



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

FILED
Dec 20, 2023, 3:09 pm
OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 23-FH2297

vs.

AGENCY FOR HEALTH CARE
ADMINISTRATION,

RESPONDENT.

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on November 15, 2023, at 1:58 p.m. Eastern Standard Time ("EST").

APPEARANCE

For the Petitioner:

[REDACTED]
[REDACTED]

Petitioner's Authorized Representative

For the Respondent:

Linda Latson
Registered Nurse Specialist
Agency for Health Care Administration

STATEMENT OF ISSUE

The issue is whether Petitioner proved by a preponderance of the evidence that Respondent's decision to deny personal care services for the Petitioner was incorrect.

PRELIMINARY STATEMENT

All parties appeared telephonically. Petitioner's Authorized Representative, [REDACTED] [REDACTED] (" [REDACTED] ") Administrator for [REDACTED], appeared on behalf of Petitioner.

Linda Latson (“Ms. Latson”), Registered Nurse Specialist for the Agency for Health Care Administration (“Agency” or “AHCA”), appeared on behalf of Respondent. Dr. Chris Kunis (Dr. Kunis”), Medical Director for Kepro/eQHealth Solutions, Inc. (“Kepro”) appeared as a witness for Respondent.

Petitioner did not introduce any exhibits at the hearing. Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a sixty-eight (68)-page proposed evidence packet and a seventy-eight (78)-page proposed evidence packet. The sixty-eight (68)-page evidence packet was admitted into evidence without objection, is identified as “Respondent’s Composite Exhibit 1”, and appears in the Office of Fair Hearings document management system as file title “[REDACTED] FH 11.07.2023.pdf”. The Respondent’s seventy-eight (78)-page packet, was admitted into evidence without objection, is identified as “Respondent’s Composite Exhibit 2”, and appears in the Office of Fair Hearings document management system as file title “23-FH2297 AHCA Evidence PCS 78 Pgs.pdf”.

FINDINGS OF FACT

1. Petitioner receives Medicaid services on a fee-for-service basis from the Agency. eQHealth is a Quality Improvement Organization (“QIO”) contracted by the agency to review prior authorization requests for services. See Respondent’s Composite Exhibit 2, page 2.
2. Petitioner is [REDACTED] diagnosed with [REDACTED] and [REDACTED] [REDACTED] currently living with [REDACTED]. See Respondent’s Composite Exhibit 1, Page 16, 56 and 66. The Petitioner is currently receiving behavioral analysis, [REDACTED], [REDACTED], and [REDACTED] services. See Respondent’s Composite Exhibit 1, pages 62 and 66.

3. Petitioner requested personal care services for five (5) hours per day, Monday through Sunday, for the certification period of August 25, 2023, through February 20, 2024, (900 total hours). See Respondent's Composite Exhibit 1, pages 20 and 21. In a Notice of Outcome ("NOO"), dated August 30, 2023, Respondent denied the Petitioner's request for personal care services. See Respondent's Composite Exhibit 1, pages 25-28. The NOO explained the basis of the denial as follows:

[T]he requested services are not medically necessary under the following standard(s):

Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs.

...

The NOO further stated:

The rationale for our decision is as follows:

PR Principal Reason - Denial:

The service is denied because the care can be provided by the parent or caregiver.

[REDACTED]. The patient is [REDACTED]
[REDACTED]
does not work and has no medical limitations but volunteers with the school PTA with no scheduled hours.

Id.

4. The Petitioner requested reconsideration of the Respondent's decision. See Respondent's Composite Exhibit 1, page 66. On September 11, 2023, the Respondent issued a Notice of Reconsideration Determination ("NRD") upholding the denial of personal care services for the Petitioner. See Respondent's Composite Exhibit 1, pages 36-39. The NRD states, in pertinent part as follows:

The reason for the denial is that the services are not medically necessary as defined in 59G-1.010, Florida Administrative Code. Specifically the services must be:

Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs.

Id.

5. On September 12, 2023, Petitioner requested a Fair Hearing to challenge the denial of the requested personal care services. On September 26, 2023, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for November 7, 2023, at 10:00 a.m. EST. The Fair Hearing was convened on November 7, 2023, but a continuance was agreed to by the parties after convening because the Petitioner's Authorized Representative did not receive the Respondent's proposed evidence. By agreement of the parties, the Fair Hearing in this matter was rescheduled by a November 8, 2023, Order Granting Continuance and Rescheduling Fair Hearing by Telephone for November 15, 2023, at 2:00 p.m., EST.

6. Dr. Kunis, testified at the Fair Hearing for the Respondent and stated the Petitioner is [REDACTED] Monday through Friday for twenty-five (25) hours per week, and is receiving BA therapy services for [REDACTED] diagnosed [REDACTED] for five (5) hours per week. *See also* Respondent's Composite Exhibit 1, pages 17, Dr. Kunis further testified that the Petitioner's [REDACTED] is not working but rather volunteers for the local Parent Teacher Association ("PTA"), which is not considered employment. *See also* Respondent's Composite Exhibit 1, page 63. Finally, Dr. Kunis testified that the Petitioner's [REDACTED] is able and can provide the services [REDACTED] needs.

7. [REDACTED] testified that [REDACTED] company, [REDACTED] is to serve as the Petitioner's provider for personal care services, and that the Petitioner is both [REDACTED] and [REDACTED]. See also Respondent's Composite Exhibit 1, page 66. [REDACTED] further testified that Petitioner is essentially a [REDACTED] [REDACTED]. [REDACTED] stated the Petitioner [REDACTED], confirmed the Petitioner has maladaptive behaviors, including [REDACTED] and [REDACTED], and is currently receiving applied analysis behavioral health services to reduce [REDACTED] maladaptive behaviors. See also Respondent's Composite Exhibit 1, page 68. Finally, [REDACTED] stated that the Petitioner even needs help when [REDACTED] is at home with [REDACTED], sometimes receives help with [REDACTED] from [REDACTED] and friends, and would waive personal care services on Saturday and Sunday to gain personal care services for five (5) hours per day, Monday through Friday.

8. [REDACTED], is the Petitioner's physician and has prescribed that the Petitioner receive the services of a home health aide/PCA for five (5) hours per day, Monday through Sunday for one hundred and eighty (180) days. See Respondent's Composite Exhibit 1, page 60.

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 Fla. Admin. Code R. 59G-1.100(17)(b).

11. The burden of proof in this proceeding is governed by Florida Administrative Code, Rule. 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 Respondent has denied a new service, Fla. Admin Code R. 59G-1.100(17)(g) assigns the burden of proof to Petitioner to demonstrate the decision by the Respondent to deny a home health aide/personal care services for the Petitioner was incurred. 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. The Agency’s Florida Medicaid Personal Care Services Coverage Policy, November 2016 (“Policy”) has been incorporated, by reference, into Fla. Admin. Code R. 59G-4.215, governs Personal Care services available under Florida Medicaid. The Policy provides the following with respect to personal care service:

1.1 Description

Florida Medicaid personal care services provide medically necessary assistance, in the home or in the community, with activities of daily living (ADL) and age appropriate instrumental activities of daily living (IADL) to enable recipients to accomplish tasks they would normally be able to do for themselves if they did not have a medical condition or disability.

...

4.1 General Criteria

Florida Medicaid reimburses for services that meet all of the following:

- Are determined medically necessary

- Do not duplicate another service
- Meet the criteria as specified in this policy

...

4.2. Specific Criteria

Florida Medicaid reimburses for up to 24 hours of personal care services per day, per recipient, in order to provide assistance with ADLs and age appropriate IADLs when the recipient meets the following criteria:

- Has a medical condition or disability that substantially limits their ability to perform ADLs or IADLs and do not have a parent or legal guardian able to provide the required care
- Is under the care of a physician and has a physician’s order for personal care services
- Requires more extensive and continual care than can be provided through a home health visit
- Requires services that can be safely provided in their home or the community

...

4.2.1 Parental Responsibility

Florida Medicaid reimburses for personal care services rendered to a recipient whose parent or legal guardian is not able to provide ADL or IADL care, and to supplement care provided by parents and legal guardians. Parents and legal guardians must participate in providing care to the fullest extent possible. Providers must offer training to enable parents and legal guardians to provide care they can safely render without jeopardizing the health or safety of the recipient when needed.

...

4.2.2 Services Provided by Independent Personal Care Providers

Personal care services provided by independent personal care providers must be:

- Supervised by the parent or legal guardian if provided by a non-home health agency when the recipient is under the age of 18 years.
- Supervised by the recipient, or their authorized representative, if the services are provided by a non-home health agency when the recipient is between the age of 18 and 21 years with no legal guardian.

...

4.3 Early and Period Screening, Diagnosis, and Treatment

As required by federal law, Florida Medicaid provides services to eligible recipients under the age of 21 years, if such services are medically necessary to correct or ameliorate a defect, a condition, or a physical or mental illness. Included are diagnostic services, treatment, equipment, supplies, and other measures

described in section 1095(a) of the SSA, codified in Title 42 of the United States Code 1396d(a). As such, services for recipients under the age of 21 years exceeding the coverage described within this policy or the associated fee schedule may be approved, if medically necessary.

14. The Policy further addresses excluded services as follows:

5.1 General Non-Covered Criteria

Services related to this policy are not reimbursed when any of the following apply:

- The service does not meet the medical necessity criteria listed in section 1.0.
- The recipient does not meet the eligibility requirements listed in section 2.0.
- The service unnecessarily duplicates another provider's service.

5.2 Specific Non-Covered Criteria

Florida Medicaid does not reimburse for the following:

- A skill level other than what is prescribed in the physician order and approved plan of care (POC)
- Assistance with homework
- Babysitting
- Care, grooming, or feeding of pets and animals
- Certification of the POC by a physician
- Companion sitting or leisure activities
- Escort services
- Housekeeping (except light housekeeping to make the environment safe), homemaker, and chore services
- Nursing assessments related to the POC
- Professional development training or supervision of home health staff or other home health personnel
- Respite care to facilitate the parent or legal guardian attending to personal matters
- Services funded under section 110 of the Rehabilitation Act of 1973 or under the provisions of the Individuals with Disabilities Educational Act
- Services furnished by relatives as defined in section 429.02(18), F.S., household members, or any person with custodial or legal responsibility for the recipient. (Except when a recipient is enrolled in the Consumer-Directed Care Plus program)
- Services provided in any of the following locations:
 - Hospitals
 - Intermediate care facility for individuals with intellectual disabilities
 - Nursing facilities
 - Prescribed pediatric extended care centers

- Residential facilities or assisted living facilities when the services duplicate those provided by the facility
- Services rendered prior to the development and approval of the POC
- Travel time to or from the recipients place of residence
- Yard work, gardening, or home maintenance work.

15. 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.

16. Petitioner is under age 21, and therefore eligible for EPSDT services. However, a state may place medical necessity limitations on EPSDT services. See 42 C.F.R. §§ 440.230(a), (b), (d).

17. 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.

18. The Florida Medicaid Definitions Policy, incorporated by reference in Fla. Admin. Code R. 59G-1.010, 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.

19. In the NOO, dated August 30, 2023, Respondent denied the Petitioner's requested personal care services, namely five (5) hours per day Monday through Sunday. See ¶ 3. The NOO explained that the basis of the denial was that the request was not "individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment" and was "in excess of the patient's needs". *Id.*

20. The Petitioner requested an appeal of the Respondent's denial of the requested personal care services. On September 11, 2023, the Respondent upheld the denial of the Petitioner's requested personal care service hours in a Notice of Reconsideration Determination (NRD) that explained the request was not "individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment" and was "in excess of the patient's needs".

See ¶ 4

21. Personal care services are intended for patients with who require medically necessary assistance, in the home or in the community, with activities of daily living (ADL) and age appropriate instrumental activities of daily living (IADL) to enable recipients to accomplish tasks

they would normally be able to do for themselves if they did not have a medical condition or disability. See ¶ 13. As provided by the EPSDT requirements, the recipient must meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. See ¶ 17.

22. As provided in the Definitions Policy, the components of medical necessity are that services must be “[i]ndividualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient’s needs”. See ¶ 19. As shown by the record, Petitioner is ambulatory, eats a regular diet, attends school Monday through Friday, and is currently receiving behavioral analysis services. See ¶ 16. In addition, the Petitioner’s [REDACTED] does not work, and lives with a home with the Petitioner and the Petitioner’s [REDACTED]. While the Petitioner is [REDACTED] and is [REDACTED], the Petitioner’s [REDACTED] is able to care for [REDACTED], and does not work outside the home, five (5) hours of personal care services per day for seven (7) days per week, would be “in excess of the patient’s needs” and for the convenience of the Petitioner’s [REDACTED] and is, therefore, not medically necessary.

23. While the Authorized Representative testified that the Petitioner’s [REDACTED] would be willing to accept five (5) hours of personal care services Monday through Friday versus five (5) hours per day for seven (7) days per week, the issue before this Hearing Officer is whether the decision to deny five (5) hours of personal care services per day Monday through Sunday, this Hearing does not have the jurisdiction or authority to decided any other issue(s) besides that already in dispute.

24. The Petitioner’s provider, [REDACTED], prescribed that the Petitioner receive the services of a home health aide/PCA for five (5) hours per day, Monday through Sunday for one hundred and eighty (180) days. See ¶ 8. However, “[t]he fact that a provider has prescribed,

recommended, or approved medical or allied care, goods, or services, does not, in itself, make such care . . . medically necessary". See ¶ 19.

25. Upon consideration of the testimony provided, evidence submitted, and applicable polices, the undersigned concludes that the Petitioner has not proved by a preponderance of the evidence that the Petitioner's requested personal care services was not medically necessary. In addition and looking at all the evidence relevant to the particular needs of Petitioner, the Petitioner has not demonstrated that requested personal care services are not necessary to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly, the Petitioner has not proved by a preponderance of the evidence that Respondent's denial of personal care services for five (5) hours per day Monday through Sunday was incorrect.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

Respondent's denial of personal care services is **AFFIRMED**. Petitioner's appeal based on Respondent's denial of personal care services is **DENIED**.

DONE and ORDERED this 20th day of December, 2023, in Tallahassee, Leon County, Florida.

Alan J. Leifer
Alan J. Leifer 23-FH2297
2023.12.20
14:53:27 -05'00'

ALAN 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]
[REDACTED]

AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com