

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-05174

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION
CIRCUIT: 04 Duval
UNIT: AHCA

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened telephonically before the undersigned hearing officer on October 15, 2009, at 3:38 p.m. The petitioner was not present. The petitioner was represented by his mother, The respondent was represented by Cynthia Barge, Area Four Registered Nurse (RN) Specialist with the Agency for Health Care Administration (AHCA). Testifying on behalf of the respondent was Dr. Rakesh Mittal, medical reviewer, Keystone Peer Review Organization (KePRO) and Bonnie Wellington, RN reviewer with KePRO.

ISSUE

The petitioner is appealing a decrease in the number of hours of private duty nursing (PDN) hours under Medicaid. The respondent held the burden of proof.

FINDINGS OF FACT

1. The petitioner is an eleven year old female. Her diagnoses include seizure disorder, Steven Johnson syndrome and dwarfism. The petitioner needs assistance with all the activities of daily living; she can not talk or walk.

2. Prior to the action under appeal, the petitioner was receiving PDN services through Medicaid for seventeen and one half hours per day (3:00 pm until 8:30 am) weekdays (school days) and twenty-four hours per day on weekends (and non-school days). The petitioner has been receiving PDN services for approximately one year.

3. Recipients of PDN services must undergo an eligibility redetermination process every six months. The home healthcare agency that provides the PDN service is responsible for submitting the online redetermination request. In July 2009, the petitioner's home healthcare agency requested her PDN hours remain the same (3584 total hours for the entire six month certification period; specific times are detailed in the above paragraph) for the certification period July 20, 2009 – January 15, 2010. On July 29, 2009, the respondent approved 720 hours (7 pm – 7 am seven days per week) and denied 2864 hours. The petitioner requested reconsideration. On August 11, 2009, the respondent issued a letter which partially overturned the previous denial; total approved hours 1904 (11 pm – 9 am seven days per week and 4 hours of the family's choosing on Wednesday), total hours denied 1680. Home health aide services were approved for hours when the petitioner is not receiving PDN services (This means either a nurse or an aide will be with the petitioner twenty four hours per day, seven days per week.). The petitioner requested a hearing on August 12, 2009. The petitioner's PDN hours have been continued at the previous level pending the results of the hearing.

4. KePRO is the Peer Review Organization (PRO) contracted by AHCA to perform medical reviews for private duty nursing and personal care assistance under the Prior Authorization Program for Medicaid recipients in the State of Florida. The KePRO reviewing physician explained that PDN services are intended to supplement the care provided by the family. The decision to approve or deny PDN hours is based on a number of factors including the petitioner's medical needs, the number of family members or caregivers, their work and/or school schedules and medical impairments. In the instant case, KePRO determined that the petitioner does require a caregiver be present at all times. The petitioner lives with her mother and three minor siblings (ages 15, 12 and 8). These three children are capable of preparing certain foods, feeding, bathing and dressing themselves as well as getting themselves to and from the bus stop. The petitioner's mother does not work. Her medical impairments included diabetes, arthritis, high blood pressure and dislocated disk. All three siblings attend school full time; none of the siblings suffer from any physical impairments, the oldest sibling is cognitively impaired (his level of cognition is that of an 8 year old). None of the siblings are able to assist with the petitioner's care. The petitioner requires medications twice a day, once in the morning and once at night; the reviewing physician explained that PDN services from 11 pm -9 am were approved so that a nurse would be in the home to administer the medication. The petitioner's mother is able to feed and suction her. The petitioner's other needs such as bathing, toileting, and general moving requirements can be performed by a home health aide who will be in the home when a nurse is not there (9 am – 11 pm) as the mother has lifting restrictions of not more than 20 lbs. The petitioner weighs 45 pounds.

5. The petitioner's mother explained that in addition to her aforementioned impairments, she also suffers from peripheral vascular disease, neuropathy, bulging disks in her back. She admitted that when she is feeling well, she can take care of all her daughter's needs, however, her illnesses are chronic (no regular pattern of occurrence) and requires daily medication which makes her drowsy and dizzy. She has confidence that a nurse can take care of all her daughter's needs when she is physically unable to do so; she fears that an aide will not provide the same level of care. The reviewing physician explained that if or when the mother's medical condition worsens, she can request a modification (temporary change) in PDN services through the home health agency. Modification requests are processed within twenty-four hours.

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.

Although the term medically necessary may be used in a variety of context, at issue is whether or not medical necessity as defined in Medicaid rules 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 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 handbook on page 2-19 states:

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 basis for the reduction by the respondent was essentially that while there is a demonstrated need for skilled nursing services daily, the hours should be reduced to

allow for the parent to provide care to the fullest extent possible. The hearing officer considered all evidence submitted at the hearing and reviewed all conditions for medical necessity as set forth in the rules of the Program.

The petitioner's care is medically complex. The evidence demonstrates that the petitioner is in need of services. It is undisputed that nursing services are required. For the Medicaid Program to authorize and pay for private duty nursing service to meet this need, the required nursing care must meet the rule definition of medical necessity. The analysis must continue to determine if there are other parties that may be responsible for providing this service. The handbook sets forth that 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 issue then rests on whether the parent can provide the services during the time period that the respondent has determined that she should. We must look at the skill of the parent and the impact of other responsibilities in the household.

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 hearing officer considered the mother's limitations and her statement that she can provide for her daughter's needs unless she is not feeling well, in which case, a modification can be requested. 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 mother is trained in the petitioner's care. The evidence demonstrated that the mother does not work and has three other minor children in the home. However, the findings show that these three children are capable of preparing certain foods, feeding, dressing and bathing themselves, as well as getting themselves to and from the bus stop.

The services of a home health aide are a less costly service than the skilled nurse and have been approved for the remainder of the day when a nurse is not in the home to assist the mother. The petitioner's mother is able to feed and suction the child. The petitioner's other needs such as bathing, toileting, and general moving requirements can be performed by a home health aide who will be in the home when a nurse is not there, due to the mother's lifting restrictions. In the opinion of the respondent's physician expert, the mother can provide the petitioner's required care with home health aide assistance. On this basis, services of a skilled nurse for the seventeen and one-half hours a day on weekdays and twenty-four hours on the weekends, would not meet the criteria for medical necessity.

Next to consider are the hours that the mother would be available to provide care to the petitioner. The respondent determined that the mother should provide care for the petitioner from 9 am to 11 pm seven days per week (and all but four hours on Wednesdays) with the assistance of a home health aide. The petitioner's mother admits she can care for the petitioner unless she is not feeling well. The agency has a procedure in place for these situations which is called a modification request and is responded to within twenty-four hours. Parents should be allowed eight hours of sleep

time therefore, the mother would be unavailable to care for the petitioner for at least eight hours per night.

The hearing officer concludes that the mother could provide care for the petitioner with assistance from a home health aide from 9 am to 11 pm seven days a week, with the exceptions of one day per week for four hours of skilled nursing in the home to allow time for shopping and running errands. This takes into consideration the medication administration given by the nurse during the approved hours. Based on the above cited authorities, the hearing officer concludes that the agency's reduction at issue was within the rules of the Program.

DECISION

The 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.

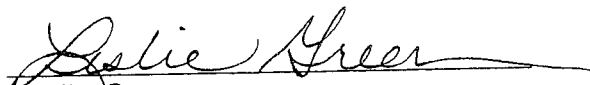
FINAL ORDER (Cont.)

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DONE and ORDERED this 10th day of November, 2009,

in Tallahassee, Florida.



Leslie Green
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Copies Furnished To: