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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR

[REDACTED]
MI [REDACTED]

Date Mailed: February 28, 2022
MOAHR Docket No.: 22-000255
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Corey Arendt

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.*, upon a request for a hearing filed on behalf of the minor Petitioner.

After due notice, a hearing was held on February 23, 2022. [REDACTED] Petitioner's Mother, appeared and testified on Petitioner's behalf. [REDACTED] Petitioner's Father, also participated as a witness. Emily Piggott, Appeals Review Officer, represented the Respondent, Michigan Department of Health and Human Services. Mellody London, Review Analyst, appeared as a witness for the Department.

ISSUE

Did the Department properly authorize a transitional reduction in Petitioner's Private Duty Nursing (PDN) services leading to a termination of those services?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. Petitioner is a Medicaid beneficiary, born [REDACTED] 2020, who is diagnosed with short bowel syndrome, imperforate anus, auditory neuropathy, developmental delays, anemia, and history of acute renal failure. Petitioner has a g-tube. (Exhibit A, pp 5, 18; Testimony).
2. On October 20, 2021, Department issued a Notice of Authorization, approving Petitioner for PDN services beginning November 1, 2021, and expiring on April 30, 2022. As of October 20, 2021, Petitioner was reliant on total parenteral nutrition (TPN). (Exhibit A, p 15).

3. As of December 4, 2021, Petitioner was weaned off of TPN and on December 7, 2021, Petitioner's Broviac was removed. (Exhibit A, pp 18-23; Testimony).
4. On December 15, 2021, First Day Homecare, one of Petitioner's PDN providers, sent the Department a letter indicating Petitioner's central line being removed and a discontinuation of TPN. (Exhibit A, p 24; Testimony).
5. On December 24, 2021, Mercy Plus, one of Petitioner's PDN providers, sent the Department a letter indicating they were discharging Petitioner following Petitioner's central line being removed and being weaned from TPN. (Exhibit A, p 26; Testimony).
6. On January 3, 2022, following a review of Petitioner's change in condition, the Department sent Petitioner a notice of Amended Notice of Authorization. The notice stated the following:

One time exception: [REDACTED] has been receiving hourly nursing services authorized by Michigan Medicaid. The authorized service will be changed on January 3, 2022. The new determination is: 10 hours per day of PDN from 11/1/21 – 1/17/22, then will be 8 hours per day from 1/18/22 – 1/31/22. Effective 2/1/22, PDN services will terminate, as beneficiary does not meet Medicaid criteria for PDN hours of Private Duty Nursing. Please prepare family for termination. Develop education/termination plan to prepare caregivers for the PDN to be terminated.¹

7. On January 3, 2022, the Department sent Petitioner a Notification of Reduction/Termination of Private Duty Nursing Services. The notice stated the following:

The decision is based on a recent removal of central line and TPN as of 12/14/21. This indicates that a change in the authorized services is warranted because:

- Based upon submitted documentation, medical criteria for PDN has not been met. Beneficiary does not have a trach, vent or TPN currently. Private Duty Nursing Chapter, Section 2.3 Medical criteria. Beneficiary does not meet Medicaid criteria for PDN

¹ Exhibit A, pp 28-29.

hours of Private Duty Nursing. Please prepare for termination.²

8. On January 24, 2022, the Michigan Office of Administrative Hearings and Rules (MOAHR), received the request for hearing filed on behalf of the minor Petitioner. (Exhibit A, pp 4-7).

CONCLUSIONS OF LAW

The Medical Assistance Program is established pursuant to Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR).

It is administered in accordance with state statute, the Social Welfare Act, the Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

This case involves the reduction in Petitioner's private duty nursing (PDN) services and, with respect to such services, the applicable version of the Michigan Medicaid Provider Manual (MPM) states:

SECTION 1 – GENERAL INFORMATION

This chapter applies to Independent and Agency Private Duty Nurses.

Private duty nursing (PDN) is a Medicaid benefit when provided in accordance with the policies and procedures outlined in this manual. Providers must adhere to all applicable coverage limitations, policies and procedures set forth in this manual.

PDN is covered for beneficiaries under age 21 who meet the medical criteria in this section. If the beneficiary is enrolled in or receiving case management services from one of the following programs, that program authorizes the PDN services.

- Children's Waiver (the Community Mental Health Services Program)
- Habilitation Supports Waiver (the Community Mental Health Services Program)
- Home and Community-Based Services Waiver for the Elderly and Disabled (the MI Choice Waiver)

For a Medicaid beneficiary who is not receiving services from one of the above programs, the Program Review Division reviews the request for authorization and authorizes the services if the medical criteria and

² Exhibit A, p 30.

general eligibility requirements are met.

