



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

In the Matter of

██████████ ██████████
████████████████████
██

DECISION

HMO/151403

PRELIMINARY RECITALS

Pursuant to a petition filed August 14, 2013, 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 09, 2013, at La Crosse, Wisconsin.

The issue for determination is whether the HMO erred in its denial of the prior authorization for bariatric surgery.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

██████████ ██████████
████████████████████
██

Petitioner's Representative:

Attorney Roger L. Imes
505 King Street
P O Box 1927
La Crosse, WI 54602-1927

Respondent:

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

By: Lucy Miller, Nurse Consultant
Division of Health Care Access And Accountability
1 West Wilson St, Box 309
Madison, WI 53701

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of La Crosse County.

2. Petitioner's provider filed a request for prior authorization for bariatric surgery with petitioner's health plan, Gunderson Lutheran.
3. Petitioner is under medical care for hypertension and is prescribed two medications. Her height is 5'2" and her weight is 238 lbs (BMI=43.8). Recent BP readings have included 142/88 on May 14, 2013 and 130/88 on January 3, 2013.
4. Cholesterol numbers were high in December 2012 with LDL=149 and HDL=34 and triglycerides at 190. She was placed on statin therapy after this test.
5. The HMO denied the request by letter dated August 1, 2013.

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).

The petitioner's evidence and argument focused on whether this surgery is a good idea for petitioner and whether the surgery would be a benefit. But, the petitioner's evidence and argument did not focus upon whether petitioner's circumstances meet the specifically designated criteria for approval. I have little doubt that petitioner would benefit from this surgery. But, this public benefit medical assistance has specific criteria in place in order to ensure that the most critically needy get coverage. The program

cannot pay for surgery for every enrolled person who might benefit from any given surgery or other treatment.

In this case, the record does not support a finding that petitioner's hypertension are unresponsive to treatment. This criterion was a point in dispute at hearing. Petitioner argued that the rule only requires that hypertension be "poorly controlled" but the Department argued that the rule requires that the condition be "unresponsive to treatment." In my review of ForwardHealth Update No. 2011-44, I observe the quoted passage above. It clearly requires that the condition be unresponsive. The portion of the Update petitioner points to is merely provides examples of conditions for which bariatric surgery can be helpful. The criterion is as quoted above. Ad for the claim of hyperlipidemia, petitioner only began statin therapy within the past year. Months later, she was still being prescribed only 10mg of Simvastatin per day which is not approaching the maximum dose of that medication. It seems that there is a long way to go in statin therapy such as other drugs and higher doses before one could argue that the cholesterol cannot be controlled by medication.

Furthermore, petitioner did not provide any documentary evidence, or testimony from a medical professional, that would lead me to conclude that the hypertension is poorly controlled. I have no reliable evidence as to what protocols have been tried, the success of those, and whether the provider would consider present response to be satisfactory or whether it is presently "poorly controlled." Petitioner did submit a letter from Dr. [REDACTED] stating that on a visit on September 11, 2013 the BP was "running above goal." But, this does not mean that invasive and costly surgery is medically necessary. The letter goes on to conclude that petitioner is "appropriate" for surgery. As previously stated, I have no doubt that she is appropriate and would benefit. But, the PA criteria in every area exist to determine the subset of most needy from the larger group of "appropriate."

In an appeal of a prior authorization denial or modification is the burden of petitioner to establish that the criteria for approval are met, not the HMO's burden to show otherwise. Petitioner failed to provide a record supporting the criteria for bariatric surgery as she did not prove that any potential comorbid conditions were unresponsive.

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 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 21st day of November, 2013

\sJohn 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 November 21, 2013.

Division of Health Care Access And Accountability
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