

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

FILED

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OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-02519

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION
CIRCUIT: 05 Hernando
UNIT: AHCA

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned-hearing officer on August 13, 2009, at 10:15 a.m., in Brooksville, Florida. The petitioner was present. Present representing the petitioner was _____, Esquire, Advocacy Center for Persons with Disabilities, Inc. Present as witnesses for the petitioner were his mother, _____ his nurse, _____ who appeared by telephone; Dr. _____, petitioner's primary care physician, who appeared by telephone and _____ RN. The respondent was represented by Daniel Lake, Esquire, assistant general counsel, Agency for Health Care Administration, who appeared by telephone. Present as a witness for the respondent was Joann Dohn, RN, Agency for Health Care Administration. Present appearing by telephone on behalf of

the respondent were Gary Erickson, nurse reviewer with KePRO, and Dr. Rakesh Mittel, physician reviewer of KePRO.

The hearing was scheduled for June 16, 2009. However, as stipulated by both parties, a continuance was granted.

The record was held open for 30 days to allow the petitioner to submit a proposed final order which has been received. The respondent opted not to submit a proposed final order.

ISSUE

The petitioner is appealing the respondent's action of April 10, 2009, to decrease the number of hours of private duty nursing for the period of March 16, 2009 through September 11, 2009. The respondent has the burden of proof.

FINDINGS OF FACT

1. Petitioner is 18 years old and lives with his parents and requires skilled nursing care in the home. Petitioner suffers from a traumatic brain injury incurred in October 2006. He lost the use of his arms and legs and does not have the ability to communicate. Petitioner spent some time in the hospital and in a nursing home before being approved to receive care in his parents' home beginning January 16, 2007. Since that time, petitioner has been hospitalized on four separate occasions for various infections, usually pneumonia. During the hospitalizations he does not receive private duty nursing and his family does not receive training for his care from the nurses. After his hospitalizations, the petitioner's needs increase and the nurses are focused on providing the care to the petitioner for a week or two after his hospitalizations.

2. Keystone Peer Review Organization (KePRO) is the Peer Review Organization (PRO) contracted by AHCA to perform medical review for the private duty nursing and personal care assistance under the Prior Authorization Program for Medicaid recipients in the State of Florida.

3. The petitioner is Medicaid eligible and was previously authorized to receive 24 hour a day private duty nursing services for seven days per week, paid for by Medicaid. He requested 4320 private duty nursing hours (24 hour care, seven days a week) for the period starting March 16, 2009 and ending September 11, 2009. There is no dispute that the skilled nursing services are medically necessary.

4. A prior authorization review was completed by KePRO. On March 30, 2009, KePRO denied 910 hours of petitioner's skilled nursing care request. The petitioner requested a reconsideration. KePRO completed a reconsideration and on April 10, 2009, denied 520 hours of private duty nursing. This denial translated to the family providing care on Mondays through Fridays from 8:00 a.m. through 12:00 p.m. KePRO determined that the mother could care for the petitioner during the above hours as her other two children were at school.

5. Respondent and KePRO relied solely on a desk review of information originally supplied by the home health provider, Maxim.

6. The KePRO pediatrician who testified at the hearing did not make either the initial determination or the reconsideration decision. He only reviewed the petitioner's file, which was entered into evidence as the Respondent's Exhibit 2 in preparation for the hearing.

7. The KePRO pediatrician believed from reviewing the documents that the initial reviewing physician must have determined after a review of schedules that the petitioner's mother was available to provide care from 8:00 a.m. until 3:00 p.m. on Monday through Friday.

8. The petitioner has siblings who are eight, eleven and 21 years old. The mother does not work outside the home. The father has been out of the state working. He left August 18, 2009, and usually works out of state for several weeks at a time, then returns to see if there is any local work available. There has been no local work available. He works out of state in undetermined and varying amounts of time and is otherwise not available or trained to provide the care for the petitioner.

9. The eight and eleven year old siblings are in school from 9:00 a.m. to 2:00 p.m. The mother is not available to provide the care from 8:00 through 9:00 a.m. and from 2:00 through 3:00 p.m. During the certification period at issue, the other two minor children were in school until June 3, 2009 and returned to school on August 24, 2009. While the children are out of school, the mother is the sole caretaker and maintains the same routine of providing care to the petitioner in the mornings and taking care of her other children when the petitioner is finished with his therapies. The mother is the sole transportation provider to her children and is needed in the afternoons and evenings to tend to them.

10. The 21 year old sibling lives in a detached apartment on their two acre property, attends school, and works full time. He has not been trained nor is he available to provide care to the petitioner or to the petitioner's younger siblings. The petitioner's mother was the only caregiver in the home.

11. The daily routine for the nurse is to review the previous shift's nurse report and conducts an assessment of the petitioner's condition and vital signs. The nurse provides the petitioner with his medications and often, an albuterol treatment to help clean his lungs, reduce secretions, and keep his airway open. The petitioner often requires a lot of suctioning in the morning. The petitioner's mother then assists the nurse in helping to move him up in his bed in order to begin a feeding and other care. The nurse needs the mother's assistance because the petitioner weights 200 pounds and is six feet tall. The petitioner has splints that are rotated from soft splints to multi-podus boots. After feeding, the nurse and the petitioner's mother begin the petitioner's "vest treatment" in which he is placed in a vest that has air pockets which inflate to increase the muscle strength for his airways. The process of placing the petitioner into the vest requires two people due to his size. The vest therapy takes 45 minutes to one hour. If he is tolerating his therapy well, they continue with the use of the tilt table. A volunteer arrives around 11:00 a.m. and the nurse, mother and volunteer, transfer the petitioner from his bed to the tilt table. All three individuals are needed to transfer the petitioner from his bed to the tilt table because of his weight. During this therapy, he requires monitoring of his heart rate, oxygen levels and blood pressure and overall tolerance of the therapy. While in the tilt table it is not very safe for petitioner. He has a strenuous cough that causes him to bounce and allows the top strap to loosen exposing him to the danger of falling head first out of the tilt table. Removing him from the tilt table also requires the three individuals. Due to his height, the nurse requires use of a stool to suction him, if needed, while in this therapy. Due to his respiratory status, the petitioner requires monitoring of his vital signs throughout the day. He experiences

tremors if not moved carefully. The nurse also keeps records of his tolerance of different procedures and therapies. The petitioner has trunk and head control exercises as well and the nurse, volunteer, and mother are all necessary to effectuate the therapy and monitor the petitioner's response.

12. Petitioner developed pneumonia in January 2009 and tested positive for it again in March 2009.

13. The petitioner's seizure activity has increased in both frequency and severity. His condition has declined and he requires frequent respiratory management. The petitioner cannot be left alone for any length of time due to his unstable respiratory status. He has frequent episodes of respiratory distress with oxygen saturation levels in the low 80s that require critical medical/nursing skilled care in order to stabilize him.

14. The petitioner receives mat table therapies and during the day at 12:00 p.m. he would be in the middle of his mat table therapies. This therapy requires the use of a volunteer to provide support in the petitioner's back during his trunk exercises. The mother cannot perform this task due to her debilitating varicose veins. She cannot be on her knees for any length of time. The nurse supports the petitioner from the front and monitors his vital signs and intervenes if he becomes in distress. A volunteer supports the petitioner from behind and the mother is present to assist if he needs to be transferred back to bed at the conclusion of the therapy or if he has an adverse reaction to the therapy. They are able to perform this therapy only through the use of a volunteer and the therapy time is dictated by the volunteer's schedule.

15. The critical care required to stabilize the petitioner requires the ability to perform tasks and interpret the needed intervention. The person providing care would

need to be able to listen and interpret lung sounds, perform suctioning if needed, perform a total body repositioning, provide oxygen, or elevate the petitioner for better air exchange. The person would also have to be able to interpret if the petitioner is getting sick. The nurse who has been providing training to the mother believes the mother is not capable of interpreting what intervention is needed should the petitioner be in distress. And if the intervention required was a total body repositioning, she would not be able to do it on her own due to petitioner's size. The nurse who cares for the petitioner cannot work more than two days in a row for the petitioner due to the physical strength it requires to maneuver him for repositioning and treatments. If the petitioner was unable to be repositioned he could deteriorate quickly to the point that emergency services would have to be called.

16. The petitioner's treating physician, who is board certified in pediatrics and pediatric critical care medicine, recommended 24 hour skilled nursing services, seven days a week and he prescribed said services for him. The treating physician is aware of the petitioner's therapies and is aware that the mother may be able to perform some parts of the functions on her own. However, he believes that if the petitioner were to be in distress the mother would not be able to react to the distress and would not know what to do. The treating physician believes that the mother would be able to recognize that the petitioner was in distress but would not be able to react to that distress with appropriate interventions.

17. The mother's daily schedule begins at 7:00 a.m. when she takes one son to his bus stop. She then takes her other son to his bus stop at 8:15 a.m. The family lives in a rural, wooded area. It is dark when the petitioner takes her sons to the bus stop

and there are no sidewalks. Therefore, for safety of the children, she drives them to the bus stops in the morning. Afterwards, she returns to the home and assists with the vest therapy for the petitioner and his therapies on the mat table for trunk and head control. The mother cannot safely put the vest on him by herself. The mother believes that she can perform certain functions such as suctioning, checking his blood pressure, starting a feeding, and giving the petitioner a bath. However, she believes that she cannot reposition him by herself or change his G-Tube or do any corrective actions with his tracheostomy. The mother has never had training in listening to the petitioner's lungs and cannot perform the upper assessments as the nurses do them. The petitioner requires total body repositioning every two hours. Therefore, the mother cannot be left alone with the petitioner for any period of time greater than two hours. The mother assists the night nurses in repositioning the petitioner and tending to his toileting hygiene due to his body size as the night nurse cannot do it by herself.

