

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

FILED
FEB 11 2009
OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-08203

PETITIONER,

Vs.
AGENCY FOR HEALTH CARE
ADMINISTRATION (AHCA)
CIRCUIT: 06 Pinellas

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened telephonically before the undersigned. The petitioner was not present, but was represented by his mother, _____ Present to testify on his behalf was _____ RN. _____ RN specialist represented the respondent. KePRO staff testimony was presented from Robert Anthony Buzzeo, MD pediatrician and physician reviewer as well as Melanie Clyatt, RN review operation supervisor.

ISSUE

At issue was whether reduction in Private Duty Nursing (PDN) hours was correct. The respondent bears the burden of proof.

FINDINGS OF FACT

1. The petitioner is twelve years old and he receives Medicaid. He has serious health challenges with medically complex care needs. He needs home

health care for hours when he is not in school. This is undisputed. The dispute relates to level and hours of care needed at home and who should provide care.

2. The petitioner's health problems include cerebral palsy, encephalopathy, spastic quadriplegia, seizure disorder, asthma, contractures, and GERD. He has poor vision, is unable to feed himself, and cannot walk, talk, or perform any activities of daily living. He weighed 85 pounds in August 2009. He requires G-tube feeding, is incontinent, has dyspnea with minimal exertion, and is developmentally delayed. Medications are delivered via an IV pole. He requires suctioning, nebulizer, and a chest vest. During the 60 days before the review, he did not receive hospital care. He saw a physician. The petitioner goes to school on a bus and does not have a skilled nurse with him in the classroom but a nurse is available in the school. Petitioner's Exhibit 1 included medical data and said the petitioner sleeps from 9:00 or 10:00 p.m. until 6:00 or 7:00 a.m.

3. The petitioner lives at home with his mother who is a disabled single parent. She receives federal disability benefits and is disabled. Her health problems are extensive. She suffers constant pain, anxiety, has a heart condition, poor endurance and dyspnea with minimal exertion. She also has rheumatoid arthritis, limited mobility, sleep problems, diabetes, edema and has recently gained significant weight. She takes many medications and some make her drowsy and limit her ability further. She occasionally requires hospital and/or emergency room care. She has frequent medical appointments. She is knowledgeable of her son's care and care needs. She can provide medication

assistance for her son and she helps meet his skilled care need. She has a strong emotional connection with her son. She cannot lift or position him. She is limited in her mobility and ability to provide physical care for her son. Petitioner's Exhibit 1 included medical information about the mother. Her doctor indicated she was unable to care for her son due to her health and fatigue issues.

4. Eligibility for PDN is evaluated every six months, for six-month certification periods. KePRO (Keystone Peer Review Organization) conducts the review for AHCA and KePRO electronically receives the review data from the care providers. KePRO does not conduct interviews with the families or doctors.

5. Past certification included PDN of 3855 hours. This covered Monday through Friday 4:00 p.m. to 9:00 a.m., Saturdays and Sundays and non-school days 24 hours, plus 4 hours on Wednesdays.

6. The petitioner requested 3600 skilled hours for the new certification period of October 18, 2009 to April 15, 2010. The request was for 17 hours daily Monday, Tuesday, Thursday, Friday; 18 hours Wednesday, plus 24 hours on Saturday, Sunday and non-school days.

7. The KePRO Medicaid review denied 2060 hours and authorized 1540 hours of PDN. The authorization covered PDN for eight hours a night, seven nights a week, and four hours on Saturday for the parent to run errands. The KePRO "Internal Focus Review Findings" said the 2060 denied nursing hours could be replaced with "HHA" (home health aide).

8. The petitioner's mother and his nurse do not agree that the mother could provide those 2060 hours of skilled care and supervision with an HHA

present. They allege that the mother is occasionally asleep or at the hospital with her emergencies and that having the PDN hours gives stability to the care. They describe the mother as physically present but functionally unavailable for long periods due to her medical problems.

CONCLUSIONS OF LAW

By agreement between the Agency for Health Care Administration (AHCA) and the Department of Children and Families, AHCA has conveyed jurisdiction to the Office of Appeal Hearing to conduct this hearing pursuant to Florida Statute, Chapter 120.80.

Florida Statute 409.905 addresses mandatory Medicaid services under the State Medicaid Plan and informs:

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...

(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. ...

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

Consistent with law, AHCA uses a prior authorization system for all PDN services. This includes assessment based on 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. AHCA does not pay for home health services unless such is medically necessary. Florida Statute 409.913 also addresses "Oversight of the integrity of the Medicaid program," with (1)(d) describing "medical necessity or medically necessary" standards and saying in relevant part. "...For purposes of determining Medicaid reimbursement, the agency is the final arbiter of medical necessity..."

