FILED
Dec 21, 2021, 3:44 pm
OFFICE OF FAIR HEARINGS

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION
OFFICE OF FAIR HEARINGS

G.C. C/O WILLIAM HOLLAND,

PETITIONER,

AHCA Case No.: 21-FH2597
Plan ID No.: OP2776609217

vs.

SUNSHINE STATE HEALTH PLAN, INC.,

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, the undersigned Hearing Officer convened a telephonic Fair Hearing in the above-styled case on December 20, 2021, at 9:32 a.m. Eastern Standard Time ("EST").

APPEARANCES

For the Petitioner:	William Holland Petitioner's Authorized Representative
For the Respondent:	Christian Pacheco Senior Director of Quality Improvement Sunshine State Health Plan, Inc.

STATEMENT OF ISSUE

The issue is whether Petitioner proved by a preponderance of the evidence that Respondent's denial of 24-hour in-home respiratory therapy services was incorrect.

PRELIMINARY STATEMENT

All parties and witnesses appeared for the Fair Hearing telephonically. Petitioner's Authorized Representative William Holland ("Mr. Holland"), appeared on behalf of the Petitioner.

Sam Baptiste, Co-Owner of Five Star Care Services, appeared as a witness for the Petitioner. Susan Whitney, Petitioner's Legal Guardian, appeared as a witness for the Petitioner. Mr. Holland, Mr. Baptiste, and Ms. Whitney appeared for the Fair Hearing and provided testimony.

Christian Pacheco, a Senior Director for Quality Improvement for Sunshine State Health Plan, Inc. ("Sunshine Health"), appeared for the Fair Hearing as a representative for Respondent. Dr. Sheryce Andres, MD ("Dr. Andrews"), a Medical Director for Sunshine Health, appeared for the Fair Hearing as a witness for Respondent. Dr. Maria Samerson, Senior Medical Director for Sunshine Health, appeared as a witness for Respondent.

Stephanie Lang, a Medical Health Care Program Analyst and Fair Hearing Liaison for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared for the Fair Hearing as an observer. Laura Gallagher, Senior and Supervising Attorney for the Office of Fair Hearings, appeared for the Fair Hearing as an observer.

Petitioner did not introduce any exhibits at the Fair Hearing. Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one-hundred and forty-two (142)-page evidence packet. The evidence packet appears in the Office of Fair Hearings document management system as "MFH Summary 21-FH2597 Cecil.pdf". The evidence packet was admitted into evidence by stipulation of the parties as Respondent's Composite Exhibit 1.

Petitioner indicated that he had written evidence that he wished to submit for the hearing; the undersigned directed that Petitioner had twenty-four (24) hours from the hearing to submit his evidence as a post-hearing submission. Respondent was given twenty-four (24) hours after the submission deadline to review Petitioner's documents and file any objections and responses. Petitioner's request tolled in part, the time requirements for the completion of the

Final Order based on the undersigned affording Petitioner additional time to provide its documents for the record. On December 21, 2021, the Respondent agreed to the admission of Petitioner's post-hearing evidence into the record.

Petitioner's post-hearing evidence submission was received on December 20, 2021, is two-hundred and thirty-seven (237) pages and appears in the Office of Fair Hearings document management system as "21-FH2597 Additional Supporting Evidence.pdf". Pages 3 to 106 contained the October 2014 Florida Medicaid Home Health Services Coverage and Limitations Handbook. Pages 107 to 237 contain the 2021 Sunshine Health Provider Manual for Medicaid (MMA), Comprehensive Long-Term Care (LTC), Child Welfare Specialty Plan (CWSP) and Serious Mental Illness Specialty Plan. Petitioner's evidence submission was admitted into evidence as Petitioner's Composite Exhibit 1.

FINDINGS OF FACT

1. As of December 4, 2021, Petitioner is an enrolled member of Sunshine Health. *See* Respondent's Composite Exhibit 1, page 4. Sunshine Health is a Medicaid Managed Care organization contracted by the Agency to provide services to eligible Medicaid recipients in the State of Florida.

