STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: October 19, 2018
[redacted]
AGENCY: MAP
FH #: 7847810K

In the Matter of the Appeal of

[redacted]

from a determination by the New York City Department of Social Services

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 December 14, 2018, 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 (Centers Plan for Healthy Living)

Julia Rolffort, Manager, Appeals enter Plan for Healthy Living, (Hearings: November 15, 2018; December 14, 2018)

ISSUE

Was the Managed Long-Term Care Plan's determination dated October 11, 2018, to deny the Appellant's request for an increase in the Appellant's Personal Care Services in the amount of Split-Shift, 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 75, has been in receipt of a Personal Care Services authorization from a Managed Long Term Care Plan[redacted].

2. The Appellant resides alone, in an apartment.

3. The Appellant currently receives Personal Care Services as follows: 7.5 hours/day; 7 days per week, totaling 52.5 hours per week. The Appellant seeks a Personal Care Services authorization in the amount of 24 hours/day 7 days per week, Split-Shift, totaling 168 per week.

4. On March 19, 2018, a nursing assessor completed a Uniform Assessment System, ("hereinafter referred to as UAS) evaluation of the Appellant's personal care needs. The assessment reads, "*Member had 2 falls in home. Once while ambulating to bed and once while transferring to toilet…*"

5. The March 19, 2018, UAS evaluation indicates that the Appellant's memory is "*OK*". The evaluation reads, "*Daughter reports small area of diaper rash around member's buttock's relived by therapeutic regimen*."

6. On June 21, 2018, the Appellant was admitted to [redacted]. The Appellant was discharged on August 21, 2018. The Appellant was diagnosed with [redacted].

6. On August 23, 2018, a nursing assessor completed a UAS, evaluation of the Appellant's personal care needs. The evaluation indicates that the Appellant has a "*Memory Problem*", and that the Appellant's "*Cognitive skills for daily decision making*" are "*Moderately impaired-Decisions consistently poor or unsafe; cues/supervision required at all times."*

7. The August 23, 2018 UAS indicates that with regard to <u>*meal preparation*</u> the Appellant has "*Total dependence – full performance by others during entire period";* with regard to <u>*stairs*</u>**,** the Appellant requires "*Maximal assistance-Help throughout task, but performs less than 50% of task on own; with respect to* <u>*bathing*</u>, the Appellant requires "*Maximal Assistance weight bearing support (including lifting of limbs) by 2+ helpers –OR weight-bearing support for more than 50% of subtasks";* with regard to <u>*personal hygiene,*</u> the Appellant requires "*Maximal assistance-Weight-bearing support (including lifting limbs) by 1 helper where person still performs 50% or more of subtasks*"; with regard to <u>*dressing of Upper Body*</u>, the Appellant requires "*Maximal assistance-Weight-bearing support(including lifting limbs) by 1 helper where person still performs 50% or more of subtasks***;** with regard to <u>*dressing of her Lower Body*</u> the Appellant requires, "*Maximal assistance-weight-bearing support (including lifting limbs) by 2+ helpers- OR weight-bearing support for more than 50% of subtasks"*; with regard to <u>*walking,*</u> the Appellant requires "*Maximal assistance*-Weight-bearing support (including lifting limbs) by 2+ helpers – OR weight-bearing support for more than 50% of subtasks**;** with regard to <u>*locomotion,*</u> the Appellant has "*Total dependence - weight-bearing support (including lifting limbs) by 2+ helpers – OR weight-bearing support for more than 50% of subtasks*."

8. The August 23, 2018 UAS evaluation further indicates that with regard to "*Transfer toilet*", the Appellant requires, "*Maximal assistance*-Weight-bearing support (including lifting limbs) by 2+ helpers – OR weight-bearing support for more than 50% of subtasks*"*; with regard to *Toilet use*, the Appellant requires "*Extensive assistance-Weight-bearing support (including lifting limbs) by 1 helper where person still performs 50% or more of subtasks";* with regard to *bed mobility*, the Appellant requires, "*Extensive assistance- Weight-bearing support (including lifting limbs) by 1 helper where person still performs 50% or more of subtasks*; with regard to *Eating*, the Appellant requires *"Limited assistance – Guided maneuvering of limbs, physical guidance without taking weight."*

9. The August 23, 2018 UAS evaluation indicates that with regard to *bladder*, the Appellant is "*Incontinent – No control present"*; and with regard to *bowel* the Appellant has *"Complete control*; *DOES NOT USE any type of ostomy device*." The Section G comment indicates that, "*Member wears pads, pull ups and chux to manage incontinence"*; the Appellant's "*Turning/repositioning program: Daily in last 3 days*."

10. The August 23, 2018 UAS indicates that the Appellant has "*Sleep problems*", which was, "*Exhibited on 1 of last 3 days*." The Appellant also suffers from "*Dyspnea*", which is "*Absent at rest, but present when performed moderate activities*." The assessment reads, "*Member was admitted into* [redacted] *(SNF) on the 07/21/2018 until 08/09/2018 for rehabilitation and therapy services. Member is currently home and PCP followed up at home today and her medication has been reconciled. Member and daughter educated on the importance of health preventive screening*."

11. The August 23, 2018 UAS indicates that the Appellant has exhibited *Dizziness* on "1 of the last 3 days", and with regard to *Unsteady gait*, "*Exhibited daily in last 3 days*." The UAS also indicates that the Appellant, "*…does not walk on own";* with respect to *balance,* defined as, "*Difficult or unable to move self to standing position unassisted: "[*the Appellant] *Exhibited daily in last 3 days*"; balance also defined as "*Difficult or unable to turn self around and face the opposite direction when standing*: "[the Appellant] *Exhibited daily in last 3 days."*

12. By Initial Adverse Determination Notice dated September 4, 2018, the Managed Long-Term Care Plan determined to partially deny the Appellant's request to increase the Personal Care Services authorization to 12 hours/day 7 days per week, split-shift, and to approve 8 hours/day; 7 days per week, totaling 56 hours per week.

13. By Final Adverse Determination Notice dated October 11, 2018, the Managed Long-Term Care Plan determined to uphold the September 4, 2018 determination, and to partially deny the Appellant' request. The determination indicates that the UAS performed on August 23, 2018

showed, "…*most of your abilities to perform physical functioning stayed the same and some declined when compared to a prior assessment that was completed by Centers Plan for Healthy Living on 8/10/2018. Your abilities to perform physical functioning stayed the same for dressing upper and lower body, personal hygiene (cleaning yourself), walking, bathing, transfer toilet (getting on and off the toilet), bed mobility (moving around the bed), toilet use, and medication management. You showed a decline to perform eating.*"

14. On October 24, 2016, 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.

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.

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. 18 NYCRR 505.14(a)(4)

The social services district must first determine whether the patient, because of the patient's medical condition, would be otherwise eligible for personal care services, including continuous personal care services or live-in 24-hour personal care services. For patients who would be otherwise eligible for personal care services, the district must then determine whether, and the extent to which, the patient's need for assistance can be met by voluntary assistance from informal caregivers, by formal services, or by adaptive or specialized equipment or supplies, as specified in sub clauses (a)(1) through (a)(3) of this subparagraph. 18 NYCRR 505.14 (a)(3)(iii)(b)

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.

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 evidence establishes that the Appellant, age 75, has been in receipt of a Personal Care Services authorization from a Managed Long Term Care Plan, Centers Plan for Healthy Living. The Appellant resides alone, in an apartment. The Appellant currently receives Personal Care Services as follows: 7.5 hours/day; 7 days per week, totaling 52.5 hours per week. The Appellant seeks a Personal Care Services authorization in the amount of 24hours/day 7 days per week, Split-Shift, totaling 168 hours per week.

The UAS dated August 23, 2018 indicates that the Appellant is diagnosed with [redacted]. The UAS reads that the Appellant's height is 5 feet, and her weight is "121."

