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Date: January 23, 2023

Re: **Alfonso Hernandez v. Humana**, AHCA Case No.: 22-FH1160

This letter is being sent on behalf of Alfonso Hernandez, an enrollee in AHCA's SMMC Long-Term Care Program Waiver. Mr. Hernandez's managed care plan is Humana. Mr. Hernandez is 99 years old and lives in his own home with his wife, who is also a Humana member under the LTC Waiver. He has been diagnosed with dementia, emphysema (on oxygen 24/7), glaucoma, peripheral vascular disease, and a host of other medical conditions. He is unable to transfer or walk, is incontinent, and requires extensive assistance with his ADLs and IADLs. His wife is similarly disabled and was authorized to receive 24/7 direct care in late 2021. At the time, Mr. Hernandez, however, was only authorized for 14 hours/week of Personal Care and 12 hours/week of Homemaker. Some home health aides for Mrs. Hernandez have been willing to assist with care for Mr. Hernandez, but other aides have pointed out correctly that they are not authorized nor paid to care for Mr. Hernandez and have refused to do so. In addition, when

Mrs. Hernandez is not in the home (for physician visits or hospitalization, for instance), no one is present to care for Mr. Hernandez.

For over a year, Mr. Hernandez's counsel, Nancy Wright, has been communicating with AHCA about this situation. After repeated oral requests to the Humana case manager went unanswered, in January of 2022, a written request was submitted to Humana seeking either 24/7 direct care services for Mr. Hernandez or, in lieu of this, sharing an aide. She filed an AHCA Complaint (Complaint # 2022-0224-0007) to force a response after Humana ignored the written requests for services. In the Notice of Adverse Benefit Determination ("NABD"), Humana approved only 16 additional hours/week of Personal Care and did not address the shared aide request in any way. A written appeal followed, making the same request. The Notice of Plan Appeal Resolution ("NPAR") was a denial, again failing to mention the shared aide request. Both Notices stated that a reason for the denial was based, in part, on the grounds that Mr. Hernandez's son helped care for him while recognizing that he also worked full-time outside the home.

The NABD also recommended Adult Day Care or Companion services, but the appeal pointed out that neither of these services were appropriate options for Mr. Hernandez who has a consistent need for hands-on care, an assertion supported by Mr. Hernandez's primary care physician. Mr. Hernandez requested a fair hearing on both the denial of Personal Care and the failure to address sharing an aide as an option.

The hearing revealed a host of problems with Humana's decision-making and a complete lack of understanding of the Long-Term Care Program Coverage Policy. For example:

- Humana stipulated that it did not have a Long-Term Care Supplemental Assessment for Mr. Hernandez nor did it have any documents or policies from AHCA or internal to Humana regarding the authorization and payment of direct care staff to provide supervision and care to more than one enrollee at a time.
- The Humana Medical Director was unfamiliar with the LTC Coverage Policy, referring instead to the Member Handbook as authoritative. She was unaware of the goal of the program, ["to provide an array of home and community-based services that enable enrollees to live in the community and to avoid institutionalization"], and could not explain what this meant even after it was read to her.
- She was unaware that the LTC Supplement Assessment was a separate assessment from the 701B and did not know what it was for. She made her decision assuming that Mr. Hernandez's son could provide physical care when he had made it clear to the Humana case manager that he could not. She also testified that Mr. Hernandez could "safely be left alone" for 18 hours a day by taking the daily allotment of 6 hours and splitting it into 3 or 4 shifts per day. In addition, she factored into her decision that Mr. Hernandez is "not a wanderer" and there were others in the household - paid help for Mrs. Hernandez - if needed.
- The Medical Director testified several times that her decision to provide only an additional 4 hours a day of Personal Care was made by estimating about 20 minutes per

day for each ADL and adding a couple more hours because of Mr. Hernandez's "dementia and other medical needs." She admitted that Companion providers are not licensed for hands-on care but thought they could provide some incidental hands-on help.

