

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

FILED
JAN 13 2015

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 14F-08928

PETITIONER,

Vs.

CASE NO.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 17 Broward
UNIT: AHCA

RESPONDENT.

FINAL ORDER

Pursuant to notice, the undersigned hearing officer convened an administrative hearing telephonically on November 25, 2014, at 1:25 p.m.

APPEARANCES

For the Petitioner:

Petitioner's Mother

For the Respondent:

Sharon Garrison, R.N.
Registered Nurse Specialist
Fair Hearing Coordinator
Agency for Health Care Administration

STATEMENT OF ISSUE

The issue is whether the decision of the Agency for Health Care Administration to terminate the petitioner's receipt of brand-name adult diapers and pull-ups and replace them with generic adult diapers and pull-ups, and then to terminate the petitioner's receipt of adult pull-ups altogether is correct.

PRELIMINARY STATEMENT

[REDACTED] the petitioner's mother and attorney-in-fact, appeared on behalf of the petitioner, [REDACTED] the petitioner ("petitioner"), who was not present. Ms. [REDACTED] may sometimes hereinafter be referred to as the petitioner's "representative". Sharon Garrison, R.N., Registered Nurse Specialist and Fair Hearing Coordinator for the Agency for Health Care Administration, appeared on behalf of the Agency for Health Care Administration. Carol King, R.N., also a Registered Nurse Specialist and Fair Hearing Coordinator for the Agency for Health Care Administration, appeared solely for observation purposes. The Agency for Health Care Administration may sometimes hereinafter be referred to as "AHCA, "Agency", or the "respondent".

The following individuals from Humana appeared as witnesses on behalf of the Agency for Health Care Administration: Keren Curnutt, Grievance and Appeals Specialist with Humana; and Dorothy Morgan, Case Manager. Mindy Aikman, also a Grievance and Appeals Specialist with Humana, was present solely for the purpose of observation.

The petitioner introduced Exhibits "1" through "5", inclusive, at the hearing, all of which were accepted into evidence and marked accordingly. The respondent introduced Exhibits "1" through "9", inclusive, at the hearing, all of which were also accepted into evidence and marked accordingly. The hearing record in this matter was left open until the close of business on Monday, December 1, 2014 for the respondent to provide the relevant portions of the Humana Member Handbook and a copy of the email from the Humana durable medical equipment provider discussing the caregiver's request for a voluntary reduction of services. Once received, the additional information was accepted

into evidence and marked as respondent's Exhibit "10". The hearing record was then closed.

FINDINGS OF FACT

1. The petitioner is an adult female. She resides in Broward County, Florida.
2. The petitioner has a history of traumatic brain injury due being struck by an automobile. As a result of the injuries she sustained, she is incontinent.
3. Petitioner was eligible to receive Medicaid benefits at all times relevant to these proceedings.
4. The petitioner is enrolled in the Statewide Medicaid Managed Care Long-term Care program. Within that Program, the petitioner has elected to receive Home and Community Based Services ("HCBS").
5. The petitioner's Health Maintenance Organization ("HMO") is Humana. Humana is a health maintenance organization contracted by the Agency for Health Care Administration to provide services to certain Medicaid eligible recipients in Broward County.
6. The effective date of petitioner's enrollment with Humana is November 1, 2013.
7. The petitioner was previously approved to receive adult diapers and pull-ups by Humana.
8. The Humana durable medical equipment ("DME") vendor through which the petitioner was receiving adult diapers and pull-ups ceased being a Humana vendor in or around July 2014.

9. At or near the time the petitioner's previous durable medical equipment vendor ceased being an approved vendor for Humana, the petitioner transitioned to Lightstream Medical ("Lightstream") as her new durable medical equipment provider.

10. The petitioner was receiving Tenna diapers and Tranquility pull-ups from her previous durable medical equipment vendor.

11. Prior to choosing the petitioner's new durable medical equipment provider, the petitioner's mother spoke with a representative at Lightstream who explained that Tenna diapers and Tranquility pull-ups were available through Lightstream.

12. After selecting Lightstream as petitioner's new durable medical equipment provider, the petitioner's representative was informed by a Humana representative that the petitioner would have to try alternative products before the Tenna diapers and Tranquility pull-ups could be approved.

13. Lightstream Medical provided the petitioner with generic alternatives to the Tenna diapers and Tranquility pull-ups. The petitioner's representative explained that one or two alternatives to the brand-name products were provided and that she was told these were the best alternatives to the name-brand supplies. No one appearing for the respondent was able to testify as to the number of alternatives provided.

14. Adult incontinent supplies such as diapers and pull-ups are similar to clothing in the respect that different brands fit differently. The petitioner tried various alternatives previously before discovering that Tenna diapers and Tranquility pull-ups provided the most effective incontinent protection for her.

15. On July 14, 2014, the petitioner's representative declined a shipment of generic pull-ups from Livestream.

16. On August 4, 2014, the petitioner's representative sent an email to the petitioner's Case Manager at Humana regarding the petitioner's pull-ups. In relevant part, the email reads: "And Yes [sic] I would love to discontinue the item[,] are you KIDDING ME, very incentive [sic] on your part."

