FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

REHEARING
DECISION

MPA/161231

PRELIMINARY RECITALS

Pursuant to a petition filed October 15, 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 (DHCAA) in regard to Medical Assistance, a rehearing was held on December 09, 2014, at Madison, Wisconsin. The petitioner was scheduled for a hearing on November 18, 2014, but failed to appear for that hearing. The petitioner's appeal was dismissed as abandoned. Petitioner requested a rehearing, and that rehearing was granted on November 24, 2014. At the request of the petitioner, the record was held open for an additional submission by petitioner, and then for the OIG pharmacy consultant to issue a reconsideration summary. Dr. Radmer issued her reconsideration on December 30, 2014 to DHA and to petitioner. The petitioner submitted her January 13, 2015 reply to DHA and to Ms. Radmer.

The issue for determination is whether the Division correctly denied the petitioner's prior authorization (PA) request for Vitamin D-3 (cholecalciferol) because it is a non-legend, over-the-counter drug which is not a Wisconsin Medicaid covered service per Wis. Adm. Code DHS 107.10(3)(h).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Lynn Radmer, R.Ph., pharmacy consultant
Division of Health Care Access and Accountability
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 (CARES # [redacted]) is a 34 year old resident of Dane County.

2. Petitioner is diagnosed with Hashimoto's thyroid disease which is a common cause of hypothyroidism. The petitioner receives thyroid replacement medications for treatment of her thyroid disease.

3. Since April, 2014, the Medicaid program has paid for Vitamin D-2 (ergocalciferol) for the petitioner as a legend (prescription only) form of Vitamin D which was prescribed by petitioner's doctors (Dr. Adrienne Hampton, Dr. Luke Fortney, Dr. Spitzer-Resnick, and APNP Patrice Streicher).

4. The petitioner's pharmacy provider, Walgreens of Madison, submitted an August, 2014 prior authorization (PA) request to the Division requesting on behalf of the petitioner approval for Vitamin D-3 –Cholecalciferol on the basis of a "Vitamin D deficiency."

5. The petitioner is not eligible for Medicaid payment for Vitamin D-3 under the HealthCheck "Other Services" benefits because she is over the age of 21 years of age.

6. The Department sent a September 17, 2014 denial letter to the petitioner stating that her PA for Vitamin D-3 was denied because the requested non-legend prescription is not an MA covered service for persons above 21 years of age through Health Check.

7. The Office of Inspector General (OIG) pharmacy consultant, Lynn Radmer, R.Ph., sent a November 10, 2014 denial summary to DHA and petitioner stating the requested drug, vitamin D3, is not a covered MA service for two reasons: a) Vitamin D-3 is a non-legend, over the counter product which is not covered pursuant to DHS 107.10(3)(h); and b) petitioner is 34 years old, and thus is not eligible for Vitamin D-3 through the HealthCheck, "Other Services" because recipients must be under the age of 21.

8. The petitioner was unable to establish with any reliable medical documentation that there is any correlation between Vitamin D levels and Hashimoto's thyroid disease.

9. The petitioner was unable to establish with any reliable medical documentation that any of petitioner's doctors stated that petitioner medically needed to take Vitamin D-3 versus D-2.

10. While the record was held open, petitioner submitted to DHA 10 pages of limited information from petitioner to her medical providers regarding the use of vitamin D2 or vitamin D3. The information included doctor prescriptions for D3, but none of those prescriptions included any medical explanation or any correlation as to why the requested D3 was necessary to treat petitioner's thyroid disease or any of petitioner's other medical problems. This ALJ sent those 10 pages to OIG, and requested that the pharmacy consultant, Dr. Radmer, to send to DHA and petitioner a reconsideration summary. See above Preliminary Recitals.

11. In her December 30, 2014 reconsideration, Dr. Radmer stated the following reasons for the continued denial of petitioner's PA request for Vitamin D-3: a) petitioner has been receiving MA paid Vitamin D-2 since April, 2014 to meet any Vitamin D deficiency; b) DHCAA has been paying claims for the petitioner for thyroid replacement medications for treatment of her hypothyroidism; c) APNP Patrice Streicher did not make a correlation between Vitamin D levels and Hashimoto's thyroid treatment, but only noted that ". . . if you feel you need to take Vitamin D3 there are many good sources OTC and you can find them at many pharmacies . . . I believe your doctor can order a Vitamin D level if you wish . . .;" d) None of petitioner's doctors stated any correlation between vitamin D3 and petitoner's thyroid disease or any other medical problem of petitioner; e) OTC vitamin D3 is very inexpensive and is readily available even at discount stores; and f) Vitamin D3 is a non-legend product which is not covered as an MA service per DHS 107.10(3)(h) for a person above the age of 21 years.

