

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

**FILED**

NOV 13 2015

OFFICE OF APPEAL HEARINGS  
DEPT OF CHILDREN & FAMILIES



APPEAL NO. 15F-07086

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION  
CIRCUIT: 18 Seminole  
UNIT: AHCA

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic administrative hearing on October 1, 2015 at approximately 10:30 a.m.

**APPEARANCES**

For Petitioner:



Petitioner's Primary Caregiver

For Respondent:

Doretha Rouse  
Registered Nurse Specialist  
Agency for Health Care Administration

**STATEMENT OF ISSUE**

At issue is Respondent's denial of Petitioner's request to continue receiving Ensure nutritional supplements. The burden of proof is assigned to Respondent.

**PRELIMINARY STATEMENT**

Respondent presented the following witnesses:

- Jennifer Arteaga, Grievance and Appeals Coordinator II, Sunshine Health.
- Dr. Ernest Bertha, Medical Director, Sunshine Health.

- Courtney Crawford, Case Manager, Sunshine Health.
- Kritzia Torres-Rodriguez, Supervisor of Case Management, Sunshine Health.
- Carolyn Smith, Director of Case Management, Sunshine Health.

Tiffany Smith, Grievance and Appeals Coordinator with Sunshine Health

(“Sunshine”) observed the hearing. [REDACTED] gave oral testimony, but did not move any exhibits into evidence. Respondent moved Exhibits 1 through 7 into evidence.

Administrative notice was taken of the following:

- The Florida Medicaid Provider General Handbook, July 2012.
- The Florida Medicaid Category Lists for the HCPCS Codes for Enteral Formula Effective July 1, 2014.

#### **FINDINGS OF FACT**

1. Petitioner is a 63-year-old female. At all times relevant to this proceeding, Petitioner was eligible to receive Medicaid services.
2. Petitioner became enrolled with Sunshine as her Long-Term Care (LTC) plan on August 1, 2013, and is currently active with the plan.

3. Petitioner’s health conditions include:

- [REDACTED]

4. Petitioner’s physician submitted an authorization request for Ensure. The request was for a supply of three (3) cans per day of Ensure administered orally.

The request form asks for a projected length of therapy of zero (0) to six (6) months, however, the physician listed that she would need the Ensure for her lifetime. The request indicated the Ensure would provide 660 calories per day, constituting 50% of Petitioner's daily nutrition. The qualifying diagnosis was listed as "calorie malnutrition," and Petitioner's body mass index (BMI) was listed as [REDACTED] (Respondent's Exhibit 4).

5. [REDACTED] testified Petitioner had previously been receiving Ensure supplements for years until Sunshine took over as her LTC plan.

6. Sunshine received the request on May 27, 2015. On May 29, 2015, Sunshine issued a Notice of Action denying the request for two (2) cases of Ensure per month for six (6) months, which corresponds to the three (3) cans per day requested for the maximum length of time listed on the request form, which is six (6) months.

7. The reason given for the denial was the Ensure is not medically necessary, specifically under the requirements of paragraph 2 of Fla. Admin. Code R.59G-1.010(166). The letter stated:

The request for Ensure is denied. The information given to Sunshine Health does not show that the member's condition fits the Medicaid criteria for Enteral Formula. The Authorization Request form for Enteral Formula states the member's BMI, or body mass index which is a measure of nutrition status, is in the normal range. There is no medical note saying the member is not able to swallow, absorb, and digest regular food.

The facts we used to make our decision are: This decision was made with Florida Medicaid criteria for Enteral Formula (Respondent's Exhibit 3).

8. On June 16, 2015, Petitioner received a 701B Comprehensive Assessment ("701B Assessment"). (Respondent's Exhibit 5). Per the assessment form, Petitioner answered the questions and Mr. Figley was present and also provided

answers to questions. Under the Memory Section, Petitioner is listed as not suffering from any [REDACTED] and presented as alert and oriented. [REDACTED] testified that she has some [REDACTED] loss.

9. Although [REDACTED] testified at the hearing that Petitioner has a low appetite, Petitioner's answer to question 78(e) states she does not have poor appetite or overeating. Petitioner's answer to question 87 indicates she eats at least two (2) meals per day. [REDACTED] testified he has known her for 18 years and she does not eat two (2) meals per day.

10. Petitioner's answer to question 88 is that, on a typical day, she has coffee for breakfast; a sandwich, chips, and soup for lunch; ribs, coleslaw, and beans for dinner; and chocolate and pudding for snacks. On question 93, Petitioner estimated her height to be 5' 5" and her weight to be 145 pounds. Dr. Bertha said that height and weight is a BMI of [REDACTED]

11. Dr. Bertha said a normal BMI ranges from 19 to 25. A BMI of over 25 means an individual is overweight. Petitioner's answer to question 96 was that she does have difficulty chewing and swallowing. [REDACTED] testified that her medications are rotting her teeth.

12. On September 14, 2015, Petitioner received another 701B Assessment. (Respondent's Exhibit 6). Again, Petitioner answered the questions and [REDACTED] was present. Petitioner was deemed alert and oriented.