18. The mother has been receiving training, has made progress, but cannot perform the more complicated measures of assessing the petitioner when in distress and responding accordingly. On a day when a nurse was not available and the petitioner was in distress, the mother had to call a friend to assist in repositioning the petitioner and she also had to call emergency services for assistance.

19. The respondent's registered nurse visited the petitioner at home. She arrived at the home at 10:15 a.m. shortly after April 14, 2009, when the hearing request was made. At the time of her arrival, the nurse and the mother had the petitioner in the vest treatment. The respondent's nurse believed that the use of the vest was to ameliorate a life threatening condition. The respondent's nurse agreed that it takes two

people to remove the vest and that at the time of her visit the attending nurse was monitoring the petitioner's heart rate and his response to the therapy. The respondent's nurse believed that the 24 hour nursing care, seven days a week was necessary.

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. The Florida Medicaid Program is authorized by Chapter 409, Florida Statutes, and Chapter 59G, Florida Administrative Code. The Program is administered by the Agency for Health Care Administration.

Fla. Stat. ch. 409.9132(d) states in part:

Medical necessity or 'medically necessary means any goods or services necessary to palliate the effects of a terminal condition, or to prevent, diagnose, correct, cure, alleviate, or preclude deterioration of a condition that threatens life, causes pain or suffering, or results in illness or infirmity, which goods or services are provided in accordance with generally accepted standards of medical practice. For purposes of determining Medicaid reimbursement, the agency is the final arbiter of medical necessity. Determinations of medical necessity must be made by a licensed physician employed by or under contract with the agency and must be based upon information available at the time the goods or services are provided."

The above controlling authority explains that Medicaid reimburses for services determined to be medically necessary. It also explains that determinations of medical necessity must be made by a licensed physician employed by or under contract with the agency and must be based upon information available at the time the goods or services are provided.

Fla. Admin. Code 59G-1.010 Definitions, defines medically necessary as applied in Medicaid prior authorization decisions and states in part:

(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.

The above legal definition of medically necessary, as applied in Medicaid prior authorization decisions by the agency physician, requires that the service reimbursed by Medicaid must not be in excess of the patient's needs, must 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 as well as the restriction that the service must be furnished in a manner not primarily intended for the convenience of the recipient's caretaker.

The Florida Medicaid Home Health Services Coverage and Limitations

Handbook defines the guidelines for private duty nursing services as follows at page 2-

17:

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...

The above authorities require that private duty nursing services must be documented as medically necessary to be reimbursed by Medicaid. 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.

In this case, the family living together consists of the mother, the father, the eight year old and an eleven year old who attend school outside of the home. The petitioner also has a 21 year old sibling who lives in a detached apartment on the property.

The father works out of state in undetermined and varying amounts of time and is otherwise not available or trained to provide the care for the petitioner. The 21 year old attends school and works full time. He has not been trained nor is he available to

provide care to the petitioner or to the petitioner's younger siblings. The petitioner's mother was the only caregiver in the home.

The petitioner receives a vest treatment daily to increase his muscle strength for breathing and reducing secretions. He also receives physical therapy daily in the tilt table and mat table to increase his trunk strength and head control. The discontinuation of those therapies would cause deterioration of his functional abilities. The mother cannot perform the therapies and the monitoring of his heart rate, oxygen levels and blood pressure, on her own. The vest treatment takes two people, the nurse and the mother, to put the petitioner in the vest. The mother is not physically capable to maneuver the petitioner into the vest safely on her own as he weights 200 pounds. Three people are needed, the nurse, mother, and a volunteer, to place the petitioner in the needed apparatus and to perform the physical therapy. The mother cannot assist physically in this therapy due to her varicose veins. The petitioner has to be repositioned every two hours. The mother cannot reposition the petitioner due to his size and weight. The petitioner requires monitoring of his vital signs, episodes of respiratory distress and tremors throughout the day. The mother does not have the skills and is not capable of interpreting what intervention is needed should the petitioner go into respiratory distress or other crisis during the day.

Based on the above it is determined that due to the complexity of the petitioner's medical care the mother cannot provide for his care from 8:00 a.m. to 12:00 p.m. Monday through Friday. Therefore, it is concluded that the petitioner requires private duty nursing services 24 hours per day seven day per week and the private duty nursing

services are medically necessary. The denial of 520 hours of private duty nursing is reversed.

DECISION

The appeal is granted. The reduction of private duty nursing services is reversed for the certification period of March 16, 2009 through September 11, 2009.

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.

DONE and ORDERED this 8th day of October, 2009,

in Tallahassee, Florida.



Morris Zamboca
Hearing Officer
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Copies Furnished To: