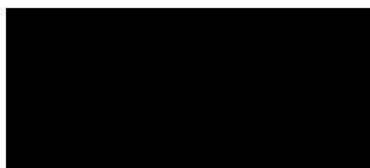


Dec 31, 2015

Office of Appeal Hearings  
Dept. of Children and FamiliesSTATE OF FLORIDA  
DEPARTMENT OF CHILDREN AND FAMILIES  
OFFICE OF APPEAL HEARINGS

APPEAL NO. 15F-08762

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION  
CIRCUIT: 15 Palm Beach  
UNIT: AHCARESPONDENT.  

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**FINAL ORDER**

Pursuant to notice, the undersigned convened an administrative hearing in West Palm Beach, Florida on December 10, 2015 at 10:08 a.m.

**APPEARANCES**

For the Petitioner:



Petitioner's Daughter

For the Respondent:

Linda Latson  
Registered Nurse Specialist**ISSUE**

Whether respondent's denial of petitioner's request for overnight care through the Statewide Long Term Managed Care Program (LTMC Program) was proper. The burden of proof was assigned to the petitioner.

**PRELIMINARY STATEMENT**

At the onset of the hearing, respondent requested a conference with the petitioner. The conference took place outside the presence of the hearing officer.

At the conclusion of the conference, the parties requested that the hearing proceed.

Appearing in person for the petitioner was her daughter [REDACTED]

Petitioner's exhibits "1" through "3" were accepted into evidence.

Ms. Latson appeared in person for the respondent. Present by telephone from United Healthcare were Christian Laos, Senior Compliance Analyst and Dr. Marc Kaprow, Executive Director for the LTMC Program. Respondent's exhibit "1" was accepted into evidence.

The record was held open through December 17, 2015 for respondent to provide definitions of services offered through the LTMC Program and to respond in writing to evidence entered by the petitioner at the time of hearing. Respondent provided the entire LTC contract as opposed to contract language specific to service definitions. Due to the size of the electronic file, service definitions were viewed at the website cited in respondent's Notice of Action dated September 11, 2015.

The record was also held open through December 24, 2015 for petitioner to provide a written response to respondent's post hearing submissions. Each party was also allowed through December 24, 2015 to submit additional written closing comments. Numerous e-mail responses were received from the petitioner. The e-mails were entered as petitioner's composite exhibit "4."<sup>1</sup>

### **FINDINGS OF FACT**

Based upon the oral and documentary evidence presented at the final hearing and on the entire proceeding, the following Findings of Fact are made:

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<sup>1</sup> As it was not clear whether some of the e-mails were shared with the respondent, a Notice of Ex Parte Communication was issued on December 28, 2015. Attached to the notice were those e-mails of concern.

1. Petitioner is 82 years of age and resides by herself in a one bedroom apartment. Her daughter resides in the same complex; her apartment is several doors away from the petitioner's.

2. Petitioner is diagnosed with [REDACTED]

Other diagnoses include [REDACTED] and [REDACTED]

3. At all times relevant to this proceeding, petitioner was Medicaid eligible.

4. Respondent administers Florida's Medicaid Program and contracts with Health Maintenance Organizations (HMOs) to provide comprehensive, cost-effective medical services to Medicaid recipients in the LTMC Program.

5. Respondent does not have a promulgated Coverage and Limitations Handbook for the LTMC Program. LTMC services descriptions are defined by contract.

6. Petitioner's LTMC services are provided by United Healthcare.

7. On September 3, 2015 a United Healthcare representative completed a functional assessment. Based on petitioner's assessment, the following Finding of Facts are made:

- Ambulates without assistance.
- Requires various levels of assistance with all activities of daily living (i.e. bathing; dressing; grooming; and toileting).
- Total assistance is required with household tasks (i.e. cleaning; cooking; shopping, etc.).

8. Petitioner is authorized to receive the following LTMC services:

Personal Care Services:	9 hours per week
Companion Services:	2 hours per week
Homemaker Services:	4 hours per week
Adult Day Care:	32.5 hours per week

9. Petitioner attends Adult Day Care each weekday from 8:30 a.m. to 4:00 p.m.

10. Personal care; companion; and homemaker services are provided Monday through Thursday from 7:15 p.m. to 9:30 p.m. and Sunday 12:00 p.m. to 6:00 p.m.

11. Due to concerns the petitioner might elope at night or otherwise injure herself in the apartment, a request for overnight care was received by United Healthcare on September 10, 2015. The requested coverage was from 11:00 p.m. to 6:00 a.m.; seven days per week.

12. On September 11, 2015 United Healthcare issued a Notice of Action. The notice denied the request for overnight care and stated "The requested service is not a covered benefit."

13. On November 14, 2015 the Office of Appeal Hearings received petitioner's request for a Fair Hearing. When requesting the hearing, petitioner's representative referenced a denial for additional companion hours in the evening<sup>2</sup>.

14. Regarding the rationale for denial, respondent's position changed at the hearing. The revised position is overnight care can be provided if medically necessary.

Respondent asserts the overnight coverage is not medically necessary for the following reasons:

- Adult Protect Services conducted an investigation. Although a report has not been received, the petitioner remains in her apartment
- There is no task that can be performed while the petitioner sleeps.
- The services through the LTMC Program are not provided to address an emergency that might arise.
- Overnight coverage in addition to services in place would be in excess of petitioner's need.
- A door or bed alarm could be considered.
- A camera could be considered.