17. Although the petitioner's representative was being sarcastic, the Humana Case Manager read the communication as a request from the petitioner's representative for Humana to stop providing pull-ups.

18. On August 14, 2014, Humana sent a notice to the petitioner advising the petitioner that Humana would discontinue providing pull-ups pursuant to the petitioner's request to voluntarily reduce services.

19. The petitioner's representative testified at the hearing that it was never her intention to voluntarily reduce services or to have Humana stop providing pull-ups, only to have Humana stop providing pull-ups that were not effective.

20. The hearing officer finds that the petitioner's representative did not intend to voluntarily terminate the provision of adult pull-ups by Humana.

21. As of the date of the hearing in this matter, the petitioner's approval for adult diapers was still effective. However, the petitioner's mother explained that the petitioner has also stopped receiving adult diapers from the Humana vendor.

22. The petitioner's testified that the alternatives provided by Lightstream were not comparable to the Tenna diapers and Tranquility pull-ups. She explained the brand-name products were larger and much more absorbent; that the generic alternatives do not fit properly; are not as absorbent; are too thin, that the material from which they are

not made is not substantial; that the products are flimsy; and that the generic products do not hold urine properly.

23. The petitioner has made a good faith effort to utilize the alternate diapers and pull-ups provided to her by Lightstream, but the alternate products do not keep the petitioner dry.

24. Pursuant to its agreement with the Agency for Health Care Administration, Humana is not required to provide name-brand incontinent supplies to members.

CONCLUSIONS OF LAW

25. By agreement between the Agency for Health Care Administration and the Department of Children and Families, AHCA has conveyed jurisdiction to the Office of Appeal Hearings to conduct this hearing pursuant to § 120.80, Fla. Stat.

26. The Florida Medicaid Program is authorized by Chapter 409, Fla. Stat., and Chapter 59G, Florida Administrative Code. The Program is administered by AHCA. All goods and services requested under the Florida Medicaid Program must be shown to be medically necessary in order to be approved.

27. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code R. 65-2.056.

28. The respondent in the present case is proposing to terminate, reduce, or change the petitioner's services. Therefore, in accordance with Fla. Admin. Code R. 65-2.060(1), the burden of proof is assigned to the petitioner.

29. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," (Black's Law Dictionary at 1201, 7th Ed.).

30. The Florida Medicaid program is authorized by Fla. Stat. ch 409 and Fla. Admin. Code R. 59G. The Medicaid program is administered by the respondent.

31. Section 409.905, Fla. Stat. addresses mandatory Medicaid services under the State Medicaid Plan:

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...

(4) HOME HEALTH CARE SERVICES.--The agency shall pay for nursing and home health aide services, supplies, appliances, and durable medical equipment, necessary to assist a recipient living at home...

(a) The agency shall require prior authorization of home health services....

(c) The agency may not pay for home health services unless the services are medically necessary ...

32. The Humana Member Handbook, on Page 20, explains as follows

Medical equipment and supplies: Medical equipment and supplies, as listed in the plan of care, include:

- Devices, controls or appliances that help make the enrollee's daily life easier
- Devices, controls or appliances that help the enrollee to understand, control and explain how they live
- Items necessary to live or to help with physical conditions along with other supplies and equipment needed to keep those items working
- Other durable and non-durable medical equipment that is needed to help with enrollee functional limitations
- Needed medical supplies not available under the State Plan, including over-the-counter medical supplies such as adult disposable diapers.

This includes durable medical equipment benefits available under the State Plan service as well as expanded medical equipment and supplies coverage under this waiver. All items shall meet valid standards of

manufacture, design and installation. This service also includes item and replacement parts repair.

33. The Florida Medicaid Home Health Services Coverage and Limitations Handbook March 2013 is incorporated by reference and promulgated into Rule by Chapter 59G-4.130, Florida Administrative Code.

34 The Florida Medicaid Home Health Services Coverage and Limitations Handbook, on Page 2-30, states as follows

Home health agencies that provide DME must comply with the policies and procedures contained in this handbook and in the Florida Medicaid Durable Medical Equipment and Medical Supply Services Coverage and Limitations Handbook.

35. Section 409.912, Fla. Stat. states, in relevant parts:

Cost-effective purchasing of health care.—The agency shall purchase goods and services for Medicaid recipients in the most cost-effective manner consistent with the delivery of quality medical care ...

(3) The agency may contract with health maintenance organizations certified pursuant to part I of chapter 641 for the provision of services to recipients. This subsection expires October 1, 2014.

36. The Florida Medicaid Provider General Handbook – July 2012 is incorporated by reference in the Medicaid Services Rules found in Fla. Admin. Code Chapter 59G-4. In accordance with the above Statute, the Handbook states on page 1-

27

Medicaid contracts with Health Maintenance Organizations (HMOs) to provide prepaid, comprehensive, cost-effective medical services to enrolled Medicaid recipients.

Medicaid pays each HMO a monthly capitation fee for managing and providing care to each enrolled recipient. In accordance with certain contractual agreements with Medicaid, the HMO provides a specified, comprehensive package of medical services for this monthly Medicaid fee.

Medicaid HMOs are also required to provide quality and benefit enhancements and can provide other expanded benefits as described in this section.

37. Pages 1-28 of the Florida Medicaid Provider General Handbook provide a list of HMO covered services. These services include durable medical equipment.

38. Page 1-30 of the Florida Medicaid Provider General Handbook states: "An HMO's services cannot be more restrictive than those provided under Medicaid fee-for-service."

39. In order for durable medical equipment and supplies to be approved, the equipment and supplies must not only be medically necessary but must also meet all requirements set forth in the Florida Medicaid Durable Medical Equipment and Medical Supply Services Coverage and Limitations Handbook.

40. Although the terms medically necessary and medical necessity are often used interchangeably and may be used in a variety of contexts, their definition for Florida Medicaid purposes is contained in the Florida Administrative Code. Fla. Admin. Code R. 59G-1.010 states:

(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.

41. Section 409.913, Fla. Stat. 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

"Medical necessity" or "medically necessary" means any goods or services necessary to palliate the effects of a terminal condition, or to prevent, diagnose, correct, cure, alleviate, or preclude deterioration of a condition that threatens life, causes pain or suffering, or results in illness or infirmity, which goods or services are provided in accordance with generally accepted standards of medical practice....

Section (1)(d) goes on the further state:

...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 and must be based upon information available at the time the goods or services are provided.

42. Section (1)(d) highlights that the Agency makes the final decision regarding whether or not a requested service is medically necessary; however, the hearing officer is the final decision making authority for the Agency. See § 120.80, Fla. Stat.

43. The Florida Medicaid Durable Medical Equipment and Medical Supply Services Coverage and Limitations Handbook (July 2010) ("DME Handbook") is

promulgated into rule by Fla. Admin. Code R. 59G-4.070. The Handbook describes the covered services, limitations, and exclusions associated with the acquisition and reimbursement of durable medical equipment and medical supplies obtained through the Medicaid program.

44. The DME Handbook, on Pages 2-48 and 2-49, sets forth the medical necessity, age, and documentation requirements for receiving disposable incontinence briefs, diapers, protective underwear, pull-ons, liners, shields, guards, pads, and undergarments, along with the associated limitations for receiving such supplies. 48.

45. AHCA Contract No. FP008, (respondent's Exhibit "4") sets forth minimum long-term care managed benefits. Section (n) of the Contract, contained on Page 8, explains as follows

Medical Equipment and Supplies --- Medical equipment and supplies, specified in the plan of care, include: (a) devices, controls or appliances that enable the enrollee to increase the ability to perform activities of daily living; (b) devices, controls or appliances that enable the enrollee to perceive, control or communicate the environment in which he or she lives; (c) items necessary for life support or to address physical conditions along with ancillary supplies and equipment necessary to the proper functioning of such items; (d) such other durable and non-durable medical equipment that is necessary to address enrollee functional limitations; (e) necessary medical supplies not available under the State Plan including consumable medical supplies such as adult disposable diapers. This service includes the durable medical equipment benefits available under the state plan service as well as expanded medical equipment and supplies coverage under this waiver. All items shall meet applicable standards of manufacture, design and installation. This service also includes repair of such items as well as replacement parts.

46. In the present case, the petitioner was previously receiving Tenna Diapers and Tranquility pull-ups from Humana. Petitioner has tried multiple alternative diaper and pull-up brands provided by Humana and they have not worked. The petitioner's

representative provided specific testimony explaining that the generic diapers and pull-ups provided are not effective; that they do not adequately absorb the petitioner's urine. The fact that the brand-specific diapers and pull-ups are not incorporated in the contract between Humana and its durable medical equipment vendor or between the Agency for Health Care Administration and Humana is irrelevant. Petitioner has demonstrated that the brand-specific diapers and pull-ups are medically necessary in her case. Petitioner's representative also provided credible testimony that she did not intend to voluntarily terminate the petitioner's receipt of pull-ups.

47. The Agency has not met its burden to show that the change in petitioner's incontinent supplies is correct or that petitioner's representative voluntarily discontinued the petitioner's services.

48. In rendering this decision, the undersigned hearing officer considered all of the testimony and documentary evidence presented during the hearing process and reviewed all conditions of "medical necessity" set forth in the Florida Administrative Code and the rules governing the Florida Medicaid program.

DECISION

The Petitioner's appeal is hereby GRANTED. The respondent is instructed to continue providing the petitioner with Tenna Diapers and Tranquility pull-ups.

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 petitioner is responsible for any financial obligations incurred as the agency has no funds to assist in this review.

DONE and ORDERED this 13th day of January, 2015,

in Tallahassee, Florida.

Peter J. Tsamis

Peter J. Tsamis

Hearing Officer

Building 5, Room 255

1317 Winewood Boulevard

Tallahassee, FL 32399-0700

Office: 850-488-1429

Fax: 850-487-0662

Email: Appeal_Hearings@dcf.state.fl.us

Copies Furnished To:



Petitioner

Sharon Garrison, Field Office Area 10 Medicaid