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

[redacted]

APPEAL NO. 14F-10179

PETITIONER,

Vs.

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

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on January 26, 2015 at 1:09 p.m.

APPEARANCES

For the Petitioner: [redacted]
Petitioner's son

For the Respondent: Carol King, grievance coordinator
Agency for Health Care Administration

STATEMENT OF ISSUE

At issue is the number of home health services hours the petitioner is eligible to receive through the Medicaid Long Term Care Waiver (LTCW) program.

PRELIMINARY STATEMENT

The Agency for Health Care Administration (the Agency or AHCA or respondent) administers the Florida Medicaid program. Medicaid rules require that most recipients receive their Medicaid services through the managed care program. The Agency contracts with numerous health care organizations to provide medical services to its program participants. United Healthcare (United) is the contracted health care organization in the instant case.

By notice dated September 5, 2014, United informed the petitioner that her request for 49 hours of weekly personal care and homemaker services was approved in part. United approved 37 hours weekly. The letter explains that United's decision "is based on national standards and clinical criteria."

The petitioner requested reconsideration.

By notice dated October 23, 2014, United informed the petitioner that the original decision was upheld. The letter reads in pertinent part: "Your appeal was reviewed...We cannot approve 49 hours because it is not medically necessary. We used the Personal care Assessment Tool...This tool tells us her needs. 37 hours/week can meet her needs..."

The petitioner timely requested a hearing to challenge the decision.

The morning of the hearing, United revised the number of approved hours to 39 weekly. The revision was expressed verbally. United had not issued a revised notice to the petitioner. The petitioner chose to go forward with the hearing. She is seeking 49 hours weekly.

There were no additional witnesses for the petitioner. The petitioner submitted documents which were admitted into evidence as Petitioner's Composite Exhibit 1.

Dr. Marc Kaprow, United long term care medical director, and Susan Frishman, United health care analyst, were present as witnesses for the Agency. The Agency submitted documents which were admitted into evidence as Respondent's Composite Exhibit 1. Adminstrative notice was taken of Florida Statute § 409.978; § 409.979; § 409.984; § 409.985; Florida Administrative Code: R.59G-1.010; TheFlorida Medicaid Home Health Services Coverage and Limitations Handbook.

The record was held open until close of business on February 2, 2015 for the submission of additional evidence. No evidence was received from either party. The record was closed.

FINDINGS OF FACT

1. The petitioner (age 86) is a Florida Medicaid recipient. The petitioner is enrolled in the LTCW program. LTCW provides, among other things, home health services to individuals who would otherwise require nursing home placement. The petitioner receives her Medicaid LTCW services through United. The petitioner also receives Medicare (federal medical assistance).

2. The petitioner's circumstances are described in a letter written by her son (and authorized representative):

1. Bed-bound and disabled.
The patient, [redacted] is an 86 year old physically disabled woman who is bed-bound. She is totally dependent on the help of others for almost all of her Activities of Daily Living. She has a marked thoracic deformity (extreme kyphosis) due to osteoporosis. This causes her to have difficulty breathing, requiring constant oxygen, and with a tendency for hypercapnia (CO2 retention). She has damaged joints, including her knees, hips, and hands, due to rheumatoid arthritis, which has rendered her to be unable to stand or bear weight. And she is also incontinent, requiring frequent changes of her diaper. I'm working on the assumption that the social worker (from UnitedHealthcare), who evaluated her case, documented her condition accurately. You may also verify most of her conditions in the doctor's notes that I've included as part of point #4 below. And if you need any additional documentation, please let me know, so that we can clarify this very important first point.

...

3. Much help is needed.
Here's a list of the main tasks where [redacted] clearly needs outside help on a regular basis:

a) Dressing, including changing her diaper
b) Applying skin cream
c) Toileting. (regularly, due to incontinence)
d) Transferring
e) Preparing a simple meal
f) Help with spoon feeding
g) Cleaning up after meals
h) Help handing her the medications
i) Help her use her nebulizer (15 minutes)
j) Help monitor her oxygen levels

These tasks can easily take two hours or more, especially when working with an 86 year old disabled person. And all these tasks are needed at least three (or even four) times a day. Keep in mind that there are still other activities beyond the ones listed, that, while not required 3 times a day, are still very much needed. Some examples of these are: giving her a sponge bath, basic grooming, helping her brush her teeth, helping with her laundry, and washing her hair, among others.

This means that, just for the tasks shown above (and besides the help that I personally provide), [redacted] really needs a minimum of 6 hours of help during the course of a day, which is equivalent to 42 hours per week.