Humana's failures might have been corrected through AHCA's fair hearing system. Unfortunately, they were overtly sanctioned or ignored by AHCA's Hearing Officer. These and other issues impacting due process included:

- The Hearing Officer stated at the hearing that she could not consider any argument on the request for a shared aide because "this has not been mentioned in the Notice of Plan Appeal Resolution and it's not an issue I have jurisdiction over."
- The Final Order never mentions the lack of a LTC Supplemental Assessment.
- The Final Order justifies Humana's decision to authorize Personal Care hours using minutes for ADLs by citing a table of "General Time Allowances" for Personal Care Tasks that is in the Personal Care Services Coverage Policy (Rule 59G-4.215). This is inconsistent with the goal of the LTC Waiver.
- Although the Hearing Officer was made aware of the licensing limitations for Companion in §400.462(7), Fla. Stat., the Final Order suggests the use of Companion care for "supervision" of Mr. Hernandez instead of Personal Care despite the extensive hands-on care needs of Mr. Hernandez round the clock. In any event, no decision was made on the appropriate array of services Mr. Hernandez needs to enable him to remain in his home and avoid institutionalization even though this decision was *de novo* and final agency action by AHCA.

Mr. Hernandez's difficulties with Humana, including ignored verbal requests for services, have been the subject of AHCA Complaints and quite a few emails and phone calls to AHCA's General Counsel Office. The hearing itself, however, revealed a level of ignorance of the rules surrounding the LTC Waiver that effectively nullify our settlement in *Parrales v. Dudek*, 4:15-cv-424-RH/CAS. In the *Parrales* settlement, AHCA agreed to adopt the LTC Waiver Coverage Policy to protect enrollees from the arbitrary decisions that were coming from managed care plans. LTC Waiver enrollees like Mr. Hernandez continue to remain at risk of institutionalization if the managed care plans do not follow the rules and AHCA does not enforce them. If, for example, a managed care plan can limit the issues to be considered at a fair hearing by ignoring a request for a benefit or service in the NABD, despite evidence that the request had been made in writing, there is a fundamental due process issue in the way AHCA is conducting these hearings.

The disregard of the LTC Supplemental Assessment is not just a failure to fill out a form. Humana made its decision for LTC services for Mr. Hernandez by assuming that "natural supports" could or would provide care, which was incorrect, and by relying on the kindness of strangers - paid aides for the wife who were put in the awkward position of also providing voluntary service for Mr. Hernandez. This is not new, unfortunately. In our representation of numerous clients who require additional home health hours, we have found that individuals are routinely denied authorization of care hours based on the presence of others in their home

without consideration as to whether the other people are willing or able to provide care voluntarily and unpaid. Denying authorization of home health hours based on the presence of others in the home who have not affirmatively agreed to provide care voluntarily, is not consistent with the federal Medicaid Act, including the regulations that govern home and community-based service programs. The LTC Supplemental Assessment form is required by regulation to ensure that an accurate evaluation is made of the amount of time the enrollee can be safely left alone and the ability and willingness of natural supports to assist with the enrollee's needs. Failure to complete and consider the information collected in this form results in a failure to accommodate the needs of enrollees and places them at risk of institutionalization.

The decision on Personal Care is equally troubling. Personal Care is the only type of licensed direct care provider under the LTC Waiver that is authorized by law to give hands-on care. Any system that does not consider consistent hands-on care needs will result in inadequate care. As in this case, the "count the minutes" method encourages managed care plan to leave enrollees who need hands-on care throughout the day and night with staff who are not authorized to provide the very assistance that is needed. This policy is even more nonsensical when the pay structure is considered; on information and belief, managed care plans provide the same pay rate for Personal Care, Companion, and Homemaker services. One can only conclude that the system is designed to delay authorization of appropriate services by penalizing enrollees who request the "wrong" service. Rather than looking holistically at requests, or even asking questions about them, denials are issued, which AHCA Office of Fair Hearings uphold, sometimes with the suggestion that the enrollee try again. In the meantime, many months have passed without adequate care and it may take months more to get a different service approved, assuming the enrollee even knows to ask. All of this leaves enrollees at risk of institutionalization and runs afoul of the requirement that Medicaid services be provided with reasonable promptness.

Our Demand:

- Authorize 24/7 Personal Care for Mr. Hernandez.
- Develop a written protocol for how enrollees can request shared aides, and the criteria for managed care plans to authorize shared aides.
- Train case managers, supervisors, medical directors, staff attorneys, and AHCA hearing officers in the LTC Coverage Policy, including
 - the goal of program,
 - what "natural support" is
 - how and why LTC Supplement Assessment must be used
 - the need for written consent by natural supports for specific amount, duration and scope of care they consent to voluntarily providing.
- Sanctions for failure to have updated, signed LTC supplement assessment in case file.
- Provide a clear process for enrollees to submit written requests for services.

- Include a contract provision with managed care plans that they are required to treat requests for Homemaker, Companion and Personal Care as a request for direct care services and require that they issue authorizations that are an appropriate *array* of services. If a managed care plan fails to do this, provide for sanctions, and train and direct Hearing Officers to reach decisions on the appropriate direct care service array rather than piecemeal decisions on a single service.

We look forward to speaking to you further about this matter. However, if we do not hear from you in two weeks or we are unable to resolve this within a month, we will advise our client to pursue federal options, including a preliminary injunction.

Sincerely,

/s/Nancy E. Wright

Nancy E. Wright, Esq.

Attachments:

Request for Services
Physician Letter

To: Humana Customer Service
Fax: 1-800-949-2961
Date: January 27, 2022
From: Alfonso Hernandez, Jr.,
DPOA for Humana LTC Waiver enrollees, Alfonso Hernandez, Sr. and Liduvina Hernandez

Re: Request for either 24/7 direct care services (personal care and homemaker) for Alfonso Hernandez, Sr. or “in lieu of” this, combining the 24/7 services now provided to his wife, Liduvina Hernandez with 24/7 services for Mr. Hernandez using one staff at a 1:2 ratio (see below for explanation).

Enrollee Information:

Alfonso Hernandez, Sr. DOB 10/31/1923
10467 SW 28th Street
Miami, FL 33165
Member ID: H76121187

Liduvina Hernandez DOB
10467 SW 28th St.
Miami, FL 33165
Plan ID Number: 143167370

DPOA Information:

Alfonso Hernandez, Jr.
2318 SW 20th Street
Miami, FL 33145
(786) 326-1946
alfonso1217@gmail.com

Mr. Hernandez is requesting either 24/7 direct care services (primarily or exclusively personal care). Under Humana’s contract with AHCA, however, Humana can provide services *in lieu of* covered benefits as the same level of medically necessary care is given. For example, Florida’s Medicaid Waiver for persons with developmental disabilities offers personal care services (called Personal Supports) where one staff is authorized to provide care to more than one individual. Both Mr. and Mrs. Liduvina require 24/7 direct care but it would be possible for a single staff to adequately care for both (i.e., staffing at a 1:2 ratio).

Liduvina Hernandez lives at home with her husband, Alfonso Hernandez, Sr.. Mrs. Hernandez has been authorized to receive 24/7 direct care services from Humana LTC plan. Mr. Hernandez, however, is only receiving 26 hours/week of combined personal care and homemaker services.

Like his wife, Mr. Hernandez needs assistance with all activities of daily living. He is 98 years old and has senile dementia, emphysema, congestive heart failure (and other serious heart issues),

sleep apnea, hearing loss, glaucoma, prostate cancer history, peripheral vascular disease, incontinence, leukemia in remission. He is oxygen dependent and can only walk 2 or 3 steps with help, needs physical assistance to stand, transfer, and groom/bathe. He cannot do housekeeping, prepare meals, use the phone, or deal with his meds. A copy of his medical chart is attached.

When Mr. Hernandez's staff have left for the day, the service provider for Mrs. Hernandez is not authorized to assist Mr. Hernandez. In addition, if Mrs. Hernandez is not home - for instance, if she is hospitalized - Mr. Hernandez is left alone for good portions of the day. His family must try to find paid help to be with him at those times. Mr. Hernandez's attorney has discussed with AHCA General Counsel Office the option of having one staff at a 1:2 ratio and been advised that this can be done via "in lieu of" provisions of the managed care contract with AHCA. This would be our preference and although staffing at 1:2 should be reimbursed at a higher rate than 1:1, it would not be as costly as having to use two staff throughout the day and night for both Mr. and Mrs. Hernandez. In addition, providing personal care at a 1:2 ratio would authorize staff to provide 24/7 care to *either* Mr. or Mrs. Hernandez, assuring that each has adequate care when the other may not be in the home.

