STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: March 23, 2018
[redacted]
AGENCY: MAP
FH #: 7726414K

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 May 31, 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

Personal appearance by Centers Plan for Health Living waived by the Office of Administrative Hearings; Plan's appearance on papers dated May 30, 2018

ISSUE

Was the March 21, 2018, determination by the Managed Long-Term Care plan, Centers Plan for Healthy Living, to authorize a reduction of the Appellant's Personal Care Services from eighty-four (84) hours per week (12 hours per day x 7 days) to fifty-two and one-half (52.5) hours per week (7.5 hours per day x 7 days) on the grounds that '[t]he current UAS-NY assessment conducted on 12/6/17 demonstrated that your needs can be effectively met with: seven and a half (7.5) hours a day/seven (7) days a week (totaling fifty-two and a half [52.5] hours a week) of CDPAP services to complete the above mentioned tasks (meal preparation, ordinary housework, bathing, dressing lower body, walking, locomotion, transfer to toilet, toilet use, medication management, eating, personal hygiene, dressing upper body and bed mobility) 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 seventy (70), has been in receipt of a Medical Assistance authorization, Medicaid benefits, and has been enrolled in a Medicaid Managed Long Term Care Plan with Centers Plan for Healthy Living.

2. The Appellant has been in receipt of an authorization for Personal Care Services in the amount of eighty-four (84) hours per week (12 hours per day x 7 days).

3. On December 6, 2017, a registered nurse assessor completed a Client Task Sheet which recommends weekly Personal Care Services in the amount of 52.5 hours.

4. On December 14, 2017, a registered nurse assessor completed a Uniform Assessment System- New York Assessment Report of the Appellant's personal care needs based upon an in-person evaluation of the Appellant by a registered nurse assessor on December 6, 2017.

5. The December 14, 2017, nurse's assessment found that the Appellant requires the following level of assistance with the following tasks of daily living: total dependence with meal preparation, ordinary housework, stairs, shopping, transportation, bathing, dressing lower body, walking, locomotion, toilet transfer and toilet use; extensive assistance with personal hygiene, dressing upper body and bed mobility; supervision with eating.

6. The December 14, 2017, nurse's assessment reported that there has been no change in the Appellant's status in the 90-day period preceding the visit with regard to the Appellant's abilities in carrying out her activities of daily living and that there has been no change in the Appellant's overall self-sufficiency.

7. The Appellant has been diagnosed with the following medical conditions: allergy to penicillin; constipation; dependence on wheelchair; edema; gastro-esophageal reflux disease without esophagitis; neuralgia and neuritis; obesity; fatigue; pain (unspecified); spinal stenosis; abnormalities of gait and mobility; osteoarthritis; urinary incontinence; vitamin D deficiency; and weakness.

8. By notice dated March 21, 2018, the Centers Plan for Healthy Living advised of the Plan's determination to authorize a reduction of the Appellant's Personal Care Services from eighty-four (84) hours per week (12 hours per day x 7 days) to fifty-two and one-half (52.5) hours per week (7.5 hours per day x 7 days) on the grounds that '[t]he current UAS-NY assessment conducted on 12/6/17 demonstrated that your needs can be effectively met with: seven and a half (7.5) hours a day/seven (7) days a week (totaling fifty-two and a half [52.5] hours a week) of CDPAP services to complete the above mentioned tasks (meal preparation, ordinary housework, bathing, dressing lower body, walking, locomotion, transfer to toilet, toilet use, medication management, eating, personal hygiene, dressing upper body and bed mobility).

9. On March 23, 2018, the Appellant requested a fair hearing in this matter.

APPLICABLE LAW

Regulations at 18 NYCRR 358-3.7(a) provide that an appellant has the right to examine the contents of the case record at the fair hearing. At the fair hearing, the agency is required to provide complete copies of its documentary evidence to the hearing officer. In addition, such documents must be provided to the appellant and appellant's authorized representative where such documents were not provided otherwise to the appellant or appellant's authorized representative in accordance with 18 NYCRR 358-3.7. 18 NYCRR 358-4.3(a). In addition, a representative of the agency must appear at the hearing along with the case record and a written summary of the case and be prepared to present evidence in support of its determination. 18 NYCRR 358-4.3(b). Except as otherwise established in law or regulation, in fair hearings concerning the discontinuance, reduction or suspension of Medical Assistance or Services, the Agency must establish that its actions were correct. 18 NYCRR 358-5.9(a).

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)(5) provides 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.

(a) Nutritional and environmental support functions include assistance with the following:

(1) making and changing beds;

(2) dusting and vacuuming the rooms which the patient uses;

(3) light cleaning of the kitchen, bedroom and bathroom;

(4) dishwashing;

(5) listing needed supplies;

(6) shopping for the patient if no other arrangements are possible;

(7) patient's laundering, including necessary ironing and mending;

(8) payment of bills and other essential errands; and

(9) preparing meals, including simple modified diets…

(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.

The authorization of a personal care services authorization must be based, in relevant part, a physician's order, social assessment and a nursing assessment. 18 NYCRR 505.14(b)(2). The guidelines for Medicaid Managed Care also provide in part:

I. Scope of the Personal Care Benefit

a. As required by federal regulations, the personal care services benefit afforded to MCO enrollees must be furnished in an amount, duration, and scope that is no less than the services furnished to Medicaid fee-for-service recipients [42 CFR §438.210]

i. The assessment process should evaluate and document when and to what degree the member 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. 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 member'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. A care plan must be developed that meets the member's scheduled and unscheduled day and nighttime personal needs.

GIS 15 MA/24, published on December 31, 2015, advises of the revisions to the Personal Care Services (PCS) and Consumer Directed Personal Assistance (CDPA) regulations at 18 NYCRR section 505.14 and 18 NYCRR section 505.28, and notes the following changes:

The definitions of "some assistance" and "total assistance" are repealed in their entirety. This means, in part, that a "total assistance" need with certain activities of daily living is no longer an eligibility requirement for continuous personal care services or continuous consumer directed personal assistance.

Pursuant to Office of Health Insurance Programs MLTC Policy 16.07, "Guidance on Task-based Assessment Tools for Personal Care Services and Consumer Directed Personal Assistance Services," issued on November 17, 2016, the New York State Department of Health has not approved the use of any task-based assessment tool. Managed Long-Term Care plans, however, are allowed to choose to use such tools as guidelines for determining an enrollee's plan of care. In any event, if the plan chooses to use a task-based assessment tool, including an electronic task-based assessment tool, it must do so in accordance with the following guidance:

- Task-based assessment tools cannot be used to establish inflexible or "one size fits all" limits on the amount of time that may be authorized for an IADL or ADL or the frequency at which such tasks can be performed. Plans must conduct individualized assessments of each enrollee's need for assistance with IADLs and ADLs. This means that plans must permit the assessments of time, as well as frequency, for completion of a task to deviate from the time, frequency, or other guidelines set forth in the tool whenever necessary to accommodate the enrollee's individualized need for assistance.
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- When an enrollee requires safety monitoring, supervision or cognitive prompting to assure the safe completion of one or more IADLs or ADLs, the task-based assessment tool must reflect sufficient time for such safety monitoring, supervision or cognitive prompting for the performance of those particular IADLs or ADLs. Safety monitoring, supervision and cognitive prompting are not, by themselves, independent or "stand-alone" IADLs, ADLs, or tasks. Ideally, all time that is necessary for the performance of any needed safety monitoring,
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- 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.
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- A task-based assessment tool cannot arbitrarily limit the number of hours of Level I housekeeping services to eight hours per week for enrollees who need assistance with Level II tasks. The eight-hour weekly cap on Level I services applies only to persons whose needs are limited to assistance with housekeeping and other Level I tasks. [See Social Services Law § 365-a (2)(e)(iv)]. Persons whose needs are limited to housekeeping and other Level I tasks should not be enrolled in a MLTC plan but should receive needed assistance from social services districts.

