

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

FILED

SEP 11 2009

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-03488

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 06 Pinellas
UNIT: AHCA

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on July 7, 2009, at 10:10 a.m., in St. Petersburg, Florida. The petitioner was not present. He was represented by mother,

The respondent was represented by Patricia Cobb, registered nurse specialist and Stephanie Lang, registered nurse specialist. Witnesses for the respondent from Keystone Peer Review Organization (KePRO) were Rakesh Mittal, M.D., physician reviewer, and Melanie Clyatt, registered nurse review operations manager.

The hearing was convened before the undersigned hearing officer on August 5, 2009, at 10:37 a.m., in St. Petersburg, Florida. The petitioner was not present. He was represented by mother Present on behalf of the petitioner was , assistant administrator for

The respondent was represented by Stephanie Lang, registered

nurse specialist. Witnesses for the respondent from Keystone Peer Review Organization (KePRO) were Rakesh Mittal, M.D., physician reviewer, and Gary Erickson, registered nurse reviewer.

ISSUE

The petitioner is appealing the notices of May 13, 2009, May 21, 2009 and July 13, 2009 for the respondent's action to deny 540 hours of private duty nursing (7:00 p.m. to 10:00 p.m., seven days a week) for the period of May 4, 2009 through October 30, 2009. The respondent has the burden of proof.

FINDINGS OF FACT

1. The petitioner care is medically complex. The petitioner is 17 years old. He was receiving private duty nursing private duty nursing 24 hours a day seven days a week. The petitioner's mother is the petitioner's primary caregiver. The petitioner resides with his mother.

2. Prior authorization for private duty nursing is reviewed every 180 days. KePRO is the contract provider for the respondent for the prior authorization decisions for private duty nursing. The request for private duty nursing is reviewed by a nurse reviewer and a physician consultant.

3. The nursing agency requested 4,320 hours of private duty nursing for the petitioner for the period of May 4, 2009 through October 30, 2009. This request would be 24 hours a day of private duty nursing. The nursing agency submitted information of the petitioner's diagnoses, services provided, family situation and synopsis of care. The nursing agency indicated that the mother

and father were caregivers, the mother works varying hours, the mother has no mental or physical limitations and the petitioner has no siblings.

4. The petitioner's home health agency submitted the information pertaining to the petitioner to KePRO through an internet program. This information is generated to the computer for review by KePRO from the information entered by the petitioner's home health agency via computer. This exchange of computer information is referred to as I-Exchange. The information provided by the home health agency is converted into a document called the Internal Focus Finding.

5. The initial nurse reviewer screened the petitioner's request for private duty nursing using the Internal Focus Finding. The Internal Focus Finding provides information to KePRO of case identifiers and additional information regarding the petitioner. This information is generated to the computer for review by KePRO from the information entered by the petitioner's home health agency via computer. On May 6 and May 8, 2009, the nurse reviewer requested the nursing agency to provide the mother recent work scheduled including days and time worked. On May 11, 2009, the nursing agency responded that the mother schedule for the last week was: "Sunday 7pm-7am; Monday off; Tues 7pm-7am; Wed 7pm-7am; Thursday off; Fri 3-11pm; Sat 7pm-7am". The petitioner's request for 4,320 of private duty nursing was then referred to the board certified physician consultant.

6. The initial physician consultant determined was based on the information received from the nursing agency. The initial physician consultant

determined that the requested hours were excessive. He would only approve hours to cover the mother's work schedule and sleep. The mother needed to provide a schedule as coverage for flex hours was not permissible. A PDN/PC Recipient Denial Letter was sent to the petitioner on May 13, 2009. The notice informed the petitioner that for the requested 4,320 hours of private duty nursing for the period of May 4, 2009 through October 30, 2009, no hours were approved and 4,320 hours were denied.

7. The nursing agency requested a reconsideration. The nursing agency restated that petitioner's diagnoses, need for 24 hours skilled nursing and the mother's varying work hours with a staffing agency. The nursing agency provided information that the mother was single and has health issues which limit her ability to provide some of his care, including lifting restrictions due to cervical spine fusion. This information is differing to the information provided in the initial request.

