STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION
OFFICE OF FAIR HEARINGS

FILED
Nov 21, 2023, 10:39 am
OFFICE OF FAIR HEARINGS

[redacted],

PETITIONER,

AHCA Case No.: 23-FH2065
Plan ID No.: [redacted]

vs.

SIMPLY HEALTHCARE PLANS, INC.,

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, the undersigned Hearing Officer convened a telephonic Fair Hearing on the instant case on October 9, 2023, at 10:00 a.m. Eastern Standard Time ("EST").

APPEARANCES

For the Petitioner: [redacted]
Petitioner's Authorized Representative

For the Respondent: Shelly Leachman, RN
National State Fair Hearing Team
Simply Healthcare Plans, Inc.

STATEMENT OF ISSUE

The issue is whether Petitioner proved by a preponderance of the evidence that Respondent's denial of Durable Medical Equipment ("DME"), namely an Augmentative Alternative Communication Device ("AAG") was incorrect.

PRELIMINARY STATEMENT

All parties appeared for the Fair Hearing telephonically. The Petitioner's [redacted], [redacted], appeared as the Authorized Representative for the Petitioner.

Shelly, Leachman, RN ("Ms. Leachman"), of the National State Fair Hearing Team for Simply Healthcare Plans, Inc. ("Simply") appeared for the Fair Hearing as a representative for Respondent. Dr. Ophelia Mall ("Dr. Mall"), Medical Director for Simply testified on behalf of the Respondent.

Diana Hearod, Medical Healthcare Program Analyst and Fair Hearing Liaison for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared for the Fair Hearing as an observer.

Prior to the hearing, the Petitioner sent to the Office of Fair Hearings and the Respondent a thirty-five (35) page evidence package that was admitted into evidence without objection, is identified as "Petitioner's Composite Exhibit 1", and is maintained in the AHCA document management system as "23-FH2065 Evidence.pdf".

Prior to the Fair Hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred and five (105) page evidence package that was admitted into evidence without objection, is identified as "Respondent's Composite Exhibit 1", and is maintained in the AHCA document management system as "FL Simply Packet-[Petitioner].pdf".

FINDINGS OF FACT

1. Petitioner is an enrolled member of Simply. *See* Respondent's Composite Exhibit 1, page 1. Simply is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in the state of Florida.

2. Petitioner is a [redacted] that has been diagnosed with [redacted] in [redacted], and has been receiving [redacted] since [redacted] was [redacted]. *See* Respondent's Composite Exhibit 1, page 10. The Petitioner has [redacted]

[redacted], [redacted], and [redacted] [redacted]. *See* Petitioner's Exhibit 1, page 31.

3. On July 26, 2023, the Petitioner requested a CPT Code E2510NU Speech Generating Device, also known as an "Augmentative Alternative Communication Device ("AAC Device"), and more specifically a Quicktalker Freestyle Speech Generating Device, which consists of an Apple IPad Mini with a protective cover and Proloquo2Go software. *See* Respondent's Composite 1, pages 7, 8, and 16. The Petitioner's physician, [redacted], M.D. provided a letter of medical necessity, which states in pertinent part:

> … it is medically necessary for [redacted] [the Petitioner] to have an augmentative alternative communication (ACC) device which would entail having the following pieces of equipment: IPad, protective cover, Proloqou2go software in order to learn to communicate and progress through school and live.

See Petitioner's Composite Exhibit 1, page 31.

4. On July 30, 2023, the Respondent issued a Notice of Adverse Benefit Determination ("NABD") denying Petitioner's request for a speech generating device based on medical necessity. *See* Respondent's Composite Exhibit 1, pages 16-20. The NABD stated the reason for the denial in part as follows:

> We made our decision because:
> (Check all boxes that apply.)
> X We determined that your requested services are **not medically necessary** because the services do not meet the reason(s) checked below: *(See Rule 59G-1.010.)*
> _ Must be needed to protect life, prevent significant illness or disability, or alleviate severe pain
> X Must be individualized, specific, and consistent with symptoms or diagnosis of illness or injury, and not be in excess of the patient's needs
> _ Must meet accepted medical standards and not be experimental or investigational

_ Must be able to be 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

_ Must be furnished in a manner not primarily intended for convenience of the recipient, caretaker, or provider
(The convenience factor is not applied to the determination of the medically necessary level of private duty nursing [PDN] for children under the age of 21.)

