



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]

DECISION

[Redacted]

PRELIMINARY RECITALS

Pursuant to a petition filed July 30, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Office of the Inspector General (OIG) in regard to Medical Assistance, a telephonic hearing was held on November 12, 2015, at Green Bay, Wisconsin. At the request of petitioner, hearings set for August 25, 2015, September 15, 2015, and October 6, 2015 were rescheduled. The record was held open for the submission of written closing arguments by the parties. OIG timely submitted its closing argument to DHA and Atty [Redacted] on November 19, 2015, and Attorney [Redacted] timely submitted his responsive closing argument to DHA (and [Redacted] Chucka) on November 27, 2015. Both closing argument are received into the hearing record.

The issue for determination is whether the Department correctly reduced the frequency of the petitioner's March 23, 2015 prior authorization (PA) request for private physical therapy (PT) from twice to once weekly for 44 PT sessions over a period of six months.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted]

Petitioner's Representative:

[Redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [Redacted], occupational therapy consultant and [Redacted], physical therapy consultant

Office of the Inspector General (OIG)
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 7 year old resident of Brown County who resides with his parent in their residence.
2. The petitioner is certified for MA benefits.
3. The petitioner has the following diagnoses: neuronal migration disorder; microcephaly and lack of coordination; hypotonia; global developmental delay (cognitive impairment); and congenital leg length deformity.
4. The petitioner's neuronal migration disorder "results in structural and functional brain deficit." Petitioner's pediatrician, [REDACTED], Exhibit 2.
5. The petitioner's pediatric neurologist, [REDACTED] stated in pertinent part in his recent letter regarding the petitioner: "in my care for a profound and chronic neurologic condition . . . Considering his complex medical history, he has made significant progress at a pace consistent with his diagnosis. [REDACTED] will require ongoing physical, occupational, and speech therapy., IT is my opinion that this child will continue to progress with the help of multiple therapists involved in his care outside of a school setting at least 2-3 times weekly per modality on a routine basis. Denial of these therapist may contribute to the deterioration of his current acquired skills." November 10, 2015 letter by [REDACTED], Exhibit 3, pp 75.
6. The petitioner receives school physical therapy (PT) and the petitioner's private PT is coordinated with the school PT.
7. The petitioner has a long history of receiving PT services since at least August, 2010 and continuing. See Exhibit 1. The petitioner has had three prior DHA physical therapy PT decisions in [REDACTED], [REDACTED], and [REDACTED] in which the Administrative Law Judge (ALJ) overturned the Department's reduction of PT services for the petitioner and approved twice weekly PT. The PA requests since about 2010 have been submitted by [REDACTED], Inc. (until the last PA) with [REDACTED] as the treating physical therapist for the petitioner. See Exhibit 1.
8. In petitioner's prior PT appeal in [REDACTED] (issued May 30, 2014), ALJ Peter McCombs concluded that "the requested twice weekly sessions of PT for 26 weeks, as noted in PA request no. [REDACTED], are medically necessary," and approved that twice weekly PT for the petitioner.
9. The petitioner's provider, [REDACTED] submitted a March 15, 2015 PA request on behalf of the petitioner requesting approval for twice weekly PT services for 44 sessions over a period of 26 weeks with a start date of April 16, 2015. See Exhibit 2.
10. The petitioner has made **measurable PT progress** in three areas: a) "quadruped position" – petitioner has gone from maintaining the quadruped position for 30 second after being placed to being able to attempt to assume the position himself from either a sitting or lying down position with a minimum to moderate amount of assistance (this skill is a necessary prerequisite for petitioner to independently creep on the floor); b) "ambulation" - between October, 2014 to March, 2015, petitioner has gone from walking with his caregiver using two hand assist to being able to begin to walk with only 1 hand assist. In addition, more recently, petition can walk about 20 feet in his home with his caregiver only providing a 1 hand assist and cues; and c) "sitting balance/transition" – petitioner has gone from needing 2 hand assistance with transitioning from sitting to standing to being able to transition with 1 hand assist (or more recently without any assist when his arms are stabilized). See Exhibit 3 (Petitioner's "Omnibus" Exhibit containing 75 pages of documents).