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<sup>2</sup> Case notes completed by United Healthcare personnel also reference companion services for the overnight care.

15. Petitioner's representative has attempted to bring the petitioner to her apartment at night. Petitioner became aggressive and the police were called. When the petitioner returned to sleeping in her own apartment, the behavioral issues ended.

16. Petitioner's representative argues her mother does not know the difference between day and night. There is a lake behind the apartment and she has concerns the petitioner might leave the apartment and get into the lake or somehow be injured through other means. Because of the [REDACTED] disease, petitioner should not be left alone. An assisted living facility would only upset her mother.

17. Regarding the petitioner, her representative also states:

- Has started to hallucinate
- The level of confusion has increased
- Security cameras in the apartment are not affordable
- Frequency of incontinency has increased
- Supervision is need at all times

#### **CONCLUSIONS OF LAW**

18. 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 § 120.80, Fla. Stat.

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

20. The standard of proof in an administrative hearing is by 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.).

21. Regarding the LTMC Program, § 409.978, Fla. Stat. states:

(1) ... the agency shall administer the long-term care managed care program ...

(2) The agency shall make payments for long-term care, including home and community-based services, using a managed care model.

22. Regarding the LTMC Program, United Healthcare and the respondent entered into a contractual relationship. The contract identifies 26 services that are to be offered.

23. Florida Medicaid, which includes the LTMC Program, only covers those services determined to be medically necessary. See § 409.905 (4) (c), Fla. Stat.

24. The definition of medical necessity is found in Fla. Admin Code. R. 59G-1.010 and 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.

25. Respondent's denial notice of September 11, 2015 references "overnight care".

When requesting the hearing, petitioner's representative referenced companion services. Internal case notes from United Healthcare also describe the requested additional hours are for companion services.

26. Analysis is first directed to companion services for the additional overnight hours.

27. The contract provides the following definition:

(1) **Adult Companion Care** — Non-medical care, supervision and socialization provided to a functionally impaired adult. Companions assist or supervise the enrollee with tasks such as meal preparation or laundry and shopping, but do not perform these activities as discreet services. The provision of companion services does not entail hands-on nursing care. This service includes light housekeeping tasks incidental to the care and supervision of the enrollee.

28. At night, the greater weight of evidence does not establish a companion provider would be supervising or assisting the petitioner with any type of task. Additionally, between 11:00 p.m. and 6:00 a.m. it does not appear the service would be for socialization purposes.

29. In regard to personal care and homemaker services, the contract provides the following definitions:

(11) **Homemaker Services** — General household activities such as meal preparation and routine household care provided by a trained homemaker when the individual regularly responsible for these activities is temporarily absent or unable to manage these activities. Chore services, including heavy chore services and pest control may be included in this service.

(19) **Personal Care** — A service that provides assistance with eating, bathing, dressing, personal hygiene, and other activities of daily living. This service includes assistance with preparation of meals, but does not include the cost of the meals. This service may also include housekeeping chores such as bed making, dusting and vacuuming, which are incidental to the care furnished or are essential to the health and welfare of the enrollee, rather than the enrollee's family.

30. Other than periodic assistance with toileting, the evidence does not demonstrate personal care services are continuously medically necessary each day between 11:00 p.m. and 6:00 a.m.

31. Neither the definition of homemaker or personal care identifies supervision as a component of the service. Rather, each service is task oriented.

32. The greater weight of evidence does not establish personal care; companion; or homemaker services are, based on the service definition, medically necessary on a continuous basis each day between 11:00 p.m. and 6:00 a.m.

33. The undersigned has also considered whether "overnight staff" might be addressed by attendant care. The contract defines this service as follows:

(5) Attendant Care — Hands-on care, of both a supportive and health-related nature, specific to the needs of a medically stable, physically handicapped individual. Supportive services are those which substitute for the absence, loss, diminution or impairment of a physical or cognitive function. This service may include skilled or nursing care to the extent permitted by state law. Housekeeping activities which are incidental to the performance of care may also be furnished as part of this activity.

34. The greater weight of evidence does not demonstrate petitioner is physically handicapped. Petitioner's arthritic condition is noted. She does, however, ambulate independently. Petitioner's [REDACTED] is also noted. Medical documentation, however, did not establish the degree of visual impairment.

35. Attendant care first requires the individual to be physically handicapped. The greater weight of evidence does not establish a significant physical handicap making overnight care medically necessary.

36. A facility based assisted living program is also service identified by contract. The contract states, in part: "This service includes twenty-four (24) hour onsite response

staff to meet scheduled or unpredictable needs in a way that promotes maximum dignity independence, and to provide supervision, safety and security.”

37. Petitioner’s representative feels assisted living is not an appropriate service to address her mother’s [REDACTED]

38. A medically necessary service need must also match a service definition. The undersigned has considered those services identified by contract. In particular companion; homemaker; personal care; and attendant care. Medical necessity for overnight care continuously between 11:00 p.m. and 6:00 a.m. has not been demonstrated.

39. If additional services identified by contract are needed, petitioner is afforded the opportunity to request those services.

40. After considering all evidence and testimony, petitioner has not met the required evidentiary standard that respondent’s action in this matter was improper.

### **DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, petitioner’s appeal is denied.

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

DONE and ORDERED this 31 day of December, 2015,

in Tallahassee, Florida.

*Frank Houston*

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Copies Furnished To:

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