


STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: January 31, 2019

AGENCY: Westchester
FH #: 7905725K

In the Matter of the Appeal of	:
	: DECISION
	AFTER
	: FAIR
	HEARING
	:
from a determination by the Westchester County 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 February 25, 2019, in Westchester County, 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)

Plan appearance waived by the Office of Administrative Hearings;
R. Simpson, Director of Grievances and Appeals (by telephone);
G. Rolffot, Supervisor (by telephone)

ISSUE

Was the Managed Long Term Care Plan's determination to deny the Appellant's request for an increase in the number of Personal Care Services from 42 hours weekly to 84 hours weekly 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:

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1. The Appellant, age 49, has been enrolled in and has received care and services, including Personal Care Services, through a Managed Long Term Care Plan operated by Centers Plan for Healthy Living (hereinafter "Centers Plan" or "the Plan").

2. The Appellant has been in receipt of Personal Care Services in the amount of 6 hours per day, 7 days per week, totaling 42 hours weekly.

3. On or about November 9, 2018, the Appellant requested an increase in her Personal Care Services hours from 42 hours weekly to 84 hours weekly (12 hours per day, 7 days per week).

4. On May 8, 2018, a nursing assessor completed a Uniform Assessment System New York (UASNY) Assessment (Comprehensive) Report of the Appellant's personal care needs.

5. On May 8, 2018, the nursing assessor completed a Client Task Sheet and recommended the Appellant to receive Personal Care Services in the amount of 7 hours per day, 7 days per week, totaling 49 hours weekly.

6. On November 8, 2018, a nursing assessor completed a Uniform Assessment System New York (UASNY) Assessment (Comprehensive) Report of the Appellant's personal care needs.

7. On November 8, 2018, the nursing assessor completed a Client Task Sheet and recommended the Appellant to receive Personal Care Services in the amount of 4 hours per day, 7 days per week, totaling 28 hours weekly, as well as 3 days of social day care. The Client Task Sheet also noted that the Appellant now has a history of falls (within the last 3 months).

8. By Initial Adverse Determination dated November 21, 2018, the Plan advised the Appellant of its determination to deny the Appellant's request for an increase in Personal Care Services from 42 hours weekly to 84 hours weekly.

9. Following an internal appeal request, by Final Adverse Determination dated December 10, 2018, the Plan advised the Appellant of its determination to uphold its initial determination to deny the Appellant's request.

10. On January 31, 2019, the Appellant requested this fair hearing.

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

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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 assistance with nutritional and environmental support functions and personal care functions.

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Such services must be essential to the maintenance of the patient's health and safety in his or her own home....".

- (2) **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.

- (4) **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.

- (5) 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.

- (b) The authorization for Level I services shall not exceed eight hours per week.

- (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.

Section 505.14(a)(3)(iii) of the regulations provides that Personal care services, including continuous personal care services and live-in 24-hour personal care services as defined in paragraphs (2) and (4), respectively, of this subdivision, shall not be authorized to the extent that the patient's need for assistance can be met by the following:

- (1) voluntary assistance available from informal caregivers including, but not limited to, the patient's family, friends, or other responsible adult;
- (2) formal services provided or funded by an entity, agency or program other than the medical assistance program; or

GIS 12 MA/026 provides as follows concerning the availability of 24 hour, split-shift personal care services in connection with the case of Strouchler v. Shah:

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;

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- 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.

General Information Service message 97 MA 033 includes a reminder that the contribution of family members or friends (to the care of a Personal Care Services recipient) is voluntary and cannot be coerced or required in any manner whatsoever.

DISCUSSION

The hearing record establishes that the Appellant has been in receipt of Personal Care Services ("PCS") in the amount of 42 hours weekly, provided under a task-based plan of care (6 hours daily, 7 days weekly). The record further establishes that, on November 9, 2018, the Appellant requested an increase in her PCS hours from 42 hours weekly to 84 hours weekly (12 hours per day, 7 days per week). Thereafter, by Initial Adverse Determination notice dated November 21, 2018, Centers Plan advised the Appellant of its determination to deny the Appellant's request for an increase in Personal Care Services from 42 hours weekly to 84 hours weekly, which was ultimately upheld by Final Adverse Determination dated December 10, 2018.

Review of the record establishes that the Appellant suffers from weakness, unsteady gait and impaired mobility as a result of multiple gunshot wounds sustained to her back and knee. The record further establishes that the Appellant suffers from neurological difficulties and is occasionally incontinent of bladder requiring the use of pull ups daily.

Review of the May 8, 2018 Uniform Assessment System New York (UASNY) Assessment (Comprehensive) Report of the Appellant's personal care needs reveals that the Appellant requires total dependence with meal preparation and housework, and requires maximal assistance with bathing, personal hygiene, dressing her upper and lower body, walking, locomotion, toilet transferring, toilet use, and bed mobility. The May 8, 2018 UASNY further states that the Appellant "receives assistance with ADL'S and IADL'S from CDPAP due to back pain and disorders of peripheral nervous system." In comparison, the UASNY completed on November 8, 2018 indicates that the Appellant requires total dependence for housework, but

requires extensive assistance with bathing and dressing her lower body, limited assistance with locomotion, walking, dressing her upper body, and toilet transferring, and is independent with bed mobility and toilet use.