_ The requested **service is not a covered benefit**

Other authority:
The facts that we used to make our decision are We cannot cover your child's speech treatment (E2510NU - Speech generating device, synthesized speech, permitting multiple methods). You are asking for a tablet to help them talk (iPad tablet). This tablet can also be used for other things. This kind of tablet is not medically needed. This decision is based on The Florida DME and Medical Supply Services Coverage and Limitations Handbook, pages 2-36 to 2-45. Your reference number is: [redacted].

Id.

5. On August 1, 2023, the Petitioner requested a plan appeal. *See* Respondent's Composite Exhibit 1, page 35. On August 9, 2023, Simply issued a Notice of Plan Appeal Resolution ("NPAR") upholding the denial of Petitioner's request for speech generating device. *See* Respondent's Composite Exhibit 1, pages 35-37. The NPAR states the following explanation, in pertinent part:

> On 08/08/2023, after consideration of the information you provided to Simply in support of your plan appeal, Simply hereby DENIES your plan appeal. We cannot cover your child's voice machine (E2510NU- Speech generating device, synthesized speech, permitting multiple methods). We see that your child has [redacted] ([redacted]). You want them to have a machine (IPAD tablet) to help [redacted] speak. The notes did not show why they need this machine. We asked your doctor to send us more notes. We did not get any. We based this on: The Florida DME and Medical Supply Services Coverage and Limitations Handbook, pages 2-36 to 2-45. Your case was looked at by a Pediatrics & Neonatology Specialist for Simply.

Id.

6. On August 24, 2023, the Petitioner requested a Fair Hearing regarding the denial of the speech generating AAC Device. On September 18, 2023, the undersigned Hearing Officer issued a notice to all parties of record scheduling the Fair Hearing to be conducted by telephone on October 9, 2023, at 10:00 a.m. EST.

7. The Petitioner's [redacted] served as the Authorized Representative in this matter and testified that [redacted] is [redacted], and has successfully used the IPad based Quicktalker Freestyle AAC Device at school and in [redacted] sessions. The Authorized Representative testified that both the Petitioner's physician and [redacted] speech-language pathologist have recommended the Quicktalker Freestyle speech generating device that consists of an Apple IPad mini device with Proloquo2go software.

8. Dr. Mall testified on behalf of the Respondent and acknowledged that an AAC Device is medically necessary for the Petitioner due to [redacted] communication deficiencies but that the Medicaid rules and regulations require a dedicated device that is not commercially available to the general public and includes speech generating software which is locked and cannot be changed or altered in any fashion by the end user. Dr. Mall further testified that the IPad mini is not a Medicaid eligible device because it is commercially available with internet access and users have the ability to alter the operating system software to allow the device to be used for other purposed beyond a AAC Device. Dr. Mall testified there are other AAC Devices that meet the Medicaid requirements because they are not commercially available, whose software can only be altered by a properly licensed speech pathologist or therapist, and are eligible as a Florida Medicaid benefit when shown to be medically necessary.

CONCLUSIONS OF LAW

9. The Agency's Office of Fair Hearings has jurisdiction over the subject matter of this proceeding and the parties pursuant to section 409.285(2) of the Florida Statutes (2019). This order is the final administrative decision of AHCA under Fla. Stat. § 409.285(2)(a).

10. This hearing was held as a *de novo* proceeding pursuant to Florida Administrative Code Rule ("Fla. Admin. Code R.") 59G-1.100(17)(b).

