

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: March 15, 2019

AGENCY: MAP

FH #: 7926843Z

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 April 9, 2019, 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 ("Center Plan for Healthy Living")

D. Ferguson, Fair Hearing Representative

ISSUE

Was the determination of the Appellant's Managed Long Term Care Plan, Centers Plan for Healthy Living, to deny the Appellant's request for an increase in personal care service hours from 66.5 hours per week (9.5 hours per day, 7 days per week) to 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift") 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 92, has been enrolled in a Managed Long Term Care Program and has been receiving care and services, including Personal Care Services, through a partially capitated Managed Long Term Care Health Plan operated by Centers Plan for Healthy Living.

FH# 7926843Z

2. The Appellant receives personal care services in the amount of 66.5 hours per week (9.5 hours per day, 7 days per week).

3. The Appellant's representative requested that the Appellant's personal care hours be increased to 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift").

4. On February 22, 2019, a nurse from Centers Plan for Healthy Living completed a Uniform Assessment System New York Assessment (Comprehensive) Report (UAS Report) of the Appellant's personal care needs.

5. On March 7, 2019, Centers Plan for Healthy Living issued a notice titled "Initial Adverse Determination Denial Notice" which set forth Centers Plan for Healthy Living's determination to deny the Appellant's request for an increase in personal care hours to 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift").

6. The Appellant's representative appealed the Plan's March 7, 2019 determination.

7. On March 11, 2019, Centers Plan for Healthy Living issued a notice titled "Final Adverse Determination Denial Notice" which set forth Centers Plan for Healthy Living's determination to deny the Appellant's request for an increase in personal care hours to 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift") because the services are not medically necessary.

8. On March 15, 2019, the Appellant requested the present hearing.

APPLICABLE LAW

Part 438 of 21 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 21 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.

- (3) Provide that the MCO, PIHP, or PAHP--
 - (i) Must ensure that the services are sufficient in amount, duration, or scope to reasonably be expected to achieve the purpose for which the services are furnished.
 - (ii) May not arbitrarily deny or reduce the amount, duration, or scope of a required service solely because of diagnosis, type of illness, or condition of the beneficiary;
 - (iii) May place appropriate limits on a service
 - (A) On the basis of criteria applied under the State plan, such as medical necessity; or
 - (B) For the purpose of utilization control, provided the services furnished can reasonably be expected to achieve their purpose, as required in paragraph (a)(3)(i) of this section; and
- (4) Specify what constitutes “medically necessary services” in a manner that:
 - (i) Is no more restrictive than that used in the State Medicaid program as indicated in State statutes and regulations, the State Plan, and other State policy and procedures; and
 - (ii) Addresses the extent to which the MCO, PIHP, or PAHP is responsible for covering services related to the following:
 - (A) The prevention, diagnosis, and treatment of health impairments.
 - (B) The ability to achieve age-appropriate growth and development.
 - (C) The ability to attain, maintain, or regain functional capacity.
- (b) Authorization of services. For the processing of requests for initial and continuing authorizations of services, each contract must require:
 - (1) That the MCO, PIHP, or PAHP and its subcontractors have in place, and follow, written policies and procedures.

- (2) That the MCO, PIHP, or PAHP:
 - (i) Have in effect mechanisms to ensure consistent application of review criteria for authorization decisions; and
 - (ii) Consult with the requesting provider when appropriate.
- (3) That any decision to deny a service authorization request or to authorize a service in an amount, duration, or scope that is less than requested, be made by a health care professional who has appropriate clinical expertise in treating the enrollee's condition or disease....

Section 438.236 of 21 CFR Subpart D provides, in pertinent part:

- (a) Basic rule: The State must ensure, through its contracts, that each MCO and, when applicable, each PIHP and PAHP meets the requirements of this section.
- (b) Adoption of practice guidelines. Each MCO and, when applicable, each PIHP and PAHP adopts practice guidelines that meet the following requirements:
 - (1) Are based on valid and reliable clinical evidence or a consensus of health care professionals in the particular field.
 - (2) Consider the needs of the MCO's, PIHP's, or PAHP's enrollees.
 - (3) Are adopted in consultation with contracting health care professionals.
 - (4) Are reviewed and updated periodically as appropriate.
- (c) Dissemination of guidelines. Each MCO, PIHP, and PAHP disseminates the guidelines to all affected providers and, upon request, to enrollees and potential enrollees.
- (d) Application of guidelines. Decisions for utilization management, enrollee education, coverage of services, and other areas to which the guidelines apply are consistent with the guidelines.

