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STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

C.G.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
UNITED HEALTHCARE,	:	**OAL DKT. No. HMA 04413-2020**
RESPONDENT.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. Respondent filed exceptions in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is November 9, 2021 in accordance with an Order of Extension.

This matter concerns the termination of Petitioner's private duty nursing (PDN) hours. Petitioner had been receiving PDN services for 12 hours a day, seven days a week. On January 16, 2020, United Healthcare (United) reassessed Petitioner's condition for PDN services. Based upon that assessment, United determined that Petitioner was no longer eligible for PDN services and sought to terminate the benefits effective February 1, 2020.

Petitioner, through his mother, F.J., appealed this termination of PDN hours.

Petitioner is five years old whose principal diagnosis at the time of his birth was congenital subglottic stenosis. ID at 2 (citing R-3 at 48). Petitioner began receiving PDN services of at least twelve hours per day, seven days per week, beginning on or about August 9, 2016. Ibid. Petitioner's Plan of Care (POC) is prepared by Bayada, the nursing agency that provides care to Petitioner. For the certification period of November 22, 2019 through January 20, 2020 the POC noted that Petitioner has "a complex past medical [history] which includes transposition of the great arteries." Ibid. The POC directed that a respiratory assessment be completed "at the beginning of the shift/visit and with status changes using these three components: pulse rate, respiratory rate, auscultation of breath sounds." Id. at 3 (citing R-3 at 49). The POC additionally provided that a pulse oximeter spot check be performed twice a day and when necessary (PRN); Petitioner's oxygen saturation be monitored when necessary for signs of respiratory distress; Petitioner be monitored during sleep and when unattended; pulse oximetry be performed when Petitioner is left in the care of his primary care guardian; chest physiotherapy (chest PT) be performed "without postural drainage" when necessary for increased congestion or increased work of breathing and after nebulizer treatments; Petitioner's stoma be covered with a dressing or Band-Aid and the skin around stoma needed to be cleaned daily and when soiled with sterile water; and Petitioner needed to be spoon feed pureed food three times per day and snacks twice per day with liquids made to be at "nectar thickened consistency." Ibid. (citing R-3 at 48-49). Moreover, the POC stated that Petitioner's medications included Albuterol every four hours as needed for respiratory distress, cough, and wheezing and oxygen as needed for respiratory distress.[1] Id. at 4 (citing R-3 at 48-49).

In reviewing the matter for a new authorization, United determined that the clinical

[1] Petitioner also used Eucerin cream, a topical lotion, as needed for skin dryness and irritation, Tylenol, as needed for fever or pain, and a paste for diaper rash. ID at 5-6.

notes showed that Petitioner did not meet the criteria for PDN services. Specifically, United's Medicaid Director, Dr. Amy Aronsky, noted that "Your child takes all food by mouth. Your child does not have a breathing tube in the neck. This was removed completely in February 2019. Your child has no breathing problems. Your child does not have seizures. Your child has not been in the hospital recently." R-1 at 5. As a result, United determined that Petitioner's PDN hours should be terminated, effective February 1, 2020. Ibid.

Petitioner argues that he meets the skilled nursing standards necessary to maintain his PDN hours. The Administrative Law Judge (ALJ) reversed United's denial of Petitioner's PDN hours. Based upon my review of the record and the applicable regulations, I hereby REVERSE the Initial Decision.

At the outset, I note that the ALJ issued credibility determinations related to the testimony of Dr. Aronsky and Johanne Orleans, R.N., who has been Petitioner's home nurse since he was five months old. Specifically, while it appears that the ALJ determined that both Dr. Aronsky and Ms. Orleans testified credibly, the ALJ afforded greater weight to the testimony of Ms. Orleans over Dr. Aronsky, citing that Dr. Aronsky did not have personal knowledge of Petitioner or his medical needs and relied upon the reports prepared by others in making her determination. ID at 19-20. The ALJ additionally noted that Ms. Orleans maintained personal knowledge of Petitioner, his medical needs, and the care that she provided to him on a daily basis. Id. at 20. The ALJ stated that Ms. Orleans's testimony was supported by shift notes that she prepared contemporaneously with her care of Petitioner and were close in time to the review period at issue. Ibid. However, Ms. Orleans testified that she engaged in activities related to the care of Petitioner that she did not set forth in her contemporaneous shift notes. By way of example, Ms. Orleans noted that she does chest PT every one to four hours on a daily basis, however, she admitted that her shift notes do not always accurately reflect this. Id. at 22. Further, the ALJ noted that records for at least four dates in December 2019 did not reference chest PT, pulse oximetry, or Albuterol. Ibid.

However, at the hearing in June 2021, approximately one and one half years after Ms. Orleans drafted her shift notes for December 2019, she testified that she engaged in these activities on a daily basis for Petitioner. Ibid. Accordingly, I cannot find that Ms. Orleans's additional testimony related to these supplemental nursing activities, which she failed to document in the shift notes, are supported by the evidence in the record, and I do not see a basis for determining that Ms. Orleans's testimony should be given greater weight than Dr. Aronsky's testimony, especially when Dr. Aronsky relied upon Ms. Orleans shift notes and other documents submitted by Ms. Orleans, Bayada, such as progress reports, clinical assessments, and plans of care, in making her determination that Petitioner no longer qualified for PDN services. Thus, the determination regarding whether Petitioner is entitled to receive PDN services in this matter can only be based upon the documented clinical evidence in the record and the testimony that is supported by same.