4. A little more help at bedtime
In addition to those basic 42 hours, there's one more activity where [redacted] needs a little more help at bed time. [redacted] needs to sleep with a VPAP (BiPAP) device every night to help her breath and control her hypercapnia (high CO2 levels) . She needs help putting water in the device, putting on her mask, checking for air leaks, and monitoring her oxygen level for a few minutes. The process is relatively simple, but someone needs to do this. This task, plus getting her ready for sleep, helping her brush her teeth, getting her pillow, covering her with a sheet or blanket, etc., easily adds an hour of needed help at the end of each day.

At present, I am forced to leave my house and drive over to [redacted] apartment every night, in order to cover this hour of work for her. This is proving to be too much for me and I hope you can see that this is indeed a real need for [redacted] For this reason, we ask for an extra hour of help at the end of each day, adding 7 more hours to the week.

This is why I believe that [redacted] needs a minimum of 49 hours per week to be able to go through her basic activities for daily living. Anything less would have a significant negative impact on her well being. I hope you can see this as a reasonable request, given [redacted] condition and current situation.

3. The petitioner lives in the family home with her husband (age 82). The husband has numerous health issues. He is of minimal assistance to the petitioner. The husband is desribed in the September 27, 2014 letter written by son [redacted]:

2. Limited help at home.
The only person living with [redacted] is her husband, [redacted] is an 82 year old man with his own array of medical issues that limit his own mobility and his ability to assist [redacted] The most relevant of [redacted] conditions include Parkinson's disease, Sciatica on his left hip and leg, Spondylolisthesis (slipped disk), Heart disease, and Hypothyroidism. Because of this, he has limited mobility and tires easily, so he is really only able to assist [redacted] in very limited ways, like getting her a cup of water. I'm assuming his condition was also documented by the UnitedHealthcare social worker, but, again, if you need any additional documentation or evidence to confirm his current health condition, please let me know.

4. The petitioner receives assistance from her son [redacted] He does not live in the family home; however, he comes by daily. Mr. [redacted] describes the assitance he provides the petitioner in his September 27, 2014 letter:

> As [redacted] son, I am the only other relative who can materially participate in [redacted] care, and I try to help as much as I can. Among the things that I do to help [redacted], here are some of the most relevant:
>
> a) Manage and maintain her apartment
> b) Buy groceries
> c) Buy medications
> d) Prepare weekly medication pill case
> e) Run errands
> f) Handle her mail.
> g) Manage bill payments
> h) Plan doctor's visits
> i) Transportation to doctor's office
> j) Trim her nails (as needed)
> k) Help cooking (when I can)
> l) Handle emergencies (like Hurricanes, etc.)
>
> But I don't live with [redacted] So, unless I leave my own home and quit my job, there are really many tasks where I'm not able to help her. Without outside help, she would not be able to go through her daily living activities.

5. The petitioner requested 49 hours of weekly personal care and homemaker services through the LTCW program; 42 hours weekly for assistance with the activities of daily living and 7 hours weekly for assistance with placement and activation of a breathing device used during sleeping hours.

6. Personal care services provide assistance with the activities of daily living (bathing, dressing, grooming, eating, preparation of meals, and light housekeeping chores essential to the enrollee only). Homemaker services provide assistance with general household activities such as meal preparation and routine household care. Homemaker services are provided when the individual who regularly peforms these

services is temporarily absent from the home or temporarily unable to manage the services.

7. All Medicaid services must be medically necessary as determined through prior service authorization. United case managers conduct in-home functional assessments to determine the patient's needs and abilities. Nursing home standard of care guidelines are used to allocate the amount of time for home health services (bathing, dressing, feeding, laundry, meal preparation).

8. United determined that the petitioner requires maximum assistance with all the activities of daily living. United concluded that the following home health services are medically necessary:

SERVICE	**WEEKLY TIME ALLOCATED**
BED BATHS	315 MINUTES
DRESSING	210 MINUTES
FEEDING	315 MINUTES
GROOMING	280 MINUTES
TOILETING	280 MINUTES
AMBULATION ASSISTANCE	280 MINUTES
CLEANING	180 MINUTES
LAUNDRY	120 MINUTES
GROCERY SHOPPING	50 MINUTES
MEAL PREPARTION	280 MINUTES
TOTAL MINUTES WEEKLY	2,310 MINUTES
TOTAL HOURS WEEKLY	2,310/60 MIN =38.5 hours **39 hours** (AFTER ROUNDING)

9. United determined that 49 hours of weekly personal care and homemaker services were in excess of the petitioner's needs and denied 10 of the requested hours. Dr. Kaprow explained placement and activiation of the breathing device that aides the petitioner while sleeping is considered skilled nursing care. Neither personal care nor

homemaker services include a provision for skilled nursing care. The petitioner receives Medicare (federal medical assistance). Medicare provides skilled nursing care services. All other funding sources must be exhausted prior to Medicaid coverage. Medicaid (state medical assistance) is the payor of last resort. The petitioner has not explored Medicare coverage for her skilled care needs.

