

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved in Part; Remanded	Appeal Number:	2201129
Decision Date:	5/31/2022	Hearing Date:	04/21/2022
Hearing Officer:	Scott Bernard		


Appearance for Appellant:
[Redacted] (Daughter/ARD) *via* telephone

Appearance for Senior Care Organization (SCO):
Cheryl A. Ellis, M.D., Medical Director, *via*
telephone



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Approved in Part; Remanded	Issue:	SCO Home Care Program (Personal Care, Homemaker, and Companion Services)
Decision Date:	5/31/2022	Hearing Date:	04/21/2022
SCO's Rep.:	Dr. Cheryl Ellis	Appellant's Rep.:	
Hearing Location:	Quincy Harbor South		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a notice dated February 5, 2022, the SCO modified the appellant's prior authorization (PA) request homemaker services.¹ (See 130 CMR 450.204; 651 CMR 3.00 *et seq.*, and Exhibit (Ex.) 3; Ex. 5; Ex. 11, pp. 37-47). The appellant's daughter filed this appeal on the appellant's behalf in a timely manner on February 11, 2022. (See 130 CMR 610.015(B) and Ex. 1). A modification of a PA request for services by an SCO is valid grounds for appeal. (See 130 CMR 610.032).

On February 16, 2022, the Board of Hearings sent the appellant a notice informing the appellant that it needed her to submit evidence that her daughter had the authority to represent her as well as an entire copy of the notice at issue. (Ex. 2). On February 23, 2022, the appellant's daughter submitted a MassHealth Authorized Representative Designation signed by the appellant naming her as the appellant's representative. (Ex. 5, p. 2). The appellant's daughter also submitted the February 5, 2022 appeal decision letter described above. (Ex. 5, pp. 3-4).

¹ It is apparent from the record below, however, that two other notices concerning companion and personal care services were also sent by the SCO on or around the same date. The testimony and evidence submitted show that the medical need for all three services was determined at the same time. Although the appellant's representative only submitted the one notice concerning homemaking services, her fair hearing request clearly indicated that she was appealing the sum reduction in hours between the three services. There was also sufficient evidence submitted at the hearing for this hearing officer to decide the need for the three services. For that reason, the hearing officer will determine the medical need for all three services.

Action Taken by the SCO

The SCO modified the appellant's request for homemaker and other services under the Home Care Program.

Issue

The appeal issue is whether the SCO was correct, pursuant to 130 CMR 450.204 and 651 CMR 3.00 *et seq.*, in determining that the requested services should be modified.

Summary of Evidence

Prior to the hearing the SCO representative submitted documents to the Board of Hearings. (Ex. 11). In the cover letter, the SCO representative stated that MassHealth only covers medically necessary services. (Ex. 11, p. 1). She continued by stating that pursuant to the contract the SCO had with the Executive Office of Health and Human Services (EOHHS), the SCO may determine the medical necessity of services and medications. (*Id.*). She referred to a clause of that contract (not in evidence) which stated that the SCO must provide services in a manner that is no more restrictive than MassHealth fee for service, and is responsible for covering at a minimum, all medically necessary services pursuant to 130 CMR 450. (*Id.*). The SCO representative wrote the appellant requested 10 hours of homemaker services, 20 hours of companion services, and 10 hours of personal care services per week. (*Id.*). The SCO representative wrote the appellant had an in-home visit on December 6, 2021, to see what the appellant could do for herself. (*Id.*). The SCO representative wrote that the appellant was ultimately approved for 3.75 hours of homemaking, 3.5 hours of companion, and 14.5 hours of personal care per week. (*Id.*).

The SCO representative testified to the following. The appellant is a female over the age of 65 with diagnoses of spinal stenosis, cerebral infarction, seizures, and weakness. The appellant has been on her current plan through the SCO since 2016. The appellant requested 40 hours (total) of homemaker, companion, and personal care services. In order to determine the level of the appellant's needs for these services, a nurse working for the SCO performed a functional assessment of the appellant in her home on December 6, 2021. (Ex. 11, pp. 23-28). The appellant lives in the home with her daughter, who is her caregiver. After observing the appellant and consulting the regulations for the Home Care Program, the nurse determined that the appellant would benefit from 3.5 hours of companion services, 3.75 hours of homemaking services, and 14.5 hours of personal care services per week. On December 15, 2021, an SCO doctor reviewed the assessment and concurred with the reduction in time for companion and homemaker services and the increase in time for personal care services to 14.5 hours per week because the appellant demonstrated an increased need for assistance with activities of daily living.

