



STATE OF WISCONSIN  
Division of Hearings and Appeals

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In the Matter of

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██████████  
████████████████████

DECISION

HMO/154356

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 18, 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 telephone hearing was held on February 04, 2014. At hearing, new documentation was presented by the petitioner, and this was forwarded to the respondent for consideration. The respondent provided a response on February 20, 2014, indicating that the additional information did not warrant any change in the initially upheld denial.

The issue for determination is whether petitioner meets the criteria for gastric bypass.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

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

Respondent:

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

By: Lora ██████████, MD, Chief Medical Officer  
Division of Health Care Access and Accountability  
Department of Health Services  
Madison, WI

**ADMINISTRATIVE LAW JUDGE:**

Peter McCombs  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a 36-year-old resident of Crawford County who receives MA with the Gunderson Health Plan HMO.

2. Petitioner is 5'6" and weighs 342 pounds; her body mass index (BMI) is 55.4. Exhibit 1.
3. Petitioner's doctor initiated a request for gastric bypass surgery. By a letter dated November 8, 2013, the HMO denied the request. Exhibit 3-3. Petitioner filed this appeal, and the Department's Chief Medical Officer, Dr. [REDACTED], reviewed it. Dr. [REDACTED] affirmed the denial on January 24, 2014. Exhibit 3.
4. Petitioner has a BMI greater than 35. She has sleep apnea and it is presently undetermined whether this will be controlled by CPAP machine. Petitioner has hypertension that is presently controlled by medication. There is no indication of cardiomyopathy. Petitioner has fibromyalgia, which may be exacerbated by her sleep apnea.

### 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. Admin. Code, §DHS 104.05(3).

The criteria for approval by a managed care program contracted with the DHCAA are the same as the general MA criteria. See 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. 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. Petitioner filed for a grievance and an appeal simultaneously. As such, the grievance file was closed, in favor of the administrative appeal.

Wis. Stat., §49.46(2)(f) provides as follows concerning MA benefits: "Benefits under this subsection may not include payment for gastric bypass surgery or gastric stapling surgery unless it is performed because of a medical emergency."

The criteria for approval of a gastric bypass are as follows:

The approval criteria for PA requests for covered bariatric surgery procedures include ... 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.

*ForwardHealth Update*, No. 2011-44, effective September 1, 2011. There also must be documented prior attempts to lose weight, three months participation in a weight loss program, and medical and psychological evaluations to determine if the person is an appropriate candidate for such surgery.

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. Admin. Code, §DHS 107.06(4)(h).

The problem with petitioner's situation is that the Wisconsin statute allows for bariatric surgery ONLY where at least one documented high-risk, life-limiting comorbid medical conditions capable of producing a significant decrease in health status is present. The petitioner has not established this, nor does the record demonstrate the existence of a listed comorbid condition. Thus, although petitioner would appear to be an ideal candidate for the gastric bypass surgery, she has not established a comorbid condition that is not controlled via treatment. I therefore must conclude that the denial was correct.

### **CONCLUSIONS OF LAW**

Petitioner's MA HMO correctly denied the request for gastric bypass surgery because there was no evidence of qualifying comorbid medical condition.

**THEREFORE, it is**

**ORDERED**

That 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, 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 14th day of March, 2014

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\sPeter McCombs  
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 March 14, 2014.

Division of Health Care Access and Accountability