It must be noted that, based on the May 8, 2018 assessment, the nurse assessor completed a Client Task Sheet indicating that the Appellant requires assistance totaling, at least, 7 hours per day, 7 days per week, or 49 hours weekly. However, the record establishes that the Plan has only authorized a total of 6 hours per day, 7 days per week, or 42 hours weekly, to meet the Appellant's needs. When questioned as to the discrepancy, the Plan's witnesses were unable to explain why the Appellant was not provided with adequate hours to meet the Appellant's needs and conceded that there appeared to be an error with its authorization. Based on the Plan's testimony alone, the record establishes that the Plan's determination to continue to provide the Appellant with a PCS authorization of 6 hours per day, 7 days per week was not correct.

Furthermore, the Appellant's attorney disputed the significant improvements allegedly observed by the nurse assessor on November 8, 2018 in comparison to the assessment completed on May 8, 2018. The Appellant's attorney argued that, although the most recent UASNY indicates that there had been a dramatic improvement in the Appellant's ability to complete her ADL's and IADL's, the Appellant's condition has not improved but rather has declined. The Appellant's attorney contended that, due to the Appellant's impaired mobility and unsteady gait, she has begun to sustain more falls. The Appellant's attorney further noted that the Appellant requires assistance to toilet transfer and, as the Appellant's aide leaves at 3:00 p.m., she must wait to use the toilet or change her diaper until her daughter gets home from work. The Appellant's attorney further argued that, because the Appellant's aide leaves at 3:00 p.m., she must wait to eat dinner until her daughter arrives from work and serves her a meal as she is unable to independently heat up a meal and carry it to a table to eat due to her unsteady gait and necessary use of a walker. Upon questioning, the Appellant's attorney contended that the following needs are not being met for the Appellant on a daily basis: toileting at the end of the day, dinner, and preparation for bed in the evening.

With respect to the Appellant's daughter fulfilling the Appellant's unmet needs after the aide leaves, the Plan is reminded that it is without authority to compel family members to assist the applicant for or recipient of Personal Care Services. GIS 97 MA/033.

In support of his claims, the Appellant's attorney presented various letters from the Appellant's treating physicians confirming the Appellant's current diagnosis and limitations. Review of the October 30, 2018 letter written by [REDACTED] indicates that, due to lumbar discogenic disease, the Appellant has chronic low back pain, requires a cane to ambulate, but is very unsteady on her feet. As a result of her chronic low back pain, the Appellant has sustained falls and requires assistance to use the toilet and get back on her feet. The Appellant's doctor further stated that the Appellant "requires 12-hour home health aide to get her into bed and then when she gets up in the morning, to get her out of bed.... The patient is not safe toileting by herself and at least should be able to have the home health aide help her with toileting also." Additionally, a November 26, 2018 letter by [REDACTED], DPT states that the Appellant is being seen for "Right Knee Pain and is still having difficulty with daily living activities. She cannot

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stand for more than 5 minutes, has muscle weakness of Right knee joints, unsteady gait pattern, and difficulty going up and down stairs.”

With respect to the Appellant’s claims, evidence presented by the Plan indicates that it was provided with the October 30, 2018 letter by [REDACTED] prior to the hearing. However, upon questioning, the Plan was unable to clearly indicate whether the letter had been taken into consideration when making its Initial or Final Adverse Determinations. Rather, the Plan’s witnesses argued that the UASNY assessments served as the basis for their determinations. In response, the Appellant’s attorney contended that the Appellant is a Spanish speaker, and requires the use of an interpreter in order to fully understand and be fully understood by a non-Spanish speaker. It is noted that the Plan’s witness confirmed that the Appellant is listed as a Spanish speaker but could not verify whether the assessors who completed the UASNY’s at issue understood or spoke Spanish. The Appellant’s attorney ultimately argued that the responses, particularly in the November 8, 2018 UASNY, appeared inaccurate and not reflective of the Appellant’s actual limitations which could have been the result of a miscommunication between the Appellant and the assessors.

The Appellant’s attorney’s claims regarding the Appellant’s unmet needs were considered and were found to be credible in that they were consistent, forthright and supported by corroborating documentation, including the doctors’ letters presented at the hearing. Furthermore, although the Plan verbally contended that the Appellant’s medical condition has not changed, the evidence presented at the hearing establishes that the Plan has never authorized sufficient PCS hours in order to adequately meet the Appellant’s needs.

Accordingly, given the totality of the testimony, and the evidence presented at the hearing, the Appellant’s authorization should be increased to 12 hours per day, 7 days per week, totaling 84 hours weekly.

DECISION AND ORDER

The Appellant's Managed Long Term Care Plan’s determination to deny a request for an increase in Appellant's Personal Care Services from 42 hours weekly to 84 hours weekly, was not correct and is reversed.

1. Centers Plan is directed to increase the Appellant’s Personal Care Services authorization to the amount of 84 hours weekly, 12 hours daily, 7 days a week.
2. Centers Plan is directed to continue to provide the Appellant with a Personal Care Services authorization in the amount of 84 hours weekly, 12 hours daily, 7 days a week.

Should Centers 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 required, the Appellant must provide it to Centers Plan promptly to facilitate such compliance.

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

DATED: Albany, New York
03/26/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to be "Lefkowitz", written over a faint circular stamp.

Commissioner's Designee