



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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

DECISION

MNP/162493

PRELIMINARY RECITALS

Pursuant to a petition filed December 8, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03, to review a decision by the Division of Health Care Access and Accountability (Division or DHCAA) in regard to Medical Assistance (MA) payments, a hearing was held on January 27, 2015, by telephone. The hearing record was held open for a submission from the petitioner, which was received.

The issue for determination is whether the Division correctly declined to pay for prescription compounded progesterone gel.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Respondent:

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

By: anonymous (one-paragraph written submission)
Division of Health Care Access and Accountability
Madison, WI

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Dane County. She is certified for MA/BadgerCare Plus.
2. On approximately December 8, 2014, a prescription for the petitioner for compounded progesterone gel was filled. The petitioner was apparently advised by the pharmacy that MA

would not pay for this product. MA does pay for multiple brands of prescribed oral progesterone tablets.

3. The petitioner desires to receive compounded progesterone gel on an ongoing basis. She asserts that this product costs \$46 for a three month supply.
4. The petitioner, age 34, has diagnoses of Hashimoto's Thyroid Disease, diabetes type II, hypothyroidism, vitamin D deficiency, obesity (BMI of 32.1), hyperlipidemia, monoclonal gammopathy, and allergies to pollen and other substances. The petitioner's progesterone level is in the low range.
5. Hashimoto's Thyroid Disease is a condition in which the immune system attacks the thyroid. The resulting inflammation, also known as chronic lymphocytic thyroiditis, often leads to an underactive thyroid gland (hypothyroidism). Hashimoto's disease is the most common cause of hypothyroidism in the United States. If this disease causes thyroid hormone deficiency, a patient may need replacement therapy with thyroid hormone. This usually involves daily use of the synthetic thyroid hormone levothyroxine (*e.g.* Synthroid), taken orally. *See*, <http://www.mayoclinic.org/diseases-conditions/hashimotos-disease/basics/definition/con-20030293> (viewed in March 2015).
6. Monoclonal gammopathy is a condition in which an abnormal protein (M protein) is in the blood. M protein is produced by plasma cells, a type of white blood cell. Per the Mayo Clinic website, monoclonal gammopathy of undetermined significance usually causes no problems. <http://www.mayoclinic.org/diseases-conditions/mgus/basics/causes/con-20026422> . However, in the petitioner's case, her doctor advises that it increases blood clotting.
7. In response to the petitioner's appeal, the Division submitted the following minimalist and unclear written statement which is, in its entirety, as follows:

Progesterone medication. No notice received. Member is appealing non-payment of compounded progesterone. Progesterone gel is a commercially available prescription product. BadgerCare policy will not cover a compounded drug when a commercially available product exists. A review of claims history found a prescription for commercially available progesterone was paid on December 8, 2014. A call to the pharmacy on December 9, 2014 confirmed the prescription was picked up.
8. Post-hearing, the petitioner submitted a letter from her primary physician, which advises that progesterone is needed "to help balance her weight, regulate menses and improve weight loss with her diabetes." A preference for topical progesterone versus oral progesterone is expressed, because a lower dose may be used.

DISCUSSION

The petitioner desires to have the MA program pay for progesterone gel, a prescribed product. State code offers the following guidance regarding what MA will pay for:

DHS 107.10 Drugs.

(1) 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., ...

(2) SERVICES REQUIRING PRIOR AUTHORIZATION. The following drugs and supplies require prior authorization: ...

(f) Drugs identified by the department that are sometimes used to enhance the prospects of fertility in males or females, when proposed to be used for treatment of a condition not related to fertility; ...

(3) OTHER LIMITATIONS. ...

(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 subsds. 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.

...

(4) NON-COVERED SERVICES. The department may create a list of drugs or drug categories to be excluded from coverage, known as the medicaid negative drug list. ... In addition, the following are not covered services:

...

(k) Drugs not listed in the medicaid index, including over-the-counter drugs not included in sub. (3) (h) and legend drugs;

...

(n) Drugs provided for the treatment of males or females for infertility or to enhance the prospects of fertility; ...

[emphasis added]

Wis. Admin. Code § DHS 107.10(1)-(4).

If progesterone gel were an over-the-counter product, it would not be covered by MA, per §DHS 107.10(30)(h). However, this judge's understanding is that this request is for prescription compounded progesterone gel.

For a prescription/legend drug, the first inquiry is whether the drug is listed as covered in the Medicaid index. This judge viewed the Division's online MA pharmacy policy handbook at the ForwardHealth portal:

<https://www.forwardhealth.wi.gov/WIPortal/Tab/42/icscontent/provider/medicaid/pharmacy/resources.htm#page#> (viewed March 2015). At that website, there is a "drug search tool." When "progesterone" is entered, multiple brands of capsules are shown as covered drugs. When progesterone gel, cream, or suppository is entered, the index tool says, "no covered drugs found for the program." This persuades me that progesterone in other than capsule form is not a covered prescription drug in the Wisconsin Medicaid index. State code gives the Department the right to exclude drugs from coverage through its selections into the Medicaid index, so there is no recourse that I can offer the petitioner here.

Although the above discussion is dispositive here, I also note that the petitioner made the unlikely argument that a custom, compounded prescription for progesterone gel is cheaper than mass-produced progesterone tablets. She quoted a price for the gel of \$46 for a 90-day supply. A review of the Wal-Mart pharmacy website shows that generic progesterone capsules are available at \$10 for a 90-day supply. *See*, online at <http://www.walmart.com/cp/1078664>.

CONCLUSIONS OF LAW

1. The requested progesterone gel is not a covered drug in the Wisconsin Medicaid index, so payment for that prescription product cannot be ordered here, per Wis. Admin. Code § DHS 107.10(4)(k).

THEREFORE, it is

ORDERED

That the petition is 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 18th day of March, 2015

\sNancy J. Gagnon
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 18, 2015.

Division of Health Care Access and Accountability