

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

FILED

FEB 25 2010

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-8190
09F-8191

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 11 Dade
UNIT: AHCA

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was convened telephonically before the undersigned-hearing officer on January 20, 2010, at 1:22 p.m., in Ft. Lauderdale, Florida. The petitioners were not present but were represented by their mother,

The respondent was represented by Jeffrey Douglas, with the Agency for Health Care Administration (AHCA). Testifying by phone on behalf of the respondent was Dr. Rakesh Mittal, physician reviewer and Melanie Clyatt, RN, review operations supervisor, both with Keystone Peer Review Organization (KePRO). Dennis Torres served as translator.

ISSUE

The petitioners are appealing the respondent's action to deny 360 hours (2 hours daily, 7 days a week) and approving 3960 (22 hours daily, 7 days a week) of private duty

nursing from a request of 4320 hours (24 hours daily, 7 days a week) for the period of November 3, 2009 through May 1, 2010. The respondent has the burden of proof.

FINDINGS OF FACT

1. The petitioners are Medicaid recipients in the state of Florida and receive shared private duty nursing services. Services at the previous level have continued throughout the hearing process.
2. The petitioner's (Alberto age 17) diagnosis among others submitted to the agency was "...DX with ichthyosis congenital, bacterial pneumonia, respiratory problems, lack of normal physiological development, GT, incontinent w/o sense of aware, trach, incontinence of feces, aphasia, has an apnea monitor on place..."
3. The petitioner's (Jean, age 14) diagnosis among others submitted to the agency was "...diagnosed with ichthyosis congenital, pneumonia, gastrostomy, tracheostomy, caccination for DTP + tab, profound mental retardation, pt is aphasic, he is incontinent of bladder and bowel..."
4. The respondent has contracted KēPRO South to perform medical reviews of Private Duty Nursing and the Personal Care Prior Authorization Program for Medicaid beneficiaries. This prior authorization review determines medical necessity of the hours requested, under the terms of the Florida Medicaid Program. The request for service is only submitted by the provider, along with all information required, in order for KēPRO to make a determination and recommendation on medical necessity for the level of service being requested.

5. On November 3, 2009, the provider (Gifted Health Group Inc.) requested 24 hours daily, 7 days a week of private duty nursing services for the petitioners for the certification period. The provider submitted medical and social information on the petitioner, the mother and siblings in order to determine if the hours being requested were justified. Medical necessity for the service is not at issue.
6. The petitioner's mother is a single parent which works 8am-5pm Monday through Friday. The mother acknowledges being able to provide care for the petitioners as she has done so for years. There is another child in the home with medical problems that attends school and receives services. The petitioners receive other shared home health services from the Med-Waiver Program.
7. In the request submitted, the provider listed the nurses duties as "Medication administration, Teaching, Perform tube feedings/care, Aspiration precautions, Seizure precautions, Tracheostomy care."
8. On November 3, 2009 the physician consultant, board certified in pediatrics reviewed the request and approved it in part, denying 2 hours daily (any 2 hrs the petitioner chooses daily) and approving 22 hours daily stating that the mother is able to provide the petitioners 2 hours a day care when the home health aide service is being received.
9. The agency representative testified that PDN services are authorized to supplement care provided by parents and that they must participate in providing care to the fullest extent possible. Medicaid does not reimburse private duty

nursing services provided solely for the convenience of the parent or the caregiver. This was obtained from the Home Health Services Coverage and Limitations Handbook (July 2008).

10. On November 5, 2009 a reconsideration was requested by the provider stating how the mother feels that she could not be left alone to care for the petitioners and would not be able to handle an emergency.

11. On November 19, 2009, a second board certified physician consultant reviewed the request and upheld the original decision to approve 22 hours daily and deny 2 hours daily of PDN services and documented the following: "...The initial decision by the Physician Reviewer is a very reasonable request so that the PCG meets the criteria for this PDN program..." The petitioner and provider were issued a PDN/PC Recipient Reconsideration-Denial Upheld Notice.

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.

Federal Regulations at 42 C.F.R. § 440.230, Sufficiency of amount, duration, and scope, informs:

(d) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

Fla. Stat. 409.905 addresses Mandatory Medicaid services under the State Medicaid Plan and informs:

Mandatory Medicaid services.--The agency may make payments for the following services, which are required of the state by Title XIX of the Social Security Act, furnished by Medicaid providers to recipients who are determined to be eligible on the dates on which the services were provided. Any service under this section shall be provided only when medically necessary and in accordance with state and federal law...

Florida Statute 409.913 addresses Oversight of the integrity of the Medicaid program, with (1)(d) describing "medical necessity or medically necessary" standards and says in relevant part: "...For purposes of determining Medicaid reimbursement, the agency is the final arbiter of medical necessity..."

Fla. Admin. Code 59G-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. ...

(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 Florida Medicaid Home Health Services Coverage and Limitation Handbook has been promulgated into rule in the Florida Administrative Code at 59G-4.130 (2).

The Florida Medicaid Home Health Services Coverage and Limitation Handbook (July 2008), under Private Duty Nursing, on page 2-17 Parental Responsibility, states:

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 Florida Medicaid Home Health Services Coverage and Limitations Handbook (July 2008), discusses the authorization process for private duty nursing services as follows at page 2-19:

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 respondent argues that the mother can provide 2 hours daily of care anytime that she chooses. They have approved 22 hours daily of PDN and have shared home health aide services provided by the Med-Waiver Program. The mother works until 5pm and is available on the weekends.

The mother's concern was with any emergencies that may arise as it did in September 2009 with a seizure. The physician consultant responded that emergencies cannot be foreseen and when emergencies do arise 911 must be called. No other emergency has resulted since September 2009.

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 evidence did not demonstrate that the mother was incapable of providing care to the petitioners, however the petitioner was given the chose to select the hours (2 hours daily) that she felt would be less of a burden and could have the presence of the home health aide.

Based on the above cited authorities, the hearing officer concludes the respondent's action to approve 3960 of private duty nursing and deny 360 hours of the 4320 hours requested was within Program rules.

DECISION

This appeals are denied as stated in the Conclusions of Law.

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.)
09F-8190
PAGE - 8

DONE and ORDERED this 25th day of February, 2010,

in Tallahassee, Florida.

A. G. Littman #

A. G. Littman
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
850-488-1429

Copies Furnished To: