

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: October 4, 2019

AGENCY: MAP
FH #: 8040479Y

In the Matter of the Appeal of
[REDACTED]
from a determination by the New York City
Department of Social Services

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**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 November 12, 2019, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[REDACTED]

For the Medicaid Managed Long Term Care Plan

Deborah Ferguson, Fair Hearing Representative

ISSUE

Was the Medicaid Managed Long Term Care Plan's determination to deny the Appellant's request for an increase in the Appellant's Personal Care Services Authorization, from 56 hours per week (8 hours per day x 7 days per week) to 24 hour, continuous ("split-shift") care (168 hours 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 [REDACTED], has been in receipt of Medicaid benefits provided through a Medicaid Managed Long Term Care Plan, Centers Plan for Healthy Living (hereinafter "Plan").

2. The Appellant is currently authorized to receive 56 hours per week (8 hours per day x 7 days per week) in Personal Care Services.

3. The Appellant's diagnosed medical conditions include abnormalities of gait and mobility, allergic rhinitis, Alzheimer's disease, acute myocardial infraction, anxiety, chronic pain, COPD, coronary heart disease, dependence on supplemental oxygen, depression, diabetes, dizziness and giddiness, edema, fatigue, fecal urgency, GERD, heart failure, history of falling, hypercholesterolemia, hypertension, insomnia, irritable bowel syndrome with diarrhea, lumbago with sciatica, peripheral vascular disease, obesity, osteoarthritis, urinary incontinence, and weakness.

4. On June 28, 2019, a registered nurse assessor conducted a Uniform Assessment System ("UAS") assessment of the Appellant's personal care needs.

5. On August 27, 2019, a registered nurse assessor conducted a Uniform Assessment System ("UAS") assessment of the Appellant's personal care needs.

6. On or about August 30, 2019, the Appellant's daughter requested an increase in the Appellant's Personal Care Services Authorization, from 56 hours per week (8 hours per day x 7 days per week) to 24 hour, continuous ("split-shift") care (168 hours per week), which the Plan determined to deny by Initial Adverse Determination, dated September 9, 2019.

7. On or about September 9, 2019, the Appellant's daughter appealed the Plan's September 9, 2019 determination, which the Plan upheld by Final Adverse Determination, dated September 11, 2019.

8. On October 4, 2019, the Appellant's daughter requested this fair hearing to appeal the Plan's determination.

APPLICABLE LAW

Section 358-5.9 of the Regulations provides that, at a fair hearing concerning the denial of an application for or the adequacy of Public Assistance, HEAP, SNAP benefits, Medical Assistance or Services, the Appellant must establish that the Agency's denial of assistance or benefits was not correct or that the Appellant is eligible for a greater amount of assistance or benefits.

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.
 - (3) Provide that the MCO, PIHP, or PAHP--
 - (i) Must ensure that the services are sufficient in amount, duration, or scope to reasonably be expected to achieve the purpose for which the services are furnished.
 - (ii) May not arbitrarily deny or reduce the amount, duration, or scope of a required service solely because of diagnosis, type of illness, or condition of the beneficiary;
 - (iii) May place appropriate limits on a service
 - (A) On the basis of criteria applied under the State plan, such as medical necessity; or
 - (B) For the purpose of utilization control, provided the services furnished can reasonably be expected to achieve their purpose, as required in paragraph (a)(3)(i) of this section; and
 - (4) Specify what constitutes “medically necessary services” in a manner that:
 - (i) Is no more restrictive than that used in the State Medicaid program as indicated in State statutes and regulations, the State Plan, and other State policy and procedures; and
 - (ii) Addresses the extent to which the MCO, PIHP, or PAHP is responsible for covering services related to the following:
 - (A) The prevention, diagnosis, and treatment of health impairments.
 - (B) The ability to achieve age-appropriate growth and development.
 - (C) The ability to attain, maintain, or regain functional capacity.
- (b) Authorization of services. For the processing of requests for initial and continuing authorizations of services, each contract must require:
- (1) That the MCO, PIHP, or PAHP and its subcontractors have in place, and follow, written policies and procedures.
 - (2) That the MCO, PIHP, or PAHP:
 - (i) Have in effect mechanisms to ensure consistent application of review criteria for authorization decisions; and
 - (ii) Consult with the requesting provider when appropriate.

- (3) That any decision to deny a service authorization request or to authorize a service in an amount, duration, or scope that is less than requested, be made by a health care professional who has appropriate clinical expertise in treating the enrollee's condition or disease....

