

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: August 6, 2018

AGENCY: MAP

FH #: 7805459J

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 August 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 (MLTCP)

Appearance waived (on papers only)

ISSUE

Was the June 28, 2018 determination by the MLTCP to deny a request to increase the amount of personal care services provided from 10 hours a day by 7 days a week (70 hours a week) to live-in 24-hour (a/k/a “sleep-in”) personal care 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, age 93, has been in receipt of Medical Assistance coverage provided through his MLTCP.
2. Appellant has been in receipt of a Personal Care Services authorization provided through his MLTCP in the amount of 70 hours a week.

3. On February 26, 2018, the MLTCP obtained a nursing assessment of the Appellant from which it created a Client Task Sheet recommending 52.6 hours a week of task based services, and a Uniform Assessment System – New York Comprehensive Community Assessment Report (hereinafter cited as UAS assessment report)

4. On April 28, 2018, the MLTCP obtained a nursing assessment of the Appellant from which it created a Client Task Sheet recommending 56 hours a week of task based services, and a UAS assessment report.

5. On May 8, 2018, a request for sleep-in personal care services was submitted to the MLTCP.

6. On May 11, 2018, the MLTCP created a “Medical Review Form”.

7. On May 18, 2018, the MLTCP issued an Initial Adverse Determination wherein it notified the Appellant that it would approve personal care aide services for 70 hours a week, 10 hours a day by 7 days a week because the “NYS Department of Health Uniform Assessment System (UAS-NY) conducted on 4/28/2018, and the plan’s client tasking tool, showed that you need eight (8) hours per day, seven (7) days per week (totaling fifty-six (56) hours per week) of PCA [personal care aide] services to complete the above mentioned tasks”.

8. On June 25, 2018, an internal plan appeal of the May 18, 2018 determination was received by the MLTCP.

9. On June 28, 2018, the MLTCP issued a Final Adverse Determination Denial Notice to the Appellant, informing the Appellant, describing him as a female, that the request for sleep-in personal care services remained denied “based on the NYS Department of Health Uniform Assessment System (UAS-NY) and the plan’s client tasking tool”.

10. On August 6, 2018, the instant fair hearing was requested on behalf of the Appellant.

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)(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 NYS Department of Health, Office of Health Insurance Programs, Guidelines for the Provision of Personal Care Services in Medicaid Managed Care provides, in part, that:

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. ... A care plan must be developed that meets the member's scheduled and unscheduled day and nighttime personal needs.

DISCUSSION

The record in this matter establishes that the Appellant has been enrolled in a MLTCP

through Centers Plan for Healthy Living. The Appellant has been receiving 10 hours a day by 7 days a week (70 hours a week) of personal care services and on May 8, 2018, a request for sleep-in personal care services was submitted to the MLTCP. By written notice dated June 28, 2018, the MLTCP denied the Appellant request “based on the NYS Department of Health Uniform Assessment System (UAS-NY) and the plan’s client tasking tool”.

At the hearing, the Appellant’s representative testified that the personal care aides are present either from 8:00 am to 6:00 pm or from 9:00 am. to 7:00 pm. The Appellant has a history of falls, does not sleep through the night, contradicting the UAS assessment report, and, therefore, needs ambulatory assistance through the day and night when the aides are not presently scheduled. The Appellant’s representative testified that the Appellant will insist on trying to use a toilet and not use a bedside commode (“potty”) but will call for assistance to go to the toilet. Consistently, the Appellant’s representative testified that the Appellant is not presently at home but, rather, is in rehabilitation from a fall, having recently fallen twice. In support, he submitted an August 24, 2018 physician letter from the rehabilitation facility where, in relevant part, it noted the “patient is a risk for falls and has muscle weakness”, and a July 25, 2018 “Discharge Summaries”, recording a July 21, 2018 hospital admission for treatment of an abrasion from a fall; a discharge diagnosis was syncope. The representative also reported a fall around June 2018, when a neighbor telephoned around 8:00 pm or 9:00 pm after hearing a noise. Also, when the aide leaves after 6:00 pm, the Appellant was unable to get food because he cannot see it nor can he hear anyone on a telephone so its use is limited. Thus, per the Appellant’s representative, the Appellant has 24-hour need for ambulation, toileting, and meal assistance.

A review of the April 28, 2018 UAS assessment report shows the Appellant is diagnosed as having had a stroke and having coronary heart disease, both with active treatment, dizziness and unsteady gait, balance problems, cognitive decline, angina pectoris, benign prostatic hyperplasia with lower urinary tract symptoms, bilateral hearing loss, essential hypertension, fecal urgency, long term use of anticoagulants, low vision of both eyes, cerebrovascular disease, fatigue, pain, history of physical injury, shortness of breath, spondylolysis of lumbar region, unspecified osteoarthritis. the Appellant fell on March 5 ,2018, was hospitalized, transferred to rehabilitation on March 9, 2018, and discharged on April 24, 2018. Regarding meal preparation, the Appellant was described as totally dependent on others. As to toilet transferring, toilet use, eating, walking and locomotion, the Appellant was described as requiring maximal assistance. Regarding testing for locomotion, the test was not performed because “does not walk on own.”. This is consistent with the Appellant’s representative’s claims. The nurse noted the Appellant was frequently bladder and infrequently bowel incontinent. There was a denial of sleep problems.

The evidence and claims of both parties have been considered. Although duly notified of the issues to be addressed at the fair hearing, the MLTCP’s paper record failed to rebut the persuasive and credible claims of the Appellant’s representative regarding the need for sleep-in personal care aide services. The June 28, 2018 Final Adverse Determination did not address the Appellant’s claim for nighttime need for service, rather premising its determination solely upon a task based assessment. Furthermore, the MLTCP failed to make a representative available by telephone to participate in the instant hearing.

Based on the foregoing, the determination by the MLTCP was not correct.

DECISION AND ORDER

The June 28, 2018 determination by the MLTCP to deny a request to increase the amount of personal care services provided from 10 hours a day by 7 days a week (70 hours a week) to live-in 24-hour (a/k/a “sleep-in”) personal care services was not correct and is reversed.

1. The MLTCP is directed to provide live-in 24-hour personal care services seven (7) days a week.

Should the MLTCP need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant’s representative promptly in writing as to what documentation is needed. If such information is requested, the Appellant’s representative must provide it to the MLTCP promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
09/21/2018

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "Allyce Gordon", is written over a horizontal line.

Commissioner's Designee