10. After United's explanation of the service allocations, the petitioner acknowledged that the 39 weekly personal care and homemaker hours were reasonable and sufficient. The three hour difference (42 requested by the pettioner, 39 approved by United) was not significant to her. Regarding the 7 hours requested weekly (1 hour each night) for placement and activiation of the breathing device, the petitioner asserts that no one ever explained the difference between Medicare and Medicaid or which program takes precedence. The petitioner argues that she would have accessed the service through the proper channels months ago had she been given the correct information.

CONCLUSIONS OF LAW

11. 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.

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

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

14. In accordance with Fla. Admin. Code R. 65-2.060(1), the burden of proof was assigned to the petitioner.

15. The Florida Medicaid program is authorized by Fla. Stat. Chapter 409 and Fla. Admin. Code Chapter 59G.

16. All Medicaid goods and services must be medically necessary. 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.

17. Section 409.979, Fla. Stat. addresses Legislative intent of the Medicaid program:

> (1) It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid. If benefits of a liable third party

> are discovered or become available after medical assistance has been provided by Medicaid, it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. Principles of common law and equity as to assignment, lien, and subrogation are abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources.

18. The cited authority explains that Medicaid in the payor of last resort. Medicare and all other third party insurances must be explored before medical assistance is provided by Medicaid.

19. Section 409.979, Fla. Stat. sets forth the eligibility criteria for long-term care services:

> (1) Medicaid recipients who meet all of the following criteria are eligible to receive long-term care services and must receive long-term care services by participating in the long-term care managed care program. The recipient must be:
> (a) Sixty-five years of age or older, or age 18 or older and eligible for Medicaid by reason of a disability.
> (b) Determined by the Comprehensive Assessment Review and Evaluation for Long-Term Care Services (CARES) Program to require nursing facility care as defined in s. 409.985(3).
> (2) Medicaid recipients who, on the date long-term care managed care plans become available in their region, reside in a nursing home facility or are enrolled in one of the following long-term care Medicaid waiver programs are eligible to participate in the long-term care managed care program for up to 12 months without being reevaluated for their need for nursing facility care as defined in s. 409.985(3):
> (a) The Assisted Living for the Frail Elderly Waiver.
> (b) The Aged and Disabled Adult Waiver.
> (c) The Consumer-Directed Care Plus Program as described in s. 409.221.
> (d) The Program of All-inclusive Care for the Elderly.
> (e) The Channeling Services Waiver for Frail Elders.

> (3) The Department of Elderly Affairs shall make offers for enrollment to eligible individuals based on a wait-list prioritization and subject to availability of funds. Before enrollment offers, the department shall determine that sufficient funds exist to support additional enrollment into plans.

20. The petitioner is eligible for LTCW services. This was never at issue.

21. The October 2014 Florida Medicaid Home Health Services Coverage and Limitations Handbook (Handbook) has been promulgated into rule by Fla. Admin. Code R. 59G-4.130(2). The Handbook sets forth the Agency's definition of personal care services; however, it is not controlling in the description or provision of LTCW services. Page 1-2 of the Handbook states:

> Personal care services provide medically necessary assistance with activities of daily living (ADL) and age appropriate instrumental activities of daily living (IADL) that enable the recipients to accomplish tasks that they would normally be able to do for themselves if they did not have a medical condition or disability. Medicaid reimburses for these services provided to eligible recipients under the age of 21 years.
> ADLs include:
> • Eating (oral feedings and fluid intake)
> • Bathing
> • Dressing
> • Toileting
> • Transferring
> • Maintaining continence (examples include taking care of a catheter or colostomy bag or changing a disposable incontinence product when the recipient is unable to control his bowel or bladder functions)
>
> IADLs (when necessary for the recipient to function independently) include:
> • Personal hygiene
> • Light housework
> • Laundry
> • Meal preparation
> • Transportation
> • Grocery shopping

- Using the telephone to take care of essential tasks (examples include paying bills and setting up medical appointments)
- Medication management
- Money management

Skilled interventions that may be performed only by a licensed health professional are not considered personal care services.

22. The petitioner requested 49 hours of weekly personal care and homemaker services; 42 hours for assistance with the activities of daily living and 7 hours for assistance with placement and activation of a device that helps the petitioner breathe while she sleeps.

23. United approved 39 hours weekly for assistance with the activities of daily living and general household duties. The petitioner acknowledged that this is sufficient time for those duties.

24. United concluded that the 7 hours requested for assistance with placement and activation of a device that helps the petitioner breathe while she sleeps has not been proven to be medically necessary because the petitioner has not requested (and been denied) Medicare coverage for this skilled care service. The undersigned concurs as Medicaid is the payor of last resort.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the 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 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 23rd day of Februany, 2015,

in Tallahassee, Florida.

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