2. As of the date of Fair Hearing, Petitioner is forty-six (46) years old. *Id*. at 13. Petitioner is diagnosed with acute hypoxemic respiratory failure, severe anemia, acute kidney injury, volvulus of the right colon, sinus tachycardia, and is gastronomy tube dependent. *Id*. at 17. Drs. Henry Odukomaiya (primary care physician) and Alexandre Furman (pulmonologist) signed a referral order for 24-hour skilled respiratory therapy services (also referred to as "Respiratory Therapy" services). *Id*. at 17-18. The referral order indicated, "His current ventilation settings are VT:

450ML, RR: 16, Peep:5, 02: 5LPM, Mode: A/C. This requires 24-hour respiratory therapy surveillance for lung compliance. Respiratory Therapists are needed to render routine respiratory services such as tracheal suctioning, monitoring of ventilation settings. Tracheal lavages, changing tracheostomy, assessing respiratory effort, administering nebulizers, monitoring breathing patterns, assessing breath sounds, and assessing presence of respiratory infections. It is essential to have 24-hour respiratory therapy services to decrease hospitalization and the potential of contracting pneumonia; as well as preventing associated airway emergencies due to potential decannulation." *Id*. at 17. Dr. Odukomaiya assesses Petitioner twice a week on Thursdays and Sundays. *Id*. at 28. Dr. Furman sees Petitioner once a week on Tuesdays. *Id*.

3. On December 4, 2021, Sunshine Health issued an NABD denying Petitioner's request for "home health services" which was received on November 15, 2021. *Id.* at 4. The NABD states as follows, in pertinent part:

> Denied as of December 4, 2021.
>
> We made our decision because:
> *(Check all boxes that apply)*
>
> ☒ The requested **service is not a covered benefit**.
> . . .
> The facts that we used to make our decision are:
>
> Sunshine Health Member Handbook, Section on Services Covered by Sunshine Health.
>
> Rationale: The request for physical therapy (special exercises that will help make the muscles stronger) and occupational therapy (treatment to help a person with self-care and activities of daily living) in the home are both denied as not a covered benefit.

Id. at 5.

4. On December 6, 2021, Petitioner requested a plan appeal. *Id*. at 37-38. On December 8, 2021, Sunshine Health issued an NPAR denying Petitioner's plan appeal. *Id.* at 37-38. The NPAR states as follows, in pertinent part:

> On 12/06/2021 we received your timely plan appeal request regarding Sunshine Health's Notice of Adverse Benefit Determination dated 12/04/2021, Notice of Adverse Benefit Determination Number , DENYING, the request for 24 hours/day, 7 days/week of in-home respiratory therapy provided to [Petitioner].
>
> On 12/8/2021, after consideration of the information you provided to Sunshine Health in support of your plan appeal, Sunshine Health hereby DENIES, your plan appeal. As a result, [Petitioner] will not receive request for 24 hours/day, 7 days/week of in-home respiratory therapy, effective 12/8/2021.
>
> The reason for our decision was [w]e received the appeal request for 24 hours/day, 7 days/week of in-home respiratory therapy. This request was denied because it is not medically necessary. Currently you have an in-home skilled nurse present 24 hours/day, 7 days/week. This nurse is also able to do tracheostomy management and routine respiratory care. The respiratory therapist is needed only for intermittent care. It is not medically necessary to have both a skilled nurse and respiratory therapist present in the home around-the-clock. The Sunshine Health Medicaid member handbook, 2021, was referenced in making this decision.. [sic] This decision was made by a Medical Director who is a Board Certified Physician in Physical Medicine & Rehabilitation.

Id. at 37.

5. On December 9, 2021, Petitioner timely requested an expedited Fair Hearing on Respondent's denial of 24-hour in-home respiratory therapy services. On December 16, 2021, the undersigned scheduled the Fair Hearing to be conducted by telephone on December 20, 2021, at 9:30 a.m. EST.

6. Mr. Holland was the first to testify on behalf of Petitioner. Mr. Holland testified that as co-owner of 5-Star Cares, they operate the facility as a medical group home for fragile patients with acute needs. Mr. Holland testified that he submitted the request due to Petitioner's medical fragility, tracheostomy status, his need for 24-hour/day mechanical ventilation, and self-injurious

behavior. He testified to some frequency of self-decannulation but was vague on the precise amounts. Mr. Holland pointed to the referral orders of the primary care physician and the pulmonologist. *Id*. at 25-29. Mr. Holland testified that having a respiratory therapist on staff to be able to cover respiratory care as needed for six patients is a service for which Sunshine Health should cover and pay for. Mr. Holland testified that Petitioner is already receiving this service, which is not being paid for by Medicaid at this time. The referral orders of Drs. Odukomaiya and Dr. Furman do reflect that, "[Petitioner] is monitored by a respiratory therapist 24-hours a day." *Id*. at 28. Mr. Holland objected to the implication that Petitioner sought 1-to-1 therapist services. In Mr. Holland's post-hearing submission, he pointed to Sections 3-2 and 3-3 regarding Home Health Visits for Multiple Recipients at One Location for justification as to why a single respiratory therapist can provide services to multiple patients, and that he can bill for multiple patients under the Medicaid guidelines. Petitioner's Composite Exhibit 1, pages 63-64.

7. Mr. Baptiste was second to testify on behalf of Petitioner. Mr. Baptiste testified that in his opinion, the skilled nurse was not able to provide proper tracheostomy services to Petitioner. Mr. Baptiste added that the pulmonologist explained that there was no overlap between the 24-hour skilled nurse and the necessary services a respiratory therapist would provide separately.

8. Ms. Whitney was the third witness to testify on behalf of Petitioner. Ms. Whitney referred to the need for an Intermediate Care Facility for the Developmentally Disabled ("ICF/DD"). Ms. Whitney testified that it was difficult to find a proper placement for Petitioner because in her opinion, only two (2) nursing home facilities in the State of Florida are equipped to deal with the level of care needed by Petitioner (with ventilated units) – and that the facilities she applied to on Petitioner's behalf ran out of beds and had no room to admit the Petitioner. As a result, she

agreed to move Petitioner to 5-Star Cares, which is a residential group home, because of the services they provide. She testified that she recalled Petitioner pulling out his Gastro-Jejunal ("GJ") tube fourteen (14) times in one year. Ms. Whitney testified that due to infections, Petitioner has been hospitalized multiple times since being placed at 5-Star Cares. Ms. Whitney believes that without increased respiratory therapy services, it is possible that Petitioner could end up hospitalized once again.

9. Dr. Andrews testified that she reviewed the request as Medical Director based on the premise that Petitioner was seeking the services of a 24-hour a day respiratory therapist to provide 1-to-1 services around the clock to Petitioner. Dr. Andrews testified that while Petitioner could be provided Respiratory Therapy services based on intermittent need, that it is highly unusual to be providing around-the-clock continuous 24-hour continued respiratory therapy care. Therefore, based on the assessment of Dr. Andrews, there is no documented medical necessity for 24-hour in-home respiratory therapy, and this is not a covered Medicaid benefit. Dr. Andrews testified that with the 24-hour in-home nursing services Petitioner already has which were approved, the skilled nurse is available on hand to provide tracheostomy care and minimize the risk of infection as per of the nurse's duties. The nurse would be able to summon the respiratory therapist if situations arise that require more specialized knowledge and care. Mr. Holland conceded a respiratory therapist is on-site and available to provide those services as the need arises. Dr. Andrews pointed to the Sunshine Health Member Handbook.

10. Review of Sunshine Health's Florida Medicaid Member Handbook indicates that for Respiratory Services, "We cover medically necessary: Respiratory testing, Respiratory surgical procedures, Respiratory device management" and that Prior Authorization is Needed, "Yes, for

some services". Respondent's Composite Exhibit 1, page 95. The Member Handbook further indicates for Respiratory Therapy, "Respiratory therapy includes treatments that help you breathe better" with a Coverage Limitation of "Per assessed need" and that with Prior Authorization Needed, the answer is "Yes". *Id*. at 117.