11. The petitioner's representative established during the hearing and in his closing argument the following reasons for **why a second session of PT is medically necessary** (twice weekly PT): a) the second PT session allows petitioner and therapist to reach the point that petitioner can "own" that adjustment to his alignment, and then practice the functional activity successfully; b) the second session allows for the retention to petitioner's "muscle memory" the PT activity worked on during the first session; c) a second session is medically necessary because the time lapse between weekly session is too long for petitioner to maintain and reinforce gains made the previous week; d) by meeting twice weekly, the gain from the first session is reinforced, does not "degrade," and becomes part of his "permanent repertoire such that he can move on to a different component of the functional task;" and e) the petitioner's private health insurance, Blue Cross Blue Shield (BCBS), has never denied approval or payment for the petitioner's request for twice weekly PT for the petitioner in the past five years even with ongoing "case management" (Medicaid is the secondary payor for all of petitioner's PT, OT and SLT services).
12. The Department sent a June 23, 2015 notice to the petitioner reducing and then approving the petitioner's PA request from twice to once weekly for 44 sessions, due to documentation submitted does not establish the medical necessity for the PT frequency of twice weekly.
13. OIG sent an August 18, 2015 detailed summary statement to DHA and petitioner signed by occupational therapist [REDACTED] and physical therapist [REDACTED] which included documents from petitioner's prior history of Medicaid PT services and some prior DHA summaries and decision regarding petitioner. See Exhibit 1.
14. During the November 12, 2015 hearing, OIG physical therapy consultant [REDACTED] testified. [REDACTED] PT experience is almost entirely from geriatric physical therapy. [REDACTED] has no experience with children with long term disabilities and almost no experience with pediatric patients in general. Exhibit 3, at p.71.
15. The petitioner's PT, [REDACTED] testified extensively at the November 12, 2015 hearing. [REDACTED] has more than 15 years of a wealth of experience specializing in the area of pediatric physical therapy with children with long term disabilities, including intellectual disabilities. She is a teaching professional in pediatric PT which is pertinent to the ongoing PT evaluation and treatment of [REDACTED] as a 7 year old child. Exhibit 3.
16. The petitioner's parents' private insurance company (Blue Cross/Shield) basically pays for the petitioner's PT requested of Medicaid in the instant PA request for twice weekly PT for the petitioner. There is likely no co-payment to be paid by Medicaid in this appeal, given Medicaid's reimbursement maximum fees.
17. OIG submitted a November 19, 2015 detailed 15 page closing argument with Attachment A-D.
18. Attorney [REDACTED] submitted a November 27, 2015 detailed 14 page closing argument with attachments.

DISCUSSION

Physical therapy is covered by MA under Wis. Admin. Code, §DHS 107.16. Generally it is covered without need for prior authorization (PA) for 35 treatment days, per spell of illness. Wis. Admin. Code, §DHS 107.16(2)(b). After that, PA for additional treatment is necessary. If PA is requested, it is the provider's responsibility to justify the need for the service. Wis. Admin. Code, §DHS 107.02(3)(d)6. If the person receives therapy in school or from another private therapist, there must be documentation of why the additional therapy is needed and coordination between the therapists. Prior Authorization Guidelines, Physical, Occupational, and Speech Therapy, Topics 2781 and 2784.

In reviewing a PA request the DHCAA must consider the general PA criteria found at §DHS 107.02(3) and the definition of "medical necessity" found at §DHS 101.03(96m). §DHS 101.03(96m) defines medical necessity in the following pertinent provisions:

“Medically necessary” means a medical assistance service under ch. HFS 107 that is:
(a) Required to prevent, identify or treat a recipient’s illness, injury, or disability; and
(b) Meets the following standards:

1. Is consistent with the recipient’s symptoms or with prevention, diagnosis or treatment of the recipient’s illness, injury or disability; ...
3. Is appropriate with regard to generally accepted standards of medical practice; ...
6. Is not duplicative with respect to other services being provided to the recipient; ...
8. ...[I]s cost effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and [REDACTED]

The OIG interprets the code provisions to mean that a person must continue to improve for therapy to continue, specifically to increase the ability to do activities of daily living. In addition, at some point the therapy program should be carried over to the home, without the need for professional intervention. The DHCAA has accepted that petitioner should receive the private therapy along with the school therapy. The therapists are working on different areas of functioning and are coordinating their services. The DHCAA instead is concerned with the amount of private therapy. [REDACTED] Chucka questions the need for the frequency of therapy (twice weekly) requested for petitioner, as OIG did about one year ago in DHA Decision [REDACTED]

In the prior decision, Administrative Law Judge Peter McCombs stated:

... Petitioner’s providers again testified as to the medical necessity of the services, the coordination of services to ensure no duplication, and the petitioner’s continued progress. While unfortunately rare in these types of cases, I was very impressed by petitioner’s school therapist’s identification of not only petitioner’s school-therapy goals, but his outpatient therapy goals as well. Exhibit 4, p.13. Petitioner’s pediatric neurologist wrote:

...This is a crucial time of brain development for [petitioner] ... In terms of how intense his therapy should be, ideally **in addition to the therapy received at school**, I would recommend 45 minutes 4 times weekly sessions for each of speech, physical and occupation therapies.
Exhibit 4, p.17 (emphasis added).