13. Petitioner's answer to question 78(3) again stated she does not suffer from poor appetite or overeating.

14. Petitioner's answers to question 88 changed from the prior 701B Assessment.

She said on a typical day she has coffee for breakfast, soup or Ensure for lunch, and a sandwich for dinner. She reported not eating any snacks. [REDACTED] said that's not true. Despite being present for the assessment, he said she has trouble remembering things and probably gave incorrect answers regarding how much she eats in a typical day. He said he can get her to eat some junk food, like apple pie, but otherwise not much nutrition. He also said that she drinks one (1) or two (2) cans of Ensure per day.

15. Her estimate of her height and weight was again 5' 5," [REDACTED] which would again be a BMI of [REDACTED]. Dr. Bertha testified it would be impossible for her to maintain that BMI if she is only drinking one (1) or two (2) cans of Ensure per day and not also eating solid food.

16. The Notes & Summary of the Nutritional Section, on page 21 of the 701B Assessment states: "[Member] was recently denied Ensure because the BMI is normal. However, the member does not agree with that because she reports a very poor appetite, saying despite that the caregiver prepares meals she unable to eat but she is able to drink an Ensure." There is no indication she is unable to absorb and digest solid food.

17. Sunshine's internal policy regarding oral nutritional supplements allows for Ensure to be provided even if the recipient is able to eat solid food, as long as they are unable to eat enough food to maintain health, including due to decreased appetite. The criteria for adults over the age of 21 are a BMI of less than 18.5 kg/m,

or, a BMI of less than 20 kg/m that is also associated with unintentional weight loss of greater than 5% within the prior three (3) months. (Respondent's Exhibit 7).

18. Dr. Bertha said there may be an over-the-counter allotment of \$25.00-\$40.00 per month available to Petitioner that could be used to purchase Ensure if she wanted. She can get the information about obtaining the allotment from Sunshine's member services or from her Case Manager. Ensure costs approximately \$20.00 for 16 cans, so a \$40.00 allotment would cover 32 cans per month, which is enough to have one (1) can every day.

### **PRINCIPLES OF LAW AND ANALYSIS**

19. By agreement between the Agency for Health Care Administration ("AHCA" or "Agency") and the Department of Children and Families, the Office of Appeal Hearings has jurisdiction over this matter pursuant to § 120.80, Fla. Stat.

20. This hearing was held as a *de novo* proceeding, in accordance with Florida Administrative Code Rule 65-2.056.

21. This is a Final Order, pursuant to §§ 120.569 and 120.57, Fla. Stat.

22. 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.).

23. Legal authority governing the Florida Medicaid Program is found in Chapter 409 of the Florida Statutes, and in Chapter 59G of the Florida Administrative Code. Respondent, AHCA, is the single state agency that administers the Medicaid Program.

24. The July 2010 Durable Medical Equipment/Medical Supply Services Coverage and Limitations Handbook ("DME Handbook") has been promulgated into law by Fla. Admin. Code R. 59G-4.070.

25. Page 1-2 of the DME Handbook states: "Medical supplies are defined as medically necessary medical or surgical items that are consumable, expendable, disposable, or non-durable and appropriate for use in the recipient's home." The DME Handbook requires any medical supplies provided to the Medicaid recipient to be medically necessary. Nutritional supplements are a consumable medical supply.

26. The definition of medically necessary is found in Fla. Admin. Code R. 59G-1.010 which states:

166) "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; and
5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

...

(c) The fact that a provider has prescribed, recommended, or approved medical or allied care, goods or services does not, in itself, make such care, goods, or services medically necessary or a medical necessity or a covered service.

27. Under AHCA's Category Lists for the HCPCS Codes for Enteral Formula, Ensure is indicated for increased caloric needs.

28. Sunshine denied Petitioner's request for Ensure for not meeting the requirements of paragraph 2 of the definition of medical necessity. The undersigned agrees. Three (3) cans of Ensure per day are in excess of her needs. Petitioner has a normal BMI. Indeed, her BMI is at the high end of the normal range. Further, Petitioner's own responses to both 701B Assessments indicate she consumes solid food.

29. The second 701B Assessment does indicate Petitioner has decreased appetite, which is a potential reason to require a nutritional supplement such as Ensure. However, [REDACTED] testimony is that Petitioner typically consumes one (1) or two (2) cans per day of Ensure. Her prescription is for three (3) cans per day.

30. At the present time, Petitioner does not require three (3) cans per day of Ensure. In the event Petitioner experiences significant, unintentional weight loss, she can submit a new request for Ensure at that time.

31. Dr. Bertha suggested Petitioner contact Sunshine's member services or her Case Manager to look into receiving an over-the-counter allotment that would allow her to purchase one (1) can per day.

### **DECISION**

Based upon the foregoing, Petitioner's appeal is DENIED and the Agency'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

FINAL ORDER (Cont.)

15F-07086

PAGE - 9

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 petitioner is responsible for any financial obligations incurred as the agency has no funds to assist in this review.

DONE and ORDERED this 13<sup>th</sup> day of November, 2015,

in Tallahassee, Florida.



Rick Zimmer  
Hearing Officer  
Building 5, Room 255  
1317 Winewood Boulevard  
Tallahassee, FL 32399-0700  
Office: 850-488-1429  
Fax: 850-487-0662  
Email: Appeal.Hearings@myffamilies.com

Copies Furnished To: [REDACTED] Petitioner  
Judy Jacobs, Area 7, AHCA Field Office