Beneficiaries who are receiving PDN services through one Medicaid program cannot seek supplemental PDN hours from another Medicaid Program (i.e., Children's Waiver, Habilitation Supports Waiver, MI Choice Waiver).

For beneficiaries 21 and older, PDN is a waiver service that may be covered for qualifying individuals enrolled in the Habilitation Supports Waiver or MI Choice Waiver. When PDN is provided as a waiver service, the waiver agent must be billed for the services.

1.1 DEFINITION OF PDN

Private Duty Nursing is defined as nursing services for beneficiaries who require more individual and continuous care, in contrast to part-time or intermittent care, than is available under the home health benefit. These services are provided by a registered nurse (RN), or licensed practical nurse (LPN) under the supervision of an RN, and must be ordered by the beneficiary's physician. Beneficiaries requiring PDN must demonstrate a need for continuous skilled nursing services, rather than a need for intermittent skilled nursing, personal care, and/or Home Help services. The terms "continuous" and "skilled nursing" are further defined in the Medical Criteria subsection for beneficiaries under age 21.

* * *

1.7 BENEFIT LIMITATION

The purpose of the PDN benefit is to assist the beneficiary with medical care, enabling the beneficiary to remain in their home. The benefit is not intended to supplant the caregiving responsibility of parents, guardians, or other responsible parties (e.g., foster parents). There must be a primary caregiver (i.e., parent, guardian, significant other adult) who resides with a beneficiary under the age of 18, and the caregiver must provide a monthly average of a minimum of eight hours of care during a typical 24-hour period. The calculation of the number of hours authorized per month includes eight hours or more of care that will be provided by the caregiver during a 24-hour period, which are then averaged across the hours authorized for the month. The caregiver has the flexibility to use the monthly-authorized hours as needed during the month.

The time a beneficiary is under the supervision of another entity or individual (e.g., in school, in day/child care, in work program) cannot be used to meet the eight hours of obligated care as discussed above, nor can the eight hours of care requirement for beneficiaries under age 18 be met by other public funded programs (e.g., MDCH Home Help Program)

or other resources for hourly care (e.g., private health insurance, trusts, bequests, private pay).

2.3 MEDICAL CRITERIA

To qualify for PDN, the beneficiary must meet the medical criteria of **either I and III below or II and III below**:

Medical Criteria I

The beneficiary is dependent daily on technology-based medical equipment to sustain life. “Dependent daily on technology-based medical equipment” means:

- Mechanical ventilation four or more hours per day, or assisted respiration does not automatically include ventilation through Bi-level Positive Airway Pressure (Bi-PAP) or Continuous Positive Airway Pressure (CPAP). Use of these devices to satisfy this criteria will be evaluated on a case-by-case basis; or
- Oral or tracheostomy suctioning 8 or more times in a 24-hour period; or
- **Nasogastric tube** feedings or medications when removal and insertion of the **nasogastric tube** is required, associated with complex medical problems or medical fragility; or
- Total parenteral nutrition delivered via a central line, associated with complex medical problems or medical fragility; or
- Continuous oxygen administration, in combination with a pulse oximeter and a documented need for observations and adjustments in the rate of oxygen administration.

Medical Criteria II

Frequent episodes of medical instability within the past three to six months, requiring skilled nursing assessments, judgments or interventions as described in **III** below, due to a substantiated progressively debilitating physical disorder.

- “Frequent” means at least 12 episodes of medical instability related to the progressively debilitating physical disorder within the past six months, or at least six episodes of medical instability related to the progressively debilitating physical disorder within the past three months;

- “Medical instability” means emergency medical treatment in a hospital emergency room or inpatient hospitalization related to the underlying progressively debilitating physical disorder;
- “Emergency medical treatment” means covered inpatient and outpatient services that are furnished by a provider who is qualified to furnish such services and which are needed to evaluate or stabilize an emergency medical condition. “Emergency medical condition” means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson who possesses an average knowledge of health and medicine could reasonably expect the absence of immediate medical attention to place the health of the individual in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part.
- “Progressively debilitating physical disorder” means an illness, diagnosis, or syndrome that results in increasing loss of function due to a physical disease process, and that has progressed to the point that continuous skilled nursing care (as defined in III below) is required; and
- “Substantiated” means documented in the clinical/medical record, including the nursing notes.

For beneficiaries described in II, the requirement for frequent episodes of medical instability is applicable only to the initial determination of medical necessity for PDN. Determination of continuing eligibility for PDN for beneficiaries defined in II is based on the original need for skilled nursing assessments, judgments, or interventions as described in III below.

Medical Criteria III

The beneficiary requires continuous skilled nursing care on a daily basis during the time when a licensed nurse is paid to provide services.

- “Continuous” means at least once every three hours throughout a 24-hour period, and/or when delayed interventions may result in further deterioration of health status, in loss of function or death, in acceleration of the chronic condition, or in a preventable acute episode.
- Equipment needs alone do not create the need for skilled nursing services.

- “Skilled nursing” means assessments, judgments, interventions, and evaluations of interventions requiring the education, training, and experience of a licensed nurse.

Skilled nursing care includes, but is not limited to, performing assessments to determine the basis for acting or a need for action; monitoring fluid and electrolyte balance; suctioning of the airway; injections; indwelling central venous catheter care; managing mechanical ventilation; oxygen administration and evaluation; and tracheostomy care.

2.6 CHANGE IN BENEFICIARY'S CONDITION/PDN AS A TRANSITIONAL BENEFIT

Medicaid policy requires that the integrated plan of care (POC) be updated as necessary based on the beneficiary's medical needs. Additionally, when a beneficiary's condition changes, warranting a decrease in the number of approved hours or a discontinuation of services, the provider must report the change to the appropriate authorizing agent (i.e., the Program Review Division, Children's Waiver, or Habilitation Supports Waiver) in writing. Changes such as weaning from a ventilator or tracheostomy decannulation can occur after months or years of services, or a beneficiary's condition may stabilize to the point of requiring fewer PDN hours or the discontinuation of hours altogether. It is important that the provider report all changes resulting in a decrease in the number of hours to the authorizing agent as soon as they occur, as well as properly updating the POC. MDCH will seek recovery of monies inappropriately paid to the provider if, during case review, the authorizing agent determines that a beneficiary required fewer PDN hours than was provided and MDCH was not notified of the change in condition.

In some cases, the authorized PDN services may be considered a transitional benefit. In cases such as this, one of the primary reasons for providing services should be to assist the family or caregiver(s) to become independent in the care of the beneficiary. The provider, in collaboration with the family or caregiver(s), may decide that the authorized number of hours should be decreased gradually to accommodate increased independence on the part of the family, caregiver(s), and/or beneficiary. A detailed exit plan with instructions relating to the decrease in hours and possible discontinuation of care should be documented in the POC. The provider must notify the authorizing agent that hours are being decreased and/or when the care will be discontinued.³

Petitioner bears the burden of proving by a preponderance of evidence that the Department erred in deciding to reduce/terminate PDN services. For the reasons discussed below, this Administrative Law Judge finds that Petitioner has not met that

³ Medicaid Provider Manual, Private Duty Nursing, January 1, 2022, pp 1-7, 10-12 ,16.

burden of proof.

The Department's Analyst testified that updated medical records reflected Petitioner no longer required TPN and further had his central line removed. The witness indicated that as a result, Petitioner no longer qualified for PDN services and would be transitioned from the program.

Petitioner's Mother and Father testified that although Petitioner did not have a nasogastric tube, he still had a g-tube that required continuous care and further had significant needs requiring "careful management". The services and needs identified however, did not require skilled nursing care and were services and needs that could be provided by other trained caregivers.

Based upon the medical documentation submitted, the Department properly determined that a transitional reduction/termination in PDN was warranted. Petitioner has failed to meet his burden of proving by a preponderance of evidence that the Department erred in authorizing a transitional reduction and then termination in his PDN services. Clearly, Petitioner has very significant health issues, requires an enormous amount of care and Petitioner's parents should be commended for the constant care that is provided to Petitioner. However, the documentation submitted showed that Petitioner no longer had needs requiring skilled nursing care. Consequently, the Department's notice of a transitional reduction/termination in services should be affirmed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly authorized a transitional reduction/termination in Petitioner's private duty nursing services based on the medical records submitted.

IT IS THEREFORE ORDERED THAT:

Respondent's decision is AFFIRMED.

CA/cg



Corey Arendt
Administrative Law Judge
for Elizabeth Hertel, Director
Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules
Reconsideration/Rehearing Request
P.O. Box 30763
Lansing, Michigan 48909-8139

DHHS -Dept Contact

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