



State of New Jersey

DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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

N.S.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
v.	:	FINAL AGENCY DECISION
	:	
UNITED HEALTHCARE,	:	OAL DKT. No. HMA 1495-2020
	:	
RESPONDENT.	:	

As Assistant Commissioner of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, Office of Administrative Law (OAL) case file and the documents filed below. Respondent filed exceptions in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is November 8, 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, five days a week. Those hours were reduced to eight hours per day, five day a week with the hours ceasing on January 3, 2020. Petitioner appealed this termination of PDN hours.

Petitioner is eight years old and has epilepsy, Arnold-Chiari Syndrome without spina bifida, hypertrophy of tonsils and asthma. ID at 2 citing R-3 at 43. He began receiving services in 2018 from only Monday through Friday while on the school bus and throughout the school day. There are no hours after school or on weekends. In reviewing the matter for a new authorization, United HealthCare, through its Medical Director Amy Aronsky, D.O., determined that the clinical notes shows that Petitioner did not meet the criteria for private duty nursing. Specifically, Petitioner's last seizure in October 2019 was brief and did not need medical intervention. R-1 at 4-5. He takes food by mouth and does not have any breathing problems. As a result, United HealthCare reduced the hours before discontinuing the hours in January 2020.

Petitioner argued that a "thorough reassessment was not performed to determine the ongoing medical necessity of EPSTD/PDN services." ID at 14. The failure to conduct the reassessment in Petitioner's home did not "clearly document any changes in the child's status or circumstances, including the frequency and types of interventions required." ID at 14. To that end, the Initial Decision reversed the reduction and then termination of PDN hours. Based on my review of the record and the applicable regulations, I hereby REVERSE the Initial Decision.

At the outset I note that the citation of N.J.A.C. 10:60-5.5 relied on in the Initial Decision is not the current version of the regulation. ID at 13. The current regulation on medical necessity determination is as follows:

(a) An initial on-site nursing assessment is necessary in order to review the complexity of the child's care. A hands-on examination of the child is not included in the assessment. The nursing assessment shall include an hour-by-hour inventory of all care-related activities over a 24-hour period, which accurately describes the child's current care. The assessment shall be completed by a nurse employed by a licensed certified home health agency, an accredited healthcare services firm, or licensed hospice agency approved by DMAHS.

(b) The assessor shall describe the specific elements of care, and the individual who rendered the service. Frequency of skilled nursing interventions shall be noted, for example, indicating whether suctioning is

occasional, or frequently required or regularly scheduled with chest PT, such as twice a day or every six hours.

(c) Activities that constitute skilled nursing interventions shall be identified by the assessor, separate from non-skilled nursing activities. The presence and intensity of skilled nursing interventions shall determine whether EPSDT/PDN hours should be authorized.

(d) The presence or absence of alternative care, such as medical day care, private duty nursing services provided by private insurance, or private duty nursing services provided by the child's school, shall be identified and recorded, and those hours shall be deducted from the total hours of EPSDT/PDN services to be authorized in accordance with N.J.A.C. 10:60-5.4.

(e) If EPSDT/PDN hours are authorized, the assessor shall indicate the duration of the prior authorization (PA) period (not to exceed six months) and the time frame for reassessment.

(f) A nursing reassessment shall be conducted by the nurse assessor prior to the end of the PDN authorization period, in accordance with the following:

1. The reassessment will be conducted in the beneficiary's home, in order to determine the on-going medical necessity of EPSDT/PDN services, and shall include a 24-hour inventory of needed services.

2. The nurse assessor shall utilize the reports from the provider agency for documentation of specific functions performed by the provider agency nurse(s).

3. Any changes in the child's status or circumstances, including the frequency and type of interventions required, shall be noted. These changes shall be clearly identified in the reassessment summary, and shall be used to support any decision to continue, reduce or increase PDN hours.

(Emphasis Added)

Respondent's exceptions point out that the regulation cited the Initial Decision is not the current version. The citation in the Initial Decision has not been in effect since 2003. See 35 N.J.R. 1279(a) for adoption of amendments to N.J.A.C. 10:60-5.5. To that end, the Initial Decision's reliance on that regulation is incorrect and cannot for the basis for the decision.

Rather the regulation that applies in this case requires the nursing reassessment be performed by "the nurse assessor." N.J.A.C. 10:60-5.5(f). The Initial Decision finds that the nursing assessor is different from the nursing agency that provides the care but points to no regulatory basis to support this conclusion. The regulation uses the term assessor and nursing assessor and specifies that the nursing assessment must "be completed by a nurse

employed by a licensed certified home health agency, an accredited healthcare services firm, or licensed hospice agency approved by DMAHS.” N.J.A.C. 10:60-5.5 (a). That language does not appear in the 2003 version of the regulation. The inclusion of this language demonstrates that the assessment and reassessment are to be conducted by nurses employed by a licensed certified home health agency such as Bayada. Indeed, Petitioner’s witness, Crystal Lee, testified she prepared the progress reports, the comprehensive clinical assessments and the plans of care (POC), which is signed off on by Petitioner’s physician, based on her visits to Petitioner’s home. ID at 6. The POC and the clinical assessments were then submitted to United HealthCare for continued authorization. ID at 6. Thus, I find that the regulatory requirements for Petitioner’s reassessment were met.

The regulations set for the purpose of PDN services as providing “individual and continuous nursing care, as different from part-time intermittent care, to beneficiaries who exhibit a severity of illness that requires complex skilled nursing interventions on a continuous ongoing basis. N.J.A.C. 10:60-5.1(b). In order to receive PDN services, N.J.A.C. 10:60-5.4 (b) sets forth the criteria to meet medical necessity.

(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.

The record does not contain any evidence that Petitioner's condition meets these requirements for PDN services. While he may have a seizure disorder, nothing in the clinical notes or assessment demonstrate that his condition is "manifested by frequent prolonged seizures, requiring emergency administration of anti-convulsants." It is not reflected in the medical records but Petitioner's mother testified he had an emergency administration of an anticonvulsant in 2018 "prior to receiving PDN services from Bayada." ID at 9. The last seizure occurred in October 2019 but resolved without the use of emergency medication.

The Initial Decision claims that Dr. Aronsky did not have "the full record of patient's history" to make the determination. ID at 16. For example, Dr. Aronsky testified that Petitioner does not take medication for his seizures. Ms. Lee and petitioner's mother testified that Petitioner was on Trileptal, an anticonvulsant medication. The Initial Decision states "[i]t would be a dereliction of duty for a nurse to conduct an assessment on a person diagnose with seizure and failed to document the seizure medication that the patient was prescribed." ID at 16. Yet that is exactly what happened here. There is nothing in the POC, the nursing assessment or the clinical notes provided by Bayada reflect the administration of any medications. Ms. Lee admitted she was aware that Petitioner is on Trifefal and a nebulizer but she did not list them on the POC or her assessments "because they are not administered by the nurses." ID at 6. As such 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).

Thus, for the reasons stated above I FIND that Petitioner was properly reassessed through the documentation provided through Bayada and his physician's POC. That

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 reduction and termination of PDN hours was appropriate under 10:60-5.4.

THEREFORE, it is on this 1st day of NOVEMBER 2021,

ORDERED:

That the Initial Decision is hereby REVERSED.



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