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**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]

DECISION

HMO/144236

PRELIMINARY RECITALS

Pursuant to a petition filed September 29, 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 telephonic hearing was held on October 31, 2012, at La Crosse, Wisconsin.

The issue for determination is whether the petitioner is entitled to Medical Assistance (MA) reimbursement for petitioner's prior authorization (PA) request for 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
Madison, Wisconsin 53703

By: Lucy Miller, RN, managed Care nurse consultant
Division of Health Care Access And Accountability
1 West Wilson Street
P.O. Box 309
Madison, WI 53701-0309

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 39 year old resident of La Crosse County who receives Medical Assistance (MA) through the Gunderson Lutheran HMO.

2. The petitioner is 5 feet 3 inches tall. Her weight is 283 pounds and her body-mass index (BMI) is about 43.
3. The petitioner is tentatively diagnosed with sleep apnea, but has not yet completed a sleep study and does not use a CPAP.
4. The petitioner submitted a prior authorization (PA) request to Gunderson Lutheran HMO to request approval for gastric by-pass surgery.
5. Gunderson Lutheran HMO denied petitioner's request for the gastric by -pass surgery due to lack of medical necessity.
6. DHCAA issued an October 12, 2012 notice to the petitioner stating it had reviewed the formal grievance regarding Gunderson Lutheran HMO's denial of her request for gastric by-pass surgery. The Department's medical director, Dr. Lora Wiggins, determined that the request for gastric by-pass surgery does not meet Wisconsin Medicaid Program guidelines for medical necessity at that time, as the medical records did not document a co-morbid medical condition(s) that cannot be treated with appropriate treatment or is life threatening.
7. The petitioner has not established a diagnosed co-morbid medical condition documenting high-risk, life threatening comorbid condition capable of producing a significant decrease in health status that are demonstrated to be unresponsive to appropriate treatment.

DISCUSSION

The petitioner requests prior authorization for gastric bypass surgery to reverse her morbid obesity. Medical assistance covers this procedure through the prior authorization process only if there is a medical emergency. Wis. Stat. § 49.46(2). Before 2001, the guidelines and the interpretation of those guidelines made approval of the procedure nearly impossible because the Department argued that the medical emergency requirement meant that the person's weight had to pose an immediate threat to her life. It further argued that if this threat did occur, prior authorization was unnecessary, which created a procedure that required prior authorization but could only be approved without prior authorization.

In 2001, the *Prior Authorization Guidelines Manual*, § 117.014.02, changed the approval criteria to the following more attainable requirements:

- 1) The patient must have acceptable operative risks and be able to participate in treatment and long-term follow-up; *and*
- 2)
 - (a) The BMI [body mass index] is 40 or greater; *or*
 - (b) The BMI is between 35 and 39 with high-risk, co-morbid medical conditions clinically judged to be life-threatening, such as documented sleep apnea, Pickwickian syndrome, obesity-related cardiomyopathy, severe diabetes mellitus.

[emphasis in original]

These regulations allowed many recipients who had not attempted to lose weight through more conventional means to receive the surgery. Because conventional means of losing weight are cheaper than surgery, this guideline was at least somewhat inconsistent with administrative code requirements that the Division consider the cost of the service and the "extent to which less expensive alternative services are available," as well as whether it is "cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient." Wis. Adm. Code §§ DHS 107.02(3)(e) and 101.03(96m)(b)8. New guidelines issued on July 8, 2005, addressed these problems. Those guidelines were revised once more in December 2005 to correct a typographical error and to require that those with a BMI of greater than 40 show a co-morbid medical condition that has not responded to appropriate treatment and threatens the patient's life. Those approval criteria stated:

- A.
1. The BMI is 40 or greater, and there is at least one (or more) diagnosed comorbid medical condition(s) that has not responded to appropriate treatment and threatens the patient's life or
 2. The BMI is between 35 and 39 with documented high-risk co-morbid medical conditions that have not responded to medical management and are a threat to life, such as but not limited to: clinically significant obstructive sleep apnea, Pickwickian syndrome, obesity-related cardiomyopathy, coronary heart disease, or medically refractory hypertension.

and

- B. The candidate has attempted weight loss in the past without successful long-term weight reduction. These attempts may include, but are not limited to diet restrictions/supplements, behavior modification, physician supervised plans, physical activity program, commercial or professional programs, pharmacological therapy, etc.