In his November 27, 2015 brief, Attorney [REDACTED] accurately specified the remaining issues in this case:
a) Does the information submitted by [REDACTED]’s physical therapist, [REDACTED], contain sufficient objective measures of [REDACTED]’s functionality to determine whether progress was made, and will likely be made in therapy; and b) Has [REDACTED] made sufficient progress in twice weekly PT to justify continuing it at that frequency.

As indicated in Finding of Fact #10 above, [REDACTED] has made measurable progress in three areas to establish sufficient objective measures of his recent past and current functional progress. The Department was unable to provide any reliable, specific evidence to refute such progress. As indicated in Finding of Fact #11 above, the petitioner established with testimony and evidence why twice weekly PT (and not once weekly PT) is medically necessary. Once again the Department was unable to establish any specific testimony or evidence to reliably refute the medical need for petitioner’s twice weekly PT at this time.

Furthermore, there is an issue in this case regarding the quality and expertise of the PT witness testimony during the hearing by each party. The hearing record is uncontested that the Department’s PT, [REDACTED], has almost no pediatric physical therapy experience, while the petitioner’s [REDACTED]

██████████ has more than 15 years of extensive experience specializing in the area of pediatric PT with children with long term disabilities. See Findings of Fact #14 and #15 above. As a result, I find the testimony of PT ██████████ regarding the medical necessity of twice weekly PT for a very complicated 7 year old to be significantly more persuasive due to her expertise and experience. Moreover, ██████████'s testimony is supported by the November 10, 2015 letter of petitioner's neurologist, ██████████. See Finding of Fact #5 above.

It is the Department's role to carefully evaluate each PA request and require each PA to establish the medical necessity of the requested therapy. However, in this case the Department's PA determination does appear to be excessively demanding of the "sufficiency" of the evidence from petitioner, especially given the past three reversals by ALJ in prior hearings regarding the need for twice weekly PT. See Finding of Fact #7 above. In order to provide some perspective, Mr. ██████████ appropriately confirmed the "purpose" of the Medicaid program generally (and the overall PT goal of therapy in this case):

To provide appropriate health care for eligible persons and obtain the most benefits available under Title XIX of the federal social security act, the department shall administer medical assistance, rehabilitative and other services **to help eligible individuals and families attain or retain capability for independence or self-care** as hereinafter provided.

(Emphasis added).

Wis. Stat. § 49.45(1).

Accordingly, based upon the above, I conclude that the Department incorrectly reduced the frequency of the petitioner's March 23, 2015 prior authorization (PA) request for private physical therapy (PT) from twice to once weekly for 44 PT sessions over a period of six months.

██████████ will not receive a copy of this decision. In order to have the service approved, petitioner must provide a copy of this decision to ██████████ who must then submit a *new* prior authorization request, along with a copy of this decision, to receive the approved twice weekly PT coverage.

CONCLUSIONS OF LAW

1. The Department incorrectly reduced the frequency of the petitioner's March 23, 2015 prior authorization (PA) request for private physical therapy (PT) from twice to once weekly for 44 PT sessions over a period of six months.
2. The petitioner established the medical necessity of twice weekly PT for 44 PT sessions over a period of six months.

THEREFORE, it is

ORDERED

That the provider, ██████████, is hereby authorized to be reimbursed for twice weekly physical therapy for the petitioner for 44 PT sessions over a period of six months, and to submit its claim along with a copy of this Decision to Forward Health for payment.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

[REDACTED]

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

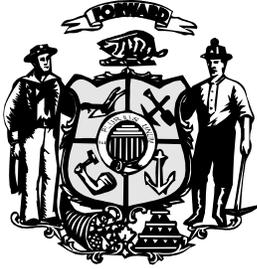
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 11th day of December, 2015

\sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals



[REDACTED]

State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on December 11, 2015.

Division of Health Care Access and Accountability

[REDACTED]
[REDACTED]