If you need anything else from us, please let us know.

Attached:

Medical chart for Mr. Hernandez

DPOA for both Mr. Hernandez and Mrs. Hernandez

DATE: 8/29/2022

To Whom It May Concern:

My patient, Alfonso Hernandez, is 98 years old and has senile dementia, emphysema (oxygen dependent), congestive heart failure, sleep apnea, hearing loss, glaucoma, and many other chronic medical conditions. (See attached list of Mr. Hernandez's Active Problem List.) Mr. Hernandez needs physical assistance (hands-on care) with all his ADLs and IADLs and requires supervision 24/7. His wife is also disabled and is physically and mentally unable to help with his care or supervision.

Mr. Hernandez's condition is deteriorating so that now he is unable to transfer or use his wheelchair without physical assistance and he is at an increased risk of falling. His dementia has also progressed. He would be unable to care for himself in an emergency and could not reliably use a Personal Emergency Response System. Any lapse in supervision for him would be dangerous to his health and wellbeing. He is not a candidate for an adult day care setting due to his limited mobility, compromised respiratory system and progressive dementia.

I understand that Mrs. Hernandez has been authorized for 24/7 care but that this authorization does not give staff the authority to provide for Mr. Hernandez's needs as well, or to assure that Mr. Hernandez has no lapse in services if Mrs. Hernandez is not in the home. It is medically necessary that Mr. Hernandez be provided with staff that can address his needs around-the-clock.

Please do not hesitate to contact me at (305) 642-5366 if you require further information regarding this patient.

Sincerely,

Dianik Martinez, MD
Leon Medical Centers



Dianik Martinez, M.D.

Name: Alfonso Hernandez | DOB: 10/31/1923 | MRN: 6151 | PCP: Dianik Martinez, MD

Letter Details



4/14/2022

Alfonso Hernandez
10467 SW 28 ST
MIAMI FL 33165

Requested by: Alfonso Hernandez Requested Date: 04/14/22

Re: Alfonso Hernandez

To

The above referenced individual is currently a patient in my care. The patient suffers from the following medical diagnoses:

Patient Active Problem List

Diagnosis

- Thrombocytopenia
- Obstructive sleep apnea
- Anatomical narrow angle borderline glaucoma
- Incipient senile cataract
- Senile nuclear sclerosis
- Hypertensive heart disease without heart failure
- Coronary atherosclerosis of native coronary artery
- Mitral valve disorder
- Aortic valve disorder
- Tricuspid valve disorders, non-rheumatic
- Cardiomegaly
- Atherosclerosis of aorta
- Sinusitis, chronic
- Asthma
- Postinflammatory pulmonary fibrosis
- Calculus of gallbladder
- Hypertrophy of prostate without urinary obstruction and other lower urinary tract symptoms (LUTS)
- Osteoarthritis
- Plantar fascial fibromatosis
- Hypersomnia with sleep apnea
- History of prostate cancer
- Body mass index 31.0-31.9, adult
- Cardiomyopathy due to hypertension, with heart failure
- ILD (interstitial lung disease)
- Centrilobular emphysema
- Chronic lymphocytic leukemia of B-cell type in remission
- Non morbid obesity
- Non-rheumatic aortic stenosis
- Non-rheumatic mitral valve stenosis
- Paroxysmal atrial fibrillation
- PVD (peripheral vascular disease)
- Senile dementia without behavioral disturbance
- Hypoxia
- Gastroesophageal reflux disease without esophagitis
- IFG (impaired fasting glucose)
- Supplemental oxygen dependent
- Primary osteoarthritis of both knees
- Non morbid obesity

Pt is 98 yo male with multiples and significant chronic conditions who need help with ADL and supervision 24/7 , pt lives with his wife who has dementia and is unable to help him.

Please do not hesitate to contact me at (305) 642-5366 if further information is necessary regarding this patient.

Sincerely,

Dianik Martinez, MD
Electronically Signed

(305) 642-5366