


STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: April 10, 2018

AGENCY: Nassau

FH #: 7737451Y

In the Matter of the Appeal of	:
	: DECISION
	AFTER
	: FAIR
	HEARING
from a determination by the Nassau 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 July 18, 2018, in Nassau County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For the Managed Care Plan

Managed Care Plan appearance waived by the Office of Administrative Hearings

ISSUE

Was the Managed Care Plan's determination as to the adequacy of Personal Care Services for Appellant in the amount of eight hours per day, seven days per week 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 85, was in receipt of a Medicaid Personal Care Services Authorization from Centers Plan for Healthy Living (Managed Care Plan) in the amount of six hours per day, four days a week.

2. The Managed Care Plan received a request to increase the Appellant's personal care services authorization to twelve hours per day, seven days per week.

3. On February 21, 2018, the Managed Care Plan nurse completed a Universal Assessment System (UAS) report finding that the Appellant requires extensive assistance with bed mobility and eating and maximal assistance with bathing, dressing, hygiene, locomotion and walking, toilet transfer and use.

4. The UAS report stated that the Appellant's diagnoses include visual and hearing loss, abnormalities of gait and mobility, weakness, shortness of breath, urinary incontinence, fatigue, hypothyroidism, age-related cognitive decline. The report stated that the Appellant utilizes a cane and walker with unsteady gait and difficulty with balance.

5. By notice dated March 14, 2018, the Managed Care Plan advised Appellant of its determination to authorize Personal Care Services to the Appellant in the amount of eight hours per day, seven days per week.

6. On April 10, 2018, 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 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

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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.

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

(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

Local Commissioners Memorandum 95 LCM-76 advises local districts that informal caregivers may volunteer to assist with the recipient's care. However, the Department reminds

social services districts that they must not require any relative or friend or other informal support of the MA recipient to assist with the recipient's care. Nor may districts require any informal support to sign any "statement of understanding" that such person is reluctant or unwilling to sign. A family member or other informal support who has signed a "statement of understanding" may determine at any time that he or she is no longer willing or able to assist with the recipient's care.

DISCUSSION

The Appellant's son appeared as Representative at the hearing, stating that the Appellant resides with him. The Appellant's son did not dispute the Managed Care Plan's determination that the Appellant requires extensive assistance with bed mobility and eating and maximal assistance with bathing, dressing, hygiene, locomotion and walking, toilet transfer and use.

The Appellant's son stated that he is the caregiver assisting the Appellant during the hours in which she does not receive personal care services from the Managed Care Plan. However, the Appellant's son stated that he is not available to assist the Appellant for more than twelve hours on a given day. The Appellant's son explained that he is an adjunct professor at five to six colleges, depending on the semester, in Suffolk, Nassau, Brooklyn and Westchester. The Appellant's son stated that depending on scheduling, his teaching schedule varies from 9 am to 10 pm, plus travel time, at up to three colleges per day. The Appellant's son also stated that he additionally supervises student teachers at varying locations, to which he must travel. The Appellant's son noted that in addition, he requires preparation time, at school and at home, for his classes. The Appellant's son maintained that he therefore cannot assist with the Appellant's undisputed needs for more than twelve hours per day.

The Managed Care Plan did not provide a task sheet to demonstrate how the adequacy of eight hours per day was determined. However, the UAS report demonstrates needs for extensive and maximal assistance with all activities of daily living, including day and nighttime needs. The Appellant's son's testimony regarding the hours for which he cannot provide assistance was extremely detailed, credible and unrebutted by the Managed Care Plan. The above Directives state that contribution of family members is voluntary and cannot be coerced or required in any manner whatsoever. For all of the foregoing reasons, the Managed Care Plan's evidence does not support its determination as to the adequacy of personal care assistance authorized for the Appellant. Therefore, based on the Managed Care Plan's UAS determinations of Appellant's day and nighttime needs, the Managed Care Plan should immediately authorize personal care services for the Appellant twelve hours per day, seven days per week.

DECISION AND ORDER

The Managed Care Plan's determination as to the adequacy of Personal Care Services for Appellant is not correct and is reversed.

1. The Managed Care Plan is directed to authorize Personal Care Services to the Appellant in the amount of twelve hours per day, seven days per week.

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Should the Managed Care 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 requested, the Appellant must provide it to the Managed Care Plan promptly to facilitate such compliance.

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

DATED: Albany, New York
07/23/2018

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "Richard A. Lurie". The signature is fluid and cursive, with the first name "Richard" being the most prominent.

Commissioner's Designee