11. The burden of proof in this proceeding is governed by Fla. Admin. Code R. 59G-1.100(17)(g), which provides as follows:

> The burden of proof is on the party asserting the affirmative of an issue, except as otherwise required by statute. The burden of proof is on the Agency or plan, whichever is applicable, when the issue presented is the suspension, reduction, or termination of a previously authorized service. The burden of proof is on the recipient or enrollee when the issue presented is the denial or a limited authorization of a service. The party with the burden of proof shall establish its position to the satisfaction of the Hearing Officer by a preponderance of the evidence.

12. Because Petitioner is requesting a new service, namely an AAC Device, Fla. Admin. Code R. 59G-1.100(17)(g) assigns the burden of proof to Petitioner. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" (Black's Law Dictionary at 1201, 7th Ed.).

13. States must provide Early and Periodic Screening, Diagnostic, and Treatment ("EPSDT") services to Medicaid-eligible children under age 21 when requested under the Medicaid state plan. *See* 42 U.S.C. § 1396a(a)(43); 42 U.S.C. § 1396d(a)(4). According to 42 U.S.C. § 1396d(r)(5), EPSDT services mean, in relevant part, the following items and services:

> 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 illness and conditions discovered by the screen services, whether or not such services are covered under the state plan.

14. The Petitioner is under age 21, and therefore EPSDT applies to [redacted] request for services. However, a state may place medical necessity limitations on EPSDT services. *See* 42 C.F.R. §§ 440.230(a), (b), (d). Fla. Stat. § 409.905(2) limits EPSDT services with a medical necessity standard:

> 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 all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems and conditions, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations.

15. Petitioner's requests for DME, specifically an AAC Device, is governed by the Florida Medicaid Durable Medical Equipment and Medical Supply Services Coverage and Limitations Handbook (July 2010) ("DME Handbook"), which is incorporated by reference in Fla. Admin. Code R. 59G-4.070. The DME Handbook provides the following, in pertinent part:

> **Purpose**
> The purpose of the DME and Medical Supply Services Program is to promote, maintain, or restore health and minimize the effects of illness, disability, or a disabling condition.
>
> **Durable Medical Equipment (DME)**
> Durable medical equipment (DME) is defined as medically-necessary equipment that can withstand repeated use, serves a medical purpose, and is appropriate for use in the recipient's home as determined by the Agency for Health Care Administration (AHCA).
> . . .
> **Service Criteria**
> All DME, medical supplies, and orthotics and prosthetic devices must be:
> - **Medically necessary**, and
> - Functionally appropriate for the individual recipient, and
> - Adequate for the intended medical purpose, and
> - For conventional use, and

- For the exclusive use of the recipient.

DME items requested or supplied must not duplicate or perform the same function as other DME equipment or medical supplies currently in the recipient's possession

. . .

Medical Necessity

Medicaid reimburses for services that do not duplicate another provider's service and are determined to be medically necessary. Per 59G-1.010, F.A.C., to be medically necessary, services must meet the following conditions:

- Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
- 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;
- Be consistent with generally accepted professional medical standards as determined by the Medicaid program and not experimental or investigational;
- 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
- Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

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.

. . .

Augmentative and Alternative Communication Systems

Introduction

Dedicated augmentative and alternative communication systems (AAC) devices are reimbursed through the Medicaid DME and medical supply services program.

. . .

Definition of Augmentative and Alternative Communication (AAC) Systems Devices

AAC devices are designed to allow individuals to communicate. As defined by the American Speech-Language Hearing Association (ASHA), an AAC device attempts to compensate for the impairment and disability patterns of individuals with severe, expressive communication disorders, i.e., individuals with severe speech-language and writing impairments.

> Dedicated AAC systems are designed specifically for a disabled population and must be prior authorized.
>
> **Non-dedicated systems are commercially available devices such as laptop computers with special software and are not reimbursable by Medicaid.**

DME Handbook at pages 1-1, 1-2, 2-5, 2-9, 2-36, and 2-37. (Emphasis added.)

16. The Florida Medicaid Definitions Policy (August 2017), incorporated by reference in Fla. Admin. Code R. 59G-1.010, provides definitions of commonly used terms that are applicable to all sections of Rule Division 59G, Florida Administrative Code (F.A.C.), unless specifically stated otherwise in a service-specific coverage policy or rule. The Florida Medicaid Definitions Policy defines "Medically Necessary" or "Medical Necessity" as follows:

> The medical or allied care, goods, or services furnished or ordered must meet the following conditions:
>
> - Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate pain
> - 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
> - Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational
> - 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
> - Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider
>
> 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.

17. Petitioner requested an AAC Device, and more specifically a Quicktalker Freestyle Speech Generating Device, which consists of an Apple IPad Mini with Proloquo2Go software. *See* supra ¶ 3. In the NABD and in the NPAR, Respondent denied Petitioner's request for the IPad based

AAG Device as not medically necessary in the Quicktalker Freestyle Speech Device is not 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. . *See* supra ¶ 4 and 5. This medical necessity requirement is referenced in the Florida Medicaid DME Handbook, the EPSDT Fla. Stat. § 409.905(2), Fla. Stat., and the Florida Medicaid Definitions Policy. *See* supra ¶ 14-16.

18. As Petitioner bears the burden of proof, Petitioner must show that Respondent's decision was incorrect. *See* supra ¶ 11. Thus, Petitioner must show that an AAC Device, and more specifically a Quicktalker Freestyle speech generating device, which in this case consists of an Apple IPad Mini with a protective cover and Proloquo2Go software, is medically necessary and falls within the eligibility of Florida Medicaid benefits. *See* supra ¶ 15 and 16. The Petitioner's Authorized Representative did not provide credible testimony demonstrating that the Quicktalker Freestyle speech generating device consisting of an Apple IPad Mini with a protective cover and Proloquo2Go software is medically necessary, is individualized, specific, and consistent with the Petitioner's confirmed diagnosis, is not in excess of the Petitioner needs, and falls within the eligibility of Florida Medicaid benefits pursuant to the DME Handbook. *See* supra ¶ 7.

19. Based on the totality of the circumstances, evidence, testimony and the applicable Florida policies, the Petitioner has not established that the Quicktalker Freestyle speech generating device consisting of an Apple IPad Mini with a protective cover and Proloquo2Go software is medically necessary and falls within the eligibility of Florida Medicaid benefits established by the DME Handbook. Dr. Mall did testify that a speech generating device is appropriate for the Petitioner, but not a commercially available device like an IPad based device. Accordingly, the record does not show that the specified device is "individualized, specific, and consistent with

symptoms or diagnosis of the illness or injury treatment and not in excess of the patient's needs". Looking at all the evidence relevant to the particular needs of Petitioner, Petitioner has not demonstrated that the IPad based Quicktalker Freestyle Speech Device is necessary to correct or ameliorate the Petitioner's defect or a physical and mental illness or condition, namely the diagnosed nonverbal condition. Accordingly, the undersigned Hearing Officer finds that Petitioner has not proved by a preponderance of the evidence that Respondent's denial of DME and more specifically Quicktalker Freestyle speech generating device consisting of an Apple IPad Mini with a protective cover and Proloquo2 was incorrect.

IT IS THEREFORE ORDERED AND ADJUDGED:

Respondent's denial of the Quicktalker Freestyle speech generating device consisting of an Apple IPad Mini with a protective cover and Proloquo2Go software is hereby **AFFIRMED**. Petitioner's appeal based on Respondent's denial is hereby **DENIED**.

DONE and ORDERED this 21st day of November, 2023, in Tallahassee, Leon County, Florida.

Alan J. Leifer
23-FH2065
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ALAN J. LEIFER, Hearing Officer
Agency for Health Care Administration
Office of Fair Hearings
2727 Mahan Drive, Mail Stop # 11
Tallahassee, FL 32308-5407

NOTICE OF A RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

Copies Furnished To:

[redacted]

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