

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

FILED
FEB 15 2010
OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-07294

PETITIONER,

Vs.

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

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on November 24, 2009, at 9:58 a.m., in Port Richey, Florida. The petitioner was not present. The petitioner was represented by her mother, The respondent was represented by Stephanie Lang, registered nurse specialist. Witnesses for the respondent from Keystone Peer Review Organization (KePRO) were Robert Buzzeo, M.D., physician reviewer, and Bonnie Wallington, registered nurse review supervisor.

The petitioner requested that the record be left open for thirty days to submit additional evidence. Any additional evidence was due no later than December 24, 2009. On December 16, 2009, the hearing officer received from the petitioner a letter written by the petitioner's mother, a picture of the petitioner's feeding tube and a letter written by the petitioner's nurse. The

evidence was entered into record as Petitioner Exhibits 7, 8 and 9. The record was closed on December 24, 2009.

ISSUE

The petitioner is appealing the respondent's action to deny 360 hours of private duty nursing for the period of October 1, 2009 through March 29, 2010.

RULING ON PETITIONER'S EVIDENCE

In the petitioner's additional evidence, the mother wrote that she was not allowed to demonstrate the functional capabilities of a feeding tube and "ambu" bag at the hearing. As the hearing is recorded, a visual demonstration solely for the hearing officer's viewing does not establish the functional capabilities of the two items for the record. The hearing officer explained that the petitioner's mother should either describe the item on the record and the functional capabilities of the two items and/or submit a description of the functional capabilities of the two items in writing. The mother described the functional capabilities of a feeding tube and "ambu" bag on both the record and in writing. The mother provided a picture of the feeding tube for the record. Therefore, the evidence of the functional capabilities of a feeding tube and "ambu" bag were duly entered into the record.

FINDINGS OF FACT

1. The petitioner is 16 years old. The petitioner care is medically complex. She is ventilator dependent, total care, non-verbal and has a severe scoliosis. The scoliosis is at 90 degrees resting on her iliac crest. The severity of the scoliosis compromises the petitioner's breathing, interrupts her GI tract for

digestion, traps gas, causes an inability to void, shortness of breath and the need for oxygen to be administered. The petitioner's inability to void results in the petitioner breaking out in hives. The petitioner was receiving 24 hours a day of private duty nursing services for the previous certification period. The petitioner requires gastric decompressing. The petitioner resides with her mother and father.

2. The petitioner's mother is a registered nurse. The petitioner's mother is trained in the petitioner's care and is the petitioner's primary caregiver. The petitioner's mother also provides care to the mother's father and the step-mother. The mother's father and step-mother do not live in the same home as the petitioner. The mother's father and his wife are aged and unable to drive. The petitioner's mother takes them to doctor appointments and does their shopping.

3. The petitioner's mother attends church on Sundays. The petitioner's mother has impairments of paralyzed vocal cord, pain on standing due her arches, colitis, problems with her hands, migraines, depression, panic attacks and stress disorder. The problem with the mother's hands is pain and "Charlie horses". The problem with the mother's hands is from the squeezing of the petitioner's feeding tube and gastric decompressing. The feeding tube is very stiff. The "ambu" bag for gastric decompression requires the stretching of the hand over the entire bag. Squeezing the "ambu" bag takes considerable pressure. The mother attested that she has to "milk" the tubing to remove the gas. The mother opined that two-person suctioning is needed.

4. The mother attested that she does most of the petitioner's care and has to teach each new nurse the petitioner's care. The mother opined that the nurses do not stay due to the extremely hard physical work and stress there is when taking care of the petitioner.

5. The father works. The father is up at about 11:00 a.m., leaves for work at noon, returns at midnight or 1:00 a.m. and goes to bed at 3:00 a.m. or 4:00 a.m. He is off one or two nights a week. He has no regular day off. English is the father's second language. He is not trained in the petitioner's care and has a language barrier. The mother attested that the petitioner's father holds the petitioner on the night he is off work and the father is capable of squeezing the "ambu" bag.

6. 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.

7. The nursing agency requested 4,320 hours of private duty nursing for the petitioner for the period of October 1, 2009 through March 29, 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. The nursing agency submitted information of the petitioner's diagnoses, services provided, family situation and synopsis of care.