Section 438.400 of 21 CFR Subpart F provides in part:

- (a) Statutory basis. This subpart is based on sections 1902(a)(3), 1902(a)(4), and 1932(b)(4) of the Act.
 - (1) Section 1902(a)(3) requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly.

- (2) Section 1902(a)(4) requires that the State plan provide for methods of administration that the Secretary finds necessary for the proper and efficient operation of the plan.
- (3) Section 1932(b)(4) requires Medicaid managed care organizations to establish internal grievance procedures under which Medicaid enrollees, or providers acting on their behalf, may challenge the denial of coverage of, or payment for, medical assistance.
- (b) Definitions. As used in this subpart, the following terms have the indicated meanings:

In the case of an MCO or PIHP- “Action” means--

- (1) The denial or limited authorization of a requested service, including the type or level of service;
- (2) The reduction, suspension, or termination of a previously authorized service;
- (3) The denial, in whole or in part, of payment for a service...

Section 438.402 of 21 CFR Subpart F provides in part:

- (a) The grievance system. Each MCO [Managed Care Organization] and PIHP [Prepaid Inpatient Health Plan] must have a system in place, for enrollees, that includes a grievance process, an appeal process, and access to the State's fair hearing system...

Section 4403-f of the Public Health Law pertains to Managed Long Term Care Plans.

Article 49 of the Public Health Law pertains to Utilization Review and External Appeal.

Section 505.14(a) of the Regulations provides:

- (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.

(3) Personal care services, as defined in this section, can be provided only if the services are medically necessary and the social services district reasonably expects that the patient's health and safety in the home can be maintained by the provision of such services, as determined in accordance with this section.

(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.

Section 505.14(a) of the Regulations provides in part 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.

(ii) Level II shall include the performance of nutritional and environmental support functions and personal care functions.

a. Personal care functions shall 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) 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.

General Information System message, GIS 97 MA/033, states in pertinent part that once the district has determined that the recipient is medically eligible for split-shift or live-in services and determined whether the recipient has informal or formal supports that are willing and able to provide hours of care, the district can assure that it is complying with the Mayer case by authorizing 24-hour split-shift personal care services for a recipient who is medically eligible for split-shift services, and who otherwise meets the fiscal assessment requirements, but has no informal or formal supports.

18 NYCRR 358-5.9(a) provides that, at a fair hearing concerning the denial of an application for or the adequacy of Public Assistance, Medical Assistance, HEAP, SNAP benefits or services, or an exemption from work activity requirements, the Appellant must establish that the Agency's denial of assistance or benefits or such an exemption was not correct or that the appellant is eligible for a greater amount of assistance or benefits

In Rodriguez v. City of New York, 197 F. 3rd 611 (Federal Court of Appeals, 2nd Circuit 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.

GIS 03 MA/03 states, in pertinent part, that social services districts should authorize assistance with recognized, medically necessary personal care services tasks. As previously advised, social services districts are **NOT** required to allot time for safety monitoring as a separate task as part of the total personal care services hours authorized (see GIS 99 MA/013, GIS 99 MA/036). However, districts are reminded that a clear and legitimate distinction exists between “safety monitoring” as a non-required independent stand-alone function while no Level II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as

transferring, toileting, or walking, to assure the task is being safely completed.

GIS 12 MA/026 provides in pertinent part 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 for 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.

GIS 15 MA/24 provides in pertinent part that:

1. 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 of daily on interrupted sleep during the aide's eight of sleep.
2. Live-in 24 hour personal care services is a provision of care by a personal care aide for a patient who, because of the patient's medical condition, needs assistance during a calendar day with transferring, walking, toileting, turning and positioning, or feeding, and whose needs 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 of period of sleep.

GIS 15 MA/24 further provides that the social assessment in live-in 24-hour PCS and CDPA cases would have to evaluate whether the individual's home has sleeping accommodations for an aide. If not, continuous PCS or CDPA must be authorized.

DISCUSSION

On March 11, 2019, Centers Plan for Healthy Living issued a notice titled "Final Adverse Determination Denial Notice" which set forth Centers Plan for Healthy Living's determination to deny the Appellant's request for an increase in personal care hours to 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift") from 66.5 hours per week (9.5 hours per day, 7 days per week) because the service is not medically necessary.