Section 438.236 of 42 CFR Subpart D provides, in pertinent part:

- (a) Basic rule: The State must ensure, through its contracts, that each MCO and, when applicable, each PIHP and PAHP meets the requirements of this section.
- (b) Adoption of practice guidelines. Each MCO and, when applicable, each PIHP and PAHP adopts practice guidelines that meet the following requirements:
 - (1) Are based on valid and reliable clinical evidence or a consensus of health care professionals in the particular field.
 - (2) Consider the needs of the MCO's, PIHP's, or PAHP's enrollees.
 - (3) Are adopted in consultation with contracting health care professionals.
 - (4) Are reviewed and updated periodically as appropriate.
- (c) Dissemination of guidelines. Each MCO, PIHP, and PAHP disseminates the guidelines to all affected providers and, upon request, to enrollees and potential enrollees.
- (d) Application of guidelines. Decisions for utilization management, enrollee education, coverage of services, and other areas to which the guidelines apply are consistent with the guidelines.

Section 438.400 of 42 CFR Subpart F provides in part:

- (a) Statutory basis. This subpart is based on sections 1902(a)(3), 1902(a)(4), and 1932(b)(4) of the Act.
 - (1) Section 1902(a)(3) requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly.
 - (2) Section 1902(a)(4) requires that the State plan provide for methods of administration that the Secretary finds necessary for the proper and efficient operation of the plan.
 - (3) Section 1932(b)(4) requires Medicaid managed care organizations to establish internal grievance procedures under which Medicaid enrollees, or providers acting on their behalf, may challenge the denial of coverage of, or payment for, medical assistance.
- (b) Definitions. As used in this subpart, the following terms have the indicated meanings:
In the case of an MCO or PIHP - "Action" means--
 - (1) The denial or limited authorization of a requested service, including the type or level of service;
 - (2) The reduction, suspension, or termination of a previously authorized service;
 - (3) The denial, in whole or in part, of payment for a service...

Section 438.402 of 42 CFR Subpart F provides in part:

- (a) The grievance system. Each MCO [Managed Care Organization] and PIHP [Prepaid Inpatient Health Plan] must have a system in place, for enrollees, that includes a grievance process, an appeal process, and access to the State's fair hearing system...

Section 438.404(b) of 42 CFR Subpart F provides in part:

- (b) Content of notice. The notice must explain the following:
 - (1) The action the MCO or PIHP or its contractor has taken or intends to take;
 - (2) The reasons for the action...

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, as specified in 18 NYCRR §§ 505.14(a)(5)(i)(a) and 505.14(a)(5)(ii)(a). Such services must be essential to the maintenance of the patient's health and safety in his or her own home, as determined by the social services district in accordance with Section 505.14; ordered by the attending physician; based on an assessment of the patient's needs and of the appropriateness and cost-effectiveness of services specified in 18 NYCRR § 505.14(b)(3)(iv); provided by a qualified person in accordance with a plan of care; and supervised by a registered professional nurse.

Section 505.14(a) of the Regulations provides in part that 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. Note: Effective April 1, 2011 Social Services Law §365-a(2)(e)(iv), which is reflected in this regulation, was amended to provide 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.
- (ii) Level II shall include the performance of nutritional and environmental support functions and personal care functions.
 - (a) Personal care functions shall include some or total 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) preparing meals in accordance with modified diets, including low sugar, low fat, low salt and low residue diets;
- (8) feeding;
- (9) 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;
- (10) providing routine skin care;
- (11) using medical supplies and equipment such as walkers and wheelchairs; and
- (12) changing of simple dressings.

When the district, in accordance with 505.14(a)(4), determined the patient is appropriate for the Personal Care Services Program, a care plan must be developed that meets the patient's scheduled and unscheduled day and nighttime personal care needs. In determining the appropriate amount of hours to authorize, the district must review the physician's order and the nursing and social assessments to assure that the authorization and scheduling of hours in combination with any informal support contributions, efficiencies and specialized medical equipment, is sufficient to meet the patient's personal care needs. The assessment process should also evaluate the availability of informal supports who may be willing and available to provide assistance with needed tasks and whether the patient's day or nighttime needs can totally or partially be met through the use of efficiencies and specialized medical equipment including, but not limited to, commode, urinal, walker, wheelchair, etc.

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.

Pursuant to GIS 03 MA/003, task based assessments must be developed which meet the scheduled and unscheduled day and nighttime needs of recipients of Personal Care Services. This GIS was promulgated to clarify and elaborate on the assessment of Personal Care Services pursuant to the Court's ruling in Rodriguez v. Novello and in accordance with existing Department regulations and policies. The assessment process should evaluate and document when and to what degree the patient requires assistance with Personal Care Services tasks and whether needed assistance with tasks can be scheduled or may occur at unpredictable times during the day or night.

