

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-8192

PETITIONER,

Vs.

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

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned-hearing officer on January 13, 2010, at 8:20 a.m., in Miami, Florida. The petitioner was not present and was represented by her mother, _____ The respondent was represented by Monica Otalora, specialist with the Agency for Health Care Administration (AHCA). Testifying by phone on behalf of the respondent was Dr. Robert Buzzeo, physician reviewer and Bonnie Wallington, RN, review operations supervisor, both with Keystone Peer Review Organization (KePRO). Dennis Torres served as translator.

ISSUE

The petitioner is appealing the agency's action of October 27, 2009 and November 24, 2009 to deny 360 hours (2 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 October 13, 2009 through April 10, 2010. The respondent has the burden of proof.

FINDINGS OF FACT

1. The petitioner is six years old, weighs 45-50 pounds (Petitioner's Exhibit 2) and is a Medicaid recipient in the state of Florida. The petitioner's diagnosis among others submitted to the agency was "Convulsive epilepsy, CPMR, Apnea, Encephalopathy, GERD, Gtube." Services at the previous level have continued throughout the hearing process.
2. 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.
3. On October 22, 2009, the provider (Maxim Healthcare Services Inc.) requested 4320 hours (24 hours daily, 7 days a week) of private duty nursing services for the certification period. The provider submitted medical and social information on the petitioner, the mother and sibling in order to determine if the hours being requested were justified. Medical necessity for the service is not at issue.
4. The petitioner's mother is a single parent which states that she works 9-12 hours daily, 7 days a week as a self-employed manicurist. She has no set work schedule

that she conforms to. There is a three year old sibling in the home that is not disabled.

5. In the request submitted the provider listed the nurses duties as "...ongoing physical assessments, seizure monitoring and interventions, VNS application, medication administration, oxygen monitoring via mask or bag valve mask, or blow by, aerosol treatments, bolus FT feedings, GT site care and maintenance, ADL's, prosthetic applications, skin monitoring, stimulation, ROM exercises."
6. On October 27, 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 petitioner 2 hours a day care.
7. 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. Training can be offered to a parent in order to enable them to provide care they can safely render and that 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).
8. On November 10, 2009 a reconsideration was requested by the provider stating how the mother cannot provide the same "calm mannered and fast action care that would come from an experienced nurse" and her long hours of work.

9. On November 23, 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 on November 24, 2009.
10. The petitioner provided letters (Petitioner's Exhibits 1 and 2) from the treating physicians explaining the petitioner's medical history and condition; treatments required; assistance required with frequencies; medications with frequencies listed; and the need for 24/7 skilled nursing care.
11. The physician reviewer explained during the hearing that he was aware of the letters submitted, but they did not list any information that would change his opinion on the petitioner's mother being able to provide 2 hours daily of care. He stated that the mother could choose any 2 hours from the day that best fit her schedule.

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 and they have approved 22 hours daily of PDN. The respondent does not dispute the need for nursing services 24 hours daily, however the 2 hours were denied to allow the mother to provide care to the fullest extent possible as PDN services are reduced over time.

The petitioner's treating physicians provided statements regarding the need for 24 nursing care, given the petitioners needs and medical condition. The mother argues that

the care she can provide is not the same as the skilled nurse and does not feel she is qualified to handle an emergency and does not feel comfortable in caring for her daughter without the nurse being present. However, the mother has cared for the petitioner for up to 12 hours in a day, when a nurse has called in sick. The mother considered this stay with the petitioner for 12 hours "a risk" that she was taking.

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 petitioner or that she had any medical conditions that limited her in caring for her daughter. However, the agency will offer the petitioner's mother training on providing care for the petitioner, as the mother has stated that she has only learned from assisting the nurses. This will allow the petitioner with an additional 30 days of continued service from the date of this Order.

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 for the period of October 13, 2009 to April 10, 2010 was within Program rules.

DECISION

The appeal is denied and the respondent's action is affirmed 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.

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

in Tallahassee, Florida.

A. G. Littman

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