and

- C. All candidates should have clinically documented evidence of a minimum of six months of demonstrated adherence to a physician-supervised weight management program including at least three consecutive months of participation in a weight management program prior to the date of surgery in order to improve surgical outcomes, reduce the potential for surgical complications and establish the candidate's ability to comply with post-operative medical care and dietary restrictions. A physician's summary letter is not sufficient documentation. Documentation should include assessment of the patient's participation and progress throughout the course of the program. The patient must also agree to attend a medically supervised post-operative weight management program for a minimum of six months post surgery for the purpose of ongoing dietary, physical activity, behavioral/psychological, and medical education and monitoring.

and

- D. The candidate should receive a pre-operative evaluation by an experienced and knowledgeable multidisciplinary bariatric treatment team composed of health care providers with medical, nutritional and psychological experience. This evaluation should include at a minimum:
1. a complete history and physical examination, specifically evaluating for obesity-related comorbidities that would require preoperative management.
 2. evaluation for any correctable endocrinopathy that might contribute to obesity
 3. psychological/psychiatric evaluation and clearance to determine the stability of the patient in terms of tolerating the operative procedure and post-operative sequelae, as well as the likelihood of the patient participating in an ongoing weight management program following surgery
 4. dietary assessment and counseling

and

- E. The recipient must be 18 years of age or older and have completed growth.

Prior Authorization Guidelines Manual, § 117.014.03 and .04. [emphasis in original]

The Department still was not satisfied with the regulation, and in February 2008 it amended the criteria, this time primarily to clarify the conditions that qualify as comorbid and to set up a new approval category for those with a body mass index of at least 50.

Those approval criteria state:

The recipient must meet Criteria A or B or C. If any of these are met the recipient must then also meet the requirements in D and E and F and G.

- A. The BMI is over 40kg/m² **and** there is clinical documentation that a continued morbidly obese status will lead to serious impairment of the patient's health because of comorbid conditions that cannot be optimally corrected with current therapy or demonstrated and documented trial of a minimum of three months.

Such comorbid conditions undergoing current appropriate therapy trial would include, but not be restricted to, congestive heart failure, recurrent venous thrombosis with [or] without pulmonary emboli, uncontrolled diabetes mellitus or demonstrated coronary artery disease with hemodynamically significant arteriolar occlusion leading to documented myocardial dysfunction.

or

- B. The BMI is between 35 and 39 with documented high-risk co-morbid medical conditions that have not responded to medical management and are a threat to life, such as but not limited to: clinically significant obstructive sleep apnea, Pickwickian syndrome, obesity-related cardiomyopathy, coronary heart disease, or medically refractory hypertension. [unchanged from previous regulation]

or

- C. The recipient must have a BMI ≤ 50 kg/m² for approval of procedure codes 43770 – 43774.

and

- D. All candidates should have clinically documented evidence of a minimum of six months of demonstrated adherence to a physician-supervised weight management program including at least three consecutive months of participation in a weight management program prior to the date of surgery in order to improve surgical outcomes, reduce the potential for surgical complications and establish the candidate's ability to comply with post-operative medical care and dietary restrictions. A physician's summary letter is not sufficient documentation. Documentation should include assessment of the patient's participation and progress throughout the course of the program. The patient must also agree to attend a medically supervised post-operative weight management program for a minimum of six months post surgery for the purpose of ongoing dietary, physical activity, behavioral/psychological, and medical education and monitoring. [unchanged from previous regulation]

and

- E. The candidate should receive a pre-operative evaluation by an experienced and knowledgeable multidisciplinary bariatric treatment team composed of health care providers with medical, nutritional and psychological experience. This evaluation should include at a minimum:
1. a complete history and physical examination, specifically evaluating for obesity-related comorbidities that would require preoperative management.
 2. evaluation for any correctable endocrinopathy that might contribute to obesity

3. psychological/psychiatric evaluation and clearance to determine the stability of the patient in terms of tolerating the operative procedure and post-operative sequelae, as well as the likelihood of the patient participating in an ongoing weight management program following surgery
4. patients receiving active treatment for a psychiatric disorder must receive evaluation by their treatment provider prior to bariatric surgery, and be cleared for bariatric surgery.
5. dietary assessment and counseling

and

- F. The recipient must be 18 years of age or older and have completed growth.
- G. The bariatric center requesting the prior authorization must be approved by CMS/ASBS guidelines as a Center of Excellence.