The federal Center for Medicare and Medicaid Services State Medicaid Manual states, in part, at section 4480 regarding Personal Care Services (speaking of activities of daily living, or "ADL's"):

1. Cognitive Impairments.--An individual may be physically capable of performing ADLs and IADLs but may have limitations in performing these activities because of a cognitive impairment. Personal care services may be required because a cognitive impairment prevents an individual from knowing when or how to carry out the task. For example, an individual may no longer be able to dress without someone to cue him or her on how to do so. In such cases, personal assistance may include cuing along with supervision to ensure that the individual performs the task properly.

DISCUSSION

The uncontroverted evidence establishes that the Appellant has been enrolled in a Managed Long-Term Care plan through Center's Plan for Healthy Living and has been in receipt of an authorization of Personal Care Services in the amount of eighty-four (84) hours per week (12 hours per day x 7 days). The record also shows that on March 21, 2018, the Plan issued to the Appellant a written notice which advises that the Plan had determined to authorize a reduction of the Appellant's Personal Care Services from eighty-four (84) hours per week (12 hours per day x 7 days) to fifty-two and one-half (52.5) hours per week (7.5 hours per day x 7 days) on the grounds that '[t]he current UAS-NY assessment conducted on 12/6/17 demonstrated that your needs can be effectively met with: seven and a half (7.5) hours a day/seven (7) days a week (totaling fifty-two and a half [52.5] hours a week) of CDPAP services to complete the above mentioned tasks (meal preparation, ordinary housework, bathing, dressing lower body, walking, locomotion, transfer to toilet, toilet use, medication management, eating, personal hygiene, dressing upper body and bed mobility).

In support of this determination the Plan presented at the hearing the a UAS nurse assessor report from December 14, 2017, and a "Client Task Sheet" dated December 6, 2017, upon which the Plan's determination is apparently based. It is preliminarily noted that careful review of the Plan's written notice establishes that the Plan does not provide any adequate nor sufficient reason as to the basis of the aforesaid reduction in Personal Care Service hours. Nor did the Plan present evidence by the evaluating nurse which might explain how 52.5 hours per week of services was determined in the Client Task Sheet.

At the hearing the Appellant testified persuasively and credibly that she cannot perform her essential activities of daily living such as transfers, locomotion/walking, toileting without the assistance of her home attendant. The Appellant testified that, due to her obesity, edema and osteoporosis, she must use a hoyer-lift to get from bed to wheel chair and for such other transfers. Although duly notified of the date, time and location of the fair hearing as well as of the issue(s) to be addressed at same, the Agency did not present further evidence which might rebut the Appellant's credible and persuasive testimony in this matter.

Based upon the medical documentation as presented by the parties in this matter, the record establishes that the facts of the Appellant's continued functional status are contrary to the determination rational as written in the Plan's March 21, 2018, Initial Adverse Determination notice. The Plan's March 21, 2018, determination to authorize a reduction of the Appellant's Personal Care Services is therefore not correct and must be reversed.

DECISION AND ORDER

The March 21, 2018, determination by the Managed Long-Term Care plan, Centers Plan for Healthy Living, to authorize a reduction of the Appellant's Personal Care Services from eighty-four (84) hours per week (12 hours per day x 7 days) to fifty-two and one-half (52.5) hours per week (7.5 hours per day x 7 days) is not correct and is reversed.

Centers Plan for Healthy Living is directed to:

1. Take no further action upon the March 21, 2018, Initial Adverse Determination.

2. Immediately restore the Appellant's authorization of Personal Care Services to eighty-four (84) hours per week (12 hours per day x 7 days).

3. Continue the Appellant's Personal Care Services authorization of eighty-four (84) hours per week (12 hours per day x 7 days) unchanged.

Should Centers Plan for Healthy Living 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 required, the Appellant's Representative must provide it to the Managed Long-Term Care plan promptly to facilitate such compliance.

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

FH# 7726414K

DATED: Albany, New York
06/07/2018

NEW YORK STATE
DEPARTMENT OF HEALTH

By

Commissioner's Designee