

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

**FILED**

**MAR 13 2015**

OFFICE OF APPEAL HEARINGS  
DEPT OF CHILDREN & FAMILIES



APPEAL NO. 14F-10190

PETITIONER,

Vs.

AGENCY FOR HEALTH  
CARE ADMINISTRATION  
CIRCUIT: 14 Calhoun  
UNIT: AHCA

RESPONDENT.

**FINAL ORDER**

Pursuant to notice, a telephonic administrative hearing was convened in the above-referenced matter on February 26, 2015 at 8:30 a.m. (Central Standard Time).

**APPEARANCES**

For the Petitioner:

  
Petitioner's mother

For the Respondent:

Cindy Henline  
Medical Health Care Program Analyst

**ISSUE**

Whether respondent's action to reduce petitioner's personal care; homemaker; companion; and skilled nursing services was proper.

**PRELIMINARY STATEMENT**

A hearing was first scheduled for January 13, 2015. Both parties appeared.

Respondent's witness, however, did not appear. Respondent's request for a

continuance was granted. The hearing was rescheduled for February 3, 2015. At the onset of the hearing, petitioner's representative stated she had not received the respondent's proposed evidence. A continuance was granted. The hearing reconvened on February 26, 2013.

Petitioner was not present but represented by his mother. Petitioner's Exhibit "1" was accepted into evidence.

Ms. Henline appeared as both the representative and witness for the respondent. Present from United Health Care (UHC) were Dr. Marc Kaprow, Long Term Care (LTC) Medical Director and Susan Frishman, Senior Compliance Analyst. Respondent's Exhibits "1" and "2" were entered into evidence. Administrative Notice was taken of: Florida Statute § 409.913; Florida Administrative Code R. 59G-1.010 (166); and the 1915 (c) Waiver.

The record was left open through February 27, 2015 for respondent to provide websites for both the 1915 (c) Waiver and the LTC Contract. Information was timely received and entered as Respondent's Exhibit "3".

On March 2, 2015 the undersigned accepted a phone call from petitioner's representative. The representative stated the petitioner was hospitalized and a continuation of night time care is needed. In response to this conversation, a Notice of Ex Parte Communication was issued on March 5, 2015.

#### **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:

1. Respondent administers Florida's Medicaid Program and contracts with Health Maintenance Organizations (HMOs) to provide comprehensive, cost-effective medical services to participants in the LTC Program. Petitioner is Medicaid eligible and receives numerous home based services through the LTC Program.
2. Since November 1, 2013 petitioner's LTC services have been provided by UHC. Prior to November 2013, services were received through a Medicaid Waiver program.
3. Through the LTC Program petitioner receives 24 hours per day; seven days per week of personal care; homemaker; and companion services (168 hours). He also receives seven hours per week of skilled nursing services<sup>1</sup>.
4. As there is no promulgated LTC Program Coverage and Limitations Handbook, service descriptions are defined by contract between respondent and UHC.
5. Petitioner is 60 years of age and lives alone. His 78 year old mother lives in a separate residence adjacent to his home. She has breathing problems and requires oxygen on a regular basis.
6. Petitioner was diagnosed with multiple sclerosis in 1991. He has no use of his legs. He has limited use of one arm, only.
7. On October 7, 2014 a UHC case manager completed a functional assessment.

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The petitioner was present as was his mother. This assessment is the basis of the functional information which follows.

8. Total assistance is required for bathing. A Hoyer lift is used to move the petitioner from his bed into a shower chair. Showering occurs three days per week.

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<sup>1</sup> In addition to the one hour per day of skilled nursing, petitioner also receives an additional two hours per month of this service.

9. The Hoyer lift is also used to transfer petitioner from the bed to a motorized wheelchair. He requires assistance to operate the chair.

10. Petitioner is not able to dress himself or perform basic grooming activities.

11. Petitioner takes all nutrition by mouth. He requires assistance with feeding.

12. Petitioner has an indwelling bladder catheter. He is bowel incontinent.

13. Petitioner is not able to: prepare meals, perform housekeeping duties; do laundry or perform shopping.

14. Regarding activities of daily living, the UHC case manager wrote, in part:

The member is a quadriplegic, and has to have total care for bathing ...

The member is not able to perform any dressing activities. He requires total help from the purchased attendant.

The member is able to eat and drink some without assistance. He has trembling in his hands and needs assistance with using a utensil to get the food in his mouth ...

The member needs total assistance for grooming. He is not able to hold his arms up to comb his hair, and he is not able to hold onto a tooth brush without assistance ...

The member is a quadriplegic and does not know when he has to use the bathroom ... He wears a diaper and has disposable bed pads to aid in hygiene. He is monitored and changed frequently by an attendant.

The member is not able to transfer without assistance. An attendant assists him in adjusting in his bed.

The member is unable to perform any meal preparation. He has an attendant prepare him breakfast every morning, and they warm him up a frozen home delivered meal every day at lunch. The mother/caregiver prepares dinner for them both every night. An attendant then comes to the caregiver's home to carry the meal to the member.

15. Through the LTC Program, 30 frozen meals are provided each month. Staff heats the meal.

16. As the petitioner has recurring urinary tract infections (UTI), he receives skilled nursing services one hour per day. The nurse also sets up medications on a weekly basis. Staff administers the medications.

