

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

REQUEST: January 15, 2019

AGENCY: MAP

FH #: 7896594J

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In the Matter of the Appeal of	:
	: <b>DECISION</b>
	<b>AFTER</b>
	: <b>FAIR</b>
	<b>HEARING</b>
from a determination by the New York City	:
Department of Social Services	:

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**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 March 1, 2019, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For the Social Services Agency

Agency appearance waived by the Office of Administrative Hearings

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

Julia Rolfford, Centers Plan for Healthy Living Representative, on March 1, 2019 only;  
Debra Ferguson, Centers Plan for Healthy Living Representative, on February 8, 2019 only

**ISSUE**

Was the Managed Long Term Care Plan's determination dated December 31, 2018, to deny the Appellant's request for an increase of Personal Care Services to the amount of Continuous Personal Care Services (Split-Shift Care) correct?

**FACT FINDING**

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 90) has been in receipt of a Personal Care Services authorization in the amount of 56 hours weekly. The Appellant requested an increase of Personal Care Services to the amount of Continuous Personal Care Services (Split-Shift Care).

2. On December 21, 2018, a nursing assessor completed a Uniform Assessment System evaluation of the Appellant's personal care needs. Among other things, the assessment indicates that the Appellant needs assistance with positioning in bed, ambulation, transferring, toileting and feeding.

3. By notice dated December 31, 2018, the Managed Long Term Care Plan's determined to deny the Appellant's request for an increased Personal Care Services authorization to the amount of Continuous Personal Care Services (Split-Shift Care), and to continue to provide the Appellant with Personal Care Services in the slightly increased amount of 66.5 hours weekly.

4. The Appellant requested an internal appeal, and by a Notice of Final Adverse Determination dated February 12, 2019, the Managed Long Term Care Plan informed the Appellant of its determination to deny the Appellant's internal appeal.

5. On January 15, 2019, this hearing was requested.

### **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.

18 NYCRR 505.14(a)(4) provides a new definition of "Live-in 24-Hour Personal Care Services" as follows: 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.

## **DISCUSSION**

The credible evidence establishes that the Appellant has been in receipt of a Personal Care Services authorization on a Live-in 24-Hour Personal Care Services basis from a Managed Long Term Care Plan, Centers Plan for Healthy Living. The credible evidence, in the form of a Uniform Assessment System assessment provided by the Managed Long Term Care Plan at the hearing, also establishes that on December 21, 2018 a nursing assessor evaluated the Appellant's Personal Care needs, and found that the Appellant is totally dependent for ambulation, transferring and toileting, and requires maximal assistance with bed mobility and extensive assistance with feeding. As standard protocol for positioning in bed is once every two hours, it is plain that a home attendant could not meet the Appellant's positioning needs while obtaining, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep. The Managed Long Term Care Plan's own evidence clearly establishes that the Appellant is appropriate for continuous care Personal Care Services.

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.

At the hearing, the Appellant's Attorney contended that the Appellant has unmet nighttime needs that include, but are not limited to assistance with toileting three or more times nightly, at unpredictable times, and assistance with positioning.

The evidence has been considered. Based on a consideration of a need for frequent hands-on assistance at night with toileting and positioning, the credible evidence establishes that the Appellant needs assistance at night with toileting and positioning 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.

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The credible evidence establishes that 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 December 31, 2018, to deny the Appellant's request for an increase of Personal Care Services to the amount of Continuous Personal Care Services (Split-Shift Care) is not correct and is reversed.

1. The Managed Long Term Care Plan is directed to provide the Appellant with an increased Personal Care Services authorization in the amount of Continuous Personal Care Services (Split-Shift Care).

Should the 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 and the Appellant's Representative promptly in writing as to what documentation is needed. If such information is required, the Appellant or 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, the Managed Long Term Care Plan must comply immediately with the directives set forth above.

DATED: Albany, New York  
03/07/2019

NEW YORK STATE DEPARTMENT  
OF HEALTH

By

A handwritten signature in black ink, consisting of a large, stylized 'L' followed by a series of loops and a horizontal stroke.

Commissioner's Designee