Centers Plan for Healthy Living February 22, 2019 Uniform Assessment System (UAS) report lists the Appellant's diagnoses as depression, age-related cognitive, constipation, dizziness and giddiness, essential hypertension, fecal urgency, full incontinence of feces, gastro-esophageal reflux disease without esophagitis, hypothyroidism, iron deficiency, major depressive disorder, mild intermittent asthma, insomnia, irritable bowel syndrome, pain, osteoarthritis, abnormalities of gait and mobility, and urinary incontinence. The February 22, 2019 UAS report

states that the Appellant is totally dependent on others for preparation of meals, managing finances, ordinary housework, shopping, navigating stairs, transportation, bathing, dressing upper and lower body, walking, locomotion, toilet transferring, and bed mobility. The Appellant requires maximal assistance with managing medications and eating. The UAS report states that the Appellant is bedbound; his ADL status has declined since his last assessment and his overall self-sufficiency has deteriorated since last assessment. The UAS report states that the Appellant is incontinent of bowel and bladder.

Moreover, in the February 22, 2019 UAS report, the nurse noted that according to Appellant's sister, the Appellant is bedbound, and that he has not gone outside for four months. He is completely dependent on others for grooming, bathing, adjusting clothes on lower and upper body, toileting, and bed mobility. The nurse also noted that the Appellant is completely dependent with meal preparation and housework, and he requires weight-bearing assistance with eating.

At the hearing, the Appellant's representative stated that the Appellant is bedbound. The Appellant's representative stated that she had been hiring different people to care for the Appellant at night, but she can no longer afford to continue hiring people to watch the Appellant at night. The Appellant's representative stated that the Appellant stays up at night and asks for assistance with toileting every five to ten minutes. The Appellant's representative stated that the Appellant does not use the toilet, but he wears adult diapers, and he requires assistance with changing diapers. She contended that the Appellant has issues with his prostate and consequently, he urinates often. The Appellant's representative stated that the Appellant wears adult diapers throughout the day, but at night, he rips off his diapers; however, she was uncertain as to the reason that the Appellant only rips off his diapers at night. The Appellant's representative also stated that the Appellant cries throughout the night because he has been experiencing pain in his head. The Appellant's representative stated that the Appellant's physician believes that the Appellant may have a tumor in his head. She contended that the Appellant requires an aide to give him pain medication at night. The Appellant's representative stated that, after the Appellant has taken pain medication, his pain subsides for approximately one hour, but subsequently, he continues to scream due to pain. The Appellant's representative states that the Appellant requires an aide to watch him during the night.

It is noted that safety monitoring or "supervision" as an independent or "standalone" task is not a covered task, and therefore, Centers Plan for Healthy Living is not required to provide personal care services for safety supervision as an independent or standalone task. However, safety monitoring or "supervision" as an independent or "standalone" task should be distinguished from appropriately monitoring a patient while providing assistance with the performance of Level II personal care tasks, such as transferring, toileting, or walking, to assure that the task is being safely completed (see "GIS 03/MA03"). Thus, safety supervision provided while assisting a patient with the performance of such tasks as ambulating, transferring, or toileting is a covered task, and is not deemed as an independent or a standalone task.

At the hearing, the Appellant's representative presented via fax a letter dated March 25, 2019 from [REDACTED] of [REDACTED] that states that the Appellant requires assistance

FH# 7926843Z

at night with positional changes to prevent pressure ulcers and he also requires assistance with his incontinence. [REDACTED] indicated that he recommends 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift").

The evidence in this case establishes that the Appellant requires 24-hour continuous personal care services. The credible evidence establishes that the Appellant is bedbound and that he is totally dependent on others for bed mobility including turning and positioning. Furthermore, the evidence establishes that the Appellant requires assistance at night with changing his adult diapers. Because the Appellant requires assistance with turning and positioning during the night and requires assistance with toileting particularly changing his diapers, an aide would not be able to obtain five hours of uninterrupted sleep due to the Appellant's nighttime needs. In addition, although the Appellant uses adaptive or specialized equipment and supplies such as adult diapers, he requires assistance with changing his diapers; therefore, the use of such supplies would not be adequate to meet the Appellant's nighttime need.

Based on the evidence presented at the hearing, Centers Plan for Healthy Living's determination cannot be sustained.

DECISION AND ORDER

The determination of the Appellant's Managed Long Term Care Plan, Centers Plan for Healthy Living, to deny the request for an increase in personal care service hours to 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift") was not correct and is reversed. Centers Plan for Healthy Living is directed to:

1. Authorize 24 hours daily, seven (7) days continuous care by more than one personal care aide ("split-shift").
2. Notify the Appellant and/or Appellant's representative of its compliance with this directive.

Should Centers Plan for Healthy Living 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 for Healthy Living promptly to facilitate such compliance.

FH# 7926843Z

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

DATED: Albany, New York
04/24/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "T. A. Selekm", with a horizontal line above the first letter "T".

Commissioner's Designee