IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART IV

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| **CODY WADE by his CO-CONSERVATORS RONNIE AND REBA WADE,** | ) | |
| **Petitioner,** | ) | |
| **v.** | ) | **CASE NO. 14-463-IV** |
| **TENNESSEE DEPARTMENT OF FINANCE AND ADMINISTRATION, BUREAU OF TENNCARE, LARRY MARTIN, COMMISSIONER,** | ) | |
| **Respondents.** | ) | |

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## MEMORANDUM AND ORDER

This case arises from Petitioner's request for TennCare coverage of in-home, private duty nursing services twenty-four hours a day, seven days per week ("24/7 PDN"). Petitioner's managed care organization ("MCO") denied the request after finding that 24/7 PDN is not medically necessary for Petitioner because it is not the least costly alternative treatment adequate for Petitioner's medical condition. Instead, Petitioner's MCO offered to cover full-time care for Petitioner in a special respiratory care unit within a skilled nursing facility or to provide the financial equivalent of in-home services, which equates to approximately sixteen hours per day of private duty nursing. Petitioner appealed, and both TennCare and the Administrative Law Judge agreed that the requested 24/7 PDN is not medically necessary for Petitioner under the TennCare program. Petitioner then sought judicial review of that final administrative decision in this Court.

## I. Findings of Fact

The Court adopts the following Findings of Fact made by Administrative Law Judge ("ALJ") J. Randall LaFevor in his Initial Order entered December 17, 2013, which are reproduced below:

1. The Petitioner is a 24-year-old TennCare enrollee diagnosed with traumatic and anoxic brain injury, quadriplegia, bowel/bladder incontinence, blindness, and recurrent cellulitis. He has a tracheostomy, is ventilator-dependent, and receives all of his nutrition and medications through a g-tube. He is bed/wheelchair bound and nonverbal. He requires assistance with all activities of daily living, transfers, tracheostomy and g-tube care, ventilator care, and medication administration. The parties agreed that his condition renders him in need of full-time medical care and assistance.

2. To address the Petitioner's extensive needs for medical care and assistance, TennCare has provided him with multiple items of durable medical equipment, and Private Duty Nursing Services in his home, twenty-four (24) hours per day, seven (7) days per week. The cost of that service is currently $26,640.00 per month. The Petitioner has requested continuation of that level of service indefinitely.

3. In light of the Petitioner's medical conditions and physical restrictions, TennCare has offered to provide him with full-time medical care at a nursing home that provides a specialized respiratory care unit for patients who are ventilator-dependent. The cost of the Petitioner's care in such a unit would be $18,000.00 per month. [In the alternative, if the Petitioner wishes to remain in his home, TennCare has offered to pay for in-home health services up to the equivalent cost of Nursing Home care].

4. The Petitioner's treating medical professionals testified at the hearing and through depositions, and clearly established that the Petitioner is in need of full-time care and assistance. The Petitioner's *Home Health Certification and Plan of Care* for the relevant time frame (See Hearing Exhibit #6, Pages 58-61) prescribes an array of daily medical treatments, procedures and medications. None of his current physicians or care-givers singled out any specific element of that *Plan of Care* that could not be performed in a nursing home.

5. Based on their general knowledge of, and past experiences with nursing homes, his treating professionals each expressed their concerns about the over-all level of care that the Petitioner would receive in a nursing home, and offered their opinions that his condition could deteriorate in such a setting. Those professionals based their opinions on their familiarity with nursing homes in general, and had no first-hand knowledge of the specific respiratory care program, medical-care providers' credentials and expertise, or staffing levels that are available at the healthcare facility proposed by TennCare.

6. Dr. David Thombs, MD, testified as an expert medical witness on behalf of the State. Prior to testifying, he reviewed the medical records provided on behalf of the Petitioner. He agreed that the Petitioner needs full-time medical care, and opined that adequate care could be provided by a skilled-care nursing facility with a dedicated respiratory care unit. He was familiar with the facility that has been recommended for the Petitioner, which has a bed currently available for him.

7. Both Dr. Thombs and the Ventilator Unit Manager of the recommended facility testified about the unit's staffing and about the level of services available to its patients. They testified that the facility was designed to serve patients in the Petitioner's condition, who are ventilator-dependent. The facility has 36 beds, 20 of which are exclusively dedicated to

ventilator-dependent patients. It is staffed in 12-hour shifts, each shift including at a minimum, 3-5 Respiratory Therapists; 4 Nurses and 1 Nurse Manager; 5 Certified Nursing Assistants; 1 Pulmonologist and 1 Nurse Practitioner. The facility is located in a full-service hospital, with an emergency room located 30 seconds from the unit. Each room contains all the medical equipment needed for treatment of the assigned patient, including a redundant monitoring system that immediately alerts staff members to any problems encountered by their patients. All staff members are trained in resuscitation techniques, and doctors and nurses are on hand to attend to [the] patients 24-hours per day. Other services available to the patients include psychiatric services, a chaplain, and an activities department.[1]

Technical Record ("T.R."), Vol. 1, pp. 23-25.

Based upon these facts and a review of relevant authorities and precedents, ALJ LaFevor found that Petitioner failed to carry his burden of proof to show that 24/7 PDN is medically necessary; that the evidence showed that the care Petitioner requested is not the least costly; and that the alternatives offered by the State would provide adequate care for Petitioner's condition. *See* T.R., Vol. 1, pp. 25-29. Accordingly, the ALJ held that Petitioner's request for 24/7 PDN was denied. This case is currently before the Court for judicial review of the final administrative decision to deny Petitioner 24/7 PDN.

## II. Standard of Review

In reviewing the decision of an administrative agency or commission, this Court does not sit as a trial court and does not consider the record *de novo*. Rather, review of this case is proper under the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-322. Accordingly, judicial review of the commission's decision is confined to the administrative record, and the

[1] The Court declines to adopt ALJ LaFevor's conclusion that "[s]uch a facility can provide adequate medical care for a patient with the Petitioner's medical needs" as a finding of fact. T.R., Vol. 1, p. 25.

commission's findings are entitled to considerable deference. *See Metropolitan Gov't of Nashville v. Shacklett*, 554 S.W.2d 601 (Tenn. 1977). The Court may not substitute its judgment for that of the commission, even when the evidence could support a different result. *See Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988).

Pursuant to Tenn. Code Ann. § 4-5-322(h), this Court may reverse or modify the commission's decision only if the petitioner's rights have been prejudiced because the commission's decision is:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5) Unsupported by evidence which is both substantial and material in light of the entire record.

*Id.* No agency's decision in a contested case shall be reversed, remanded or modified unless for errors which effect the merits of the decision. *See* Tenn. Code Ann. § 4-5-322(i).

In determining whether the agency's decision is based on substantial and material evidence, this Court must determine if the record of the proceedings contains "such relevant evidence as a reasonable mind might accept to support a rational conclusion." *Clay County Manor v. State Dep't of Health & Env't*, 849 S.W.2d 755, 759 (Tenn. 1993). The Court may not reweigh the evidence, and the commission's decision need not be supported by a preponderance of the evidence. *See Humana of Tenn. v. Tennessee Health Facilities Comm'n*, 551 S.W.2d 664, 667 (Tenn. 1977); *Street v. State Bd. of Equalization*, 812 S.W.2d 583, 585-86 (Tenn. Ct. App. 1990). An agency's decision is arbitrary and capricious if it is not based on any course of

reasoning or exercise of judgment, or if there is a clear error in judgment.[2] *See* Tenn. Code Ann. § 4-5-322(h)(4); *Jackson Mobilephone Co. v. Tennessee Pub. Serv. Comm'n*, 876 S.W.2d 106, 110-11 (Tenn. Ct. App. 1993).

**III. Discussion**

Private duty nursing services are only covered by TennCare as medically necessary when they are prescribed by an attending physician and are rendered by a registered nurse or a licensed practical nurse, who is not an immediate relative. *See* Tenn. Comp. R. & Regs. 1200-13-13-.04(1)(b)(29). In order to meet the medical necessity criteria, it must be shown that private duty nursing care is:

> (a) . . . recommended by a licensed physician who is treating the enrollee or other licensed healthcare provider practicing within the scope of his or her license who is treating the enrollee;
>
> (b) . . . required in order to diagnose or treat an enrollee's medical condition;
>
> (c) . . . safe and effective;
>
> (d) . . . not experimental or investigational; and
>
> (e) . . . the least costly alternative course of diagnosis or treatment that is adequate for the enrollee's medical condition.

Tenn. Comp. R. & Regs. 1200-13-16-.05(1); *see also* Tenn. Code Ann. § 71-5-144. "Adequate," when applied to a medical service, means that the service, considered as part of a course of treatment, is sufficient, but not in excess of what is needed, for treatment of the particular

[2] "Agency decisions not supported by substantial and material evidence are arbitrary and capricious. . . . [A]gency decisions with adequate evidentiary support may still be arbitrary and capricious if caused by a clear error in judgment." *Jackson Mobilephone Co. v. Tennessee Pub. Serv. Comm'n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993). An "arbitrary" decision is one not based upon any course of reasoning or exercise of judgment or is one that disregards "the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Id.* at 111. Evidence is sufficient "if it furnishes a reasonably sound factual basis for the decision being reviewed." *Id.*

medical condition. *See* Tenn. Comp. R. & Regs 1200-13-16-.01(1). Petitioner's request for 24/7 PDN was denied based upon prong (c). Thus, in order for 24/7 PDN services to be medically necessary, they must be 1) the least costly alternative course of treatment 2) that is adequate for Petitioner's medical condition.

**a. Least Costly Alternative**

At the administrative hearing, Vickie Cloer, TennCare's Manager Care Specialist, testified that the average cost for private duty nursing services is $37.00 per hour. Based upon a 24/7 schedule, the average monthly cost of Petitioner's private duty nursing services is $26,640. *See* T.R., Vol. 2, p. 88. A skilled respiratory care facility, on the other hand, costs approximately $18,000 per month. *See id.* Given this cost analysis, TennCare determined private duty nursing services were not the least costly alternative course of treatment and offered Petitioner either skilled nursing care at Signature Healthcare or in-home care that does not cost more than $18,000 per month, which equates to approximately 16/7 PDN. While private duty nursing services are clearly not the least costly course of treatment, the analysis cannot stop here. It must be determined that private duty nursing services are the least costly course of treatment ***that is adequate*** for the treatment of Petitioner's condition in order for Petitioner to continuing receiving such care.

**b. Adequate for Medical Condition**

Seven medical professionals testified as to their opinion on whether a skilled respiratory care facility would be adequate for the treatment of Mr. Byrd's medical condition: Dr. John Clendenin, Dr. Robert Kennon, April Laster, LPN, Freda Pond, LPN, and Dr. Dana Nash for Petitioner, and Yolandra Trezevant, Respiratory Therapist, and Dr. David Thombs for Respondent. At the administrative hearing, Dr. John Clendenin, Petitioner's primary care

physician, testified by deposition and sworn declaration. Dr. Clendenin testified that if Petitioner's care regimen is not complied with or his needs are not met, his condition can change rapidly and at any given time. Without a nurse with Petitioner around the clock, Dr. Clendenin testified that the probability of a critical situation arising is "very high." T.R., Vol. 3, p. 15. Due to Petitioner's care needs, Dr. Clendenin testified that "it is critical that [Petitioner] have 24-hour individual nursing care." *Id.* Specifically, Dr. Clendenin testified: "Cody Wade requires private duty skilled nursing, 24 hours a day, 7 days a week. This service is needed on a predictable basis. Cody Wade needs 24 hours a day of hands on nursing services." *Id.* Further, Dr. Clendenin testified:

> Cody Wade is a total care patient, requiring total constant 24-hour individual daily care. Cody is currently getting this in his home environment with 24-hour nursing and additional assistance from his family. I do not believe Cody could receive adequate care at a long-term facility at this time. Even in a hospital situation, they would not be able to provide the individual constant 24-hour care that he requires. Although cheaper, I do believe this would shorten Cody's life and cause him to suffer.

*Id.* at 16; T.R., Vol. 3, p. 8 ("Due to Cody's medical conditions, he's a – a total-care patient, requiring constant, 24-hour-a-day, 7-day-a-week medical care on a one-on-one basis because of his apneic episodes and seizures and the ventilator management and other issues that he has. He needs one-on-one monitoring and care from a nursing standpoint.").

Dr. Robert Kennon, a psychologist who evaluated[3] Petitioner, testified in person and by declaration. Dr. Kennon testified: "To ignore Cody's long-term emotional attachments is, in my professional opinion, inconsistent with adequate care." T.R., Vol. 3, p. 2. Dr. Kennon testified that the type of emotional support to which Petitioner is accustomed cannot be provided to

[3] Dr. Kennon observed Petitioner, interviewed Petitioner's grandfather and attending nurse, and reviewed Petitioner's medical records, Declaration of Gary R. Smithson, MA, SLPE, Declaration of John Clendenin, MD, treatment records from April Laster, LPN, TennCare Medical Necessity Review (September 2013), and treatment records from Vanderbilt University Medical Center. *See* T.R., Vol. 3, p. 1.

Petitioner if he is displaced from his home environment. *See id.* at 3. Further, he testified that "[t]he sustained relational attachments of Cody should not be ignored, as the supportive role of the family is a significant factor contributing to the recovery and stability of brain injured patients." *Id.* at 4. Petitioner's "lack of communication, coupled with staff changes that are common in nursing facilities, may compromise Cody's emotional, psychological and even medical condition." *Id.* In summary, Dr. Kennon testified:

> [T]he psychological and emotional needs of Cody Wade need to be strongly considered in the decision of skilled nursing placement. It is my professional opinion that a skilled nursing facility would be inadequate in meeting Cody's emotional and psychological needs. A dramatic change in his environment may place Cody at risk for deterioration, psychologically and emotionally. Inattention to his psychological and emotional needs can contribute to physical and medical deterioration.

*Id.*

April Laster, a licensed practical nurse ("LPN"), has cared for Petitioner for 36 to 48 hours a week for more than six years. Nurse Laster testified about Petitioner's condition, regimen, needs, and ordered treatments, which requires care "24 hours a day," T.R., Vol. 2, p. 32, as "[n]o two days are the same[.]" *Id.* Nurse Laster testified that Petitioner can get into a life-threatening situation "[v]ery quickly[,]" and she opined that Petitioner needs 24-hour skilled nursing care because "a crisis will occur if you're not watching him." *Id.* at 44. Nurse Laster further opined that Petitioner would not survive without 24-hour skilled nurses observing him at all times. *See id.*

In support of her opinion that Petitioner requires one-on-one, 24-hour care, Nurse Laster testified about a specific situation she encountered with Petitioner. According to Nurse Laster, Petitioner had been in a stable, peaceful state when he suddenly began vomiting without any warning or indication. She was in the room with Petitioner when this occurred, and she

"immediately ran to his bedside and positioned him on his side and tilted his head down to protect his airway and suctioned his mouth out immediately to prevent him from aspirating." *Id.* at 45. She testified: "[I]f I'd not been in the room with him, you know, there was no way I would have known he was vomiting, because there's no machine that's going to go off and let you know that he's throwing up." *Id.* Further:

> Due to the immediate intervention that we've provided Cody when he starts vomiting or choking on his own saliva, we can decrease his risk of aspirating and protect his airway, but you have to be right there. You can't be down the hall. You have to be there. That's why it's imperative, like I said before, that he's monitored 24 hours a day, because there's no machine for this. You know, your 02 stats machine might go off once he's turned blue, but, I mean, that could be a little too late.

