

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

FILED

OCT 23 2009

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-04315

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 12 Sarasota
UNIT: AHCA

RESPONDENT.

FINAL ORDER

Per notice, a hearing was held by telephone before the undersigned hearing officer on September 3, 2009, at 10:02 a.m. All the parties appeared by telephone. The minor petitioner was not present, but was represented by her mother, _____, who also testified. The petitioner's father, _____, appeared as a witness. The respondent was represented by Pat Brooks, program operations administrator with the Agency Health Care Administration (AHCA). Ms. Brooks also testified. Karen Smith, registered nurse specialist with AHCA, appeared as a potential witness. Present as witnesses for the respondent from Keystone Peer Review Organization (KePRO) were Rakesh Mittal, M.D., physician reviewer, and Teresa Ashe, review operations supervisor.

ISSUE

The petitioner appeals the respondent action of June 25, 2009 to deny 512 hours of private duty nursing (PDN) for the period of June 4, 2009 through November 30, 2009, per notice. Specifically, the petitioner appeals the elimination of approved PDN hours Monday through Friday from 7:00 p.m. to 11:00 p.m. The respondent has the burden of proof.

FINDINGS OF FACT

1. The petitioner is a three and a half years old and is eligible for Medicaid. The petitioner lives with her mother, father and an 11 year-old sibling. Both the mother and father are employed full-time.
2. The nursing agency requested 4,112 hours of private duty nursing for the petitioner for the period of June 4, 2009 to November 30, 2009. The respondent denied 512 hours of PDN. The denied hours are from 7:00 p.m. to 11:00 p.m., Monday through Friday.
3. KePRO is the contract provider for the respondent for the prior authorization decisions for PDN. The request for PDN is reviewed by a nurse reviewer and a physician consultant.
4. The petitioner's home health agency submitted information pertaining to the petitioner to KePRO through an internet program. This information is generated for review by KePRO from the information entered by the petitioner's home health agency. 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 KePRO nurse reviewer screened the petitioner's request for PDN, and referred to the physician consultant. The KePRO physician concluded there are no health issues for the parents or the sibling. The KePRO physician concluded that the parents are capable to provide independent care during the evenings when they are home from work. Thus, the KePRO physician denied the requested PDN hours from 7:00 to 11:00 p.m. Mon.-Fri., but approved the other requested hours.
6. The petitioner's nursing agency requested PDN hours for medication administration, teaching, perform tube feedings/care, perform bowel program, aspiration precautions, seizure precautions, and tracheostomy (trache) care. The petitioner's parents can provide needed care when both are present in the home.
7. On June 8, 2009, the home health agency requested reconsideration. The reconsideration request advised that the petitioner will pull-out her trache on multiple times during the day and night. However, the petitioner has recently reduced this behavior, per testimony. Two persons are needed to re-insert the trache. The petitioner's mother does not feel competent alone to re-insert the trache. Trained nurses are able to independently re-insert the trache when necessary. The mother needs to be available to assist with her other daughter while the father provides care to the petitioner when he is home from work.
8. On June 25, 2009, a second KePRO physician reviewed a request for reconsideration of the denied hours. This physician concluded that both

parents are in the home from 7 p.m. to 11 p.m. to independently care for the petitioner. The physician concluded that the trache problem can be prevented with a restrictive measure applied to the child's arms so she can not reach the trache. The KePRO physician advised that skilled nurses should teach the parents of this restriction. The second physician consultant upheld the previous denial of 512 PDN hours.

9. The petitioner has been taught sign language to communicate her needs and feelings. If the petitioner's hands were restrained, then this communication would be eliminated. The petitioner's mother does not believe it appropriate to eliminate the progress in communication by the hand restraint.
10. Both the petitioner's parents work full-time in outdoor jobs. The mother works in a nursery and the husband works as a land surveyor. Both parents must shower immediately after returning from work before providing any care to the petitioner. KePRO understood that the mother works from 8:00 a.m. to 5:00 p.m., Monday through Saturday. However, the mother provides transportation for both children to and from school. Therefore, the mother does not arrive home until 7:00 p.m. on many occasions to make up for the lost hours in transportation time.
11. KePRO understood that the father works 7:00 a.m. to 7:00 p.m., Monday through Friday. The father's travel time in his employment as a surveyor has increased due to the slower economy. Therefore, he usually arrives home by 8:00 p.m. from work.

12. The petitioner seeks a compromise in the number of denied hours. At the hearing, the respondent offered to reduce the denied PDN hours at issue from 8:00 p.m. to 11:00 p.m., rather than from 7:00 p.m. to 11:00 p.m. The petitioner asserted that this increase would be better, but seeks the reduction of PDN hours from 9:00 p.m. to 11:00 p.m. The respondent retained its decision to reduce approved PDN hours from 8:00 p.m. to 11:00 p.m.

CONCLUSIONS OF LAW

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

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.

It is undisputed that nursing services are required in view of the petitioner's medical needs. The evidence clearly supports that the petitioner requires 24 hour nursing care. However, simply because medical necessity is found for the petitioner to require 24 hour PDN 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 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 is 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. After further evaluation of the information presented at the hearing, the respondent determined that the reduction should be from 8:00 p.m. to 11:00 p.m. Mondays through Fridays. The petitioner believes the reduction should be from 9:00 p.m. to 11:00 Monday through Friday.

The issue rests on whether the parents can provide needed care for the petitioner during the time period that the respondent has determined that they should. We must then look at the ability of the parents to provide needed care and the impact of other responsibilities in the household.

Both parents are generally able to provide care for the petitioner. However, the evidence shows that two persons are needed to re-insert the trache on the occasions when the petitioner has pulled out her trache. Since the petitioner communicates by sign language to express her needs, it is not concluded as appropriate to restrain her hands to prevent her from this behavior. Thus, two persons are needed in the home to concurrently provide care for the petitioner, and also look after the needs of the other sibling.

The evidence establishes that both parents are generally in the home by 8:00 p.m. after their work schedules. Upon returning home, both parents must shower before providing care to the petitioner, as both work outside. The evening meal would then need to be prepared and eaten. In view of the petitioner's care needs and the parents work hours, it is reasonable that the parents could not begin to provide care to the petitioner until 9:00 p.m., as requested by the petitioner.

DECISION

This appeal is granted, in part.

For the certification period of June 4, 2009 through November 30, 2009, private duty nursing is granted for the additional hours of 7:00 p.m. to 9:00 p.m.

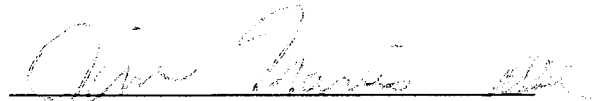
Mondays through Fridays, as sought by the petitioner at the hearing. PDN hours remain denied from 9:00 p.m. to 11:00 p.m. Mondays through Fridays.

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 23rd day of October, 2009,

in Tallahassee, Florida.



Jim Travis
Hearing Officer
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Copies Furnished To