



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

DECISION

MPA/149757

PRELIMINARY RECITALS

Pursuant to a petition filed May 30, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability (Division or DHCAA) in regard to Medical Assistance (MA), a hearing was held on August 29, 2013, by telephone. Hearings set for July 9 and July 16, 2013, were rescheduled at the petitioner's request.

The issue for determination is whether the Division correctly declined to provide authorization for payment for private duty nursing services for the petitioner for the April 8 through May 12, 2013 period, due to his enrollment in hospice.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
With: [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By written submission of Cindy Zander, RN
Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Dane County. He is certified for MA.
2. On April 5, 2013, a prior authorization request (#5...067) was submitted on the petitioner's behalf for private duty nursing (PDN) services, to begin April 8, 2013. Service from registered nurse ██████ was requested for 24 hours daily, 7 days per week, for 52 weeks, with a one year charge of \$329,440.
3. During the prior authorization processing, the Department's reviewer noted that the petitioner appeared to be in hospice, which presented a problem. The reviewer returned the request to Ms. ██████ on May 8, seeking clarification on the hospice status. On May 13, ██████ spoke to the reviewer and advised that the petitioner was in hospice. The reviewer indicated that, while he was in hospice, hospice was responsible for providing nursing service (so MA PDN authorization could not be granted). The petitioner was dis-enrolled from hospice on the same day. On May 14, 2013, the Department issued written notice to ██████, advising that the requested PDN services were approved, beginning May 13, 2013. Services for the April 8 – May 12, 2013 period, were not authorized.
4. The Department declined to authorize PDN for the petitioner for April 8-May 12 because the petitioner was receiving hospice services, and further that the hospice services were through Medicare.
5. The petitioner, age 41, has diagnoses that include amyotrophic lateral sclerosis (ALS) with ventilator dependence. Physician orders require around the clock nursing care to assess respiratory/cardiovascular/integumentary/gastrointestinal/genitourinary/neurological systems, control pain, perform ventilator management and maintain respiratory status (*e.g.*, tracheostomy care), administer medications and g-tube feedings, and manage a bowel program.
6. The petitioner was briefly hospitalized for a period ending with discharge on February 3, 2013. His whereabouts thereafter until April 8 are unclear in this hearing record. The petitioner entered a hospice program operated by Heartland Hospice by at least April 8, because he desired end of life care and spiritual support for his young daughter. Heartland does not have ventilator-trained nurses, so Ms. ██████ was asked to provide this care in the petitioner's brother's home, where he resides. ██████ provided this care during the April 8 – May 12 period.
7. ██████ has asked Heartland for payment for the April 8 – May 12 period. Payment was denied. Heartland professed "shock" that MA had not granted authorization to ██████, and noted that the \$150 daily payment that this hospice received from Medicare was inadequate to cover ██████ charges.

DISCUSSION

The DHCAA only reimburses providers for medically necessary and appropriate health care services and equipment listed in Wis. Stat. §§49.46(2) and 49.47(6)(a), as implemented by Wisconsin Administrative Code, Chapter DHS 107. Some services and equipment are covered only if a prior authorization request is submitted and approved by the DHCAA in advance of receiving the service. Private duty nursing (PDN) requires prior authorization. Wis. Admin. Code § DHS 107.12(2).

There is no dispute that the petitioner had a medical need for the services provided by nurse ██████ during the April 8 – May 12 period. Rather, the Division objects to payment for PDN here because a less expensive alternative (hospice) was available, forcing the hospice to pay for PDN would have been a more appropriate use of available services, and Medicaid is supposed to be the payor of last resort (after Medicare, which paid the hospice). *See*, §§ DHS 107.02(3)(e)6,7, and DHS 106.04(b).

When the petitioner elected to enter the Medicare-paid hospice, that hospice was supposed to provide the petitioner with a “comprehensive set of services ... to provide for the physical ... needs of a terminally ill patient... as delineated in a specific patient plan of care.” 42 C.F.R. § 418.3. Sections 418.64 and 418.202 of the same rule state that hospice-covered services include nursing care provided by a registered nurse. Because the petitioner is ventilator-dependent, I assume that his plan of care had to include nursing care related to the ventilator. The Wisconsin MA program was correct to assume that the hospice should have either provided, or contracted with, a nurse to provide all appropriate nursing care, *or* that the hospice should have immediately advised the petitioner that the essential nursing services (*i.e.*, ██████████) would be an out-of-pocket expense for the petitioner.

As an informational aside, I note that if the hospice care had been funded by Wisconsin Medicaid, the Wisconsin code would have required the recipient entering hospice to file a statement that “waives any MA covered services pertaining to his or her terminal illness and related conditions.” Wis. Admin. Code § DHS 107.31(2)(b)2. Wisconsin’s code goes on to require that the hospice provide services, including nursing services, using “hospice employees.” *Id.*, (c). Thus, if Heartland had been providing services as a Medicaid provider, the petitioner would have had to sign a waiver precluding the use of Ms. ██████████’ services.

I must conclude that MA authorization was correctly denied, and sadly for the petitioner must conclude that MA payment to ██████████ for the April 8 – May 12 gap is not available. The petitioner may wish to check with an advocacy organization, such as Disability Rights Wisconsin or ABC for Health (both have Madison offices), to determine if there is a further recourse vis-à-vis the hospice provider.

CONCLUSIONS OF LAW

The Division correctly denied prior authorization for PDN for the petitioner for the April 8 – May 12, 2013, period, because the petitioner was receiving comprehensive services from a hospice provider at the time.

THEREFORE, it is

ORDERED

That the petition is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 9th day of October, 2013

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Wayne J. Wiedenhoef, Acting Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on October 10, 2013.

Division of Health Care Access And Accountability