*Id.* at 46.

Regarding use of the Masimo monitoring system, Nurse Laster testified that Petitioner's current nurses also use the Masimo system, but without a nurse present by Petitioner's bedside, the Masimo system will not safeguard Petitioner because:

> Cody's condition changes rapidly. The other day when he vomited when I was in the room with him, the vent did not alarm me that he was vomiting.
>
> The sound that he made alerted me that he was vomiting. I don't think it's in Cody['s] best interest to wait until his airways are blocked before you attend to him.
>
> He has vomited before and the alarm go off immediately. And by the time I get to him and I'm suctioning as fast as I can - - he's turned blue on me several time[s] in six years, because I cannot attend to him, and I'm right there in the room.
>
> So what I'm telling everyone is those alarms do not always go off when he vomits. It may once the airway is obstructed.
>
> So we have the same system also and he did not. It was the sound he made that alerted me that he needs attention stat.

*Id.* at 131-32.

Freda Pond, an LPN, has cared for Petitioner for 36 to 48 hours a week for approximately four and a half years. Nurse Pond testified that it would not be adequate care for Petitioner if

Petitioner were placed in a facility where there were caregivers who had to care for multiple patients and could not be in Petitioner's room with him all of the time. *See id.* at 63. Nurse Pond testified that having a nurse with Petitioner all of the time is necessary for his safety, because Petitioner "needs constant monitoring because of the regurgitation and vomiting, as well as . . . his mucus plugs and things." *Id.* at 63-64.

Dr. Dana Nash is a family medicine physician. An excerpt of her testimony before ALJ Wilson in the 2011 administrative hearing concerning Cody Wade[4] was admitted into evidence at the current administrative hearing. Dr. Nash testified that family is a crucial part of Petitioner's care, well-being and recovery. *See* T.R., Vol. 3, p. 51. When asked whether the nursing facility she directed would be adequate treatment for Petitioner, Dr. Nash testified: "Well, in my humble opinion, no, it would not be adequate because . . . we cannot provide him with the 24 hour care that he's getting right now and adequate to me has to include all of the things you just mentioned. . . . I don't think it would be adequate medically or mentally. I think that would be a bad thing. So no, I don't feel that it would be adequate." *Id.* at 54-55. Further:

> I don't think he could get adequate care in the long-term care or even the hospital because you don't have the one-on-one care that he needs.
>
> You also don't have the emotional support that he is going to need and I do agree with Dr. Clendenin that I think to disrupt the current situation where Cody is, I do think it could potentially shorten his lifespan and that he would suffer.
>
> I mean, how could he not for him to not be in the same environment that he's been in, his total care to have the support, the medical attention, emotional support and the physical needs and the mental needs that he has in his current location, I do think that would cause him to [suffer], and it could potentially shorten his life.

*Id.* at 56-57.

[4] In 2011, TennCare sought to transfer Petitioner from his in-home 24/7 PDN to Dove Health and Rehab, a Collierville nursing facility located in Shelby County where Dr. Nash was the director.

Yolandra Trezevant, a licensed Respiratory Therapist who is the Ventilator Unit Manager for Signature Healthcare, testified that Signature Healthcare is connected to St. Francis Hospital in Memphis and is a 36-bed vent and trachea unit that has respiratory therapists, nurses, and CNAs, as well as physical therapy and dietitian services. *See* T.R., Vol. 2, p. 91. Per 12-hour shift, there are three respiratory therapists except during the day, four nurses, a nurse manager, and five CNAs. *See id.* at 92-93. She testified that the specialized respiratory care unit uses redundant monitoring for each patient to alert staff to any patient distress, vent failure, or malfunction. *See id.* at 93-94. An external monitor alert sounds outside the patient's room if the vent fails or is disconnected from the system. *See id.* The vent is integrated with the patient's pulse oximeter reading and respiratory rate, and if a patient's numbers fall out of the pre-set range, an alarm is automatically triggered with a page delivered to the RT on duty. *See id.* at 94-95. Ms. Trezevant has never met Petitioner and cannot say which alternative monitoring systems Petitioner could use. *See id.* at 104-05.

