

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: July 24, 2018

AGENCY: MAP
FH #: 7796899H

In the Matter of the Appeal of	:
	: DECISION
	AFTER
	: FAIR
	HEARING
from a determination by the New York City	:
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 16, 2018, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For the Managed Long Term Care Plan (Centers Plan for Healthy Living)


No Plan personal appearance, appearance on papers

ISSUE

Was the determination of the Managed Long Term Care Plan to deny the Appellant's request for personal care service hours in the amount of 24 hours per day 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, , resides alone. The Appellant has been in receipt of a Medical Assistance authorization and is enrolled as a participant in the Centers Plan for Healthy Living Managed Long Term Care Plan (hereinafter referred to as "the Plan"). The Appellant has been in receipt of a Personal Care Services authorization (hereinafter referred to as "PCS services") in the amount of 24 hours a day, 7 days a week, live-in services.

2. The Appellant filed an application with the Plan to increase his authorization for PCS services to 24 hours a day for continuous care by more than one personal care aide (“split-shift”).

3. By means of a written Initial Adverse Determination notice dated June 21, 2018, the Plan advised the Appellant of its determination to deny the Appellant’s request for an increase in PCS hours to 24 hours a day, split-shift.

4. By means of a written Final Adverse Determination notice dated July 12, 2018, the Plan advised the Appellant of its determination to deny the Appellant’s request for an increase in PCS hours to 24 hours a day, split-shift because the service is not medically necessary.

5. On July 24, 2018, this hearing was requested.

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 some or total assistance with personal hygiene, dressing and feeding; and nutritional and environmental support functions. Such services must be essential to the maintenance of the patient's health and safety in his or her own home.

Section 505.14(a) of the Regulations provides in part that:

(2) Some or total assistance shall be defined as follows:

- (i) Some assistance shall mean that a specific function or task is performed and completed by the patient with help from another individual.
- (ii) Total assistance shall mean that a specific function or task is performed and completed for the patient.

(6) 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.

Section 505.14(a)(2) provides that *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.

In Rodriguez v. City of New York, 197 F.3d 611 (2d Cir. 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(c)(9) of the Regulations provides that each local social services department shall have a plan to monitor and audit the delivery of personal care services provided by arrangements or contracts.

New York City has received approval to deliver Personal Care Services through a Task Based Assessment methodology. Service delivery is task oriented, not time oriented, and the client continues to receive service in accordance with assessed needs.

GIS 12 MA/026 provides that the Department has been directed by the U.S. District Court for the Southern District of New York, in connection with the case of Strouchler v. Shah, to clarify the proper interpretation and application of 18 NYCRR 505.14 with respect to the availability of 24-hour, split-shift personal care services for needs that are predicted and for Medicaid recipients whose only nighttime need is turning and positioning. 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

Evidence presented at the hearing on August 16, 2018 establishes that the Appellant, [REDACTED], resides alone. The Appellant has been in receipt of a PCS services in the amount of 24 hours a day, 7 days a week, live-in services, currently provided by three different aides.

The Appellant filed an application with the Plan to increase his authorization for PCS services to 24 hours a day for continuous care by more than one personal care aide ("split-shift"). By means of a written Initial Adverse Determination notice dated June 21, 2018, the Plan advised the Appellant of its determination to deny the Appellant's request for an increase in PCS hours to 24 hours a day, split-shift. By means of a written Final Adverse Determination notice dated July 12, 2018, the Plan advised the Appellant of its determination to deny the Appellant's request for an increase in PCS hours to 24 hours a day, split-shift because the service is not medically necessary.

The Appellant's daughter and grandson appeared at the hearing. They testified that the Appellant has nighttime needs which cannot be met by one aide if the aide is to receive five hours of uninterrupted sleep per night. The Plan appeared on papers. A Medical Review Form dated June 18, 2018 submitted by the Plan stated that "As per PCA member does not sleep during the nights, calling aide 7-8 times per night every night, experiences mood swings, becomes aggravated (vendor communication notes are in CT). As per vendor, PCA has no time for rest (5 hrs uninterrupted sleep) and not able to rest during day time due to the member requires assistance all 24 h/day 7 days/week." The Medical Review Form further notes that the Appellant's primary diagnosis includes Parkinson's Disease, Dementia, Anxiety, Depression, Insomnia, HTN, OA, chronic pain, hearing loss, Urinary incontinence, and a history of falling. The form notes that the Appellant's last fall was on May 21, 2018, when he fell and broke two ribs. The Appellant was admitted to [REDACTED] Hospital, and discharged on May 24, 2018. A letter dated June 6, 2018 in file from [REDACTED] states that the Appellant is diagnosed with progressive dementia, Parkinson's disease, hypertensive heart disease, anemia of chronic disease, insomnia, history of falls, instability of gait, malaise and fatigue, occlusion and stenosis of carotid artery, Sinoatrial node dysfunction, Sinus bradycardia, and a history of syncope. The letter further states that the Appellant requires assistance with all transfers and ambulation and due to worsened instability of gait and dizziness currently ambulates via

wheelchair. A letter dated June 14, 2018 from [REDACTED] states that the Appellant is diagnosed with progressive dementia, Parkinson's disease, traumatic brain injury, hypertensive heart disease, anemia of chronic disease, insomnia, history of falls, instability of gait, malaise and fatigue, occlusion and stenosis of carotid artery, Sinoatrial node dysfunction, Sinus bradycardia, and a history of syncope

A Uniform Assessment System (UAS) report in file from March 8, 2018 notes in the section regarding sleep problems in the category of "Difficulty falling asleep or staying asleep; waking up too early; restlessness; non-restful sleep" that these symptoms were exhibited daily in the last 3 days. A Uniform Assessment System (UAS) report in file from May 26, 2018 contains the same wording in the section regarding sleep problems in the category of "Difficulty falling asleep or staying asleep; waking up too early; restlessness; non-restful sleep" that these symptoms were exhibited daily in the last 3 days."

As noted above, the Appellant's daughter and grandson appeared at the hearing, and testified that the Appellant has nighttime needs which cannot be met by one aide if the aide is to receive five hours of uninterrupted sleep per night. They further testified that the Appellant cannot sleep at night, and calls out to the aide for assistance, including requesting assistance to go to the bathroom multiple times during the night. The Appellant's grandson testified that the Appellant has progressive dementia and traumatic brain injury, and that the Appellant's medication confuses the Appellant. The grandson testified that the Appellant frequently sleeps at times during the day, which causes the Appellant to be awake at night. The grandson further testified that the Appellant goes to bed at 10 PM, but will wake up at 12:30 AM and start calling the aide for assistance to go to the bathroom, or to provide him with medication which he has already been given. The grandson testified that because the Appellant cannot sleep at night, and wakes up multiple times, the aide is not able to get five hours of uninterrupted sleep at night.

GIS 12 MA/ 026 provides, in pertinent part, 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 adaptive or specialized equipment or supplies or voluntary assistance from informal caregivers. Additionally, 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. As noted above, the report from the Appellant's vendor states that the aide cannot obtain five hours of uninterrupted sleep.

The record has been reviewed and considered. The weight of the credible evidence demonstrates the Appellant requires assistance during the night due to his condition of progressive dementia to such a degree that one aide cannot get the required five hours of uninterrupted sleep. Accordingly, the Plan's determination to deny the Appellant's request for personal care service hours in the amount of 24 hours per day split-shift cannot be sustained.

DECISION AND ORDER

The determination of the Managed Long Term Care Plan dated July 12, 2018 to deny the

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Appellant's request for personal care service hours in the amount of 24 hours per day split-shift, is not correct and is reversed.

1. The Plan is directed to authorize the Appellant for personal care service hours of 24 hours per day split-shift.

As required by Section 358-6.4 of the Regulations, the Plan must comply immediately with the directives set forth above.

DATED: Albany, New York
09/06/2018

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "C. C. Olewesa".

Commissioner's Designee