CONCLUSIONS OF LAW

11. Pursuant to section 409.285(2), Florida Statutes (2019), the Agency's Office has jurisdiction over the subject matter of this proceeding and the parties. This Final Order is the final administrative decision of AHCA. Fla. Stat. § 409.285(2)(a).

12. This hearing was held as a *de novo* proceeding pursuant to Rule 59G-1.100(17)(b), Florida Administrative Code ("F.A.C.").

13. Because Petitioner requested new services, the burden of proof is on the Petitioner. *See* Fla. Admin. Code R. 59G-1.100(17)(g). The standard of proof in an administrative hearing is a preponderance of the evidence. *Id*. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" (Black's Law Dictionary at 1201, 7th Ed.).

14. Pursuant to Rule 59G-1.100(17)(g), F.A.C., the burden of proof is as follows:

> The burden of proof is on the party asserting the affirmative of an issue, except as otherwise required by statute. The burden of proof is on the Agency or plan, whichever is applicable, when the issue presented is the suspension, reduction, or termination of a previously authorized service. The burden of proof is on the recipient or enrollee, when the issue presented is the denial or a limited authorization of a service. The party with the burden of proof shall establish its position to the satisfaction of the Hearing Officer by a preponderance of the evidence.

15. The Florida Medicaid Respiratory Therapy Services Coverage Policy ("Respiratory Therapy Policy") (August 2018), incorporated by reference in Fla. Admin. Code R. 59G-4.322, establishes

the provision of respiratory therapy services under Florida Medicaid. The Respiratory Therapy Policy provides, in pertinent part, as follows:

> **1.0 Introduction**
> Respiratory therapy services treat conditions that interfere with respiratory functions or other deficiencies of the cardiopulmonary system.
>
> **1.1 Florida Medicaid Policies**
> This policy is intended for use by providers that render respiratory therapy services to eligible Florida Medicaid recipients. It must be used in conjunction with Florida Medicaid's General Policies (as defined in section 1.3) and any applicable service-specific and claim reimbursement policies with which providers must comply.
>
> Note: All Florida Medicaid policies are promulgated in Rule Division 59G, Florida Administrative Code (F.A.C.). Coverage policies are available on the Agency for Health Care Administration's (AHCA) Web site at http://ahca.myflorida.com/Medicaid/review/index.shtml.
>
> **1.2 Statewide Medicaid Managed Care Plans**
> Florida Medicaid managed care plans must comply with the service coverage requirements outlined in this policy, unless otherwise specified in the AHCA contract with the Florida Medicaid managed care plan. The provision of services to recipients enrolled in a Florida Medicaid managed care plan must not be subject to more stringent service coverage limits than specified in Florida Medicaid policies.
>
> **. . .**
> **1.4 Definitions**
> The following definitions are applicable to this policy. For additional definitions that are applicable to all sections of Rule Division 59G, F.A.C., please refer to the Florida Medicaid definitions policy.
>
> . . .
> **1.4.5 Provider**
> The term used to describe any entity, facility, person, or group enrolled with AHCA to furnish services under the Florida Medicaid program in accordance with the provider agreement
>
> . . .
> **1.4.7 Therapy Treatment Visits**
> Active treatment sessions with a recipient for the purpose of providing therapy services.
>
> **1.4.8 Unit of Service**

A minimum of 15 minutes of therapy treatment between the therapist or therapy assistant and the recipient.

. . .

4.1 General Criteria

Florida Medicaid covers services that meet all of the following:

- Are determined medically necessary
- Do not duplicate another service
- Meet the criteria as specified in the policy

4.2 Specific Criteria

Florida Medicaid covers the following in accordance with the applicable fee schedule(s), or as specified in this policy:

- One initial therapy evaluation per year, per recipient
- One therapy re-evaluation every six months, per recipient
- Up to 14 therapy treatment units per week (Sunday-Saturday), per recipient (maximum of four units per day)

Respiratory Therapy Policy, pages 1-2. Comparing Section 4.2 of the Respiratory Therapy Policy with Section 4.2 of the Florida Medicaid Private Nursing Services Coverage Policy ("PDN Policy") (November 2016), the PDN Policy provides as follows:

4.2 Specific Criteria

Florida Medicaid reimburses for up to 24 hours of PDN services per day, per recipient, when the recipient meets all of the following criteria:

- Is under the care of a physician and has a physician's order for PDN services
- Requires more extensive and continual care than can be provided through a home health visit
- Requires services that can be safely provided in their home or the community
- For recipients requiring less than two hours of PDN services per day, please refer to the Florida Medicaid home health visits services coverage policy.

PDN Policy, page 3.

16. The Florida Medicaid Statewide Medicaid Managed Care Long-term Care Program Coverage Policy ("LTC Policy") (March 2017) incorporated by reference in Rule 59G-4.192, F.A.C.,

establishes the provision of LTC services under Florida Medicaid. The LTC Policy provides as follows, in pertinent part:

> **1.1 Description and Program Goal**
> Under the Statewide Medicaid Managed Care Long-term Care (LTC) program, managed care plans (LTC plans) are required to provide an array of home and community-based services that enable enrollees to live in the community and to avoid institutionalization.
> . . .
> **4.1 General Criteria**
> Florida Medicaid covers services that meet all of the following:
> - Are determined medically necessary;
> - Do not duplicate another service; and
> - Meet the criteria as specified in the policy.
>
> **4.2 Specific Criteria**
> Florida Medicaid LTC plans cover services that meet all of the following:
> - Consistent with the type, amount, duration, frequency, and scope of services specified in an enrollee's authorized plan of care
> - Provided in accordance with a goal in the enrollee's plan of care
> - Intended to enable the enrollee to reside in the most appropriate and least restrictive setting
>
> . . .
> **4.2.2 Mixed Services**
> Mixed services may exceed State Plan limits on those services in accordance with this policy. The Long-term Care benefit includes coverage of the following mixed services:
> . . .
> **4.2.2.9 Respiratory Therapy**
> In accordance with Rule 59G-4.322, F.A.C., for enrollees under the age of 21 years. This service includes the provision of ventilator support, therapeutic and diagnostic use of medical gasses, respiratory rehabilitation, management of life support systems, bronchopulmonary drainage, breathing exercises, and chest physiotherapy. The scope and nature of these services do not otherwise differ from respiratory therapy services furnished to persons under the age of 21 years.

LTC Policy, pages 1, 4, 6-7.

17. The Florida Medicaid Respiratory Therapy Fee Schedule, effective January 1, 2021, and incorporated by reference in Rule 59G-4.002, F.A.C., provides a list of the respiratory therapy

services that all Statewide Medicaid Manage Care plans must provide to Florida Medicaid recipients. *See* § 4.2 of the Respiratory Therapy Policy. The Florida Medicaid Respiratory Therapy Fee Schedule only provides a benefit for code G0238 (Respiratory Therapy Visit – Rendered by a Registered Respiratory Care Practitioner) and code S5180 (Initial Evaluation/Reevaluation – Rendered by a Registered Respiratory Care Practitioner). The maximum allowable unit frequency of Code S5180 is "1 per 6 months" and the maximum allowable unit frequency of G0238 is "4 per day, 14 per week". Section 4.2 of the PDN Policy explicitly allows for 24-hour Private Duty Nursing services. *See* supra ¶ 15. If the rule makers who promulgated the Florida Medicaid administrative code had desired to provide for 24-hour respiratory therapy services, they certainly could have written it into the Respiratory Therapy Policy as they did explicitly in the PDN Policy rather than providing a limitation of 4 treatment units per day, 14 per week.

18. As established on the record, Respondent denied Petitioner's request for respiratory therapy services because the specific respiratory therapy service requested for authorization is not a covered benefit based on the unit frequency sought. *See* supra ¶ 3-4, 10, 15. Petitioner argued that the requested 24-hour respiratory therapy services should be approved because he is seeking reimbursement of services for which Petitioner is already receiving, and that he sought to bill for the patient to have access to a respiratory therapist; this is what Petitioner argues Medicaid must pay for. *See* supra ¶ 6. Petitioner argued that it is not necessary for this service to be provided specifically to Petitioner on a 1-to-1 basis, and that access to the on-call on-staff respiratory therapist should be billed as being on a 24-hour basis. *Id*.

19. Respiratory therapy services "treat conditions that interfere with respiratory functions or other deficiencies of the cardiopulmonary system." *See* supra ¶ 15. The requested respiratory

therapy services are covered if the services meet the criteria as specified in the respiratory therapy policy and the LTC Policy. *See* supra ¶ 16. The respiratory therapy Policy covers G0238 (Respiratory Therapy Visit – Rendered by a Registered Respiratory Care Practitioner) with a maximum allowable unit of 4 per day, 14 per week. *See* supra ¶ 15, Respiratory Therapy Policy, pages 1-2. Florida Medicaid also covers respiratory therapy services in accordance with the applicable Florida Medicaid fee schedule. *See* supra ¶ 17.

20. As established on the record, Petitioner's provider submitted a prior authorization request for a unit frequency that is not a covered benefit under the Florida Medicaid program. *See* supra ¶ 10. Although Petitioner is in need of respiratory therapy services, Petitioner and their provider are bound to the appliable Florida Medicaid polices and fee schedules given that the Petitioner is enrolled into the Florida Medicaid program as a recipient and their caregiver must follow the rules of a Florida Medicaid provider. The record indicates the requested services are not covered benefits, and the Petitioner may request respiratory therapy services under G0238 (Respiratory Therapy Visit - Rendered by a Registered Respiratory Care Practitioner) with a maximum allowable unit of 4 per day, 14 per week. Petitioner did not provide any evidence or testimony with respect to this request for 24-hour in-home respiratory therapy services being a covered benefit under the Florida Medicaid. Although Petitioner demonstrated that they are in need of intermittent respiratory therapy services to provide proper respiratory care and provide as needed therapy services to ameliorate the patient's condition, the record indicates that the specific requested treatment is not covered under their Managed Care plan.

21. Upon consideration of the record, the undersigned finds that Petitioner has not carried their burden of proof regarding this issue because Petitioner has not established the medical

necessity for the requested respiratory therapy services at the unit frequency sought (24 hours/day); as a result, this service sought is not a covered benefit. Accordingly, upon consideration of the evidence admitted into the record, the applicable policies and fee schedules, and the parties' sworn testimony, the undersigned concludes that Petitioner did not prove by a preponderance of the evidence that Respondent's denial of 24-hour in-home respiratory therapy services was incorrect.

DECISION

Respondent's denial of 24-hour in-home Respiratory Therapy services is **AFFIRMED**. Petitioner's request for relief is hereby **DENIED**.

DONE and ORDERED this 21st day of December 2021, in Tallahassee, Leon County, Florida.

Woody Clermont 21-FH2597 2021.12.21 15:29:32 -05'00'

WOODY CLERMONT, Hearing Officer
Agency for Health Care Administration
Office of Fair Hearings
2727 Mahan Drive, Mail Stop #11
Tallahassee, FL 32308-5407
Office: (850) 412-3649
Fax: (850) 487-1423
E-mail: OfficeOfFairHearings@ahca.myflorida.com

NOTICE OF A RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE

DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

COPIES FURNISHED TO (w/ enclosure):

G.C. c/o William Holland
17922 Clearlake Dr
Lutz, FL 33548
wholland@5starcares.com

Sunshine State Health Plan, Inc.
SunshineHealth_MFH@centene.com

AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com