

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: July 20, 2018

AGENCY: MAP

FH #: 7794785Q

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 an increase in Personal Care Service hours to the amount of 24 hours per day, 7 days a week split-shift services 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. The Appellant has been in receipt of a Personal Care Services authorization in the amount of 11 hours a day, 7 days a week, for a total of 77 hours per week.

FH# 7794785Q

2. The Appellant filed an application with the Plan to increase her authorization for Personal Care 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 Denial Notice dated May 17, 2018, the Plan advised the Appellant of its determination to partially deny the Appellant’s request for an increase in Personal Care Service hours to 24 hours a day, split-shift.

4. By means of a written Final Adverse Determination Denial Notice dated July 3, 2018, the Plan advised the Appellant of its determination to deny the Appellant’s request for an increase in Personal Care Service hours to 24 hours a day, split-shift because the service is not medically necessary.

5. On July 20, 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

FH# 7794785Q

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 resides in a house. The Appellant's son resides in a basement apartment in the house. 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 had been in receipt of a Personal Care Service authorization (hereinafter referred to as "PCS services") in the amount of 59.5 hours a week. The Appellant filed an application with the Plan to increase her 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 Denial Notice dated May 17, 2018, the Plan advised the Appellant of its determination to partially deny the Appellant's request for an increase in PCS hours to 24 hours a day, split-shift. Instead, the Plan approved the Appellant for an increase in PCS to 11 hours a day, 7 days a week, for a total of 77 hours per week. By means of a written Final Adverse Determination Denial Notice dated July 3, 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.

At the hearing on August 16, 2018, the Appellant's representative modified the Appellant's request from a request for an increase in PCS hours from 24 hours a day, split-shift services to a request for 24 hours per day, 7 days a week live-in PCS hours.

At the hearing the Plan appeared on papers. The Plan submitted a Client Task Sheet from June 7, 2018 which shows that the Appellant is totally dependent on transferring to the toilet, and is frequently incontinent of both bladder and bowel. Both the Initial Adverse Determination Denial Notice dated May 17, 2018 and the Final Adverse Determination Denial Notice dated July 3, 2018 state that the Appellant's condition in regard to dressing upper and lower body, walking, transfer toilet, toilet use, personal hygiene, bed mobility and bathing declined from maximal assistance where the Appellant needed physical help to complete most parts of the task to total dependence, where the Appellant depends completely upon someone else to complete all

parts of the task, as the Appellant does not participate in the task at all. The file contains a letter dated May 11, 2018 from [REDACTED] which states that the Appellant suffers from progressive organic mental syndrome, is totally disoriented and confused, “acts in a child-like manner and really cannot be left alone, i.e. she requires 24 hour a day home health services.”

A Medical Review Form dated May 14, 2018 submitted by the Plan stated that the Appellant is frequently incontinent of bladder and bowel. It is additionally noted in the report that the Appellant has “full incontinence of feces” and “unspecified urinary incontinence.”

A Uniform Assessment System (UAS) report in file from April 30, 2018 notes that the Appellant is totally dependent for transferring to the toilet, toilet use, and bed mobility, and is frequently incontinent of bladder and bowel. A UAS report in file from June 7, 2018 notes the same, that the Appellant is totally dependent for transferring to the toilet, toilet use, and bed mobility, and is frequently incontinent of bladder and bowel.

At the hearing the Appellant’s representative stated that the Appellant’s condition has deteriorated, in that as of August 14, 2018 the Appellant is no longer able to walk. The representative also stated that the Appellant’s son is not able to help the Appellant. Although the Appellant’s son lives in the same house, he lives in a basement apartment, while the Appellant’s apartment is on the second floor of the house. Therefore, the representative stated that the Appellant’s son would not be able to hear the Appellant if she requested assistance. The Appellant’s representative submitted an affidavit from the Appellant’s son, [REDACTED], which states in part that he works full time and is not able to assist his mother at night when she gets out of bed, and that he resides in the basement level of the house and his mother resides in the second floor. The representative also submitted a letter dated July 12, 2018 from [REDACTED] which states that the Appellant “is now totally disoriented and has been agitated,” “She acts in a child-like manner and suffers from progressive organic mental syndrome, is totally disoriented and confused,” “She acts in a child-like manner and much of her speech is gibberish and not intelligible,” “It is dangerous to leave her alone at home at night,” “She desperately requires a 24-hour a day aide in view of the fact that she has constant wandering and is totally disoriented,” “She also desperately requires a split shift, i.e. she has to take a [REDACTED] at night otherwise she is wandering about,” “She has markedly deteriorated since my last exam on May 11, 2018,” “Once again, she cannot be left alone for even a short period of time due to her total disorientation and agitation. Her [REDACTED] will be raised to tolerance.” The representative also submitted a letter dated August 15, 2018 from [REDACTED] which states that the Appellant “continues to suffer from severe OMS with confusion. She also has severe osteoarthritis especially involving her bilateral knees. Due to these she is totally disabled and cannot accomplish any of her AODL.”

The Appellant’s representative stated that the Appellant’s medication causes her to sleep, and the Appellant therefore does not get up a lot during the night, but instead sleeps. As noted, the Appellant currently receives 11 hours per day (it was not established at the hearing what are the exact 11 hours that the Appellant receives). The representative further stated that the Appellant needs help to go to the bathroom, and a 24 hour live-in aide would be able to care for the Appellant’s needs (positioning, toilet needs) until the Appellant sleeps, and the aide would

FH# 7794785Q

still be able to five hours of uninterrupted sleep, as the Appellant's medication would make the Appellant sleep. Therefore, as noted, the Appellant modified her request from a request for 24 hours per day, 7 days a week split-shift services to a request for 24 hours per day, 7 days a week live-in services.

The record has been reviewed and considered. The weight of the credible evidence, including the letter dated July 12, 2018 from [REDACTED], demonstrates the Appellant's condition has recently deteriorated to the point where 11 hours per day will not meet the Appellant's needs. The testimony and evidence establishes that the Appellant's needs have increased, and PCS of 24 hours per day, 7 days per week would meet her needs and still allow one aide to get the required five hours of uninterrupted sleep. Accordingly, the Plan's determination to deny the Appellant's request for PCS hours in the amount of 24 hours per day, 7 days per week, split-shift services cannot be sustained.

DECISION AND ORDER

The determination of the Managed Long Term Care Plan dated July 12, 2018 to deny the Appellant's request for PCS 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 PCS hours of 24 hours per day, 7 days per week live-in services.

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



Commissioner's Designee