8. 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.

9. The initial physician consultant determination was based on the information received from the nursing agency. The initial physician consultant approved hours 3,600 hours and denied 720 hours of private duty nursing. The initial physician consultant opined:

...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 recipient, the parents or the caregiver...

A PDN/PC Recipient Denial Letter was sent to the petitioner on October 6, 2009.

10. The nursing agency requested reconsideration. The nursing agency provided additional information. The nursing agency stated:

...PCG's aging father is now considered legally blind, therefore PCG is managing their banking, mail as well as their doctors appt, meds, personal shopping/groceries and lab appts...
...father is not trained at all in the pts care. He is 60 y/o with constant shoulder pain and leg pain resulting from an auto accident

years ago. He is the only working parent he must preserve his shoulder for his occupation as a Hibachi Chef...

11. The reconsideration was reviewed by a second physician consultant. The second physician consultant approved 22 hours a day seven days a week. The second physician consultant stated: "...Mother has fine motor disabilities but father is available during the times would not interfere with the fathers readiness for work...". The second physician consultant recommended the parents provide care any two hours each day. The respondent sent a PDN/PC Recipient Reconsideration - Denial Upheld notice on October 19, 2009. The notice indicated that for the 4,320 hours of private duty nursing requested, 3,960 hours were approved and 360 hours were denied for the certification period of October 1, 2009 through March 29, 2010.

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 sets forth the rules for private duty nursing. The handbook, 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...

The handbook, on page 2-17, states:

Medicaid does not reimburse private duty nursing services provided solely for the convenience of the child, the parents or the caregiver. Medicaid does not reimburse private duty nursing for respite care. Examples are parent or caregiver recreation, socialization, and volunteer activities.

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.

For the Medicaid Program to authorize and pay for private duty nursing service, the required nursing care must meet the rule definition of medical necessity. The petitioner's care is medically complex. It is undisputed that 24 hour nursing services are required.

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.

First, the hearing officer considered the mother's ability, impairments and availability. The petitioner's mother is a registered nurse. The petitioner's mother is very involved with the petitioner's care. The mother is trained in the petitioner's care. The evidence demonstrated that the mother does have impairments and needs assistance when caring for the petitioner.

The petitioner's mother is very involved in the care of her father and step-mother which takes her out of the home on a regular basis. There is a time allowance for the primary caregiver to provide that care to other household members for which the primary caregiver is responsible for in the home where the recipient resides. However, Medicaid does not pay for private duty nursing for the care of a recipient so that the primary caregiver can voluntarily provide care and assistance to family members outside of the home in which the petitioner resides. Therefore, the private duty nursing hours that are utilized when the petitioner's mother provides care and assistance to a family member outside of the home do not meet the definition of medical necessity or the rules for private duty nursing.

Next, the hearing officer considered the father's ability, impairments and availability to care for the petitioner. The petitioner's father is not trained in the petitioner's care and has impairments. As such, he is unable to provide direct care for the petitioner. The father works five or six days a week and is gone from the home twelve hours a day when he works. The mother attested that the

petitioner's father holds the petitioner on the night he is off work and the father is capable of squeezing the "ambu" bag. As the rule requires parent to participate to the fullest extent, the father would be capable of assisting the mother two hours a day.

Based on the parents' ability and availability, the parents are capable of providing services for two hours a day, seven days a week. Based on the above cited authorities, the hearing officer concludes that the respondent's action to deny 360 hours of private duty nursing for the period of October 1, 2009 through March 29, 2010 was within the rules of the Program.

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.

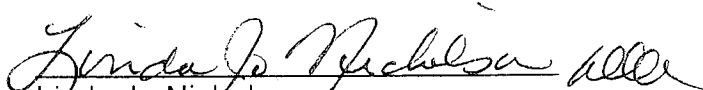
FINAL ORDER (Cont.)

09F-07294

PAGE - 11

DONE and ORDERED this 15th day of February 2010,

in Tallahassee, Florida.



Linda Jo Nicholson

Hearing Officer

Building 5, Room 255

1317 Winewood Boulevard

Tallahassee, FL 32399-0700

850-488-1429

Copies Furnished T