



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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MPA/160145

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**PRELIMINARY RECITALS**

Pursuant to a petition filed August 23, 2014, 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 in regard to Medical Assistance, a telephonic hearing was held on November 19, 2014, at Rhinelander, Wisconsin. At the request of petitioner, a hearing set for October 1, 2014 was rescheduled. At the request of the parties, the record was held open for consecutive briefs to the Division of Hearings and Appeals (DHA) and to the other party. The briefing period was then extended due to an addition submission by DHS. Both parties timely submitted their briefs to DHA which are received into the hearing record. The hearing record finally closed on February 16, 2015.

The issue for determination is whether the Department correctly denied the petitioner’s prior authorization (PA) request for laparoscopic bariatric gastric bypass surgery.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Petitioner's Representative:

Attorney [REDACTED]  
Benefit Specialist Supervising Attorney  
[REDACTED]  
[REDACTED]

Respondent:

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

By: Dr. [REDACTED], chief medical officer  
Office of the Inspector General  
1 West Wilson Street, Room 272  
P.O. Box 309  
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner is a 62 year old resident of Oneida County who is eligible for BadgerCare Plus benefits.
2. The petitioner's significant obesity problems began about 12 years ago.
3. The petitioner is about 5'6" tall and weighs about 281 pounds. Her body mass index is about 42.74kg/m<sup>2</sup>. Her blood pressure is about 137/81. See Exhibit 2.
4. The petitioner is diagnosed with morbid obesity, sleep apnea, diabetes, hypertension, reflux disease, mild coronary artery disease, and knee osteoarthritis.
5. On or about July 9, 2014, the petitioner's surgeon and provider, Dr. [REDACTED], submitted a prior authorization (PA) request on behalf of the petitioner for a Laparoscopic Gastric Bypass/Roux-En-Y bariatric surgery.
6. The Office of Inspector General (OIG) sent an August 14, 2014 notice to the petitioner stating that her PA request for gastric bypass surgery was denied due to not medically necessary.
7. The petitioner has cooperatively undergone extensive training, classes, and counseling in an effort to prepare her for her planned gastric bypass surgery and to assist her with her weight loss. See Exhibits 3 – 6.
8. The petitioner has undergone thorough physical examinations, and her attempted non-surgical procedures, have been treated by mental health professionals (including psychologist, [REDACTED], PhD and her psychiatrist, Dr. [REDACTED]). Those professionals indicate that petitioner has made behavioral changes for about one year, and is agreeable to attending medically supervised post-operative weight management program. See Exhibit 10. Petitioner's medical providers have approved her for the bariatric surgery.
9. OIG chief medical officer, [REDACTED], MD, sent an August 28, 2014 letter to DHA and to petitioner summarizing the reasons for denial of the petitioner's requested bariatric surgery. In that letter, Dr. [REDACTED] stated that petitioner does not meet the Forward Health Bariatric surgery guidelines because she does not meet these criteria, "as her hypertension and obstructive sleep apnea appear to be currently well controlled, and no other comorbid condition meets this criteria." See Exhibit 1.
10. The petitioner was unable to establish at least one documented high-risk, life limiting comorbid medical condition capable of producing a significant decrease in her health status that is demonstrated to be **unresponsive** to appropriate treatment.
11. During the hearing or while the record was held open until February 16, 2015, the petitioner did not provide any reliable medical evidence to refute OIG that petitioner's hypertension and obstructive sleep apnea were not controlled with medication or the usage of her CPAP. Petitioner also did not establish with reliable medical evidence that her coronary artery disease was sufficiently severe that it was a "documented high-risk, life-limiting comorbid medical conditions capable of producing a significant decrease in health status."

### DISCUSSION

The petitioner requests prior authorization for a bariatric 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)(f). The rules have changed several times over the last decade and a half. 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).

In the instant case, the petitioner's body-mass index is about 42.78kg/m<sup>2</sup>, but the Office of Inspector General denied her request for bariatric surgery because she did not document a comorbid condition that is not responsive to appropriate treatment. She has been diagnosed with hypertension, but OIG asserted correctly that her hypertension appears to be well controlled with medication. The petitioner is also diagnosed with sleep apnea, but OIG correctly asserted that her obstructive sleep apnea appears to be well controlled with her usage of a CPAP.

During the hearing or while the record was held open until February 16, 2015, the petitioner did not provide any reliable medical evidence to refute OIG that petitioner's hypertension and obstructive sleep apnea were not controlled with medication or the usage of her CPAP. Furthermore, Attorney ██████ also argued that petitioner has obesity related heart disease. However, petitioner's attorney did not establish with reliable medical evidence that her coronary artery disease was sufficiently severe that it was a "documented high-risk, life-limiting comorbid medical conditions capable of producing a significant decrease in health status."

During the hearing, Attorney ██████ was a zealous advocate on behalf of the petitioner. In addition, petitioner's surgeon, Dr. ██████ testified at length regarding why he believed bariatric surgery was medically necessary for ██████. Dr. ██████ argued that for OIG to assert that ██████'s comorbidities are "well controlled" is a "misnomer." He testified that while some of the petitioner's symptoms related to her weight may be responsive to medication or the use of a CPAP, that the underlying problems have not been treated. Dr. ██████ argued that the only way to "appropriately" treat the petitioner's weight issues and comorbidities is to have her undergo the requested bariatric surgery, and not leave the underlying root issues to go untreated (instead of treating only the symptoms).

In her December 9, 2014 response, Dr. ██████ stated in pertinent part that:

Concern was raised that ██████'s comorbidities were not being appropriately treated unless she undergoes bariatric surgery to "treat the root causes." Obesity can certainly be contributory to hypertension and to sleep apnea, although there is no literature to support that it consistently "cures" these conditions. It is certainly not a standard of care intervention for managing hypertension or sleep apnea. Standard, accepted treatment for sleep apnea is the use of CPAP, and hypertension treatment is typically with medications. ██████'s conditions are well managed with these interventions.

In his December 3, 2014 brief, Attorney ██████ raised the issue that Dr. ██████ in her August 28, 2014 letter did not mention or discuss petitioner's obesity-related heart disease as a possible comorbidity of the petitioner. However, in her same December 9, 2014 letter, Dr. ██████ responded:

There is no documentation of significant heart disease. Dr. [REDACTED]'s note, dated 10/6/14, stated "borderline negative EKG for stress test in 2010 for questionable small reversible filling defect. She has been followed with a coronary CT which did not reveal any calcifications or significant stenosis. . ." Her medication list does not include any anti-anginal medications. This is documentation that she does not have significant heart disease.

Petitioner did not submit any response to either of the above OIG arguments in Dr. [REDACTED] December 9, 2014 letter. Based upon the evidence in the hearing record, this ALJ finds OIG's arguments convincing. While it might sometimes be the best of care to pursue the root causes of serious diseases, the petitioner's advocates have not established the medical necessity of pursuing those root causes with the requested bariatric surgery, when the Guidelines only require that the serious medical conditions be "responsive to appropriate treatment" (i.e. medication or CPAP).

During the hearing, Attorney [REDACTED] and Dr. [REDACTED] persuasively established that petitioner was fully prepared for the surgery and was an appropriate candidate for the surgery, even with her mental health issues. See Findings of Fact # 7 and #8 above. However, petitioner was unable to establish with any specific testimony or medical evidence that petitioner had at least one documented high-risk, life limiting comorbid medical condition which was not controllable with appropriate treatment and compliant behavior. See Finding of Fact #10 and #11 above. Although I understand that petitioner has serious health problems related to her weight, she does not meet the criteria needed for approval of the requested surgery. Accordingly, based upon the above, I must uphold the Office of Inspector General's denial of the requested bariatric surgery.

#### CONCLUSIONS OF LAW

1. The Office of Inspector General correctly denied the petitioner's request for bariatric surgery because petitioner failed to establish that the requested surgery was medically necessary based upon current Bariatric Guidelines.
2. The petitioner is not entitled to Medical Assistance reimbursement for bariatric gastric bypass surgery at this time.

**THEREFORE, it is**

**ORDERED**

The petition for review herein be and the same is hereby Dismissed.

#### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 20th day of April, 2015

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\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 April 20, 2015.

Division of Health Care Access and Accountability  
Attorney [REDACTED]