Dr. David Thombs, who testified on behalf of TennCare as a medical expert, is personally familiar with the specialized respiratory care unit at Signature Healthcare. Dr. Thombs visited Signature Healthcare on November 11, 2013. During this visit, Dr. Thombs met with the Director of the Respiratory Care Unit and her supervisor. He toured several respiratory care rooms and observed the medical equipment in each room, including the monitoring systems for ventilator patients and the staff on duty. *See* T.R., Vol. 2, pp. 111-112. Dr. Thombs testified: "[I]t is difficult to take someone out of the home, but having seen the unit at St. Francis and knowing the Lincare crew which provides similar care in other facilities throughout the state which I have also visited, that for the diagnosis or treatment or the medical conditions that

[Petitioner] has[,] these conditions can be sufficiently and adequately treated at the unit at St. Francis." *Id.* at 119.

In *Grier v. Goetz*, 402 F. Supp. 2d 876 (M.D. Tenn. 2005), the Court advised that the weight given to a treating physician's opinion shall increase if it is well-supported by evidence from an enrollee's medical records and other relevant information, while a treating physician's conclusory statements should not be binding. *See id.* at 929. The Court recommended using the standard used to evaluate medical opinions in Social Security disability cases, such as *Wilson v. Commissioner of Soc. Sec.*, 378 F.3d 541 (6th Cir. 2004). In *Wilson*, the Court advised:

> [A]n ALJ must give more weight to opinions from treating sources since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [the claimant's] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. An ALJ must give the opinion of a treating source controlling weight if he finds the opinion "well-supported by medically acceptable clinical and laboratory diagnostic techniques" and "not inconsistent with the other substantial evidence in [the] case record."

*Id.* at 544 (citations omitted).

Using this standard, this Court finds that there is substantial and material evidence in the record to support the testimony of Petitioner's treating medical professionals that the treatment Mr. Wade would receive in a skilled respiratory facility is not adequate to meet his medical needs. In order for a service to be medically necessary, it must be the least costly alternative that is adequate to treat the enrollee's condition. A skilled respiratory facility does not satisfy the adequacy requirement, as the substantial and material evidence in the record shows that Mr. Wade needs constant, hands-on, one-on-one 24/7 medical care. While the Court is sensitive to the fact that the cost to TennCare of 24/7 private duty nursing is quite high, it is the only care this

Court finds adequate to treat Mr. Wade's medical needs. Mr. Wade requires one-on-one attention that can only be adequately given by a private duty nurse.

## IV. Conclusion[5]

Based upon the foregoing and given the urgent, persistent, 24/7 life-sustaining care needed for Petitioner's litany of medical conditions and needs, the Court finds that Respondents' decision in the final administrative order is arbitrary and capricious because it reflects a clear error in judgment. TennCare exceeded its statutory authority when it directed medical treatment that was not adequate for Petitioner. Therefore, this Court REVERSES the Final Order finding that private duty nursing care is not medically necessary. Pursuant to this Court's decision, Mr. Ward is entitled to continue receiving 24/7 private duty nursing care indefinitely. Costs of this cause, including any facsimile filing fees, are taxed to Respondents, for which execution may issue if necessary.

**IT IS SO ORDERED.**

CHANCELLOR RUSSELL T. PERKINS

cc: Roy B. Herron, Esq. (via facsimile)
Daniel A. Horwitz, Esq. (via facsimile)
Shayna R. Abrams, Esq. (via facsimile)

[5] For the reasons stated in its Order of June 13, 2014, the Court concludes that it has subject matter jurisdiction over this administrative appeal.