17. The case manager entered petitioner's functional information into a computer program. A recommendation was then generated for the frequency of required services. The functional assessment and recommendations were then reviewed by Dr. Kaprow. Dr. Kaprow then determined the number of hours needed for skilled and unskilled services.

18. A notice was issued by UHC on October 30, 2014 stating a reduction in services would occur. The following service frequencies would be authorized based on the time needed for various activities of daily living:

Service:	Activity:	Weekly Minutes:
<b>Personal Care</b>		
	Bathing	180
	Dressing	210
	Feeding	210
	Grooming	280
	Toileting	210
	Transferring	490
	Medication Assistance	280
Total Personal Care:		1860 minute (31 hours)
<b>Homemaker</b>	Cleaning	360
	Laundry	120
	Cooking	210
	Shopping	50
Total Homemaker:		740 minutes (12 hours)
<b>Companion</b>		420 minutes (7 hours)
<b>Skilled Nursing</b>		720 minutes (7 hours)

19. The notice outlined a gradual reduction of services over a period of 16 weeks. The notice also stated "Additional minutes were added to round up to the next hour if needed. The hours were approved as a total amount of time. Hours are not required to be used for a specific task."

20. On November 17, 2014 the Office of Appeal Hearings timely received petitioner's request for a fair hearing. The frequency of petitioner's skilled and unskilled services remains unchanged pending the outcome of this proceeding.

21. Petitioner's representative argues her son was in a skilled nursing facility and received a poor quality of care. With current support levels, his health has been better and his overall quality of life improved.

22. When experiencing a UTI, the petitioner goes into a coma-like state. The representative argues should night coverage be reduced or eliminated, the petitioner would not be able to alert anyone regarding an urgent medical condition. She does not believe the petitioner would be able to press an emergency response button.

23. Petitioner's Exhibit "1" includes a letter from his physician, [REDACTED]. The letter states, in part: "Due to [REDACTED] medical condition he is in need for 24 hour care. During the night if [REDACTED] is in need of assistance he is unable to alert or wake caregivers."

24. Respondent argues the LTC Program does not replicate a nursing home level of care. Petitioner's required assistance with activities of daily living can be met through 51 hours per week of personal care; homemaker; and companion services. These hours are in addition to seven hours per week of nursing services. In total, 58 hours per

week are medically necessary. Respondent asserts hours in excess of that amount are for the convenience of the caregiver.

### **CONCLUSIONS OF LAW**

25. 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.

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

27. In accordance with Fla. Admin. Code § 65-2.060 (1), the burden of proof is assigned to the respondent. 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.).

28. Regarding the LTC 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.

29. In this instant appeal, the managed care plan is UHC.

30. Section 409.98 (1) – (19), Fla. Stat. enumerates 19 service categories each LTC managed care plan must, at a minimum, provide.

31. Regarding the LTC Program, UHC and the respondent entered into a contractual relationship. The contract requires, in part, the following LTC services:

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.

**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 ...

**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 hand-on nursing care. This service includes light housekeeping tasks incidental to the care and supervision of the enrollee.

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

33. 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.

34. Respondent has proposed a combined weekly reduction of personal care; homemaker and companion services. Petitioner is currently receiving 168 hours each week of unskilled services. The proposed reduction to 51 hours per week represents 117 fewer unskilled service hours each week. This equates to approximately 70% fewer weekly hours.

35. At present, the petitioner is receiving 24 hours per day; seven days per week of unskilled services. The proposed reduction would reduce the daily service hours to approximately 7.3 hours per day.

36. Neither evidence nor testimony establishes petitioner's medically necessary unskilled service needs have decreased. Rather, respondent's own assessment tool identified a high level of needed support with most, if not all, activities of daily living.

37. Although the proposed 51 hours per week could be broken into numerous daily components, petitioner would still remain unassisted for a significant portion of his non-sleeping hours.

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38. The Findings of Fact establish the petitioner's mother/representative is elderly and has a breathing problem. The amount of additional care she could provide was not established.

39. The greater weight of evidence does not support that unskilled hours in excess of 51 hours per week are for the convenience of the petitioner; his caretaker; or providers.

40. The issue before the undersigned is not whether 24 hours of unskilled care; seven days a week is medically necessary. Additionally, the role of a hearing officer is not to determine the number of medically necessary service hours. Rather, the issue is whether the respondent has met its evidentiary burden regarding the proposed reductions.

41. After considering petitioner's functional status and the caregiver's health, respondent has not demonstrated by the required evidentiary standard that its proposed reductions are proper. As such the number of weekly skilled and unskilled service hours existing at the onset of this proceeding are to continue.

### **DECISION**

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

### **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 13<sup>th</sup> day of March, 2015,

in Tallahassee, Florida.



Frank Houston

Hearing Officer

Building 5, Room 255

1317 Winewood Boulevard

Tallahassee, FL 32399-0700

Office: 850-488-1429

Fax: 850-487-0662

Email: Appeal\_Hearings@dcf.state.fl.us

Copies Furnished To:

██████████ Petitioner

Marshall Wallace, Area 2, AHCA Field Office Manager

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