

STATE OF FLORIDA  
DEPARTMENT OF CHILDREN AND FAMILIES  
OFFICE OF APPEAL HEARINGS

[REDACTED]

APPEAL NO. 11F-08980

PETITIONER,

Vs.

CASE NO.

AGENCY FOR HEALTH CARE ADMINISTRATION  
CIRCUIT: 15 Palm Beach  
UNIT: AHCA

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on January 24, 2012 at 3:03 p.m. in [REDACTED] Florida.

**APPEARANCES**

For the petitioner:

[REDACTED]

Petitioner's wife

For the respondent:

[REDACTED]

, Management Analyst, Agency for Health  
Care Administration – Area 9

**STATEMENT OF ISSUE**

Petitioner is disputing whether the denial of an additional 10 home care hours per week through the respondent's Nursing Home Diversion Project was proper.

**PRELIMINARY STATEMENT**

The petitioner was not present but represented by his wife, [REDACTED].  
Petitioner did not enter any exhibits into evidence.

Present for the respondent was [REDACTED]. Appearing as witnesses from [REDACTED] were: [REDACTED] Quality Assurance Coordinator; [REDACTED], Director of Managed Care; and [REDACTED] Care Management Manager. Also present was [REDACTED] Contract Manager – Department of Elder Affairs (DOEA). Respondent's composite exhibit one was entered into evidence.

The record was left open until the close of business on February 1, 2012 for [REDACTED] to provide a copy of the petitioner's care plan and assessment. The information was timely received and marked as respondent's exhibit two. The record was also left open until the close of business on February 1, 2012 for [REDACTED] to provide either a copy of or internet link to the contract DOEA has with [REDACTED]. This information was not received by the undersigned.

The undersigned, [REDACTED] and [REDACTED] appeared in person. All other parties appeared by telephone.

As this is a request for additional services, the burden of proof is assigned to the petitioner.

**FINDINGS OF FACT**

1. The petitioner is a [REDACTED] male with a birth date of [REDACTED].
2. Petitioner's diagnoses include dementia and diabetes. He has experienced strokes and been treated for colon cancer. Petitioner is incontinent; non verbal; and has a history of falling.

3. Petitioner resides with his wife; daughter; and the daughter's friend. His wife is the primary caregiver. She has no documented medical limitations.
4. The petitioner has been eligible to receive Medicaid services at all times relevant to this proceeding.
5. The Florida Department of Elder Affairs administers contractual relationships for the Long-Term Care Community Diversion Project, also known as the Nursing Home Diversion Program, through an interagency agreement with the respondent Agency for Health Care Administration.
6. The Long-Term Care Community Diversion Project is designed to provide senior citizens with community-based alternatives to nursing home care. Services are received either in the patient's home or in an Assisted Living facility. Services provided under the Program are paid by Medicaid.
7. DOEA contracts with numerous managed care organizations to provide services under this program. Petitioner has received services through [REDACTED] (hereafter referred to as "provider") since February 2009.
8. Petitioner currently receives 24 hours per week of home care services<sup>1</sup>.

Services are received as follows:

Sunday:	No services
Monday:	8:00 a.m. to 1:00 p.m.
Tuesday:	8:00 a.m. to 1:00 p.m.
Wednesday:	No services
Thursday:	8:00 a.m. to 1:00 p.m.
Friday:	8:00 a.m. to 1:00 p.m.
Saturday:	10:00 a.m. to 2:00 p.m.

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<sup>1</sup> 19 hours of homemaking and 5 hours of personal care.

9. The nursing provider staff assists petitioner with showering; dressing; and eating.

The staff person also walks with petitioner and does light housekeeping.

10. Petitioner does not receive services from any other program.

11. Petitioner's home care services began in February 2009 at a frequency of 14 hours per week. As a result of requests for additional services, weekly hours were

increased by the provider on the following dates:

- September 2010: to 16 hours per week
- October 2010: to 20 hours per week
- December 2010: to 24 hour per week

12. In a quarterly review completed on October 21, 2011, the program case manager (CM) wrote, in part:

CM met with client and his wife [REDACTED] [sic] face to face for a quarterly visit. [REDACTED] [sic] mentioned that she would like additional hours of personal care; CM mentioned that if she feels client needs more care that an ALF<sup>2</sup> could be helpful. [REDACTED] [sic] stated that she prefers to keep the client home.

13. In DOEA's annual assessment completed on November 9, 2011, petitioner's case manager/assessor wrote:

Member is a [REDACTED] Italian male living at home with his wife and adult daughter. He is confused and disoriented to time or place. His mental health has been deteriorating. His wife [REDACTED] is his primary caregiver. He is totally dependent on her for all his needs. He is non-verbal.

