

FILED

JUL 06 2009

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

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DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-02042

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION
CIRCUIT: 07 Volusia
UNIT: AHCA

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was convened telephonically before the undersigned hearing officer on June 2, 2009, at 1:15 p.m. The petitioner was not present. He was represented by his mother and father who were located at the Daytona Beach Service Center in Daytona Beach, Florida. The respondent was represented by Gwendolyn Mathis, registered nurse specialist who was present with the petitioner's parents. Witnesses for the respondent by telephone from Keystone Peer Review Organization (KePRO) were Robert Buzzeo, M.D., physician reviewer, and Melanie Clyatt, registered nurse review supervisor.

ISSUE

The petitioner is appealing termination of private duty nursing services. The respondent held the burden of proof.

FINDINGS OF FACT

1. The petitioner is 15 years old; her principal diagnosis is epilepsy. The petitioner requires gastrointestinal feeding and tracheotomy suctioning. She is totally dependent on others for her activities of daily living. The petitioner lives with her mother and father.

2. Prior to the action under appeal, the petitioner was receiving private duty nursing (PDN) through the Medicaid Program on Mondays, Wednesdays and Fridays from 8:00 a.m. until 4:00 p.m.

3. Medicaid reimbursable PDN services must be medically necessary and require prior authorization via a utilization review. KePRO is contracted to provide the utilization reviews for AHCA.

4. In February 2009, a request for continued PDN services was submitted to KePRO. On March 5, 2009 the request was denied. The notice states in part, "KePRO is contracted by...AHCA to perform medical review for the Private Duty Nursing...Based on the initial information provided to us by your home health care agency, it has been determined that your medical care as described to us is not medically necessary, and the authorization request is denied ...for the above dates of service/hours of service." A reconsideration request was filed on the petitioner's behalf. On March 12, 2009 the reconsideration request was denied. The notice states in part "A KePRO physician consultant has conducted a reconsideration of the case of the above listed date. Based on the information provided to us by your home health agency, it has been determined that the medical care as described to us is not medically necessary and the denial is upheld." KePRO explained that its denial was based in part on the fact that neither of

the petitioner's parents work during the hours PDN services were requested. Both parents have been trained in the petitioner's care and are able to feed, suction and perform all the activities of daily living required by the petitioner. Therefore, KePRO concluded that the services were not medically necessary.

5. The petitioner's parents acknowledge that they are capable of providing total care for the petitioner; they also admitted that neither of them work during the hours PDN services were requested. However, the petitioner's mother explained that she works nights Wednesday through Sunday, arriving home between midnight and 2:00 a.m.; she needs sleep during the day and sometimes takes medication which causes her to be drowsy during the day. In addition, the petitioner's mother asserted that she recently had hernia surgery and has lifting restrictions. The petitioner's father explained that while he is not currently working, he has been offered a job which he would like to accept, but can not do so because the PDN services were terminated. KePRO advised the parents to reapply for PDN through the home health care agency when/if the father obtains employment. KePRO did not feel the mother's asserted lifting limitations impacted the denial decision as lifting does not require skilled nursing services. A home health aide could provide that service. KePRO stands by its decision.

6. The record was held open for 14 days to allow the petitioner's mother to provide medical records documenting impairments and restrictions. No evidence was received and the record was closed.

CONCLUSIONS OF LAW

By agreement between the Agency for Health Care Administration and the Department of Families and Children, the Agency for Health Care Administration has

conveyed jurisdiction to the Office of Appeal Hearings to conduct this hearing pursuant to Chapter 120.80 F.S.

Florida Administrative Code 59.G-1.010, "Definitions", states for medical necessity:

(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.

(b) "Medically necessary" or "medical necessity" for inpatient hospital services requires that those services furnished in a hospital on an inpatient basis could not, consistent with the provisions of appropriate medical care, be effectively furnished more economically on an outpatient basis or in an inpatient facility of a different type.

(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.

The Medicaid Home Health Services Coverage and Limitation Handbook under Private Duty Nursing, on page 2-14 and 2-15 define skilled nursing:

The following are examples of services that require the direct care skills of a licensed nurse:

Administration of intravenous medication;
Administration of intramuscular injections, hypodermoclysis, and subcutaneous injections only when not able to be self administered appropriately.

Insertion, replacement and sterile irrigation of catheters;
Colostomy and ileostomy care; excluding care performed by recipients;
Treatment of decubitus ulcers when:
- deep or wide without necrotic center;
- deep or wide with layers of necrotic tissue; or
- infected and draining;
Treatment of widespread infected or draining skin disorders;
Administration of prescribed heat treatment that requires observation by licensed nursing personnel to adequately evaluate the individual's progress;
Restorative nursing procedures, including related teaching and adaptive aspects of nursing, which are a part of active treatment and require the presence of licensed nurses at the time of performance;
Nasopharyngeal, tracheotomy aspiration, ventilator care;
Levin tube and gastrostomy feedings, excluding feedings performed by the recipient, family or caregiver; and
Complex wound care requiring packing, irrigation, and application of an agent prescribed by the physician.

The Medicaid Home Health Services Coverage and Limitations Handbook, July 2008, define the guidelines for private duty nursing services as follows at page 2-17 and 2-19:

Private Duty Nursing Definition. Private duty nursing services are medically necessary skilled nursing services that may be provided in a child's home or other authorized settings to support the care required by the child's complex medical condition...

Private Duty Nursing Requirements. Private duty nursing services must be: ordered by the attending physician; documented as medically necessary; provided by a registered nurse or a licensed practical nurse; consistent with the physician approved plan of care; and authorized by the Medicaid service authorization nurse...

Parental Responsibility. Private duty nursing services are authorized to supplement care provided by parents and caregivers. Parents and caregivers must participate in providing care to the fullest extent possible. Training can be offered to parents and caregivers to enable them to provide care they can safely render.

Medicaid does not reimburse private duty nursing services provided solely for the convenience of the child, the parents or the caregiver...

Flex hours or banking of hours - Medicaid does not allow 'banking of hours' or 'flex hours'. Only the number of hours that are medically necessary may be approved. Home health service providers must request only the number hours that are expected to be used and must indicate the

times of day and days per week that the hours are needed. If a recipient requires additional hours due to unforeseen circumstances or change in medical or social circumstances, the home health service providers should submit a modification request to the PRO for the additional hours needed... Authorization Process - Private duty nursing services are authorized by the Medicaid peer review organization if the services are determined to be medically necessary. Private duty nursing services will be decreased over time as parents and caregivers are taught skills to care for their child and are capable of safely providing that care or as the child's condition improves.

The legal authority cited above defines medically necessary as related to Medicaid services. The Medicaid handbook explains that private duty nursing services are medically necessary skilled nursing services that may be provided in a child's home or other authorized settings to support the care required by the child's complex medical condition. The handbook also sets forth that parents and caregivers must participate in providing care to the fullest extent possible. The petitioner's parents are capable of caring for the petitioner during the hours (Monday, Wednesday and Friday from 8:00 a.m. to 4:00 p.m.). PDN services were denied as neither is working during those hours and both are trained in all aspects of the petitioner's care. The asserted reasons for PDN services were the mother's unsubstantiated lifting restrictions and the father's possible future employment. A skilled nurse is not required to lift the petitioner. It was recommended that the petitioner's parents find a home health care aide to assist with lifting. As the father is not yet employed, no need yet exists for PDN services. It was recommended that the family reapply for PDN services through the home health care agency when the father has obtained employment.

Fla. Admin. Code 65-2.060 in parts states:

The burden of proof, except where otherwise required by statutes, is on the party asserting the affirmative of an issue. The burden is upon the Department when the Department takes action which would reduce or terminate the benefits or payments being received by the recipient. The burden is upon the petitioner if an application for benefits or payments is denied. The party having the burden shall establish his/her position, by a preponderance of evidence, to the satisfaction of the hearing officer.

The respondent terminated the petitioner's PDN services. The legal authority cited above explains that the respondent had the burden of proof. The respondent presented evidence that established that it was not medically necessary for the petitioner to have private duty nursing services as the parents are available to care for their child. There was no sufficient rebuttal evidence for the undersigned to conclude that these hours are medically necessary. Therefore, it is concluded that the respondent met its burden and the action terminating the PDN services was correct. The parents can seek Medicaid nursing services through their home health agency if their schedules change in the future.

DECISION

This appeal is denied.

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 agency has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

FINAL ORDER (Cont.)
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DONE and ORDERED this 6th day of July, 2009,
in Tallahassee, Florida.


Leslie Green
Hearing Officer
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850-488-1429

Copies Furnished To: