (continuous care by more than one person) split-shift, seven days per week for the Appellant.

Should the MLTCP 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 MLTCP promptly to facilitate such compliance.

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

FH# 7943562H

DATED: Albany, New York
01/06/2020

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, flowing style.

Commissioner's Designee