Social services districts should authorize assistance with recognized, medically necessary Personal Care Services tasks. As previously advised, social services districts are NOT required to allot time for safety monitoring as a separate task as part of the total Personal Care Services hours authorized (see GIS 99 MA/013, GIS 99 MA/036). However, districts are reminded that a clear and legitimate distinction exists between “safety monitoring” as a non-required independent stand-alone function while no Level II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed.

Completion of accurate and comprehensive assessments are essential to safe and adequate care Medical Plan development and appropriate service authorization. Adherence to Department assessments requirements will help assure patient quality of care and district compliance with the administration of the Personal Care Services Program.

Section 505.14(a)(4) of the Regulations provides that 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(a)(2) of the Regulations provides that 24 hour continuous personal care services (“split shift”) 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.

MLTC Policy 16.07 provides, in pertinent part: Plans cannot use task-based assessment tools to authorize or reauthorize services for enrollees who need 24-hour services, including continuous services, live-in 24-hour services, or the equivalent provided by formal services or informal caregivers. The reason for this is that task-based assessment tools generally quantify the amount of time that is determined necessary for the completion of particular IADLs or ADLs and the frequency of that assistance, rather than reflect assistance that may be needed on a more continuous or “as needed” basis, such as might occur when an enrollee’s medical condition causes the enrollee to have frequent or recurring needs for assistance during the day or night. A task-based assessment tool may thus be suitable for use for enrollees who are not eligible for 24-hour services but is inappropriate for enrollees who are eligible for 24-hour care.

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. The plan must first determine whether the enrollee, because of the enrollee's medical condition, would be otherwise eligible for PCS or CDPAS, including continuous or live-in 24-hour services. For enrollees who would be otherwise eligible for services, the plan must then determine whether, and the extent to which, the enrollee's need for assistance can be met by voluntary assistance from informal caregivers, by formal services, or by adaptive or specialized equipment or supplies.

MLTC Policy 15.09 provides, in pertinent part: Services shall not be authorized to the extent that the individual's need for assistance can be met by voluntary assistance from informal caregivers, by formal services other than the Medicaid program, or by adaptive or specialized equipment or supplies that can be provided safely and cost-effectively.

DISCUSSION

The uncontroverted evidence in this case establishes that the Appellant [REDACTED], has been in receipt of Medicaid benefits provided through a Medicaid Managed Long Term Care Plan and is currently authorized to receive Personal Care Services (hereinafter "PCS") in the amount of 56 hours per week (8 hours per day x 7 days per week). Medical evidence presented at the hearing establish that the Appellant's diagnosed medical conditions include abnormalities of gait and mobility, allergic rhinitis, Alzheimer's disease, acute myocardial infraction, anxiety, chronic pain, COPD, coronary heart disease, dependence on supplemental oxygen, depression, diabetes, dizziness and giddiness, edema, fatigue, fecal urgency, GERD, heart failure, history of falling, hypercholesterolemia, hypertension, insomnia, irritable bowel syndrome with diarrhea, lumbago with sciatica, obesity, osteoarthritis, peripheral vascular disease, urinary incontinence, and weakness.

The record further establishes that on or about August 30, 2019, the Appellant's daughter requested an increase in the Appellant's PCS Authorization, from 56 hours per week (8 hours per day x 7 days per week) to 24 hour, continuous ("split-shift") care (168 hours per week) (hereinafter "24 hour, split shift"), which the Plan determined to deny by Initial Adverse Determination, dated September 9, 2019. On or about September 9, 2019, the Appellant's daughter appealed the denial, which the Plan upheld by Final Adverse Determination, dated September 11, 2019. The Plan denied the request based on a purported lack of medical necessity and specifically advised the following:

...[the Appellant] recently underwent a [UAS assessment] on August 27, 2019...that showed most of her abilities to perform physical functioning stayed the same since her prior [UAS] assessment...therefore, her hours stay the same...

...The UAS did not support the need for night time hours. Additional hours are not provided for safety supervision, companionship, or when tasks are not being performed. The discharge summaries from [REDACTED], dated August 22, 2019, [REDACTED], dated July 25, 2019, and [REDACTED], dated August 13, 2019, were reviewed in making this decision...

