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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

I.D.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
	:	**OAL DKT. NO. HMA 02739-21**
UNITED HEALTHCARE,	:	
RESPONDENT.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this matter, consisting of the Initial Decision, the documents in evidence, and the contents of the Office of Administrative Law (OAL) case file. Neither party filed exceptions to the Initial Decision. Procedurally, the time period for the Agency Head to render a Final Agency Decision is May 31, 2022 in accordance with N.J.S.A. 52:14B-10, which requires an Agency Head to adopt, reject or modify the Initial Decision within 45 days of the agency's receipt. The Initial Decision was received on April 14, 2022.

This matter arises from the United Healthcare's (United) February 16, 2021 reduction of Petitioner's Private Duty Nursing (PDN) services. Based on my review of the record, I hereby ADOPT in part and REVERSE in part the findings, conclusions and recommended

decision of the Administrative Law Judge (ALJ).

Petitioner receives PDN services through United, a Managed Care Organization (MCO). On February 16, 2021, United notified Petitioner that her PDN services would be reduced from fourteen hours per day to eight hours per day, seven days per week. United's notice contained appeal rights stating Petitioner could request an external appeal through Department of Banking and Insurance (DOBI) or a Medicaid fair hearing. Petitioner chose to pursue an external appeal of the reduction in services through DOBI's independent utilization review organization (IURO) process and a Medicaid fair hearing. N.J.A.C. 11:24-8.7(a). The IURO determines whether the MCO's determination was correct, and if it was not, the IURO must identify the appropriate services for the member. N.J.A.C. 11:24-8.7(k). The IURO's decision is binding on the MCO. N.J.A.C. 11:24-8.7(j). Permedion, DOBI's contracted IURO, conducted the review pursuant to DOBI's rules and regulations. See N.J.A.C. 11:24-8.7. On February 25, 2021, Permedion upheld the denial of PDN services for fourteen hours per day, seven days per week as they were not medically necessary and noted that the services Petitioner had been receiving from his nurses were primarily non-skilled in nature. (R-5).

On February 23, 2021, Petitioner requested a fair hearing and on March 5, 2021, the matter was transmitted to the OAL for hearing. The matter was heard on July 27, 2021 and the record was closed on November 16, 2021. An Initial Decision was issued on April 14, 2022.

At the onset, Petitioner challenged the reduction of PDN services legally, as well as clinically. Petitioner's legal argument claimed that DMAHS' guidance to Managed Care Organizations (MCOs) issued on March 30, 2020, updated on May 16, 2020 and again on October 15, 2020 that outpatient services which require face-to-face assessments were to be extended with no reductions in services until the end of the Public Health Emergency applied to Petitioner's case. The guidance cited by Petitioner does not prohibit the reassessment of Petitioner's authorization for PDN hours. As United Healthcare argued, the

face-to-face assessment for PDN services was performed by nurses who were in the home. The rules to reauthorize PDN services do not require the MCO to send an outsider into the home but rather uses the clinical records and assessments that are done by the nursing staff performing the service. The October 15, 2020 guidance did not suspend the regulatory requirement that the nursing agency maintain clinical records including the "documentation of all care rendered" and reassessments of the beneficiary. N.J.A.C. 10:60-5.6. Those required records would then form the basis for the authorization of services. N.J.A.C. 10:60-5.5. Thus, I FIND that United Healthcare was permitted to take action on Petitioner's PDN hours based on clinical records required to be maintained by the PDN agency. See A.D. United Healthcare, OAL Dkt. No. HMA 02915 (August 24, 2021).

Clinically, the Petitioner disputes United's reduction of PDN services and argues that he is entitled to continue to receive fourteen hours per day, seven days per week in PDN services. Petitioner is a thirty-two year old man who suffered a traumatic brain injury in 2010. He has been diagnosed with spastic quadriplegia, dysphagia, gait dysfunction, and cognitive deficits. In January 2020, he was approved for 14 hours per day, seven days per week. Petitioner is also authorized to receive forty-two weekly hours of Personal Care Assistant (PCA) services. In January 2021, United reassessed Petitioner's need and reduced PDN services to eight hours per day.

