

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-02/08-72
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Office of Vermont Health Access (OVHA) denying prior authorization for the purchase of a mechanized scooter. The issue is whether petitioner's request for a mechanized scooter (scooter) is medically necessary under the pertinent Medicaid regulations.

Procedural History

Petitioner was denied prior authorization for the scooter on or about February 6, 2008 based on OVHA's opinion that the scooter was not suitable for use in petitioner's home and was not necessary for petitioner's activities of daily living (ADLs). Petitioner appealed this decision on or about February 21, 2008. Petitioner's case was originally scheduled for March 27, 2008. Petitioner's case was first delayed due to the assigned hearing officer's accident and then due to a death in the family of petitioner's attorney.

A status conference was held on May 6, 2008. The parties agreed that the material facts did not appear to be in dispute and presented differing opinions as to the legal

standard. A briefing schedule was set. OVHA was given an extension of time to respond to petitioner's brief.

A status conference was held on August 7, 2008. The hearing officer indicated that OVHA's interpretation of "suitable for use in the home" was unduly restrictive given the interpretation of this standard by the courts (the arguments and issues will be fully set out below). However, the briefs did not fully address the issue of medical necessity and did not address whether any factual testimony was needed to address remaining issues. The parties were given additional time to draft a stipulation of facts and submit additional written argument.

A status conference was held on October 7, 2008 to determine the status of the case. Firm deadlines were set for additional briefing and a stipulation of facts. All material has now been received.

The following decision incorporates the Stipulation of Facts, pertinent portions of documentary evidence, and briefs. In terms of additional materials submitted or argued by the parties, where the Proposed Findings of Fact are the same or consistent with the parties' specific proposals, those proposals have been accepted. Where the Proposed

Findings of Fact differ or are inconsistent with the parties' specific proposals, those proposals have been rejected.

FINDINGS OF FACT

1. The petitioner is disabled and receives Social Security Disability benefits of \$920 per month. The petitioner has degenerative osteoarthritis in both knees, his hips and ankles, and is morbidly obese.

2. Petitioner's treating physician is Dr. S.¹ and his orthopedic surgeon is Dr. H. Both doctors state that petitioner can walk only minimal distances provided he does so with support.² Petitioner should not walk unaided. The doctors believe that walking will exacerbate petitioner's osteoarthritis and increase degeneration of his joints. In addition, the petitioner is in danger of falling because he is unstable on his feet. The risk from falls includes fractures, pressure injuries, muscle crush injuries and exposure.

3. Both Dr. S. and Dr. H. support petitioner's request for a scooter to meet his ambulatory needs.

¹Dr. S. has recently left the medical practice that petitioner uses.

²Dr.S. wrote that petitioner can walk a maximum of twenty yards, and Dr. H. said petitioner can walk a maximum of ten feet.

4. Petitioner avoids walking because walking even with supports is painful.

5. Petitioner has a scooter that he purchased approximately five years ago. The scooter breaks down three to five times per year. These repairs are not covered by Medicaid.

6. Petitioner has an apartment in a scattered site public housing project that includes apartments of varying sizes. As part of the housing project's design, mail boxes and laundry facilities are located separately from the apartments.

7. Petitioner lives in an efficiency apartment measuring 465 square feet. The petitioner's apartment is too small to use the scooter inside the apartment. Petitioner is able to ambulate in his apartment by using furniture, etc. as supports.

8. The petitioner lives about six buildings from the mailbox and eight buildings from the laundry facilities. The petitioner cannot pick up his mail or use the laundry facilities without the use of his scooter.

9. The petitioner's treating doctor is located next to his apartment complex. The petitioner estimates that it is 300 feet from his apartment to the nurse's desk. The

petitioner cannot get to his doctor's office without the use of his scooter.

10. The petitioner lives close to a bus stop. He estimates that he is 200 feet from the bus stop. The petitioner uses his scooter to get to the bus stop. Without his scooter, petitioner could not access public transportation and would not be able to do grocery shopping. The petitioner estimates that the closest corner store is 1500 feet from his apartment.

11. The prescription request for the scooter came from S.H., a physical therapist, who does seating and positioning for petitioner. In terms of therapeutic results, S.H. wrote:

Independent and safe mobility outside of small apartment; laundry, groceries, pharmacy, mail, MD appointments.

She noted the small size of the apartment would preclude inside use of the scooter.

12. S.M. is a physical therapist employed by OVHA to review requests for prior authorization. S.M. asked S.H. for further information regarding whether the scooter was suitable for use in the home and what basic ADLs petitioner could not do without the scooter.

13. On or about February 1, 2008, S.H. responded to S.M. by e-mail stating:

(1) No the device is not suitable for use in the home because he lives in a very small (one room) apartment. However, the device can be brought into the home via the existing ramp and then parked just inside the door.

(2) [petitioner] cannot walk sufficient distances to attend to all activities necessary for independent living since he does not have any outside help. He lives in an apartment complex with laundry at the other end of the complex accessible via a series of paved paths. His doctor's office is one building down from his apartment, within traditional 'walking" distances, although beyond his walking tolerance. He is on a bus route for going for groceries, pharmacy, etc., but cannot walk to the bus stop or stand and wait for it to come.

14. Additional information was provided to OVHA in April 2008. Information included (1) S.H. replying to S.M. on April 25, 2008 that petitioner does not use the scooter for feeding, dressing, grooming or hygiene and (2) Dr. S. writing on April 29, 2008 that petitioner could not shop for food or other essentials without a scooter, therefore, he could not eat or provide himself with personal hygiene, grooming and dressing.

15. S.M. updated her medical basis statement on April 22, 2008 that the scooter was not medically necessary to accomplish basic activities of daily living and not suitable for use in the home. S.M. wrote:

While it is clear that [petitioner's] mobility is limited by his medical issues, it does not appear that [petitioner] requires the requested scooter for basic activities of daily living (feeding, grooming, hygiene

and dressing) as required by Medicaid. The device does not appear to be suitable for use in the home, because the device does not fit in the home aside from the ability to park it inside the home, according to the prescribing therapist. The medical need for the scooter for basic activities of daily living, and having the device be suitable for use in the home are clearly requirements of regulation M840.4, M841.3pg3.

S.M.'s opinion is based upon her understanding of the regulations.

16. Mobility in and outside the petitioner's apartment is an activity of daily living. Being mobile allows petitioner to access needed care and necessities. Petitioner needs the scooter to meet his activities of daily living.

ORDER

OVHA's decision to deny prior authorization for a mechanized scooter is reversed.

REASONS

Congress created the Medicaid program as a cooperative federal and state program to:

furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self care . . . (emphasis added).

42 U.S.C. § 1396.

See Meyers v. Reagan, 776 F.2d 241, 243 (8th Cir. 1985).

State participation is voluntary. Once a state elects to participate in the Medicaid program, the state must submit a plan and comply with certain Congressional requirements. 42 U.S.C. § 1396a, Harris v. McRae, 448 U.S. 297, 301 (1980). The Medicaid program is a remedial act meaning that its provisions must be liberally construed in favor of recipients seeking necessary medical care. Christy v. Ibarra, 826 P.2d. 361 (Court of Appeals, Co. 1991).

Because Medicaid is a cooperative federal and state program, it is imperative to determine whether state actions are in conflict with federal law. The Vermont Legislature gave the Human Services Board the authority to determine whether a Department's or OVHA's actions are in conflict with federal or state law. 3 V.S.A. § 3091(d), Stevens v. Department of Social Welfare, 159 Vt. 408, 416 (1992). