

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

FILED

OCT 26 2009

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-04879

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 06 Pasco
UNIT: AHCA

RESPONDENT.

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FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on August 19, 2009, at 2:54 p.m., in St. Petersburg, Florida. The petitioner was not present. He was represented by his parents

The respondent was represented by Patricia Cobb, registered nurse specialist and Stephanie Lang, registered nurse specialist.

Witnesses for the respondent from Keystone Peer Review Organization (KePRO) were Rakesh Mittal, M.D., physician reviewer, and Teresa Ashy, review operations supervisor.

ISSUE

The petitioner is appealing the respondent's action to deny 820 hours of private duty nursing for the period of July 8, 2009 through January 3, 2010. The respondent has the burden of proof.

FINDINGS OF FACT

1. The petitioner care is medically complex. The petitioner is 12 years old. The petitioner was receiving private duty nursing services. The petitioner resides with his mother, father and 20 years old sibling. The petitioner's mother is trained in the petitioner's care and is the petitioner's primary caregiver. The mother and father work.

2. Prior authorization for private duty nursing is reviewed every 180 days. KePRO is the contract provider for the respondent for the prior authorization decisions for private duty nursing. The request for private duty nursing is reviewed by a nurse reviewer and a physician consultant.

3. The nursing agency requested 4,320 hours of private duty nursing for the petitioner for the period of May July 8, 2009 through January 3, 2010. This request would be 24 hours a day of private duty nursing. The petitioner's home health agency submitted the information pertaining to the petitioner to KePRO through an internet program. This information is generated to the computer for review by KePRO from the information entered by the petitioner's home health agency via computer. This exchange of computer information is referred to as I-Exchange. The information provided by the home health agency is converted into a document called the Internal Focus Finding.

4. The nursing agency submitted information of the petitioner's diagnoses, services provided, family situation and synopsis of care. The Home Health Agency asserted that the petitioner condition has declined over the last year. The petitioner requires constant suctioning. He has therapy during the

day. He requires frequent repositioning. The petitioner is fed through GT (GJT) four times a day from 6:00 a.m. to 7:00 a.m., 8:30 a.m. to 10:00 a.m., 12:00 p.m. to 2:00 p.m. and 4:00 p.m. to 5:30 p.m. The home health agency further stated: "...Times subject to change at pcg discretion...". Caregiver is to flush GT (GJT) before and after feeding, medication and as needed for tube maintenance. The agency also provided the parents' working hours. The mother works in a doctor's office and is out of the home for work from 7:00 a.m. to 7:30 p.m. as she works 8:00 a.m. to 6:30 p.m. Monday through Friday. They stated that the father works two jobs and is out of the home for work from 6:30 a.m. to 11:00 p.m. seven days a week. The mother had a cerebral vascular accident which resulted in limited function/strength on her left side. The father has surgery on c-spine, bilateral knee and back and has limited physical abilities. The petitioner's sister is going to schooling, working and does not participate in the petitioner's care.

5. The initial nurse reviewer screened the petitioner's request for private duty nursing using the Internal Focus Finding. The Internal Focus Finding provides information to KePRO of case identifiers and additional information regarding the petitioner. This information is generated to the computer for review by KePRO from the information entered by the petitioner's home health agency via computer. The Internal Focus Finding indicated that for the previous certification the petitioner was receiving private duty nursing private duty nursing 7:30 p.m. to 7:00 a.m. Mondays through Fridays and 24 hours a day on Saturdays and Sundays.

6. The initial physician consultant determination was based on the information received from the nursing agency. The initial physician consultant approved hours from 7:00 a.m. to 7:30 p.m. Mondays through Fridays and denied all other requested hours of private duty nursing. The initial physician consultant opined that the parents could provide care when home with home health aide help and recommended a home health aide for all other requested denied hours. A PDN/PC Recipient Denial Letter was sent to the petitioner on June 10, 2009. The notice informed the petitioner that for the requested 4,320 hours of private duty nursing for the period of July 8, 2009 through January 3, 2010, 1,600 hours were approved and 2,720 hours were denied.

7. The nursing agency requested a reconsideration. The nursing agency restated that petitioner's diagnoses, need for 24 hours skilled nursing, the petitioner's need for skilled care when the parents are sleeping and that the petitioner's skilled care requires two hands. The home health agency opined that the mother is unable to safely provide care for the petitioner as she has left side weakness. The skilled care the petitioner needs cannot be preformed by a home health aide. The mother requires assistance with petitioner's trach change, trach suctioning, GT care, medication administration, CPT and postural drainage.

8. The reconsideration was reviewed by a second physician consultant. The second physician consultant stated: "...there is limited information submitted for this case to suggest additional hours are requested. There is no indication when this PCG suffered a 'CVA' and what her lifting limits are since she is working full time each day". The second physician consultant upheld the denial.

The respondent sent a PDN/PC Recipient Reconsideration - Denial Upheld notice on June 22, 2009.

9. The parents provided additional information at the hearing. The petitioner's intake through his GT (GJT) is 8:30 a.m. to 10:30 a.m., 12:00 p.m. to 2:00 p.m. and 4:30 p.m. to 5:30 p.m. The petitioner has continuous feeding from 9:30 p.m. to 6:30 a.m. The parents submitted notes from their doctors. The mother has a rating of 2-3 of 5 for strength in left hand. She is unable to lift any significant weight with the left arm. The father is not to lift more than 20 pounds. The mother works at a doctor's office. She takes care of patients doing light work such as taking blood pressure, no lifting. The father works two jobs. His first job is full time working as a merchandiser during the day, Monday through Friday. At his second job, he works during the day Saturdays and Sundays from 8:00 a.m. to 4:30 p.m. and every evening, 7 days a week, from 9:00 p.m. to 2:00 a.m. He is home Saturdays and Sundays from 5:00 p.m. to 9:00 p.m. The parents do their shopping on Saturdays and Sundays.

10. In consideration of the additional evidence submitted by the parents, the physician reviewer offered to authorize 3,492 hours of private duty nursing and deny 828 hours of the 4,320 hours requested for the period of July 8, 2009 through January 3, 2010. The physician reviewer indicated that the parents would provide care for the petitioner from 8:30 p.m. to 10:30 p.m. Monday through Friday and 10:00 a.m. to 9:00 p.m. on Saturdays and Sundays. The physician reviewer recommended a home health aide for the hours when private duty nursing were denied to assist the mother in providing the petitioner's care.

The physician reviewer explained that KePRO must follow the Home Health Services Coverage and Limitation Handbook in that caregivers are required to provide care to the fullest extent while they are home, private duty nursing is to supplement care provide by parents.

11. The parents did not accept physician reviewer's offer. They are requesting 24 hours a day of private duty nursing.

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 24 hours daily, the hours should be reduced to allow for the parents 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 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. The evidence clearly supports that this petitioner requires 24 hour nursing care. 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 benefit. The handbook sets forth the 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 parents can provide the services during the time period that the respondent has determined that they should. We must look at the skill of the parents 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 father's inability to lift the petitioner and the mother's left side weakness and inability to lift as a barrier to providing care for the petitioner. 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 has about one-half of her left hand strength. The evidence did not demonstrate that the mother was incapable of using her left hand and arm. The mother does have weakness on her left side which does limit her ability to lift or reposition the petitioner. Lifting and repositioning are not skilled nursing services and these are services that could be performed by a home health aide. The services of a home health aide would be a less costly service. In the opinion of the respondent's physician expert the parents can provide the petitioner's required care when home, with home health aide help. The petitioner can request services of a home health aide to assist with repositioning the petitioner and lifting the petitioner so that the mother can perform the petitioner's care. On this basis, services of a skilled nurse for the 24 hours a day, seven days a week would not meet the criteria for medical necessity.

Next to consider is the hours that the parents would be available to provide care to the petitioner with assistance. The respondent determined that the parents should provide care for the petitioner from 8:30 p.m. to 10:30 p.m.

Mondays through Fridays and 10:00 a.m. to 9:00 p.m. Saturdays and Sundays. The parents are not caring for any sibling of the petitioner or disabled person in the home other than the petitioner. The father is out of the home working two jobs. He works days, evening and weekends. He is home Saturdays and Sundays from 5:00 p.m. to 9:00 p.m. The mother is out of the home for work from 7:00 a.m. to 7:30 p.m. as she works 8:00 a.m. to 6:30 p.m., Monday through Friday. Parents should be allowed eight hours of sleep time therefore, they would be unavailable to care for the petitioner eight hours a night.

The hearing officer concludes that the mother could provide care for the petitioner with assistance from a home health aide from 8:30 p.m. to 10:30 p.m., Monday through Fridays. As the father is in the home from 5:00 p.m. to 9:00 p.m. on Saturdays and Sundays and the mother is not working Saturdays and Sundays, the hearing officer concludes that the parents could provide care for the petitioner with assistance from a home health aide from 10:00 a.m. to 9:00 p.m. on Saturdays and Sundays. Based on the above cited authorities, the hearing officer respondent's action to approve 3,492 hours of private duty nursing and deny 828 hours of the 4,320 hours requested for the period of July 8, 2009 through January 3, 2010 was within the rules of the Program. The petitioner's request for private duty nursing 24 hours a day, seven days a week is denied.

DECISION

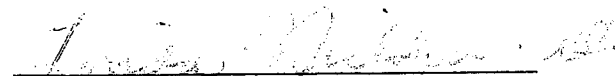
This appeal is denied.

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.

DONE and ORDERED this 26th day of October, 2009,

in Tallahassee, Florida.



Linda Jo Nicholson
Hearing Officer
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Copies Furnished To