


STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: July 15, 2019

AGENCY: Suffolk
FH #: 7994614Z

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| 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 August 5, 2019, in Suffolk County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For the Plan (Agency)


Ms. Deborah Ferguson, Fair Hearing Representative

ISSUE

Was the Agency's determination to authorize Personal Care Services (PCS) Assistance for the Appellant for 9.5 hours per day, 7 days a week, in lieu of the requested 24-hour, 2/12-hour split shift Continuous Care Services, 7 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 , is currently in receipt of a Personal Care Services Authorization through Centers Plan For Healthy Living, a Managed Long Term Care Program (MLTC) in the community (Agency) in the amount of 9.5 hours per day, 7 days a week. The Appellant lives alone in her house.

2. On July 3, 2019, the Agency obtained a nursing assessment which recommends that the Appellant receive Personal Care Services (PCS) and the Plan initially authorized PCS in the amount of 8 hours a day, seven days a week.

3. On July 11, 2019, the Appellant's family requested an increased authorization for PCS in the amount of 24 hours per day, 7 days per week (2/12-hour split shift continuous twenty-four-hour care by more than one personal care aide) from the Agency. The Appellant was at that time in receipt of PCS authorization for 8 hours per day, 7 days a week, which the Agency then increased to 9.5 hours per day, 7 days a week, pursuant to the subject request.

4. By Initial Adverse Determination, dated, July 12, 2019, the Plan denied the services requested on the Appellant's behalf, for 24-hour, continuous ("split-shift") (168 hours per week) and advised the Appellant of its determination to continue to authorize Personal Care Services (PCS) Assistance for the Appellant in the amount of 8 hours per day, 7 days a week, but subsequently increased her PCS to 9.5 hours per day, 7 days a week, in lieu of the requested 24 hours per day, 7 days per week, continuous ("split-shift") (168 hours per week) on the grounds that it was "not medically necessary" and the Appellant "does not meet the criteria". The Plan further stated that PCS is not for companionship or safety supervision.

5. The Appellant's representatives appealed the Initial Adverse Determination. The Plan relied on the referenced assessment it conducted to base its decision. No new assessment was conducted at the time of the subject request as the assessment was current. The prior assessment was March 18, 2019. It was uncontroverted that the Appellant's cognition has declined to severely impaired or oftentimes nonexistent.

6. By Final Adverse Determination notice dated, July 15, 2019, the Plan advised the Appellant of its determination to uphold its July 12, 2019, Initial Adverse Determination.

7. Uniform Assessment System (UAS) Report dated, July 3, 2019, and the subject dispute notice indicated, in relevant part: Meal Preparation: Total dependence, Ordinary Housework: Total dependence, Locomotion: Total dependence, : Total dependence, Dressing Upper Body, Personal Hygiene, Bed Mobility: Maximal Assistance by 2+ helpers (need physical help to complete most parts of this task, like someone lift from bed... Dressing lower body: Total dependence, Toilet Use, Dressing upper body: Maximal Assistance by 2+ helpers, Walking, Bathing, Locomotion, Transfer Toilet, Meal preparation and Ordinary Housework: Total dependence (depend completely upon someone else to complete all parts of this task. You do not participate in this task at all. "Eating: Setup help only (If...prepared for you and placed within your reach...) Medication management: Total dependence (need physical help to complete some parts of this task, like someone to lean on or help you lift a body part and frequently incontinent of bladder and bowel. All relevant tasks were rated either total dependence or maximal assistance.

8. Both parties agree that the Appellant has a degenerative disease, Advanced Alzheimer's or Dementia which causes steady decline in modified cognition and Activities of

FH# 7994614Z

Daily Living (ADL) functions, with every assessment warranting an agreement for increase in care. The Appellant is also wheelchair bound. The Appellant is currently unable to even roll on a bed.

9. The Appellant suffers from Hypertension, Acute Kidney Failure, Dementia, Urinary Tract Infection (UTI), Hyperlipidemia, Idiopathic Gout, Diabetes Mellitus, Respiratory Tuberculous Screenings, Constipation, Generalized Muscle Weakness and requires assistance with ADLs and IADLs, Metabolic Encephalopathy, Sepsis, Nutritional Anemia and Deficiency and Edema.

10. Both parties agree that the Appellant suffers from impaired cognition and mobility resulting in an inability to perform functional tasks and acknowledge the steady cognitive decline. She has Incontinence of Bladder and Bowel if left alone and requires assistance with all ADLs and IADLs. She is either chair, bed or wheelchair bound but her diagnoses render her unable to even navigate the wheelchair for any functional activities. Due to the degenerative nature of her diagnoses, the Appellant is unable to sustain functional communication with familiar and unfamiliar listeners and is unable to communicate for safety and social purposes.

11. On July 15, 2019, the Appellant requested this fair hearing.

APPLICABLE LAW

Part 438 of 42 Code of Federal Regulations (CFR) pertains to provision of Medicaid medical care, services and supplies through Managed Care Organizations (MCOs), Prepaid Inpatient Health Plans (PIHPs), Prepaid Ambulatory Health Plans (PAHPs) and Primary Care Case Managers (PCCMs), and the requirements for contracts for services so provided.

Section 438.210 of 42 CFR Subpart D provides, in pertinent part:

- (a) Coverage - Each contract with an MCO, PIHP, or PAHP must do the following:
 - (1) Identify, define, and specify the amount, duration, and scope of each service that the MCO, PIHP, or PAHP is required to offer.
 - (2) Require that the services identified in paragraph (a)(1) of this section be furnished in an amount, duration, and scope that is no less than the amount, duration, and scope for the same services furnished to beneficiaries under fee-for-service Medicaid, as set forth in Sec. 440.230.

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.

Section 505.14(b) of the Regulations provides that when a social services district receives a request for personal care services, it must determine whether the individual is eligible for Medical Assistance. The initial authorization for services shall be based on :

- a physician's order from the patient's physician based on the patient's current medical status as determined by a medical examination within 30 days of the request for Personal Care Services;
- a social assessment which must include a discussion with the patient to determine perception of his/her circumstances and preferences, an evaluation of the potential contribution of informal caregivers, such as family and friends, to the patient's care, and consideration of the number and kind of informal caregivers available to the patient, ability and motivation of informal caregivers to assist in care, extent of informal caregivers' potential involvement, availability of informal caregivers for future assistance, and acceptability to the patient of the informal caregivers' involvement in his/her care. The social assessment is completed by the Agency. When live-in 24-hour personal care services is indicated, the social assessment shall evaluate whether the patient's home has adequate sleeping accommodations for a personal care aide.
- a nursing assessment. The nursing assessment is completed by a nurse from a certified home health agency or by a nurse employed by the local social services department or by

FH# 7994614Z

a nurse employed by a voluntary or proprietary agency under contract with the local social services department. The nursing assessment must be completed within 5 working days of the request and must include the following:

- (1) a review and interpretation of the physician's order;
 - (2) the primary diagnosis code;
 - (3) an evaluation of the functions and tasks required by the patient;
 - (4) the degree of assistance required for each function and task;
 - (5) an evaluation whether adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, can meet the patient's need for assistance with personal care functions, and whether such equipment or supplies can be provided safely and cost-effectively.
 - (6) the development of a plan of care in collaboration with the patient or his/her representative; and
 - (7) recommendations for authorization of services.
- an assessment of the patient's appropriateness for hospice services and an assessment of the appropriateness and cost effectiveness of using adaptive or specialized medical equipment or supplies covered by the Medicaid Program including, but not limited to, bedside commodes, urinals, walkers, wheelchairs and insulin pens; and

The Department's regulations also reflect a Court ruling in *Mayer* regarding the use of task based assessments [18 NYCRR 505.14(b)(5)(v)(d)]. Specifically, social services districts are prohibited from using task-based assessments when authorizing or reauthorizing personal care services for any recipient whom the district has determined needs 24-hour care, including continuous 24-hour services (split-shift), 24-hour live-in services or the equivalent provided by a combination of formal and informal supports or caregivers. In addition, the district's determination whether the recipient needs such 24-hour personal care must be made without regard to the availability of formal or informal supports or caregivers to assist in the provision of such care. GIS 01 MA/044, issued on December 24, 2001.

In *Rodriguez v. City of New York*, 197 F. 3rd 611 (Federal Court of Appeals, 2nd Circuit 1999), cert. denied 531 U.S. 864, the Plaintiffs were Personal Care Services recipients who alleged that they would be in receipt of inadequate service not meeting legal requirements, without the provision of safety monitoring as an independent task in their Personal Care Services authorizations. The district court had ruled in favor of the Plaintiffs, but the Court of Appeals held that the Agency is not required to provide safety monitoring as an independent Personal Care Services task in evaluating the needs of applicants for and recipients of Personal Care

Services. Local Agencies were advised of this decision in GIS message 99/MA/036.

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
- 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, it was established that the Appellant's diagnoses were not in dispute. The Appellant's representatives explained that the Appellant currently resides alone. Her cognitive impairment and physical conditions require that she depends on someone else to complete all her activities of daily living. The representative further explained that the Appellant's Personal Care Aide leaves daily at 5:00 pm and transfers the Appellant to her bed at that time. Throughout this

time, from 5:00 pm, during bedtime, until the next day, at about 9:00 am the next morning when the aide returns, the Appellant is alone. The Appellant is 100% wheelchair-bound, is transferred with a Hoyer Lift, has no use whatsoever of her lower leg and cannot get in and out of bed without that Lift. The family would need to pay someone out of pocket to provide informal help with her activities of daily living at night but could not sustain that.

The representatives pointed out reasonably that by the Agency's own assessment and notice, the Appellant has declined to severely impaired and the assessment stated that she requires either complete physical help or maximum supervision at all times for all functions and activities. They also pointed out that, realistically, due to her cognitive and physical impairment and decline, the Appellant actually had total dependence for the functions the Agency had labeled maximal. The Appellant's capacity is nonexistent as to what she can physically do on her own hence their request for Personal Care Aide Level 2, 24-hour continuous split-shift per diem.

The current authorized Personal Care Services level means that the Appellant cannot get off her bed or wheelchair, depending on where the aide left her, to even use the bathroom or have supper. If she is left on the wheelchair, she would not be able to get to bed to sleep or eat either and vice versa. She would have to sit on the wheelchair and stay in her soiled diaper, without food, without going to bed and without any hygiene functions from 5:00 pm until about 9:00 am the next morning when the aide returns, or alternatively, just lie in bed for the same period with the same inabilities. The Appellant is unable to simply reposition herself on the bed, even with side rails on the bed, as such, she would just lie in the same position she was left and a short-term goal is to just roll to the side with help however, improvement was no longer indicated or expected due to advanced age and health degeneration. The Appellant's representatives submitted supporting medical letter from the Appellant's physician to buttress the argument that the Agency's determination in this case was not appropriate or safe for this Appellant. They further referenced several supporting documents in the Plan's own evidentiary packet.

The Appellant's representatives also explained that the Appellant was admitted into the hospital on [REDACTED], 2019, for a 100 day stay due to UTI-Sepsis. Due to that significant hospitalization and courses of treatment, the Appellant suffered a steep decline in every aspect of her life and health and the hospital's discharge plan dated, [REDACTED], 2019, was the provision of continuous twenty-four-hour Personal Care Services. They reiterated that the information in the UAS supports that discharge plan.

Part of the Plan's contention was that the request was understood as "safety monitoring or supervision" and since request for that as independent or "standalone" task is not a covered task, the Plan stated that it is not required to provide PCS for such. The determination was ostensibly based in part on the information available to the Agency at the time on the nature of the assistance required by the Appellant. However, irrespective of the language utilized by the Appellant's lay POA and the physicians for the request in this case, the substantive issue must be decided on its merit. The Appellant's representatives were advised that since assessments for the level of need for services are ongoing, they could procure and submit additional documentation about all the specific overnight needs of the Appellant to the Agency, if necessary.

Live-in 24-hour personal care services were also being explored by the representatives and was mentioned by the POA but it was noted on the record that those services were not requested and denied and could therefore, not be an issue for the hearing. Moreover, per applicable Regulations, “**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 facts of this case do not fit the foregoing criteria because it was established that the Appellant's needs and dependence were such that an aide could not obtain “five hours daily of uninterrupted sleep during the aide's eight-hour period of sleep”.

Be that as it may, the salient legal point in this case is that the weight of the medical and factual evidence adduced at this hearing tilted in favor of the argument that the needs of this Appellant cannot be safely and adequately met by 9.5 hours per day, 7 days a week personal care aide services, who could only care for the Appellant until 5:00 pm during the day but could not be available to the Appellant at all for the rest of the night until midmorning. The Agency made a determination based on the information available but must also assess the ADLs and IADLs needs of the Appellant during nighttime hours. Moreover, the determination in this case is incongruous with the information contained in the UAS and the hospital discharge documents. The record of this hearing supports a finding that this Appellant would require the provision of 24 hours per day, 7 days per week, split-shift PCA services to safely and adequately meet and manage her care.

Consequently, in accordance with regulatory requirements and the circumstances of this case, the Agency's determination of the Appellant's medical need for Personal Care Services in this instance cannot be sustained.

DECISION AND ORDER

The Agency's determination to authorize Personal Care Services (PCS) Assistance for the Appellant for 9.5 hours per day, 7 days a week, in lieu of the requested 24-hour, 2/12-hour split shift Continuous Care Services, 7 days a week, is not correct and is reversed.

1. The Agency is directed to authorize Personal Care Services to the Appellant for 24 hours per day 2/12-hour split shift Continuous Care Services, 7 days per week.

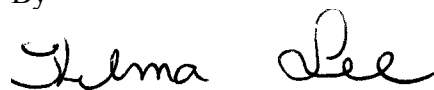
As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

FH# 7994614Z

DATED: Albany, New York
08/12/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "Selma Lee". The signature is written in a cursive, flowing style.

Commissioner's Designee