FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MPA/163323

PRELIMINARY RECITALS

Pursuant to a petition filed January 16, 2015, 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 hearing was held on February 19, 2015, at Menomonie, Wisconsin.

The issue for determination is whether the petitioner is entitled to surgery to reduce her weight.

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: Lora Wiggins, M.D.
Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:
Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [redacted]) is a resident of Dunn County.
2. On October 10, 2014, the petitioner with the Marshfield Clinic requested for a lap sleeve gastrectomy at a cost of $8,059. The Office of Inspector General denied the request on December 19, 2014.

3. The petitioner is 5'5" and weighs 288 pounds. Her body-mass index is 48. http://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/english_bmi_calculator/bmi_calculator.html.
4. The petitioner has back and joint pain and suffers from stress urinary incontinence. Her excessive weight puts her at risk of early death.
5. The petitioner has sleep apnea that is controlled by a CPAP breathing device.

DISCUSSION

The petitioner requests prior authorization for a lap sleeve gastrectomy 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). 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.

The petitioner's body-mass index is 48kg/$m^{2.}$. It appears that the Office of Inspector General denied her request for bariatric surgery solely because she did not document a comorbid condition that would not respond to appropriate treatment. Besides demonstrating that she is morbidly obese, the testimony and file indicate that she has tried several other forms of treatment, is over 18 years old, has never had bariatric surgery, and would have the surgery at an approved center. She has joint and back pain, and she faces early death because of her weight. But these do not qualify as comorbid conditions. She also has sleep apnea, which does qualify as a comorbid The question is whether the Office of Inspector General correctly determined that it is well controlled by a CPAP.

I must rely on the medical evidence in her file. The physician who would perform the requested surgery, Dr. Timothy Pitchford, did not mention sleep apnea in a supporting the procedure on January 28, 2014. She was diagnosed with the condition after a test performed on June 18, 2014. A note from June 25, 2014, indicated there was "evidence of overall mild sleep apnea which became severe during dreaming sleep." The note went on to state: "We discussed the fact that while CPAP is an adequate treatment for sleep apnea, it is not a cure. Weight loss can be curative, and therefore she is interested in the procedure." From this, I find that while her medical record supports her contention that the requested surgery could improve her health, her only comorbid condition, sleep apnea, is adequately controlled through another means. Therefore, I must find that she does not have an uncontrolled comorbid condition. Because she does not have such a condition, the Office of Inspector General correctly denied her request for weight-control surgery.

CONCLUSIONS OF LAW

The Office of Inspector General correctly denied the petitioner's request for bariatric surgery because it is not medically necessary.

THEREFORE, it is **ORDERED**

The petitioner's appeal 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 16th day of March, 2015

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\sMichael D. O'Brien
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 16, 2015.

Division of Health Care Access and Accountability