12. The petitioner's January 13, 2015 written reply to OIG's reconsideration asserted several allegations by the petitioner, but was unable to establish with any reliable medical evidence to refute OIG's reasons for denial of D3 indicated in Finding of Fact #11 above.

DISCUSSION

The MA rules provide some guidance on how to determine which services to cover for an MA recipient. The department shall reimburse providers for **"medically necessary and appropriate health care services"** listed in ss. 49.46(2) and 49.47(6)(a), Stats., when provided to currently eligible medical assistance recipients. See Wis. Adm. Code DHS §107.01(1). The listed services include over-the-counter drugs listed by the department in the Wisconsin medical assistance drug index. See Wis. Stats. §49.46(2)(b)6.i.

The Wisconsin Administrative Code also specifies when drugs are covered by MA.

> COVERED SERVICES. Drugs and drug products covered by MA include legend and non-legend drugs and supplies listed in the Wisconsin Medicaid drug index which are prescribed by a physician licensed under s. 448.04, Stats., by a dentist licensed under s. 447.05, Stats., by a podiatrist licensed under s. 448.04, Stats., by an optometrist licensed under ch. 449, Stats., by an advanced practice nurse prescriber licensed under s. 441.16, Stats., or when a physician delegates the prescribing of drugs to a nurse practitioner or to a physician's assistant certified under s. 448.04, Stats., and the requirements under s. N 6.03 for nurse practitioners and under s. Med 8.08 for physician assistants are met.

Thus, there is a requirement that the drug index list the drug before it is covered by MA. There is the further requirement that it be medically necessary and appropriate. The Code states:

> h) **To be included as a covered service, a non-legend drug shall be used in the treatment of a diagnosable medical condition and be a rational part of an accepted medical treatment plan.** The following general categories of **non-legend drugs are covered**:
>
> 1. Antacids;
> 2. Analgesics;
> 3. Insulins;
> 4. Contraceptives;
> 5. Cough preparations;
> 6. Ophthalmic lubricants; and
> 7. Iron supplements for pregnant women.
> 8. Non-legend drugs not within one of the categories described under subds. 1. to 7. that previously had legend drug status and that the department has determined to be cost effective in treating the condition for which the drugs are prescribed.
>
> (Emphasis added).

Wis. Adm. Code §107.10(3)(h).

In the instant case, the hearing record clearly establishes that the requested Vitamin D3 is not included in the above non-legend drugs as covered per Medicaid per Wis. Adm. Code §107.10(3)(h). Furthermore, the petitioner was unable to establish with any reliable evidence that the requested D3 was medically prescribed for petitioner's usage in the treatment of a diagnosable medical condition.

The Medicaid program is required to follow these rules. DHCAA and OIG determined that based upon the submitted PA and the supplemental information submitted by petitioner to OIG, the petitioner failed to establish with reliable medical evidence that the requested vitamin D3 was medically necessary. I must agree.

During the hearing and in her written submissions (including her January 13, 2015 letter), petitioner argued insistently that due to her many health problems and allergies she believes that the requested vitamin D-3 was medically necessary for her. However, petitioner was unable to provide any letter or document from any of her doctors which stated with any specificity that petitioner required vitamin D-3 (versus D-2) to treat any of her documented medical problems. While I understand the recipient's motivation for requesting what she believes to be an improved form of vitamin D for her overall health, Medical Assistance is meant to provide only **basic and necessary care**. This means that requests, such as this one, may be denied even if they are for desirable items that petitioner believes may improve her health or quality of life. While petitioner may believe this to be unfair, it is the long-standing position of the Division of Hearings & Appeals that the Division's Administrative Law Judges (ALJs) lack the authority to render a decision on constitutional or 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 and policy.

CONCLUSIONS OF LAW

The Division correctly denied the petitioner's prior authorization (PA) request for Vitamin D-3 (cholecalciferol) because it is a non-legend, over-the-counter drug which is not a Wisconsin Medicaid covered service pursuant to Wis. Adm. Code DHS 107.10(3)(h).

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 2nd day of March, 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 March 2, 2015.

Division of Health Care Access and Accountability