The Appellant's daughter, in her September 9, 2019 Plan appeal, advised the Plan of the following: "[the Appellant] has been hospitalized many times during the last 4 months as her health has declined, has fallen twice, has a diagnosis of dementia, [and] needs constant assistance during the night as incidents regarding falls and hospitalizations happened during [that time]...and [that she] is having difficulty ambulating even with the assistance of a walker as she needs one person assistance to stand up." At the hearing, the Appellant's daughter testified that because the Appellant is incontinent of the bowel and suffers from diarrhea, she has fallen at night – in the absence of a Personal Care Aide (hereinafter "PCA") – due to slipping in her "own feces," which resulted in the aforementioned July 25, 2019 hospitalization. With regard to this issue, the Appellant's daughter contends that there are times that the Appellant is found with feces all over the floor and bed since it "comes out of the diaper" due to the severity of her diarrhea. The Appellant's daughter further testified that the Appellant recently fell, again, while trying to get a glass of water the PCA left on the nightstand at the end of her shift, since the PCA currently arrives at 11:00 AM and leaves at 7:00PM daily.

With regard to the Appellant's need for assistance with Activities of Daily Living ("ADLs"), the August 27, 2019 UAS Assessment provides that the Appellant requires the assistance of others with all ADLs, including bathing, personal hygiene, dressing upper and lower body, walking, bed mobility, locomotion, toileting (use and transfer), meal preparation, eating, and managing medications. The UAS further provides that the Appellant: is incontinent of the bladder and bowel for which she uses pull-ups; has abnormalities of gait and mobility; exhibits balance issues, as she has difficulty with, or is unable to, "move self to standing position unassisted;" is "unable to finish normal day-to-day activities" due to "diminished energy;" takes a total of twenty-two (22) medications, nine (9) of which are to be taken in the evening or at bedtime; has suffered multiple falls; and suffers from irritable bowel syndrome with diarrhea. The Plan's nurse further noted that the Appellant needs significant weight bearing assistance for bathing, dressing lower body, and toilet transfer due to osteoarthritis pain; and requires "some" weight bearing assistance to turn side by side in bed in order to get to a sitting position. This evidence supports the Appellant's daughter's credible contentions.

The evidence and contentions of the respective parties in this matter, having been carefully reviewed and fully considered, establish that the Appellant, an [REDACTED] who suffers from multiple progressive medical conditions, has care needs sufficient to warrant the provision of a 24 hour live-in PCS authorization. This is because Section 505.14(a)(4) of the Regulations provides that live-in 24-hour PCS means the provision of care by one PCA for a patient who, because of the patient's medical condition, needs assistance during a calendar day with toileting, walking, transferring, turning and positioning, and/or feeding, which the Appellant's documented care needs establish. The Appellant is, therefore, eligible for 24 hour

FH# 8040479Y

live-in PCS.

With regard to the provision of 24 hour, split-shift PCS, the Regulations provide that “continuous personal care services (split-shift) 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 PCA would be unlikely to obtain, on a regular basis, 5 hours daily of uninterrupted sleep during the aide’s 8 hour period of sleep.” In this matter, the Appellant’s daughter failed to present sufficient evidence to establish the Appellant’s need for a 24 hour, split shift PCS authorization, since she testified that the Appellant needs assistance with toileting at night, but did not testify to, or provide evidence, which would establish that those nighttime needs would prevent a 24 hour live-in PCA from regularly obtaining 5 hours of uninterrupted sleep during the 8 hour sleep period. Accordingly, the Plan’s determination not provide a 24 hour live-in PCS Authorization cannot be sustained.

Additionally, the record does not support the Plan’s contention that the request for additional PCS hours is based solely on a need for safety supervision. This is because, even if the Appellant has a need for safety supervision, the Regulations provide that a clear and legitimate distinction exists between “safety monitoring” as a non-required independent stand-alone function while no Level II PCS task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II PCS task, such as transferring, toileting, or walking, to assure the task is being safely completed. In this matter, the record establishes that the Appellant needs the assistance of a PCA with all ADLs during an entire calendar day.

DECISION AND ORDER

The Plan’s determination to deny the Appellant’s request for an increase in the Appellant’s Personal Care Services Authorization, from 56 hours per week (8 hours per day x 7 days per week) to 24 hour, continuous (“split-shift”) care (168 hours per week), is not correct and is reversed.

1. The Plan is directed to immediately provide the Appellant with a Personal Care Services Authorization in the amount of 24 hour, live-in (91 hours per week).
2. The Plan is directed to notify the Appellant, in writing, of its determination to increase the Appellant’s Personal Care Services Authorization from 56 hours per week (8 hours per day x 7 days per week) to 24 hour, live-in (91 hours per week).

Should the Medicaid Managed Long Term 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 Plan promptly to facilitate such compliance.

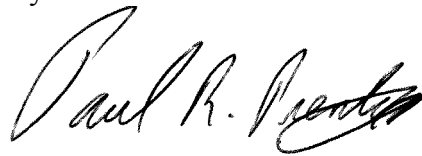
FH# 8040479Y

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

DATED: Albany, New York
12/10/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "Paul R. Prentiss", with a stylized flourish at the end.

Commissioner's Designee