

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. 10F-00074

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION
CIRCUIT: 05 Hernando
UNIT: AHCA

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was convened by telephone before the undersigned-hearing officer on March 10, 2010, at 1:50 p.m. The petitioner was not present. Present representing the petitioner was her father, Present as a witness for the petitioner was RN. The respondent was represented by Joann Dohn, RN with the Agency for Health Care Administration (AHCA). Testifying on behalf of the respondent were Dr. Rakesh Mittal, medical reviewer, Keystone Peer Review Organization (KePRO), and Christina Bowling, RN nurse reviewer with KePRO.

The record was held open for 28 days to allow the submission of additional evidence which has been received and entered into evidence as the Petitioner's Exhibit 2 and the Respondent's Exhibit 2.

ISSUE

The petitioner is appealing the respondent's action to decrease the number of hours of private duty nursing for the period of December 7, 2009 through June 4, 2010.

The respondent had the burden of proof.

FINDINGS OF FACT

1. The petitioner was adopted as an infant, along with an older sibling and a younger sibling. She is 11 years old and has been diagnosed with shaken baby syndrome, epilepsy, hydrocephalus, VP shunt, developmental delays and is blind. The petitioner is non-verbal and non-ambulatory. She has multiple seizures daily which sometimes require medical intervention. She is incontinent of bowel and bladder and requires total care.
2. The petitioner was receiving private duty nursing services of 12 hours per day seven days per week. She was also receiving 12 hours per day, seven days per week of Home Health Aide services.
3. The petitioner lives with her father, her mother, an eight year old brother and 13 year old sister. She does not attend school. The father has lumbar disc problems and diabetes. The mother has spinal stenosis, hypertension, fibromyalgia and Parkinson's disease. The brother has ADHD and the sister has hypotonic Cerebral Palsy. The mother is not able to care for the children due to her advanced Parkinson's.
4. The father cares for the petitioner, her siblings and his wife. The brother and sister do not have complications with their medical conditions. They both attend school during the day. The mother is 64 years old and receives Social Security Disability benefits. The father is 66 years old and was receiving Social Security Disability. However, he is now receiving Social Security Retirement benefits due to his age.
5. Keystone Peer Review Organization (KePRO) is the Peer Review Organization (PRO) contracted by the Agency for Health Care Administration to perform

medical review for the private duty nursing and personal care Prior Authorization Program for Medicaid recipients in the State of Florida.

6. A prior authorization review was completed by KePRO. On December 16, 2009, KePRO denied all nursing services hours and approved home health aide of nine hours at night and two hours during the day for sibling care.

7. The petitioner requested a reconsideration because she disagreed with the decrease in the number of hours of private duty nursing services. On December 29, 2009, a reconsideration review was completed by (KePRO). On reconsideration, KePRO approved four hours per week of nursing services to allow the petitioner's father to leave the home to run errands and for medical appointments. KePRO denied all other nursing service hours.

8. The petitioner submitted a letter dated March 3, 2010 from A.R.N.P., with Dr. _____ office. She explains that the petitioner was a normal infant until she sustained brain damage at the age of 5 months. Due to this injury, she developed brain damage with blindness and obstructive hydrocephalus. She is a quadriplegic and is unable to participate in her own care in any way. She requires skin care and turning every two hours to prevent pneumonia and skin breakdown. She believes without the "daytime nurses and night aides" assisting the family with the petitioner's care, she could no longer be able to be maintained in her home. The petitioner is now "adult size at 11 years of age." She states, "Because of their success in caring so effectively for this child I can only highly recommend that they be provided with the two shifts of caregivers they need to continue the level of care they are capable of providing."

9. The evidence includes the petitioner's Home Health Certification and Plan of Care (Form HCFA-485) signed by a nurse of Dr. _____ office and _____ A.R.N.P. This plan of care indicates nursing care frequency of 8 to 12 hours per day for 5 to 7 days per week. It also indicates home health aide frequency of 8 to 12 hours per day for 5 to 7 days per week. It includes orders that the nurse can accompany the patient to doctor appointments and other developmental appropriate activities, assess vital signs, medication and diet. It states the patient will be maintained in a safe environment without injury during a seizure throughout the certification period and includes suctioning as needed, medication administration, seizure precaution and maintain seizure log.