At the fair hearing scheduled for November 15, 2018, the Appellant's Representatives contended that the assistance by the family is CDPAS, however, the Appellant's daughter and granddaughter cannot continue to take care of the Appellant. The Representatives stated that the Appellant has fallen on 5 occasions, and the Appellant wanders at night. The Appellant's attorney testified that the daughter and granddaughter's caregiving is only a temporary measure, and not intended to be a long-term solution, because neither the Appellant's daughter not her granddaughter resides with the Appellant. Further, the Appellant's daughter has medical issues, which make it difficult for her to take care of the Appellant. The Appellant's Representatives stated that there was no sleep study performed so that the Agency could assess the Appellant's nighttime needs. The attorney requested the Managed Long-Term Care Plan performed a sleep study. On the adjourned date, the Plan's Representative indicated that a sleep study was not performed during the adjournment period.

The Appellant's Representatives introduced into evidence two letters dated August 24, 2018, written by the Appellant's treating physician, both of which contain the Appellant's diagnoses, and one of which expresses the doctor's opinions regarding the Appellant's PCS hours, and the basis for such belief. Specifically, the letter reads, "[redacted] *is a 73-year-old female with muscle weakness and abnormalities in walking. Due to her medical conditions, she would benefit from a 12 on 12 hours of home aide services for assistance with ADLs such as*

feeding, dressing, bathing and toilet since she is unable to care for herself..." The letters were authored by [redacted].

The Appellant's Representatives also introduced into evidence a Letter dated November 14, 2018, written by the Appellant's treating physician. The letter was written subsequent to the date of the MLTC Plan's Initial Adverse Determination, and Final Adverse Determination, and therefore cannot be considered in this fair hearing.

The Appellant's Representatives introduced into evidence the Medical Review form prepared by the MLTC Plan, dated August 29, 2018, which contains Case Manager Notes that read, including, but not limited to, "*multiple falls. Other dx urinary incontinence, fecal urgency, htn, goiter, insomnia, depression, anxiety*." "*As per last reassessment: cognition status is alert and oriented x 1*." *Five falls have been reported within 90 days. 1st fall occurred in the home on 3/2/18, w/o fracture. 2nd fall occurred in the home on 3/18/18, without fracture. 3rd fall occurred 7/5/18 while admitted in the SNF, as per SNF notes, mbr was transported to ER xrays completed w/o any fractures. 5th fall 8/12/18 as per mbr's dtr mbr informed her that she fell at night while waiting for CNA to assist her to go to the bathroom, as per dtr SNF personnel assessed her and no injury noted. Mbr tends to wander at night either to use the bathroom or to try to go to the kitchen. Mdr gets up about 3 times per night, and very rarely will sleep more than 5 hrs at once. No wandering out of apartment reported. Despite using diapers mbr prefers to be assisted to the toilet for elimination, mbr has fallen in an attempt to get to the bathroom. Daughter [redacted] stayed over mbr's home for a few months because of mbr's decline and requiring assistance at night, but dtr [redacted] has moved out and mbr does not have anyone to care for her at night. Dtr [redacted] states that she is not able to care for their mother due to her own family responsibilities and also due to her own health condition being unstable. No other family mbr or friend available to provide assistance."*

At the hearing, the Appellant's granddaughter testified that she did begin taking care of the Appellant, for 3 to 5 times per week after 9:00pm. The granddaughter stated that when she arrives at the Appellant's home, the home health aide, (HHA) has already gone for the day. The granddaughter stated that she started spending the night in October 2018. She testified that she has observed a decline in the Appellant's condition, because the Appellant has been losing weight, and has become more frail, and unable to walk by herself. The granddaughter stated that last Wednesday the Appellant was taken to an Urgent Care facility, where the Appellant was weighed, and her weight was *105 lbs*.

The granddaughter also stated that the Appellant is unable to take her medication by herself, because she does not know what the medications are, and she has to be reminded constantly.

The granddaughter stated that when she arrives at the Appellant's home, she prepares food, and checks the Appellant's diaper. She stated that she sometimes finds feces in the Appellant's diaper, and she cleans the Appellant. The granddaughter stated that she sometimes finds dirty diapers in the bathroom from when the HHA was there, and she sometimes leaves dirty diapers in the bathroom, with the plan to dispose of them later.

The granddaughter stated that the HHA does not always document activities in the log.

The granddaughter stated that since she has started spending the night in the Appellant's home, she cannot get 5 hours of uninterrupted sleep on any night because the Appellant is incontinent, and she is unable to go to the toilet by herself. The granddaughter stated that the Appellant prefers to go to the bathroom, rather than eliminate in her diaper, and she falls down when she tries to walk to the bathroom by herself. The granddaughter stated that she changes the Appellant's diaper, and cleans the Appellant, because the Appellant cannot clean herself. The granddaughter testified that the Appellant periodically wakes up on her own the night, every night. The granddaughter further testified that she and her mother keep a Night Time log, in which she made entries during the period of October 19, 2018 through October 24, 2018. A review of the log shows that the granddaughter made approximately 40 entries, which establish a regular, and consistent pattern of the Appellant requiring assistance of the Appellant have urinary urgencies, requiring her to go to be taken to the bathroom and cleaned, on 2 to 3 occasions in the middle of every night. The entries also show that medication preparation, and snack preparation, as necessary for weight gain, during nighttime hours.

The testimony of the Appellant's granddaughter is credible because it is detailed, plausible, consistent, and her responsiveness to questioning, and log entries further supports her credibility.

The MLTC Plan Representative zealously contended that the Night Time Log should not be entered into evidence because it is inherently unreliable.

The MLTC Plan's contention is partially correct. The entries in the log that have been given weight are those made by the Appellant's granddaughter, who testified at the hearing, and was therefore subject to cross-examination by the Plan's Representative. The other entries in the log will not be afforded weight because their author did not testify, and the reliability of such entries could not be explored.

The evidence has been duly considered. The credible evidence establishes that there has been a change in the Appellant's medical condition, specifically a decline in her medical health, accompanied by weight loss of 16 pounds, (from 121) with the Appellant currently weighing only *105 lbs*. The MLTC Plan recognized that the Appellant is totally dependent in eating, but does not recognize that a significant weight loss has resulted, which affects the degree to which she may be able participate in her ADL. The Appellant's significant weight loss has occurred subsequent to the MLTC Plan's Final Adverse determination, and therefore has not been included in accurately assessing the Appellant's current overall medical condition.

The credible record also establishes that there has also been another change in the Appellant's circumstances, specifically that the Appellant's daughter, and granddaughter are not able to remain the Appellant's nighttime caregivers.

The credible evidence therefore, establishes that the Appellant's urinary incontinence and toileting needs, mobility, and bed repositioning, are of 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. The Appellant's granddaughter credibly testified that she cannot get 5 hours of uninterrupted sleep when she spends the night with the Appellant. The credible record establishes that the Appellant prefers to go to the bathroom, rather than use her diaper during the night, and she is unable to get to the bathroom by herself. If the Appellant does not physically go to the bathroom, she will wear the same diaper, and remain in her own urine, and at times, excrement from the time that the aide leaves, until the aide hopefully arrives timely the next morning, a period exceeding 10 hours.

The weight of the evidence establishes that the MLTC Plan's denial of the Appellant's request for an increase to Split-Shit cannot be sustained.

The Appellant is entitled to a Personal Care Services authorization in the amount of continuous personal care services (split-shift care).

DECISION AND ORDER

The Managed Long Term Care Plan's determination dated October 11, 2018 to deny the Appellant's request for an increase in the Appellant's Personal Care Services to Split-Shift, is not correct and is reversed.

1. The Managed Long Term Plan, Centers Plan for Healthy Living is directed to provide the Appellant with an increased Personal Care Services authorization in the amount of Split-Shift, effective immediately.

Should the Agency 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 Agency promptly to facilitate such compliance.

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

DATED: Albany, New York

FH# 7847810K

03/14/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By H. Cooper Gregory

Commissioner's Designee