[emphasis in original]

In **August 2011**, responding to new research, the Department issued a major revision of the guidelines. The latest guidelines reduce the level of obesity required for approval and provide the service to those who have serious health problems that are likely to respond to the surgery and who have been unable to lose weight despite serious efforts that include following plans laid out by a physician. The new approval criteria, which are found in *ForwardHealth Update No. 2011-44*. (August 2011) and went into effect on September 1, 2011, state in their entirety:

The approval criteria for prior authorization (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**. There is evidence that significant weight loss can substantially improve the following comorbid conditions:
 - **Sleep apnea.**
 - Poorly controlled Diabetes Mellitus while compliant with appropriate medication regimen.
 - Poorly controlled hypertension while compliant with appropriate medication regimen.
 - Obesity-related cardiomyopathy.
- ✓ The member has been evaluated for adequacy of prior efforts to lose weight. If there have been no or inadequate prior dietary efforts, the member must undergo six months of medically supervised weight reduction program. This is separate from and not satisfied by the dietician counseling required as part of the evaluation for bariatric surgery.
- ✓ The member has been free of illicit drug use and alcohol abuse or dependence for the six months prior to surgery.
- ✓ The member has been obese for at least five years.
- ✓ The member has had medical evaluation from the member's primary care physician that assessed his or her preoperative condition and surgical risk and found the member to be an appropriate candidate.
- ✓ The member has received a preoperative evaluation by an experienced and knowledgeable multidisciplinary bariatric treatment team composed of health care providers with medical, nutritional, and psychological experience. This evaluation must include, at a minimum:
 - A complete history and physical examination, specifically evaluating for obesity-related comorbidities that would require preoperative management.

- Evaluation for any correctable endocrinopathy that might contribute to obesity.
 - Psychological or psychiatric evaluation to determine appropriateness for surgery, including an evaluation of the stability of the member in terms of tolerating the operative procedure and postoperative sequelae, as well as the likelihood of the member participating in an ongoing weight management program following surgery.
 - For members receiving active treatment for a psychiatric disorder, an evaluation by his or her treatment provider prior to bariatric surgery. The treatment provider is required to clear the member for bariatric surgery.
 - At least three consecutive months of participation in a weight management program prior to the date of surgery, including dietary counseling, behavioral modification, and supervised exercise, in order to improve surgical outcomes, reduce the potential for surgical complications, and establish the candidate's ability to comply with post-operative medical care and dietary restrictions. A physician's summary letter is not sufficient documentation.
 - Agreement by the member to attend a medically supervised post-operative weight management program for a minimum of six months post surgery for the purpose of ongoing dietary, physical activity, behavioral/psychological, and medical education and monitoring.
- ✓ The member is 18 years of age or older and has completed growth.
 - ✓ The member has not had bariatric surgery before or there is clear evidence of compliance with dietary modification and supervised exercise, including appropriate lifestyle changes, for at least two years.
 - ✓ The bariatric center where the surgery will be performed has been approved by Centers for Medicare and Medicaid Services/American Society for Bariatric Surgery (ASBS) guidelines as a Center of Excellence and meet one of the following requirements:
 - The center has been certified by the American College of Surgeons as a Level 1 Bariatric Surgery Center.
 - The facility has been certified by the ASBS as a Bariatric Surgery Center of Excellence.

(Emphasis added).

The Division of Health Care Access and Accountability denied the petitioner's request for gastric bypass surgery because her one possible, tentative comorbid condition, sleep apnea, had not actually been confirmed in any sleep study, and petitioner has not pursued any treatment, such as a CPAP. Furthermore, Dr. Wiggins in her report stated in pertinent part: "Although there was reference to sleep apnea in the past medical history (Attachment 6), there was not documentation of sleep apnea as a current problem, no mention of concerns in the clinical note and no reference to the use of CPAP. There was no documentation of other co-morbidities that would meet the Wisconsin Medicaid fee for service guidelines for bariatric surgery."

The petitioner was unable to refute such argument with any reliable medical evidence. The petitioner did not establish that she met the criteria of a 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. Accordingly, based upon the above, I conclude that the Department correctly denied the petitioner's request for gastric bypass surgery because petitioner did not establish that she met the MA program's approval criteria for that surgery.

CONCLUSIONS OF LAW

1. The petitioner has not established that the requested gastric bypass surgery is medically necessary.

2. The Department correctly denied the petitioners' request for gastric bypass surgery because petitioner did not establish that she met the MA program's approval criteria for that surgery.

THEREFORE, it is

ORDERED

The petition for review herein be and the same is hereby 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 11th day of December, 2012

\sGary M. Wolkstein
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 December 11, 2012.

Division of Health Care Access And Accountability