10. The evidence also includes a prescription dated October 13, 2009 from _____ A.R.N.P., to continue home care at 12 hours "skilled nursing" and 12 hours "CNA."

11. The record was held open to allow the petitioner's father the opportunity to submit a two week log documenting his weekly schedule and to allow KePRO the opportunity to review the log and to modify the number of private duty nursing hours approved.

12. Subsequent to the hearing, the father submitted his log which has been entered into evidence as the Petitioner's Exhibit 2. Upon review of the log, KePRO modified the number of private duty nursing hours and approved a total of 14 hours per week of nursing services which would allow the father to leave the home for errands and for medical appointments. KePRO also increased the home health aide hours to a

total of 18 hours per day. The modification from KePRO was entered into evidence as the Respondent's Exhibit 2.

CONCLUSIONS OF LAW

The Office of Appeal Hearings has subject matter jurisdiction in this proceeding, pursuant to Sections 120.569, 120.57(1), 120.80(7) and 409.285 Florida Statutes.

Fla. Admin. R 65-2.060, states in part:

(1) The burden of proof, except where otherwise required by statutes, is on the party asserting the affirmative of an issue. The burden is upon the Department when the Department takes action which would reduce or terminate the benefits or payments being received by the recipient. The burden is upon the petitioner if an application for benefits or payments is denied. The party having the burden shall establish his/her position, by a preponderance of evidence, to the satisfaction of the hearing officer.

Because the Agency moves to reduce private duty nursing care hours, the Agency has the burden of proof.

The hearings are de novo hearings, in that, either party may present new or additional evidence not previously considered by the Department in making its decision.

Fla. Admin. R 65-2.060, states in part:

(3) The Hearing Officer must determine whether the department's decision on eligibility or procedural compliance was correct at the time the decision was made. The hearings are de novo hearings, in that, either party may present new or additional evidence not previously considered by the department in making its decision.

Consequently, the undersigned took into consideration all the evidence presented to him at the hearing, not solely what was made available to the Agency when it made its decision.

Florida Statutes 409.913 governs the oversight of the integrity of the Florida Medicaid Program. Section (1)(d) sets forth the "medical necessity or medically necessary" standards, and states in pertinent part as follows:

.... For purposes of determining Medicaid reimbursement, the agency is the final arbiter of medical necessity. Determinations of medical necessity must be made by a licensed physician employed by or under contract with the agency See §409.913(d), Florida Statutes.

Based on these authorities, the hearing officer concludes the Agency makes the final decision of medical necessity.

The hearing officer has been delegated the final decision making authority for the Agency in making this decision. In making the decision, he will evaluate the testimony of the expert witnesses, taking into consideration the facts in the records upon which the experts relied in reaching their opinion. (See sections 90.702, 90.703 90.704, 90.705, Florida Statutes.) The hearing officer will credit additional weight to the treating physician's testimony regarding the petitioner's condition and treatment needs when there is a conflict of opinion on these matters. The hearing officer will equally consider the treating physician's opinion and the reviewing physician's opinion on the ultimate issue of medical necessity as that is a matter of applying the legal definition of the medical necessity as used by the Medicaid Program to the petitioner's condition and needs.

Florida's Administrative Code at 59G-1.010, Definitions, states in part:

(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;

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.

Coverage for Medicaid children's services is controlled by the federal program requirements for Early Prevention, Screening, Diagnosis, and Treatment (EPSDT).

Children under age 21 who are Medicaid beneficiaries are entitled to EPSDT services.

The relevant provision of the federal definition of medical necessity, 42 U.S.C. § 1396d

(r)(5), states in pertinent part as follows:

Early and periodic screening, diagnostic, and treatment services. The term "early and periodic screening, diagnostic, and treatment services" means the following items and services: ... (5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.

Private-duty nursing care services are described at 42 U.S.C. §1396d(a)(8). The requirements under federal law are that the private-duty nursing services be "necessary treatment to correct or ameliorate physical and mental conditions ... "

It is important to note that the Agency has accepted its responsibility to cover private-duty nursing services and the dispute in this case is not whether the Agency covers such services but rather the amount of services (in hours) the petitioner requires. There are no arbitrary limits on the amount of hours rather an individual determination is made based on the petitioner's individual needs. There has been no authority submitted which would suggest the state has set utilization limits on the amount of private-duty nursing services a child may receive.

The state of Florida has implemented the federal definition "necessary ... treatment and other measures described in subsection (a) of 1396d to correct or ameliorate physical and mental conditions" through, statute and rule including handbooks referenced in rule. These authorities evaluate and determine the necessary treatment to correct or ameliorate physical and mental conditions through the use of the term "medical necessary".

Florida Statute section 409.905 (4)(b) specifically requires "The assessment of need shall be based on a child's condition, family support and care supplements, a family's ability to provide care, and a family's and child's schedule regarding work, school, sleep, and care for other family dependents."

The state of Florida has made it clear that when the family can provide care as envisioned under the statute, Medicaid will not pay for care as an alternative to the family providing the care. Any care the family can provide under the statute, even when such care may elsewhere be described as skilled nursing care, is not considered necessary health care or treatment to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services.

The Agency reduced private duty nursing services based on its belief that the father was capable of providing nursing care to the petitioner from December 7, 2009 through June 4, 2010 for all hours except for 14 hours per week. This decision was made by the Agency's expert Dr. Mittal, after considering the father's daily routine.

The petitioner submitted a letter from the petitioner's A.R.N.P in which she stated that the petitioner requires turning every two hours to prevent pneumonia and skin breakdown. The A.R.N.P. also requested that the petitioner should be provided two shifts of caregivers. The A.R.N.P. did not state that the caregivers needed nursing skills to care for the petitioner and that nursing services were required in turning the petitioner every two hours. The respondent approved 18 hours of home health aide and 2 hours of nursing services per day (14 per week) for a total of 20 hours per day. With a total of 20 hours per day of care, the undersigned concludes that the father should only have to turn the petitioner once during the four hours that a caregiver is not present. The evidence did not show that the father was not capable of turning the petitioner once during the time when a caregiver is not present.

The Home Health Services Coverage and Limitations Handbook defines the guidelines for private duty nursing services as follows at page 2-17:

Private Duty Nursing Definition. Private duty nursing services are medically necessary skilled nursing services that may be provided in a child's home or other authorized settings to support the care required by the child's complex medical condition...

Private Duty Nursing Requirements. Private duty nursing services must be: ordered by the attending physician; documented as medically necessary; provided by a registered nurse or a licensed practical nurse; consistent with the physician approved plan of care; and authorized by the Medicaid service authorization nurse...

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 above authorities require that private duty nursing services must be documented as medically necessary. 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.

The evidence presented did not establish that the care required by the petitioner was so complex that from December 7, 2009 through June 4, 2010, the father could not care for her during the four hours per day when the private duty nurse or the home health aide was not present. Based on the evidence presented, both the petitioner's treating physician (A.R.N.P.) and the agency's expert physician, it is determined that the respondent met its burden of proof in the reduction of the hours of private duty nursing services from 12 hours per day seven days per week, to a total of 14 hours per week. Therefore, it is concluded that the respondent correctly denied private duty nursing for all hours except for 14 hours per week from December 7, 2009 through June 4, 2010.

DECISION

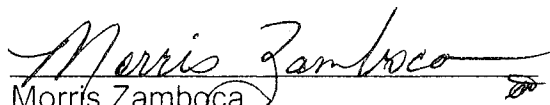
The appeal is denied. The respondent's action is affirmed.

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 28th day of April, 2010,

in Tallahassee, Florida.



Morris Zamboca
Hearing Officer
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Copies Furnished To: