

The matter arises regarding the reduction of Petitioner's Private Duty Nursing (PDN) hours. Petitioner had been receiving 20 hours a day in PDN services. An assessment using the PDN acuity tool was performed by Horizon NJ Health on April 16, 2019. As a result, it was determined that Petitioner was authorized for 8 hours a day, 7 days a week. Petitioner appealed that determination to the Independent Utilization Review Organization (IURO) under N.J.A.C. 11:24-8.7 and through the Medicaid fair hearing process. On May 28, 2019 the IURO upheld the denial of 20 hours a day and the approval of 8 hours a day. R-4.

The Initial Decision reversed Horizon's authorization of 8 hours and concluded that 16 hours a day was "an appropriate level of PDN services." ID at 9. For the reasons that follow, I hereby REVERSE the Initial Decision and reinstate Horizon's determination that 8 hours a day was supported by the clinical records.

The purpose of private duty nursing services is to provide "individual and continuous nursing care", as opposed to "part-time intermittent care". N.J.A.C. 10:60-5.1(b). In order to be considered for private duty nursing services an individual must "exhibit a severity of illness that requires complex skilled nursing interventions on an ongoing basis". N.J.A.C. 10:60-5.3(b). "Complex" means the degree of difficulty and/or intensity of treatment/procedures." N.J.A.C. 10:60-5.3(b)(2). "Ongoing" is defined as "the beneficiary needs skilled nursing intervention 24 hours per day/seven days per week." N.J.A.C. 10:60-5.3(b)(1).

Additionally, the regulations addressing the medical necessity for private duty nursing services state that criteria includes a beneficiary who is ventilator dependent, has an active tracheostomy and needs deep suctioning. N.J.A.C. 10:60-5.4(b)(1). Medical necessity may also be established if the individual needs around-the-clock nebulizer treatments, with chest physiotherapy; gastrostomy feeding when complicated by frequent regurgitation and/or aspiration; or a seizure disorder manifested by frequent prolonged seizures, requiring emergency administration of anti-convulsants. N.J.A.C. 10:60-5.4(b)(2). Additionally the rules define services that do not by themselves constitute a need for PDN services as when

there is no intervention as set forth in N.J.A.C. 10:60-5.4(b). Those services include “[p]atient observation, monitoring, recording or assessment; . . . [o]ccasional suctioning; . . . [g]astrostomy feedings, . . . and [s]eizure 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).

Petitioner had been receiving 20 hours of PDN a day. Pursuant to the annual re-assessment, Horizon reviewed the clinical records from Star Pediatric Homecare Agency that provides nurses to care for Petitioner. Those records showed the care that Petitioner was actually receiving. Those records contained a seizure log. It was recorded that Petitioner had not had a seizure since May 2018.² R-2. He was clinically assessed less than every four hours. As a result his skilled nursing needs were scored at 18 points which correlates to a range of 4 to 7.9 hours and 8 hours was approved. ID at 4.

At the hearing Petitioner’s mother and Jarrod Kucharski, M.D., his treating physician, testified. Both testified that he needed 24 hours of PDN services. Dr. Kucharski provided a letter dated November 20, 2019 that Petitioner needs round the clock continuous skilled nursing care. He does not identify what skilled care a nurse would provide during that 24 hour period. He had prescribed an oxygen blender to be administered on an as needed basis that “a qualified skilled nurse is far better able to administer.” ID at 4. However, there is no indication that the oxygen has been administered during the time covering this assessment.

The Initial Decision found that there was a preponderance of evidence that 8 hours a day was not an appropriate level of services. ID at 8. The decision also found there was no need for 24 hours of nursing as requested by Petitioner’s mother “given the frequency [Petitioner] is being tended to by physicians.” ID at 9. There is no description of what evidence forms the basis of these findings. In finding that Petitioner should receive 16 hours

² Prior to the hearing Horizon reviewed the seizure log from October and November 2019 that reflected none were reported. R-13.

a day, the Initial Decision points to the most recent Home Nursing Certification and Plan of Care. ID at 9 and R-13. However, this ignores that, over the course of seven months, physicians in Dr. Kurcharski's office certified to three separate plans of care with widely different hours.

The first certification was signed under Nermine Doss, M.D.'s name on March 11, 2019 for the period of March 23 through May 22 and called for skilled nursing care to be provided 20 hours a day, 7 days a week. R-3. The second also signed by Dr. Doss on July 11, 2019 for the period of July 23 through September 21 certified that Petitioner was in need of 8 hours of skilled nursing, 7 days a week. R-6. The last one signed on October 2, 2019 under Dr. Doss's name certified that Petitioner needed 16 hours of skilled nursing for 7 days a week. R-13. Despite these three certifications ranging between 8 and 20 hours of PDN a day, the narrative under section 21 titled "Order for Discipline and Treatments" and section 22 titled "Goals/Rehabilitation Potential/Discharge Plans" are identical. There nothing in the three plans to account for widely different hours being ordered over the course of seven months nor did Dr. Doss testify at the hearing.

The finding that these plans of care "are generally consistent with Dr. Kucharski's testimony" is also not supported. Dr. Kucharski's testimony was that Petitioner needed 24 hours a day in skilled nursing care. None of the three plans agree with that amount of hours. Moreover, the Initial Decision ignores the July 2019 certification that Petitioner needs 8 hours a day of skilled nursing. I find that the weight afforded these plans is not warranted due to the wide range of hours with no identifiable change in Petitioner's conditions.

In finding that the PDN tool was arbitrary and capricious, the Initial Decision fails to detail any deficiencies in the PDN tool or what skilled nursing needs are not provided with 8 hours of care. Rather the PDN tool is the only assessment of Petitioner's care needs that remains consistent. See R-1 and R-5. The initial assessment was based on the nursing records of late March and early April 2019. R-2. The nursing notes completed during that

time period record the nurses performing non-clinical Activities of Daily Living (ADLs) such as showering, toileting, preparing meals and clothes for school. These contemporaneous medical records show no seizure activity and no administration of anti -seizure medication or oxygen. When Horizon performed a re-assessment in July 2019, the assessment again scored Petitioner's need between 4 and 7.9 hours. The notes again show the nurses performing ADLs for Petitioner with few skilled nursing tasks. Thus, I FIND that Petitioner was properly assessed for 8 hours a day.

THEREFORE, it is on this 16th day of JULY 2020,

ORDERED:

That the Initial Decision is hereby REVERSED; and

That Horizon's assessment for 8 hours a day is reinstated.



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