14. The assessment indicates petitioner "wanders for no apparent reason and demonstrates significant memory problems". The assessment also notes that petitioner requires total help with all activities of daily living (bathing; dressing; eating; toileting,

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<sup>2</sup> Assisted Living Facility

etc.) and instrumental activities of daily living (housekeeping; meal preparation; shopping; medication administration, etc.).

15. The Assessment Summary states: "ALF is assessor recommendations. Family refuses ALF placement."

16. Petitioner's Care Plan was updated on November 9, 2011. It documented the need for personal care and homemaking assistance as well as the need for consumable medical supplies (wipes and adult diapers). Petitioner's Care Plan was signed by petitioner's wife (as his representative) and the care manager on that date. (See Respondent's Exhibit 2).

17. On November 4, 2011, petitioner's wife, due to being overwhelmed with care responsibilities, requested 10 additional home care hours per week. Petitioner's Determination of Services prepared by [REDACTED] indicates that on that date, it was recommended petitioner be placed in a secured ALF unit. (See Respondent's Exhibit 1).

18. Petitioner's wife's request for 10 additional home care hours was reviewed by provider's [REDACTED]

19. In correspondence dated November 8, 2011, the provider denied the above request. The provider wrote, in part:

This letter acknowledges that [REDACTED] has reviewed your request to provide **10 additional home care hours for a total of 34 care hours** per week.

Our [REDACTED] [REDACTED] has reassessed your condition and denied your request for the following reason:

***The 24 weekly hours of home care services that you are currently receiving is appropriate to support your needs.***

20. The correspondence stated should the petitioner disagree with the decision, an appeal with the provider's Internal Review Panel or a fair hearing could be requested.

21. In correspondence dated November 28, 2011, the provider wrote, in part:

Your request for 10 additional home care hours was reviewed by our Internal Appeal Panel on 11/23/11 to determine a resolution.

After further assessment and review, your request for 10 additional home care hours has been denied for the following reason: [Petitioner] received 24 weekly hours of home care that in conjunction with the care provided by his wife/caregiver, is appropriate to support his needs. In addition, it has been determined that [Petitioner's] needs could be met in a secured memory unit ALF.

The Appeal Panel's decision is binding on behalf of [REDACTED]  
[REDACTED] Choice plan.

22. A request for a Fair Hearing was received by the Office of Appeal Hearings on November 16, 2011 and this proceeding followed.

23. Petitioner's wife asserts he walks all day long and, due to potential falls, requires assistance. He is unable to do anything for himself and requires constant supervision. She will not place him into a nursing home.

24. Respondent asserts an Assisted Living Facility (ALF) is not a nursing home. Petitioner's wife responded her husband is beyond would not receive the level of care he requires in an assisted living facility.

25. Petitioner's wife states he is deteriorating, walks slower and "that's about it".

**CONCLUSIONS OF LAW**

26. By agreement between the Agency for Health Care Administration (AHCA) and the Department of Children and Families, AHCA has conveyed jurisdiction to the Office of Appeal Hearings to conduct this hearing pursuant to Chapter 120.80, Fla. Stat.

27. This is a final order pursuant to § 120.569 and § 120.57, Fla. Stat.

28. This hearing was held as a de novo proceeding pursuant to Fla. Admin. Code R. 65-2.056.

29. In accordance with Fla. Admin. Code R. 65-2.060 (1), the burden of proof is assigned to the petitioner. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by “the greater weight of the evidence,” (Black’s Law Dictionary at 1201, 7<sup>th</sup> Ed.).

30. The Florida Medicaid program is authorized by Chapter 409, Fla. Stat. and Chapter 59G, Fla. Admin. Code. The Medicaid program is administered by the respondent Agency for Health Care Administration.

31. The Florida Medicaid Summary of Services (2011-2012) on page 102 explains the Medicaid Nursing Home Diversion Waiver:

The primary objective of the Medicaid Nursing Home Diversion (NHD) Waiver is to provide frail elders with an alternative to nursing facility placement. Under this managed care program, applicants can choose to continue living at home or in a community setting such as an assisted living facility. The program makes this option possible by offering coordinated acute and long-term care services to plan members in the community setting ...

The Department of Elder Affairs (DOEA) operates this 1915(a) and 1915(c) waiver program.

Long-term care services include adult companion services, adult day health services, assisted living, case management, chore services,

consumable medical supplies, environmental accessibility and adaptation, escort, family training, financial assessment and risk reduction, home delivered meals, homemaker, nutritional assessment and risk reduction, personal care, personal emergency response systems, respite care, occupational, physical and speech therapies, home health, and nursing facility services.