The regulations state that the purpose of PDN services is to provide "individual and continuous nursing care, as different from part-time intermittent care, to beneficiaries who exhibit a severity of illnesses that require complex skilled nursing interventions on a continuous ongoing basis." N.J.A.C. 10:60-5.1(b). Further, N.J.A.C. 10:60-5.4(b) sets forth the criteria to be met in order to receive PDN services:

> **(b)** Medical necessity for EPSDT/PDN services shall be based upon, but may not be limited to, the following criteria in (b)1 or 2 below:
>
> **1.** A requirement for all of the following medical interventions:
>
> **i.** Dependence on mechanical ventilation;
>
> **ii.** The presence of an active tracheostomy; and
>
> **iii.** The need for deep suctioning; or
>
> **2.** A requirement for any of the following medical interventions:
>
> **i.** The need for around-the-clock nebulizer treatments, with chest physiotherapy;
>
> **ii.** Gastrostomy feeding when complicated by frequent regurgitation and/or aspiration; or
>
> **iii.** A seizure disorder manifested by frequent prolonged seizures, requiring emergency administration of anti-convulsants.

Additionally, the regulation goes on to exclude certain criteria that do not rise to the level of PDN services unless the criteria above is met:

> **(d)** Services that shall not, in and of themselves, constitute a need for PDN services, in the absence of the skilled nursing interventions listed in (b) above, shall include, but shall not be limited to:
>
> **1.** Patient observation, monitoring, recording or assessment;
>
> **2.** Occasional suctioning;
>
> **3.** Gastrostomy feedings, unless complicated as described in (b)1 above; and
>
> **4.** Seizure disorders controlled with medication and/or seizure disorders manifested by frequent minor seizures not occurring in clusters or associated with status epilepticus.

N.J.A.C. 10:60-5.4(d).

The record does not contain any evidence that Petitioner's condition meets these requirements for PDN services. Specifically, Petitioner does not have a dependence on mechanical ventilation, an active tracheostomy, or the need for deep suctioning. While Petitioner at one time had an active tracheostomy, it was removed in February 2019, and Petitioner is currently left with a stoma that only requires cleaning with sterile water and covering with a dressing, as needed. Moreover, Ms. Orleans denies that she uses deep suctioning with Petitioner. ID at 12. There is also nothing in the record to support a finding that Petitioner suffers from a seizure disorder. Further, while Petitioner is on a special diet, he is able to eat manually and does not rely upon gastrostomy feedings. There is also no evidence submitted in the record to show that Petitioner has experienced frequent regurgitation and/or aspiration. The mere risk of aspiration does not rise to the level to qualify Petitioner for PDN services under N.J.A.C. 10:60-5.4(b), as PDN services cannot be used purely for monitoring in the absence of a qualifying medical need. See N.J.A.C 10:60-5.4(d)1. Lastly, while nebulizer treatments with chest PT are administered to Petitioner, these treatments are not performed "around the clock" and are only performed on an as needed basis approximately every four hours. Accordingly, its administration does not rise to the

level of a medical intervention to support a finding of medical necessity under N.J.A.C. 10:60-5.4(b). Petitioner, thus, does not require complex, ongoing interventions by a licensed nurse, and therefore, he does not meet the eligibility requirements for PDN services.

Based upon the record and the testimony in this matter, it appears that Petitioner is in need of observation, supervision, and monitoring. However, the regulations clearly state that PDN services are not available for observation, monitoring, or assessment. See N.J.A.C. 10:60-5.4(d). The shift notes and POC show the PDN care being provided consists of mainly monitoring and observing Petitioner's medical conditions, which is not considered skilled care.

I additionally note that while Petitioner argues and the ALJ found that United failed to take Petitioner's family situation, such as his parents' residing in separate residences and working full time, into consideration, the difficulties with Petitioner's parental support cannot be a basis for providing the PDN services. See H.W. v. United Healthcare, HMA 18602-2017, Final Decision, (August 16, 2018). Petitioner's parents' work schedule and living situation is only relevant when the PDN services have been found medically necessary. 10:60-5.4(c)(1) (stating that available primary care provider support, additional adult care support within the household, and alternative sources of nursing care shall be considered in determining the extent of the need for PDN services and authorized hours of service only after medical necessity, as set forth in N.J.A.C. 10:60-5.4(b), has first been established). Because United found that PDN services were not medically necessary in this matter, a consideration of Petitioner's family situation was not appropriate.

Thus, for the reasons stated above, I FIND that Petitioner was properly reassessed through the documentation provided through Bayada and his POC. Petitioner's reassessment and the supporting clinical records fail to demonstrate that Petitioner meets the criteria for medical necessity to support continued PDN services. Petitioner's medical records do not demonstrate or document that he has a need for complex skilled nursing

interventions on an ongoing basis. As such, the termination of PDN hours was appropriate under N.J.A.C. 10:60-5.4.

THEREFORE, it is on this 3rd day of NOVEMBER 2021,

ORDERED:

That the Initial Decision is hereby REVERSED.

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services