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). The regulations define "skilled nursing interventions" as "procedures that require the knowledge and experience of licensed nursing personnel, or a trained primary caregiver." N.J.A.C. 10:60-5.3(b)(3). Patient observation and monitoring alone do not qualify for this type of care. N.J.A.C. 10:60-5.4(d). However, the regulations addressing the medical

necessity for private duty nursing services state that patient observation, monitoring, recording and assessment may constitute a need for private duty nursing services provided that the beneficiary 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). However, private duty nursing cannot be used purely for monitoring in the absence of a qualifying medical need. For example, the presence of a shunt and feeding tube do not, in and of themselves satisfy the threshold eligibility requirements for private duty nursing and no medical evidence was presented at the hearing demonstrating the need for complex ongoing nursing intervention. There is no dispute that Petitioner requires PDN services, only the amount of services is at issue.

Petitioner's clinical nursing notes, which reflect all the tasks performed by his nurses, were reviewed to complete the PDN Acuity Tool. The tool is developed by Milliman Care Guidelines (MCG) and assigns a point value to the types of care being provided. I FIND that United's reduction of Petitioner's PDN hours as determined by the PDN Acuity Tool was reasonable and based on the assessment of Petitioner's needs. While there does not appear to be a reported case regarding the use of the Milliman Care Guidelines developed for PDN, other jurisdictions have found that the use of Milliman Care Guidelines by hospitals "to evaluate medical necessity comports with generally accepted standards of care." See Todd R. v. Premera Blue Cross Blue Shield of Alaska, No. C17-1041JLR, 2021 U.S. Dist. LEXIS 129556, at *38-39 (W.D. Wash. July 12, 2021) "As Premera points out, numerous courts and commentators have identified the Milliman Care Guidelines as 'nationally recognized' and 'widely used.' See, e.g., Norfolk Cty. Ret. Sys. v. Cmty. Health Sys., Inc., 877 F.3d 687, 690 (6th Cir. 2017) (noting that the Milliman Care Guidelines "were written and reviewed by

over 100 doctors and reference 15,000 medical sources" and are used by about 1,000 hospitals nationwide. . ."). The PDN Acuity Tool provided a score that aligned with a range of hours which is used in conjunction with the application clinical judgment and proper consideration of any unique circumstances. Petitioner's score resulted in a range of 4 to 7.9 hours and lead United to authorize 8 hours per day. Petitioner presented no evidence to contradict the use or accuracy of the PDN Acuity Tool by United and the use of the tool is "reasonable and objective" to determine medical necessity for PDN hours. N.J.A.C. 10:60-5.3 and 10:74-1.4.

Conversely, Petitioner's witness did not speak to his assessment pursuant to the PDN tool. Instead, her independent report post-dated United's January 2021 determination; relied, at least in part, on documentation that was not in effect at the time of United's determination; did not account for PCA services and included her own assessment which occurred six months after the January 2021 determination. Consequently, I find the court's reliance on this report misplaced.

Moreover, the conclusion that Petitioner should receive a reduction in PDN services, but not necessarily the reduction determined by United Healthcare and upheld by the IURO, is not based in any evidence. Here, the ALJ determined that Petitioner's PDN services should be reduced to eleven hours per day, seven days per week, as opposed to eight hours per day, seven days per week. The decision fails to explain why 56 weekly PDN hours are insufficient with respect to addressing Petitioner's specific care needs or point to any needed service or task that cannot be performed within that time. Moreover, the decision does not address those services performed during Petitioner's hours of weekly PCA services or the duplication of services.

THEREFORE, it is on this 27th day of MAY 2022,

ORDERED:

That the Initial Decision is hereby ADOPTED in part and REVERSED in part; and

That the Initial Decision is hereby ADOPTED with regard to the determination that

Petitioner did not establish a need for PDN services fourteen hours per day, seven days per week; and

That the Initial Decision is hereby REVERESED with regard to the determination that PDN services eleven hours per day, seven days per week is medically necessary; and

That United Healthcare's determination is upheld.

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