32. Fla. Admin. Code R. 59G-13.080 and entitled "Home and Community-Based Services Waivers" clarifies the purpose of personal care and homemaker services received by the petitioner:

(2) Definitions. General Medicaid definitions applicable to this program are located in Rule 59G-1.010, F.A.C. Additional descriptions of services available under this program are provided in subsection (3) of this rule. The following definitions apply:

(p) Homemaker, and Homemaker and Personal Care Services provide assistance with daily living activities and household tasks related to supporting clients in a home setting. Services include assistance with bathing, dressing, eating, maintenance of personal belongings, and performance of light housekeeping, and meal planning and preparation.

33. Florida Statute § 409.912 states, in relevant part:

(3) The agency may contract with health maintenance organizations certified pursuant to part I of chapter 641 for the provision of services to recipients. This subsection expires October 1, 2014.

34. Florida Admin. Code R. 58N-1.001 states: "Entities who wish to provide services under the Long-Term Care Community Diversion Pilot Project must enter into a contract with the Department of Elder Affairs." [REDACTED] entered into such a contractual relationship with the Department of Elder Affairs and is qualified to provide the types of services petitioner receives through the Program.

35. Florida Statute § 430.705(2)(a) provides that the Long-Term Care Community Diversion Program be designed to "maximize the placement of participants in the least restrictive appropriate care setting." Additionally, section (10) that statute provides

authorization for the creation of any rules necessary to implement and administer the program.

36. Fla. Admin. Code R. 58N-1.009 explains Care and Service Standards and states in pertinent part:

(3) Care Planning:

(a) Each participant must have a care plan. The care plan is the tool used by the case manager to document a participant's assessed needs, desired outcomes, and services to be provided. The care plan is a plan of action, developed with the participation of the case manager, the program participant, the participant's caregiver or representative, and to the extent possible, the participant's health care provider. It is designed to assist the case manager in the overall management of the participant's care.

1. At each face-to-face visit, the participant or representative and case manager must review the care plan and make changes, if necessary, to meet the participant's continuing needs. The participant or representative and case manager must acknowledge in writing that the care plan was reviewed and changes to the care plan were agreed upon, if applicable.

2. At any time a significant change is indicated, the participant or representative and case manager must acknowledge the change in writing. A significant change is defined as any deterioration or improvement in the participant's mental, physical or social condition that would require an adjustment in his or her care plan. A significant change could result in an increase or decrease in services, depending upon the outcome.

3. The participant or representative must receive a signed and dated copy of the care plan or care plan summary.

(b) All changes in services in the care plan must be documented in the participant's file.

37. Petitioner's care plan was updated on November 9, 2011, and signed by petitioner's representative on the same date. The care plan identified no significant changes which warranted a change in service frequency.

38. The case notes from case manager's face-to-face visit on October 21, 2011, notes a request for additional hours. No justification, however, was included to support the requested increase. At the hearing, petitioner's wife stated the petitioner was deteriorating; was walking slower, and "that's about it."

39. Other than generalized comments, no credible evidence was presented to indicate the petitioner's present condition warrants additional home care service hours. No supporting information from a medical authority or other professional source was provided to corroborate a decline in petitioner's mental or physical status which equates to a significant change.

40. No information was presented as to when the increased hours would be utilized.

41. No medical barriers were established which would prevent the wife in participating in the petitioner's care.

42. No credible evidence was presented that assistance with personal care and light housekeeping cannot be performed with the context of those hours currently in existence. Walking with petitioner so he does not fall is not within the service description for either a homemaker or personal care staff.

43. For services to be approved under Medicaid funded programs, "medical necessity" must be established. Fla. Admin. Code R. 59G-1.010(166), defines medical necessity as:

"Medically necessary" or "medical necessity" means that the medical or allied care, goods, or services furnished or ordered must:

(a) Meet the following conditions:

1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;

2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; statewide;
5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

44. Petitioner has not presented credible evidence which establishes all conditions of medical necessity have been satisfied to justify an increase in service hours,.

45. It is not clear why the DOEA witness failed to supply the contract (or internet link to the contract) between DOEA and the provider as agreed at the hearing. Regardless, the fact that the provider and DOEA have a contractual relationship to provide services is not in dispute. The undersigned based this decision on testimony and existing documentary evidence , as well as applicable rules and regulations as related to the Long Term Care Diversion Program.

46. The challenges encountered by the petitioner's wife in providing care are understood, however the burden of proof is assigned to the petitioner. This standard requires the petitioner to establish the need for additional hours by a greater weight of the evidence. This standard was not met.

47. The undersigned has considered all testimony, documentary evidence, and applicable Florida Statutes and the Florida Administrative Code. The undersigned denies the petitioner's request for 10 additional home care services per week.

**DECISION**

The petitioner's appeal is DENIED. The respondent's action is AFFIRMED.

**NOTICE OF RIGHT TO APPEAL**

This decision is final and binding on the part of the agency. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, FL 32308-5403. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The agency has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2012,

in Tallahassee, Florida.

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