

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

FILED
FEB 11 2010
OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-07295

PETITIONER,

Vs.

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

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened by telephone before the undersigned-hearing officer on December 29, 2009, at 3:35 p.m. The petitioner was not present. Present representing the petitioner was her mother, The respondent was represented by Cecelia Young, RN specialist 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), Bonnie Wallington RN reviewer with KePRO and Alice Reshard, program administrator with AHCA. Marilyn Schlott, field office manager with AHCA was present as an observer.

The record was held open for 14 days to allow the submission of additional evidence. An extension of 14 additional days was granted at the request of the

respondent. Subsequent to the hearing, additional evidence was received which has been entered into evidence as the Respondent's Exhibits 3 and 4.

ISSUE

The petitioner is appealing the respondent's action of September 23, 2009, to decrease the number of hours of private duty nursing for the period of August 30, 2009 through February 25, 2010.

The respondent had the burden of proof.

FINDINGS OF FACT

1. Prior to the action under appeal, the petitioner was receiving private duty nursing services of 24 hours per day except for every other Sunday when the petitioner was receiving 17 hours of private duty nursing. The petitioner was requesting the continuation of the above nursing service hours.

2. The petitioner is 11 years old and lives with her mother and 13 year old brother. She has been diagnosed with encephalopathy, apnea, seizure disorder, autosomal anomalies, cerebral degeneration, global delays, chronic respiratory disease and infections, NPO/GT, scoliosis and developmental delays. The petitioner is non-ambulatory and wheelchair bound. However, the petitioner spends the majority of the time in bed. The petitioner is transferred to a wheelchair one to two times per day as tolerated. She has a history of right hip dislocation with corrective surgery. The petitioner has difficulty swallowing and has G-tube feeding. The petitioner receives intermittent oxygen therapy, nasopharyngeal suctioning, apnea monitoring, oxygen saturation monitoring, nebulizer treatments, chest physiotherapy and frequent

suctioning throughout the day. The petitioner requires constant supervision and cannot be left at home alone.

3. The petitioner is on homebound schooling with the Marion County School Board. The mother is a single parent and is the sole caregiver for the petitioner and her 13 year old son. At the time of the action under appeal, the mother was working from 7:00 a.m. to 7:00 p.m. on Monday, Tuesday, Wednesday and Friday (first week), 7:00 a.m. to 7:00 p.m. Monday, Tuesday, Wednesday (second week) and 7:00 a.m. to 7:00 p.m. every other Sunday.

4. 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.

5. A prior authorization review was completed by KePRO. On September 23, 2009, KePRO denied 14 hours of nursing services on the days that the mother does not work, denied 10 hours on Saturday, seven hours on every other Sunday and denied 14 hours on every other Sunday. All other hours of nursing services were approved. Additionally, KePRO approved 24/7 hours of nursing services from November 16, 2009 through November 30, 2009, because the mother had a lumpectomy on November 16, 2009 and had post operative restrictions. The mother has recovered and there was no evidence presented that showed that the mother continued to have any post operative restrictions.

6. The petitioner requested a reconsideration because she disagrees with the decrease in the number of hours of nursing services. A reconsideration review was

completed and on October 12, 2009, KePRO upheld the decrease in the number of nursing service hours.

7. During the hearing, the mother reported that her new work hours were 7:00 a.m. to 7:00 p.m. Monday, Tuesday and Wednesday and every other Sunday. The mother also reported that she was attending school on Thursday from 8:00 a.m. to 9:15 a.m. and Friday from 1:00 p.m. to 3:40 p.m. The round trip travel time to and from the school was one hour. The mother also reported that she needs four hours per day for study time. The record was held open for 14 days to allow the petitioner the opportunity to request a modification of the nursing hours and to allow KePRO the opportunity to consider the mother's school schedule in determining the number of nursing service hours.

8. Subsequent to the hearing, KePRO submitted a care planner that showed that from August 30, 2009 through February 25, 2010, they approved nursing services of 21 hours per day except for every other Sunday. For every other Sunday KePRO approved 17 hours of nursing services. KePRO denied three hours per day of nursing services except for every other Sunday because they believed that the mother would be able to provide for the petitioner's care during those three hours when she was not working or in school. Also, KePRO denied 7 hours of nursing services for every other Sunday when the mother was not working. The change in the number of hours approved was based on new information that the mother reported during the hearing as related to her school schedule. The number of hours approved after receiving the mother's school schedule was still less than the number of hours the petitioner was previously receiving.

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 (emphasis added).

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;
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 and 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 services based on its belief that the mother was capable of providing care to petitioner for three hours per day except for every other Sunday in which they believed that the mother was capable of providing seven hours of care as

she did not work every other Sunday. This decision was made by the Agency's expert Dr. Mittal. The petitioner did not provide any rebuttal medical evidence.

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 the mother could not care for her during the three hours per day and the seven hours every other Sunday when the private duty nurse was not available. Based on the evidence presented, it is determined that the respondent met its burden of proof in the reduction of the hours of private duty nursing services. Therefore, it is

concluded that the respondent correctly denied private duty nursing services of three hours per day and seven hours on every other Sunday.

DECISION

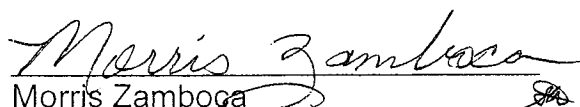
The appeal is denied. The respondent's action is affirmed.

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 11th day of February, 2010,

in Tallahassee, Florida.



Morris Zamboca
Hearing Officer
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