The SCO representative stated that for that reason, the SCO issued Coverage Decision Letters on December 28, 2021 for each of the three services. (Ex. 11, pp. 29-36). The SCO subsequently issued the Appeal Decision Letters dated February 5, 2022. (*See* Ex. 3; Ex. 5; Ex. 11, pp. 37-47).

The specific notice the appellant appealed only pertained to the number of hours she received for

homemaker services, but the SCO assessed the appellant for companion and personal care services at the same time. (See Ex. 3; Ex. 5; Ex. 11, pp. 37-47). These services are provided under the umbrella of the Home Care Program. (Ex. 11, pp. 3-15). The SCO representative stated that homemaker services consisted of light housekeeping, meal preparation, and laundry. (Ex. 11, p. 5). Companion services were non-medical services that involved socializing as well as some meal preparation and laundry as well. (Ex. 11, p. 4). Personal care services consisted of assistance with the appellant's activities of daily living (ADLs). (Ex. 11, p. 5).

The SCO representative stated that after reviewing the appellant's information, she discovered the reviewers evaluated the appellant's needs as though the appellant's representative was always available to help. The SCO representative indicated that the caregiver in the Home Care Program is expected to provide assistance with ADLs and/or IADLs. The SCO representative stated that as she reviewed this case, she saw that although the caregiver was willing and able to assist the appellant on evenings, nights, and weekends, she was not available during the weekdays to assist because she had a full-time job. The SCO representative offered to adjust the homemaker services to 7.25 hours per week and the companion service to 10 hours per week. The SCO representative stated that she would let the personal care services remain at 14.5 hours per week. The new total would be 31.75 hours per week.

Prior to the hearing, the appellant's representative had submitted letters from two of the appellant's doctors and a physician's assistant², which the hearing officer forwarded to the SCO representative. (Ex. 4; Ex. 6; Ex. 7; Ex. 9; Ex. 10). The letter from Dr. Joel M. Oster, dated February 18, 2022, states:

...[The appellant] is treated for cognitive difficulties in multiple areas including executive and memory as well as receptive language and visual spatial functions. The appellant underwent formal neuropsychological testing in December 2015 where it was concluded, [sic] mostly an executive nature to these problems, acknowledging her very large cerebral hemispheric stroke and untreated obstructive sleep apnea. The stroke occurred in the medial right MCA territory in 1982. She suffered post stroke seizures and epilepsy thereafter. On May 4, 2019, she was seen in the emergency room after a head strike where CT scan showed a stable right frontoparietal temporal large cystic area and deep bilateral white matter changes.

[The appellant] has cognitive decline primarily from stroke and vascular dementia opposed to Alzheimer's. At [the appellant]'s last visit, her gait was very ataxic. I adjusted her Dilantin and dose and her gait has since improved. She uses a Walker and still falls occasionally.

Due to her age and medical conditions, the patient is unable to be alone for long periods of time. Please take this into consideration when determining how much time she needs with personal care assistance on a daily basis...(Ex. 4; Ex. 9, p. 2; Ex. 10, p. 3).

² This third letter from Julia Gilman, PA just lists the appellant's various diagnoses. (See Ex. 7; Ex. 9, pp. 3-4; Ex. 10, pp. 4-5).

The letter from Dr. Matthew Gordon, dated February 23, 2022 states:

I am the treating orthopedic surgeon for [the appellant]. [The appellant] is s/p left total knee arthroplasty and has severe right knee osteoarthritis. Unfortunately, she is not a candidate for a right total knee arthroplasty due to medical comorbidities. Her severe knee OA limits her mobility and causes an unsteady gait. She ambulates with a Walker and will need to for the foreseeable future. She is at increased risk of falls. Please accommodate with the VNA services accordingly. (Ex. 6; Ex. 9, p. 5; Ex. 10, p. 2).

The SCO representative confirmed that she received these letters earlier on the day of the hearing. The SCO representative stated that these contained a lot of diagnoses and descriptions of the appellant's functional needs but did not describe the time the appellant needed for various services. The SCO representative did want to suggest that the appellant's representative, as the caregiver, explore an adult day health setting.

The appellant's representative, the appellant's daughter, stated that she was confused by the SCO's determination. Prior to the current assessment, the appellant used to receive 40 hours per week of services. This meant that someone could be with the appellant Monday through Friday from 7 a.m. to 3 p.m., while the appellant's representative was working. The SCO decreased those services, which are currently only 21 hours. The appellant's representative stated that this was only about four hours per day. The appellant's representative stated that she now has to leave work early to rush back home by 11 a.m. so that the appellant is not alone. The appellant's representative is concerned because the appellant has mobility impairments and vertigo. The appellant's representative stated that the appellant is a fall risk and should not be left unattended for long periods of time.

The appellant's representative stated that she did not want to be difficult but that she has to work from 7 a.m. to 3 p.m. every day. The appellant needs to use a walker around the home but also has vertigo. The appellant's representative argued that the appellant needed someone to be around her for the 40 hours a week the appellant's representative was out of the home at work. Currently the appellant's companion can't stay for even 2 hours a day. The appellant's representative stated that the nurse from the SCO even said that the appellant should not be alone for a significant amount of time. The appellant has had a neck operation, knee replacement, back problems, and seizures. The appellant's representative was worried that her mother would fall and that she would find the appellant on the floor. The appellant's representative has a great deal of anxiety.

Based on the appellant's representative's testimony, the SCO representative stated that she would like to offer an adjustment to the appellant's total hours for Home Care Services to 35 hours per week. The appellant's representative understood that 35 hours per week was generous, but it still meant that the appellant would need to leave work early. The appellant's representative has had to take a great deal of sick time to accommodate the appellant's 21 hours per week of service. The appellant's representative's employer has said that she needs to resolve this situation. As for going to adult day health, the appellant's representative stated the appellant used to go to an adult day health center, but this was an imperfect solution since she had trouble leaving the house and safely ambulating during bad weather conditions.

Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. Pursuant to the contract the SCO has with EOHHS, the SCO may determine the medical necessity of services and medications. (Ex. 11).
2. The SCO must provide services in a manner that is no more restrictive than MassHealth fee for service, and is responsible for covering at a minimum, all medically necessary services pursuant to 130 CMR 450.204. (Ex. 11).
3. The appellant is a female over the age of 65. (Testimony of the SCO representative).
4. In 1982, the appellant had a stroke and has experienced post stroke seizures and epilepsy since then. (Ex. 4; Ex. 9, p. 2; Ex. 10, p. 3).
5. The appellant has cognitive difficulties in multiple areas including executive and memory as well as receptive language and visual spatial functions. (Ex. 4; Ex. 9, p. 2; Ex. 10, p. 3).
6. The appellant has cognitive decline primarily from stroke and vascular dementia. (Ex. 4; Ex. 9, p. 2; Ex. 10, p. 3).
7. The appellant is status post left total knee arthroplasty, has severe right knee osteoarthritis and is not a candidate for a right total knee arthroplasty due to medical comorbidities. (Ex. 6; Ex. 9, p. 5; Ex. 10, p. 2).
8. The appellant's severe knee osteo-arthritis limits her mobility. (Ex. 6; Ex. 9, p. 5; Ex. 10, p. 2).
9. The appellant ambulates with a walker and will need to for the foreseeable future. (Ex. 4; Ex. 6; Ex. 9, pp. 2, 5; Ex. 10, pp. 2, 3).
10. The appellant's severe knee osteo-arthritis and cognitive decline contribute to the appellant's unsteady gait. (Ex. 4; Ex. 6; Ex. 9, pp. 2, 5; Ex. 10, pp. 2, 3).
11. The appellant has a history of falls and is generally at an increased risk for falls. (Ex. 4; Ex. 9, p. 2; Ex. 10, p. 3; Testimony of the appellant's representative).
12. Due to her age and medical conditions, the patient is unable to be alone for long periods of time. (Ex. 4; Ex. 9, p. 2; Ex. 10, p. 3; Testimony of the appellant's representative).
13. The appellant lives in the home with her daughter, who is her caregiver. (Testimony of the SCO representative; Testimony of the appellant's representative).
14. The appellant's daughter has a full-time job. (Testimony of the SCO representative; Testimony of the appellant's representative).

