



FH

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MPA/148465

PRELIMINARY RECITALS

Pursuant to a petition filed April 03, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability (n/k/a Office of Inspector General (OIG)) in regard to Medical Assistance (MA), a hearing was held on April 23, 2013, at Kenosha, Wisconsin.

The issue for determination is whether petitioner has presented evidence sufficient to demonstrate that a prior authorization (PA) request for a speech generating device (SGD) meets the legal standards necessary for approval of payment by the MA program.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: written submittal of Theresa Walske
Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Kenosha County.
2. Petitioner was diagnosed with a brainstem stroke in 2002, resulting in Locked-In Syndrome and quadriplegia.
3. On January 22, 2013, a PA request was submitted on the petitioner's behalf for a SGD. The specific device requested was a C15 (\$8395) with an eye tracking module (\$6900) and floor stand/adaptor add-ons (\$1062). The OIG issued written notice of denial on March 6, 2013 and the petitioner appealed.
4. The OIG's basis for denial was that the documentation submitted did not establish that this device is medically necessary for the petitioner.
5. Petitioner received a SGD in 2004 from the MA program; that SGD was lost in a move.

DISCUSSION

The requested SGD is a type of durable medical equipment that must be authorized by the OIG before MA will pay for it. Wis. Adm. Code, §DHS 107.24. When determining whether a service is necessary, the OIG must review, among other things, the medical necessity of the service, the appropriateness of the service, the cost of the service, the extent to which less expensive alternative services are available, and whether the service is an effective and appropriate use of available services. Wis. Adm. Code, §DHS 107.02(3)(e)1.,2.,3.,6. and 7. "Medically necessary" means a medical assistance service under ch. DHS 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;
 2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider, and the setting in which the service is provided;
 3. Is appropriate with regard to generally accepted standards of medical practice;
 4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
 5. Is of proven medical value or usefulness and, consistent with s. HFS 107.035, is not experimental in nature;
 6. Is not duplicative with respect to other services being provided to the recipient;
 7. Is not solely for the convenience of the recipient, the recipient's family, or a provider;
 8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
 9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Admin. Code, §DHS 101.03(96m).

As with most public assistance benefits the initial burden of demonstrating eligibility for any particular benefit or program at the operational stage falls on the applicant. See Gonwa v. Department of Health

and Family Services, 2003 WI App 152, 265 Wis.2d 913, 668 N.W.2d 122 (Ct.App.2003). In other words, it is petitioner's burden to demonstrate that he qualified for the requested equipment by a preponderance of the evidence.

The OIG denied the requested SGD for several reasons. See Exhibit 3. First, the OIG had questions about the previously purchased SGD, the several PAs for same prior to the instant one, and the lack of response about the current condition of the 2004 SGD. Given the purchase price of the current SGD the OIG was correct in requesting that information and the petitioner's (or her caregiver's) ability to keep it safe and to see if a less costly adaptation could be made to the SGD previously approved. However, petitioner's spouse testified at hearing that it was lost in a move sometime between 2008-2009. Secondly, the OIG did not find that the documentation supported that petitioner was able to demonstrate consistent self-initiated, non-cued use of the 2004 SGD. It could not determine how petitioner communicated from 2004 to the time the SGD was lost. It is also unclear how it was lost, how she communicated after it was lost, and the medical necessity of that device if she has been without one since that time. No evidence was submitted with the PA to show that a more rapid low-tech option of communicating with eye gaze was attempted or how the 2004 SGD increased her level of communication beyond what could be provided by a low-tech method. Thirdly, the OIG found that the 4 week trial of the requested SGD did not support that there was a medical necessity. It suggested a lengthier trial of that SGD, of alternative SGDs and low-tech SGDs, and that her nursing staff at the facility where she lives had the ability or interest to carryover use of the SGD. It argues that the evidence submitted with the PA did not show that petitioner was able to use the requested SGD through self-initiated communication beyond what could be accomplished through a low-tech method. Fourthly, it questioned the assessments made regarding previous trials along with the PA requests made four times previous to the instant PA.

The OIG states that the most critical factor in considering a PA such as this is actual evidence of consistent self-initiated communication using the requested SGD. Before purchasing the equipment it has to be clear that Petitioner can use it to become a functional communicator. It is apparent from a few dates during the trial period where she was able to use the system spontaneously but without a more quantified analysis I am unwilling to approve the purchase of such expensive equipment. While I understand this may be a lot of work, it may be the foundation for purchase of equipment that petitioner's representatives believe will give her heretofore unexpected function and independence. This is true in light of the problems identified with her endurance and fatigue in using the requested device. It is also true that the provider testified that no other less costly alternatives were trialed. The provider needs to document why any less costly alternative would not work. The provider also admitted that the *basic* package C15 was all petitioner really needed, and as such the provider should be making an amendment to the current PA supporting its basis for that requested SGD. For these reasons, I agree with the OIG that a lengthier trial, documenting consistent and spontaneous use with a variety of conversation partners is warranted here. The provider should also provide a clear explanation of the previous SGD's loss and previous use to substantiate the situation here. The Notes indicated that "the Dynavox that was owned several years ago is no longer functioning or in the patient's possession." See Exhibit 1. The evaluation states, "Based on reports and data from previous speech pathologists, along with input from [REDACTED] and her spouse, the Tobii C15 has proven to be the most successful device for [REDACTED]." Id. This conflicts with the testimony that there was no information from previous speech pathologists in the past due to turnover and that the previous SGD was lost in a move.

The provider did provide post-hearing a signed statement from the nursing staff indicating their support for the SGD and willingness for training on the device. They also provided examples of the need for petitioner to be able to communicate spontaneously with her caregivers. They cited to two examples where petitioner was having problems with her oxygen machine and her g-tube feedings and her caregivers were unable to understand her communicative attempts to tell them the problem. This gives me pause as to the type of care petitioner is receiving if her nursing staff cannot identify when her medical needs are not being met. It also shows that her nursing staff cannot always understand her.

However, the evidence does not yet support a finding that shows that the requested SGD would be effectively used in such situations either.

I add, assuming petitioner finds this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

CONCLUSIONS OF LAW

Petitioner has not presented evidence sufficient to demonstrate that a PA request for a SGD meets the legal standards necessary for approval of payment by the MA program.

THEREFORE, it is

ORDERED

That the petition for review herein 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 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 Milwaukee,
Wisconsin, this 28th day of May, 2013

\sKelly Cochrane
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 May 28, 2013.

Division of Health Care Access And Accountability