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

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DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-07953
09F-07954

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION (AHCA)
CIRCUIT: 07 Volusia
UNIT: AHCA

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened telephonically before the undersigned hearing officer on January 20, 2010, at 10:38 a.m. The petitioners were not present; they were represented by their mother, The respondent was represented by Sheila Broderick, Area Four Registered Nurse (RN) Specialist with the Agency for Health Care Administration (AHCA). Testifying on behalf of the respondent was Dr. Rakeesh Mittal, medical reviewer, Keystone Peer Review Organization (KePRO) and Gary Erickson, RN reviewer with KePRO.

ISSUE

The petitioners are appealing termination of personal care (PC) services for the period October 27, 2009 through April 24, 2010. The respondent holds the burden of proof.

FINDINGS OF FACT

1. The petitioners are two year old twin boys born prematurely (24 weeks gestation). As a result of their premature births, both children suffer from developmental delays. Both petitioners need assistance with all the activities of daily living, both are incontinent (still wear diapers, were not toilet trained as of the date of the hearing) and are speech impaired (one child does not speak; the other speaks one or two words). Both children ambulate independently and are fed by mouth; neither requires oxygen (ventilators, etc.).

2. Prior to the action under appeal, the petitioners were receiving PC services (same home health aide cared for both children) eight hours per day, Monday – Friday, 8 am – 4 pm. The continued need for PC services must be re-evaluated twice a year (every six months). In October 2009, the home health care agency requested the petitioner's PC services be continued at the same level for the period October 27, 2009 – April 24, 2010; the total hours for the six month period equals 1032 for each child.

3. On October 20, 2009, the respondent denied all of the requested hours. The letter for each child states in part: "Denied Hours 1032...Total Approved Hours 0". The petitioners' mother requested reconsideration (via the home health care agency). On November 9, 2009, the respondent issued a letter for each child which partially overturned the previous denial. The reconsideration letters state in part, "Denied Hours

768...Total Approved Hours 264". The petitioners' mother requested a hearing on November 16, 2009.

4. KePRO is the Peer Review Organization (PRO) contracted by AHCA to perform medical reviews for the private duty nursing (PDN) and personal care assistance under the Prior Authorization Program for Medicaid recipients in the State of Florida. The KePRO reviewing physician, Dr. Mittal, board certified pediatrician, explained that services are intended to supplement the care provided by the family. The decision to approve or deny private duty nursing or PC hours is based on a number of factors including the petitioner's medical needs, the number of family members or caregivers, their work and/or school schedules and medical impairments. In the instant case, the petitioners live with their mother and father. They have a fifteen year old half-sibling (father's daughter from a previous relationship) who lives in the home part-time (father has joint custody with the child's mother). The petitioners' father has been diagnosed with high blood pressure; there are no other known medical impairments. Both the mother and the step sister are healthy; no known impairments. The mother is the principle caregiver; she does not work. The father works weekdays 7:30 am – 4 pm. The stepsister attends school full time.

5. The home health aide assists with all the activities of daily living (feeding, bathing, dressing, etc.); she accompanies the petitioners to doctors' appointments and assists with their physical therapy. The respondent concluded that these activities do not require the services of a trained medical professional; the mother is capable of feeding, bathing, dressing, taking the twins to medical appointments and helping with their physical therapy. As the services can be performed by the family and do not

require a medical professional, the respondent determined that the services were not medically necessary and should be terminated. The respondent decided it would be best to allow the family to adjust to the change by terminating the PC services in step down stages; PC services were to continue at the previous level of eight hours per day for 30 days (beginning October 27, 2009), then reduce to four hours per day for another 30 days (beginning November 27, 2009). At the end of 60 days (December 26, 2009), the PC services would terminate completely. The services have been continued at the previous level pending the hearing decision.

6. It is the mother's position that the children have thrived since their premature births due in large part to the services of the home health aide. The children are still approximately four months behind their peer group in terms of developmental delay. Although they are twins and share many impairments; there are differences which the mother believes requires individual time and attention which would not be possible without the home health aide. requires more physical therapy and has a paralyzed right vocal cord which causes reflux. requires more speech and occupational therapy; he is also near sighted. In order to give each child individual attention specific to his needs, a home health aide is needed to care for the other child. The mother is also concerned about how she would manage both children in a medical emergency; the presence of a home health aide is reassuring. Due to their compromised immune systems, the petitioners' mother is concerned about taking them out for errands; currently the home health aide stays home with the children while the mother runs the errands.

7. The respondent emphasized that PC services must be medically necessary to protect life or prevent illness; PC services can not be provided for the convenience of the family. The respondent concluded that the reasons to continue PC services asserted by the mother do not meet the definition of medical necessity. A medical professional is not necessary to care for one child while the mother cares for the other, to stay at home with the children while the mother runs errands or to be on hand in case of emergencies. The respondent believes the family would perhaps benefit from the services of a sitter, but do not require PC services. The respondent stands by its termination decision.

CONCLUSIONS OF LAW

The Florida Medicaid Program is administered by the Agency for Health Care Administration. By agreement, the Agency for Health Care Administration has conveyed jurisdiction to the Department of Children and Families, 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.

Fla. Stat. ch. 409.9132(d) in relevant part states:

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. 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.

The cited authority explains that Medicaid reimburses for services determined to be medically necessary; determinations of medical necessity must be made by a licensed physician employed by or under contract with the agency and the determinations are based upon information submitted to the reviewer. In the instant case, KePRO is the agency's contracted provider; Dr. Mittal is a licensed physician reviewer with KePRO who determines medical necessity.

Fla. Stat. ch. 409.905, states in relevant part:

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... (2) EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT SERVICES.--The agency shall pay for early and periodic screening and diagnosis of a recipient under age 21 to ascertain physical and mental problems and conditions and provide treatment to correct or ameliorate these problems and conditions. These services include all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations... (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... (b) The agency shall implement a comprehensive utilization management program that requires prior authorization of all private duty nursing services, an individualized treatment plan that includes information about medication and treatment orders, treatment goals, methods of care to be used, and plans for care coordination by nurses and other health professionals. The utilization management program shall also include a process for periodically reviewing the ongoing use of private duty nursing services. 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. When implemented, the private duty nursing utilization management program shall replace the current authorization program used by the Agency for Health Care Administration and the

Children's Medical Services program of the Department of Health. The agency may competitively bid on a contract to select a qualified organization to provide utilization management of private duty nursing services. The agency is authorized to seek federal waivers to implement this initiative.

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

As explained in the legal authority cited above, the agency shall provide, among other things, home health services for children determined eligible via a prior authorization process. Eligibility criteria includes the 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 agency may not pay for home health services unless the services are medically necessary.

Fla. Admin. Code 59G-1.010 Definitions, defines medically necessary as applied in Medicaid prior authorization decisions and 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.

The Florida Medicaid Home Health Services Coverage and Limitations

Handbook, July 2008, defines the guidelines for personal care services as follows at page 2-22:

Personal Care Services Definition. Personal care services are to provide medically necessary assistance with activities of daily living that support a recipient's medical care needs.

Who Can Receive Personal Care Services. Medicaid reimburses personal care services for recipients under the age of 21 who: Have complex medical problems; and Require more individual and continuous care than can be provided through a home health aide visit.

Personal Care Services Requirements. Personal care services must be: Documented as medically necessary; Prescribed by the attending physician if provided through a home health agency; Supervised by a registered nurse if provided through a home health agency; supervised by the parent or legal guardian if provided by a non-home health agency; Provided by a home health aide or independent personal care provider; Consistent with the physician, support coordinator, or case manager approved plan of care; and Authorized prior to providing services.

Prior Authorization. All personal care services must be authorized by the Medicaid peer review organization prior to the provision of services.

Place of Service Requirement. Personal care services must be provided according to an individualized plan of care in the eligible Medicaid recipient's place of residence or, under authorized situations, outside the place of residence.

The above legal authorities make it clear that the Medicaid services must not be in excess of the patient's needs, must be reflective of the level of service that can be

safely furnished, and are intended to supplement the care of recipient's family or caretaker.

The agency terminated PC services for the petitioners because it determined that the services were no longer medically necessary. The children were born prematurely and suffer from developmental delays. The children have made significant progress since their birth; both are ambulatory, fed by mouth, are learning to speak (with some delay), do not require oxygen or any care that must be provided by a medical professional. The home health aid assists them with the activities of daily living, attends doctors' appointments, stays at home with the children while the mother runs errands, and assists with their physical therapy. While the mother is capable of performing these tasks, she believes that the children will be deprived of individual attention if the PC services are terminated and may suffer developmental setbacks.

The legal authorities are clear and unambiguous; PC services must be medically necessary and can not be in excess of the family's needs or provided for the family's convenience. The evidence proves that the services provided by the home health aide are not medically necessary and therefore, the undersigned must conclude that the respondent's termination of the PC services was correct.

DECISION


The 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 12th day of February, 2010,

in Tallahassee, Florida.



Leslie Green *SLG*
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
850-488-1429

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