


STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: March 16, 2018

AGENCY: Suffolk

FH #: 7722436Y

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 May 7, 2018, in Suffolk County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For the Agency


Centers Plan For Healthy Living (Agency)
Agency appearance waived by the Office of Administrative Hearings

ISSUE

Was the Agency's determination to authorize Personal Care Services (PCS) Assistance for the Appellant for 8 hours per day, 7 days a week, in lieu of the requested two 12-hour split-shift continuous care per day, 7 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 , 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 8 hours per day, 7 days a week.

2. The Appellant's provider and her POA requested an increased authorization for PCS in the amount of two 12-hour split-shift continuous care per day, 7 days per week from the Agency. The Appellant was at that time in receipt of PCS authorization for 8 hours per day, 5 days a week, which the Agency then increased to 8 hours per day, 7 days a week, pursuant to the subject request.

3. By notice dated, March 7, 2018, the Agency 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, 5 days a week, but subsequently increased her PCS to 8 hours per day, 7 days a week, in lieu of the requested two 12-hour split-shift continuous care per day, 7 days per week.

4. The notice also stated, in relevant part, that for the Appellant, "Dressing Upper Body, Personal Hygiene, Bed Mobility: Maximal Assistance (You need physical help to complete most parts of this task, like someone to lean on or help you lift a body part... Dressing lower body, Walking, Bathing, Locomotion, Transfer Toilet, Toilet Use, Meal preparation and Ordinary Housework: Total Dependence (You 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: Extensive Assistance (You need physical help to complete some parts of this task, like someone to lean on or help you lift a body part..."

5. Both parties agree that the Appellant has a degenerative disease, Multiple Sclerosis, which causes steady decline in modified cognition and Activities of Daily Living (ADL) functions, with every assessment warranting an agreement for increase in care.

6. Both parties agree that the Appellant suffers from Multiple Sclerosis (MS), for over a decade, with Hemiplegia and other neurological issues, hypertension, hyperlipidemia, depression, recurrent decubitus ulcers, and osteoarthritis. Her upper and lower body paralysis result in an inability to use her arm and hands for any functional tasks. She is either bed or wheelchair bound (motorized scooter indoors/outdoors) but progressive fatigue throughout the day renders her unable to even navigate the wheelchair for any functional activities and she has a history of bed sores. Due to the degenerative nature of MS, muscular weakness, severe dysarthria, and impaired respiratory support, the Appellant also has severe speech impairment/unintelligibility and is unable to sustain functional communication with familiar and unfamiliar listeners and is unable to communicate for safety and social purposes. She has urinary incontinence and bowel incontinence if left alone and requires assistance with all ADLs and IADLs.

7. On March 16, 2018, the Appellant 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.

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.

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:

- (i) Level I shall be limited to the performance of nutritional and environmental support functions.

- (b) The authorization for Level I services shall not exceed eight hours per week.

- (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
- 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

This Fair Hearing proceeded without the direct testimony of the Appellant. There was no direct contact between the Appellant and the Agency during the processing of this request and the Appellant is also incapable of contributing to the proceedings for medical reasons. The Appellant's family, POA and representatives possess the requisite knowledge for this Fair Hearing to proceed. Furthermore, the only issue for this Fair Hearing concerns matters of law only, based upon the documentary evidence available at the hearing. The factual issues were not in dispute, and thus, the hearing proceeded without the participation of the Appellant. Based on the review of the record therefore, none of the facts of this case was in dispute. Consequently, the in-person testimony of the Appellant is not required pursuant to *Varshavsky v. Perales*.

At the hearing it was established that the Appellant's diagnoses were not in dispute. The Appellant's representative explained that the Appellant currently resides alone and has been battling MS and its complex complications for more than a decade. Her weak health and physical conditions require that she depends on someone else to complete her activities of daily living. She further explained that the Appellant's Personal Care Aide leaves on a daily basis at 4:30 pm. Throughout this time, from 4:30 pm, during bedtime, until the next day, at about 9:00 am the next morning when the aide returns, the Appellant is alone. Her children and a friend, who used to be around to provide informal help with her activities of daily living, are no longer available. She pointed out reasonably that by the Agency's own notice dated, March 7, 2018, the Appellant requires either complete physical help or maximum supervision at all times for all functions and activities. The Appellant is very limited to nonexistent as to what she can physically do on her own hence their request for two 12 hours a day of Personal Care Aide Level 2. The current authorized Personal Care Services level means that the Appellant cannot get off her bed or get

off her scooter, depending on where the aide left her, to even use the bathroom or have supper. If she is left on the scooter, she would not be able to get to bed to sleep or eat either and vice versa. She would have to sit on the scooter and stay in her soiled diaper, without food, without going to bed and without any hygiene functions from 4:30 pm until about 9:00 am the next morning when the aide returns, or alternatively, just lie in bed for the same period of time with the same inabilities.

The Appellant's representatives submitted supporting medical evidence from the Appellant's physicians to buttress the argument that the Agency's determination in this case was not appropriate or safe for this Appellant. Part of the Agency's contention was that the Appellant had a partner and family members available to provide informal help to supplement the Personal Care Services. The determination was ostensibly based in part on the information available to it at the time that the Appellant had assistance from family and friends. However, irrespective of the argument of whether family members could be mandated to make up Personal Care Services hours that would be otherwise medically necessary for safe and appropriate care, the family members in question in this case, who hitherto volunteered to supplement the hours for this Appellant, are no longer available. Each family member submitted an affidavit explaining why they were no longer able to assist. The daughter explained that she lived too far from the Appellant to provide immediate/daily care and moreover, she is a mother of a [REDACTED]-year-old child and an [REDACTED]-month-old child, with a full-time career and a husband, who runs his own business. The son/POA explained that he also lived too far from the Appellant to provide immediate/daily care and moreover, his new employment requires him to be on call 24/7, which precludes the possibility of responsibility to the task of caring for the Appellant. The boyfriend was currently diagnosed with neck and back medical problems, which now, at best, compromises his ability to assist in lifting and transferring the Appellant, as he had done in the past or completely precludes him from safely assisting. The representative also submitted medical documentation from the boyfriend's physician to substantiate his claim.

Be that as it may, the salient legal point in this case is that the weight of the medical documentary evidence and the evidence of current lack of informal supplemental help from family and friends, educed at this hearing tilted in favor of the argument that the needs of this Appellant cannot be safely and adequately met by 8 hours per day, 7 days a week personal care aide, who could only care for the Appellant until 4:30 pm during the day but could not be available to the Appellant at all for most of the evening and at night until midmorning. The evidence supports a finding that this Appellant would require the provision of uninterrupted care, by more than one personal assistant (aide), for more than 8 hours in a calendar day in order to safely and adequately meet and manage the complexity of her care. Consequently, in accordance with regulatory requirements, the Agency's determination in this case was correct when made but cannot be sustained at this time.

DECISION AND ORDER

The Agency's determination to authorize Personal Care Services (PCS) Assistance for the Appellant for 8 hours per day, 7 days a week, in lieu of the requested two 12-hour split-shift continuous care per day, 7 days per week was correct when made.

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1. The Agency is directed to authorize Personal Care Services to the Appellant for two 12-hour split-shift continuous care per day, 7 days a week.

2. The Agency is directed to inform the Appellant, in writing, of its authorization.


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

DATED: Albany, New York
05/15/2018

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "Selma Lee". The signature is fluid and cursive, with the first name "Selma" and the last name "Lee" clearly distinguishable.

Commissioner's Designee