At issue is whether reduction of PDN hours with replacement of HHA hours is justified for the new certification period. Consistent with statute, Florida Administrative Code 59G-1.010 "Definitions" informs:

(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 Limitation

Handbook is adopted by rule under the Florida Administrative Code at 59G-4.130

(2). The Florida Medicaid Home Health Services Coverage and Limitation

Handbook, addresses PDN, parental responsibility and flex hours, with pages 2-

17 and 19, stating:

Parental Responsibility.

Private duty nursing services are authorized to *supplement* (emphasis added) 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. Medicaid does not reimburse private duty nursing for respite care. Examples are parent or caregiver recreation, socialization, and volunteer activities.

...

Limitations

...

Authorization Process

Private duty nursing services are authorized by the Medicaid peer review organization if the services are determined to be medically necessary.

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 reduction in this case was that the parent would be expected to provide supervision (no lifting) to the fullest extent possible. The petitioner's

care is medically complex. He needs continuous skilled care along with personal attention, and that is undisputed. He has not required emergency room care or hospitalization during the past few months. Although his medical condition is complex and he sees the physician regularly, his situation may be described as somewhat stabilized. Additionally, he is generally away from the home during school hours, without PDN during that time.

For the Medicaid Program to authorize and pay for PDN service, all review standards must be met. In the review, it is necessary to assess other sources of care. The Florida Medicaid Handbook, set forth under rule, says that private duty nursing services are authorized to *supplement* care provided by parents but parents must participate in providing care to the fullest extent possible. It is then important to assess whether parents can provide the services during the time and in the manner the respondent has determined they can.

To make that evaluation, the undersigned considered skill levels and extensive limitations of the parent. This parent is a disabled single parent. She understands her son's care needs, is deeply committed to his well-being, and she can provide skilled services that do not require strength. However, she is unable to lift or position him, she is frequently in pain, she is often medicated and occasionally asleep. Her doctor does not seem to believe she can personally provide physical care for her son. However, the mother lives in the home, is knowledgeable about care requirements, is strongly connected to her son, is able to perform non-lifting care, and she is not mentally incompetent. These factors are also relevant.

The Florida Medicaid Home Health Services Coverage and Limitation Handbook, under Licensed Nurse and Home Health Aide 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 procedure, 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 feeding, 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 Handbook continues, and page 2-15 addresses “Home Health Aide Services” stating:

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 Handbook, page 2-31 addresses “Changes to Approved Requests

(Modifications),” and informs:

For any requested change, the provider must submit via the Internet additional new information, not previously submitted, documenting the need for the additional hours.

When requesting additional hours within a certification period, the provider should indicate that the request:

- Is for additional hours or a change to an already requested certification period; and
- Includes the attending physician, support coordinator, or case manager approved POC (plan of care), new orders (if a home health agency), and a reason for the adjustment.

The rules say that the request must reflect the level of service for which no equally effective and more conservative or less costly treatment is available. In accord with rules, the Handbook also has a system to address modifications, if needed. In this situation, it is proper to assess the hours that the parent would be available to provide assistance and care to the petitioner. It is recognized she cannot provide any lifting or positioning of the petitioner on her own and she has periods of fatigue and limitation. She cannot care for her son without significant hands-on assistance. However, with an HHA in the home to fully replace the PDN for 2060 hours it should be possible for her to manage, supervise, and assist in his skilled care on an as needed basis. This would be consistent with

her health and fatigue limitations, as described by her doctor. Such would also be consistent with her concern for, caring of, and connection to her son.

The petitioner is in school for a good part of most days, so the mother is not expected to provide care around the clock. The AHCA plan would continue to have PDN available for 8 hours every night and an additional 4 hours on a weekend day so the mother could attend to errands during the weekend. These factors should permit her to have restorative sleep time and chore time. All 2060 non-approved PDN hours would be replaced with HHA. The mother would not be expected to provide care without an assistant.

The change planned by AHCA is reasonable, as long as the 2060 non-approved PDN hours are replaced with HHA. If care problems were encountered, then the provider could submit new information in accord with modification standards. Based on evidence and guidelines, the reduction has been justified.

DECISION

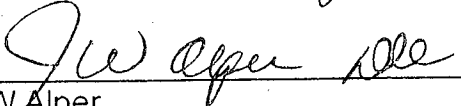
The appeal is denied and the respondent's action is affirmed.

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.

FINAL ORDER (Cont.)
09F-08203
PAGE - 11

DONE and ORDERED this 18th day of February, 2010, in
Tallahassee, Florida.



J W Alper
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
850-488-1429

Copies Furnished To: