



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

HMO/143566

PRELIMINARY RECITALS

Pursuant to a petition filed September 04, 2012, under Wis. Stat. § 49.45(5)(a), and Wis. Admin. Code § HA 3.03, to review a decision by the Division of Health Care Access and Accountability in regard to Medical Assistance, a hearing was held on October 03, 2012, at Appleton, Wisconsin. Following the termination of the hearing, this ALJ received a call from petitioner and also from Betsy Winniken, a Nurse Practitioner at Midwest Bariatric Solutions. Petitioner asked that I take Ms. Winneken's testimony as petitioner did not request it at the time of the hearing but realized she wished it in the record. I agreed to do so, even in the absence of a Department representative, and have considered that testimony as part of the record.

The issue for determination is whether the HMO, as the agent of the Department, erred in denying the requested gastric bypass surgery.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

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

By: Lucy Miller, Nurse Consultant
Division of Health Care Access And Accountability
1 W. Wilson St.
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Outagamie County.
2. Petitioner's provider, Midwest Bariatric Solutions, requested approval for gastric bypass surgery from petitioner's HMO, United Healthcare Community Plan.
3. The HMO denied the request by letter dated August 23, 2012.
4. By letter dated September 21, 2012 (exhibit #5), the Department of Health Services has affirmed the denial by the HMO.
5. Petitioner suffers from high cholesterol which is untreated by prescription medication. Petitioner takes 2 grams of fish oil for this concern. Petitioner has mild high blood pressure. She has not been on medication for this until beginning a medication therapy in the last week of September.
6. Petitioner filed a timely appeal of the HMO denial

DISCUSSION

Under the discretion allowed by Wis. Stat. §49.45(9), the Department now requires MA recipients to participate in HMOs. Wis. Admin. Code, §DHS 104.05(2)(a). MA recipients enrolled in HMOs must receive medical services from the HMOs' providers, except for referrals or emergencies. Wis. Admin. Code §DHS 104.05(3).

The criteria for approval by a managed care program contracted with the DHS are the same as the general MA criteria. See, Wis. Admin. Code, §DHS 104.05(3), which states that HMO enrollees shall obtain services "paid for by MA" from the HMO's providers. The department must contract with the HMO concerning the specifics of the plan and coverage. Wis. Admin. Code, §DHS 104.05(1).

If the enrollee disagrees with any aspect of service delivery provided or arranged by the HMO, the recipient may file a grievance with the Department or appeal to the Division of Hearings and Appeals.

Just as with regular MA, when the Department denies a grievance from an HMO recipient, the recipient can appeal the department's denial within 45 days. Wis. Stat. § 49.45(5), Wis. Admin. Code, §DHS 104.01(5)(a)3.

The criteria for approval of a gastric bypass, as of September 1, 2011, are as follows:

The approval criteria for PA requests for covered bariatric surgery procedures include *all* of the following:

- The member has a body mass index greater than 35 with at least one documented high-risk, life-limiting comorbid medical conditions capable of producing a significant decrease in health status *that are demonstrated to be unresponsive to appropriate treatment.*

ForwardHealth Update, No. 2011-44, effective September 1, 2011 (emphasis added).

The use of the Department's periodic Updates to set MA coverage guidelines is approved by law. See Wis. Admin. Code § DHS 108.02(4). The criteria at issue here were drafted because of the mandate that gastric bypass is limited to medical emergencies. Wis. Admin. Code, § DHS 107.06(4)(h).

I must concur with the Division's Medical Consultant. The record does not support a finding that petitioner's high cholesterol or hypertension are unresponsive to treatment. Petitioner has not been prescribed any medication for her high cholesterol. She has taken only over-the-counter fish oil. She has not been on a statin drug or other therapy. She has slight hypertension, but has only within the week prior to our hearing been taking a prescription medication to address that. Treatment must be tried and given a chance to be effective before a determination can be made whether petitioner is responsive to those treatments. None of her other diagnoses, including the slightly elevated glucose, are life-threatening conditions unresponsive to therapies.

I understand that the surgery would likely benefit petitioner, and it may be the best choice for her. Ms. Winneken argued this as part of her testimony encouraging that the surgery be approved as the obesity is likely the cause of the variety of other issues. I understand that Ms. Winneken is advocating for petitioner and considering the best care for her. But, the MA programs are not required to provide the best care available. The MA programs must serve great numbers of people with many varied needs with limited dollars available. MA must only provide what is *medically necessary*. The rules exist to better define when a service is necessary rather than just beneficial. The HMO and the Department properly applied the current guidelines here, and denied this authorization request.

I note that the Department also denied the request based on the absence of a psychological evaluation. It became apparent at the time of the hearing that there was such an evaluation (exhibit #6) that was not considered by the Department initially. After the nurse consultant briefly reviewed it at the time of the hearing, she stated that it was insufficient. The consultant did not state her reasons why it was insufficient. However, I find that it was adequate to meet the requirement for this type of request. It does not matter, however, as the denial is upheld for the reasons stated above.

CONCLUSIONS OF LAW

The Department did not err in denying the request for prior authorization of gastric bypass surgery.

THEREFORE, it is

ORDERED

That this appeal 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 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, Room 651, 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 15th day of October, 2012

John P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on October 15, 2012.

Division of Health Care Access And Accountability