8. The reconsideration was reviewed by a second physician consultant. The second physician consultant stated: "I find it hard to believe that the mother works for a 'staffing agency' from 7pm to 7am at night. In addition KePRO cannot authorize 'flex hours' Suggest to UPHOLD DENIAL. Previous cert period referred that mother was working 50+ hours as a nurse?". The reconsideration was denied for the 4,320 hours of private duty nursing. The respondent sent a PDN/PC Recipient Reconsideration - Denial Upheld notice on May 21, 2009.

9. The hearing was reconvened for the parties to discuss possible resolution. The information provide by the mother was that the father is not in the

home, she works Monday through Friday 10:00 am to 5:30 p.m. plus 30 minutes travel time each way and does flex hours when she is able. The physician reviewer, Dr. Mittal, reviewed this information that was different from the information provided by the nursing agency both for the initial request and for the reconsideration. The physician reviewer offered to the petitioner that the respondent would authorize all hours except for either two nights a week or two hours a night seven days a week. The physician reviewer explained that KePRO must follow the Home Health Services Coverage and Limitation Handbook in that caregivers are required to provide care to the fullest extent while they are home, private duty nursing is to supplement care provide by parents and Medicaid does not all flex hours. KePRO notified the mother that the nursing agency could request a modification when additional hours were needed. On July 7, 2009, The physician reviewer reported that the mother agreed to provide care two nights a week and this would be discussed between the mother and the nursing agency. On July 8, 2009, the nursing agency notified KePRO that the mother does agree to provide care two nights a week. On July 12, 2009, the physician reviewer denied care from Friday at 7:00 p.m. to Saturday 7:00 a.m. and from Saturday 7:00 p.m. to 7:00 a.m. The respondent sent a PDN/PC Recipient Reconsideration - Overturned notice on July 13, 2009. The notice informed the petitioner that for the requested 4,320 hours of private duty nursing for the period of May 4, 2009 through October 30, 2009, 3,708 hours were approved and 612 hours were denied.

10. The petitioner's mother does not agree with KePRO's offer of either two nights a week or two hours a night seven days a week. The mother stated as follows. She cannot lift the petitioner. She is a licensed practical nurse working for a staffing agency. She cannot do two nights in a row by Sunday she would be a zombie. She is taking medication for depression, anxiety, pain and blood pressure. This week she had to cover three nights when the night nursing did not come to the home to provide care to the petitioner. She provides a minimum of three hours of direct care every day. She is preparing his meals or getting medication or diapers. She has to train each and every nurse that cares for the petitioner. The nursing agency was not aware of her depression or her blood pressure. The lift in the home is not working. She is able to do her job as a licensed practical nurse with a staffing agency with her mental and physical problems. She wants to know when she just gets to be the petitioner's mother.

11. The physician reviewer stated that he was aware of the petitioner's diagnoses, symptoms, treatments and that the mother is not physically able to lift the petitioner. He stated that the nursing agency is responsible to train the nursing agency nurses not the mother. He noted that the mother stated she is providing three hours a day of direct care and as a nurse the mother is capable of providing care for the petitioner. On that basis, the physician reviewer offered to authorize all hours but three hours a day from 7:00 p.m. to 10:00 p.m., seven days a week. This would be a denial of 540 hours. The mother declined the offer to provide care for the petitioner from 7:00 p.m. to 10:00 p.m., seven days a week. The petitioner has a sister that does not live in the home. The mother

stated that if she provided care for the petitioner for the hours from 7:00 p.m. to 10:00 p.m., seven days a week she could not have dinner with her daughter.

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.

1. As to the issue as to whether or not medical necessity was demonstrated for 24 hour private duty nursing.

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 Home Health Services Coverage and Limitation Handbook under Licensed Nurse and Home Health Aide Visit Services, on pages 2-14 and 2-15

"Skilled Nursing Services", states:

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 Home Health Services Coverage and Limitation Handbook under Licensed Nurse and Home Health Aide Visit Services, on page 2-15 "Home Health Aide Services", states:

Home health aide services help maintain a recipient's health or facilitate treatment of the recipient's illness or injury. The following are examples of home health aide services reimbursed by Medicaid:

- Assisting with the change of a colostomy bag;
- Assisting with transfer or ambulation;
- Reinforcing a dressing;
- Assisting the individual with prescribed range of motion exercises that have been taught by the RN;
- Assisting with an ice cap or collar;
- Conducting urine test for sugar, acetone or albumin;
- Measuring and preparing special diets;
- Providing oral hygiene;
- Bathing and skin care; and
- Assisting with self-administered medication.

Home health aides must not perform any services that require the direct care skills of a licensed nurse.

The petitioner is medically complex. It is undisputed that nursing services are required. The evidence clearly supports that this petitioner requires 24 hour nursing care. Simply because medical necessity is found for the petitioner to require 24 hour private duty nursing does not mandate the granting of this benefit. The analysis must continue to determine if there are other parties that may be responsible for providing this benefit.

The mother is a licensed practical nurse working for a staffing agency. The mother is trained to provide all of skilled care services and it is uncontested that she is capable of caring for the petitioner. Since the mother can safely

provide care to the petitioner, we must then determine if there are other barriers to providing this care.

The mother is able to do her job as a licensed practical nurse with a staffing agency with her mental and physical problems. As no further explanation of that was offered, the hearing officer considered the mother's inability to lift as a barrier to providing care for the petitioner. Lifting is not a skilled nursing service. The petitioner can apply for home health aide that can assist with lifting. The rule sets forth that the request 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. The services of a home health aid would be a less costly service.

The mother indicated a barrier to her providing care for the petitioner from 7:00 p.m. to 10:00 p.m., seven days a week was that she could not have dinner with her daughter. The rule states that the service must be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

The Home Health Services Coverage and Limitation Handbook has been promulgated into rule in the Florida Administrative Code at 59G-4.130 (2). The Home Health Services Coverage and Limitation Handbook under Private Duty Nursing, on page 2-15 "Parental Responsibility", states:

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...
(emphasis added)

The basis for the reduction by the respondent was essentially that while medical necessity was demonstrated for skilled nursing services 24 hours daily, the hours should be reduced to allow for the parents to provide care to the fullest extent possible. The respondent determined that the mother should provide care for the petitioner from 7:00 p.m. to 10:00 p.m., seven days a week.

The hearing officer considered all evidence submitted at the hearing and reviewed all conditions of medical necessity as set forth the rules of the Program. The evidence demonstrates that the petitioner is in need of services. The issue then rests on whether the mother can provide the services during the time period that the respondent has determined that they should. We must look at the skill of the parents and the impact of other responsibilities in the household. The handbook sets forth the private duty nursing services are authorized to *supplement* care provided by parents and parents must participate in providing care to the fullest extent possible. The petitioner's mother is very involved with the petitioner's care. As a license practical nurse for a staffing agency, the petitioner mother is more than capable of safely providing care to the petitioner. The hearing officer concludes that the mother could provide care from 7:00 p.m. to 10:00 p.m., seven days a week. Based on the above cited authorities the hearing officer concludes that the respondent's action to deny 540 hours of private duty nursing (7:00 p.m. to 10:00 p.m., seven days a week) for the period of May 4, 2009 through October 30, 2009 was within the rules of the Program. If the petitioner needs other types of services to assist her, then the home health agency should submit that request to the respondent.

DECISION

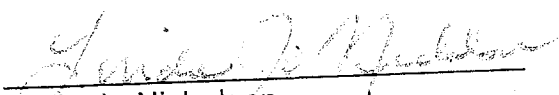
This appeal is denied.

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.

DONE and ORDERED this 11th day of September 2009,

in Tallahassee, Florida.



Linda Jo Nicholson
Hearing Officer
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Copies Furnished To