15. The appellant has been on her current plan through the SCO since 2016. (Testimony of the SCO representative).
16. The appellant requested 10 hours of homemaker, 20 hours of companion, and 10 hours of personal care service for a total of 40 hours per week. (Testimony of the SCO representative).
17. Homemaker services consist of light housekeeping, meal preparation, and laundry. (Ex. 11, p. 5).
18. Companion services are non-medical services that involved socializing as well as some meal preparation and laundry as well. (Ex. 11, p. 4).
19. Personal care services consisted of assistance with the appellant's ADLs. (Ex. 11, p. 5).
20. These services are provided under the umbrella of the Home Care Program. (Ex. 11, pp. 3-15).
21. A nurse working for the SCO performed a functional assessment of the appellant in her home on December 6, 2021 and determined that the appellant would benefit from 3.5 hours of companion services and 3.75 hours of homemaking services and 14.5 hours of personal care services per week. (Ex. 11, p. 28).
22. On December 15, 2021, an SCO doctor reviewed the assessment and concurred with the reduction in time for companion and homemaker services the increase in time for personal care services to 14.5 hours per week because the appellant demonstrated an increased need for assistance with activities of daily living. (Testimony of the SCO representative).
23. For that reason, the SCO issued Coverage Decision Letters on December 28, 2021 for each of the three services. (Ex. 11, pp. 29-36; Testimony of the SCO representative).
24. Subsequently, the SCO issued Appeal Decision Letters concerning the services on February 5, 2022. (Testimony of the SCO representative; Ex. 3; Ex. 5; Ex. 11, pp. 37-47).
25. In making its decisions, the SCO did not consider the fact that the appellant's daughter had a full-time job and was only available during evening, nights, and weekends to provide care. (Testimony of the SCO representative).
26. The appellant's representative has had to leave work early to provide caregiver services to the appellant to make up the reduced service time. (Testimony of the appellant's representative).
27. The SCO representative offered to adjust the total hours of service to 35 hours per week. (Testimony of the SCO representative).
28. At 35 hours per week, the appellant would still be left alone for five hours per week while the appellant's representative works. (Testimony of the appellant's representative).

Analysis and Conclusions of Law

MassHealth members who are 65 years of age or older may enroll in a Senior Care Organization (SCO) pursuant to 130 CMR 508.008(A). (130 CMR 508.001(C)). In order to voluntarily enroll in a senior care organization, a MassHealth Standard member must meet all of the following criteria:

- (1) be 65 years of age or older;
- (2) live in a designated service area of a senior care organization;
- (3) not be diagnosed as having end-stage renal disease;
- (4) not be subject to a six-month deductible period under 130 CMR 520.028: *Eligibility for a Deductible*;
- (5) not be a resident of an intermediate care facility for individuals with intellectual disabilities (ICF/ID); and
- (6) not be an inpatient in a chronic or rehabilitation hospital. (130 CMR 508.008(A)).

MassHealth will notify members of the availability of an SCO in their service area and of the procedures for enrollment. (130 CMR 508.008(B)). An eligible member may voluntarily enroll in any SCO in the member's service area. (*Id.*). A service area is the specific geographical area of Massachusetts in which an SCO agrees to serve its contract with MassHealth and the Centers for Medicare & Medicaid Services. (*Id.*). Service area listings may be obtained from MassHealth or its designee. (*Id.*). The list of SCOs that MassHealth will make available to members will include those SCOs that contract with MassHealth and provide services within the member's service area. (*Id.*). When a member chooses to enroll in an SCO in accordance with the requirements under 130 CMR 508.008, the SCO will deliver the member's primary care and will authorize, arrange, integrate, and coordinate the provision of all covered services for the member. (130 CMR 508.008(C)).

The appellant has been enrolled with a plan administered by an SCO since 2016. The SCO oversees services which fall under the ambit of the Home Care Program. The regulations for Home Care Program are located at 651 CMR 3.00 *et seq.*

The purpose of the Home Care Program is to assist elders in Massachusetts secure and maintain maximum independence in their home environment. (651 CMR 3.01). MassHealth members who meet Home Care Program eligibility criteria shall be eligible to receive Home Care Program Services provided that such services are determined to be non-duplicative with other MassHealth services but ineligible if enrolled in an all-inclusive MassHealth program. (651 CMR 3.04(a)). Services provided under this program include, but are not limited, to the following:

1. Companion: Non-medical services identified in a required comprehensive service plan, such as socialization, meal preparation, laundry, shopping, escort to appointments and light housekeeping tasks that are incidental to the care and supervision of the Consumer.
2. Homemaker: Services to assist a client with Instrumental Activities of Daily Living provided in accordance with homemaker standards issued by Elder Affairs.
3. Personal Care: Hands-on assistance, prompting or cueing, and supervision to assist a Consumer to perform Activities of Daily Living provided in accordance with the Personal

Care Guidelines issued by Elder Affairs. (See 651 CMR 3.02).

The standard for assessing eligibility for these programs is one of medical necessity, and the SCO uses MassHealth's definition of medical necessity, which is:

A service is medically necessary if

- (1) it is reasonably calculated to prevent, diagnose, prevent the worsening of, alleviate, correct, or cure conditions in the member that endanger life, cause suffering or pain, cause physical deformity or malfunction, threaten to cause or to aggravate a handicap, or result in illness or infirmity; and
- (2) there is no other medical service or site of service, comparable in effect, available, and suitable for the member requesting the service, that is more conservative or less costly to the [SCO].

The record shows the following. The appellant is an individual over the age of 65, who receives her services through the SCO. In 1982 the appellant had a stroke and has experienced seizures and epilepsy since that time. The appellant's stroke caused cognitive difficulties in her executive and memory as well as her receptive language and visual spatial functions. The appellant has had cognitive decline due to the ongoing effects of that stroke, as well as from vascular dementia. Additionally, the appellant has osteoarthritis in both knees. She is status post left knee arthroplasty, but she cannot have right knee replacement because of her medical comorbidities. The appellant relies upon the use of a walker for her mobility. The appellant's severe osteoarthritis, as well as her cognitive conditions appear to both cause her to have an unsteady gait. Two of the appellant's doctor's state that she is at risk of falls. One doctor wrote that she should not be left alone for long periods of time. The appellant's representative, the appellant's daughter, confirmed that the appellant has had a history of falls and that she is afraid of leaving the appellant alone for any significant amount of time.

The appellant lives with her daughter, who is considered a caregiver for the purposes of the Home Care Program. A caregiver is a person, regardless of place of residence, who is 18 years of age or older and assists with ADLs and/or IADLs, supervision, or social and emotional support as required by a consumer on a daily basis without pay. (See 650 CMR 3.02). The SCO representative indicated that based on this information, the SCO determined that the appellant required far fewer hours of service than the 40 hours the appellant requested. The SCO representative admitted, however, that the SCO did not give due consideration to the fact that the appellant's daughter, although available to assist the appellant on evenings, nights, and weekends, also had a full-time job. In response to this information, as well as the appellant's representative's testimony at the hearing, the SCO representative eventually offered to increase the appellant's total hours to 35 hours per week.

The record shows by a preponderance of the evidence, however, that the appellant requires the 40 hours a week she requested. Her doctors state that given her physical and cognitive conditions, the appellant is at higher risk for falls at this time. In the opinion of one of the doctors the appellant should not be left alone for long periods of time. The appellant's medical condition could realistically result in her further injury and may endanger her life. Always having someone with her while her daughter works would alleviate this issue. Modifying the request for services and approving fewer total hours of service

is not a solution that is comparable in effect, available, and suitable for this member, that is more conservative or less costly to the SCO.³

At the same time, this hearing officer has neither sufficient evidence nor sufficient expertise redetermine the allotment of hours between personal care, homemaking, and companion services.

For the above stated reasons, the appeal is APPROVED IN PART and REMANDED.

Order for the SCO

Issue a new determination approving 40 hours per week of Home Care Program Services. Redetermine the allotment of those 40 hours between Personal Care, Homemaking, and Companion services.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Implementation of this Decision

If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings, at the address on the first page of this decision.

Scott Bernard
Hearing Officer
Board of Hearings

cc:

United Healthcare SCO, Attn: Cheryl A. Ellis, M.D., LTC Medical Director, 950 Winter St., Ste. 3800, Waltham, MA 02451

³ Although the SCO representative suggested the appellant's representative explore an adult day health setting as an option, no information was submitted that would allow this hearing officer to determine whether such an option was comparable in effect, available, and suitable for the member requesting the service, that was more conservative or less costly to the SCO.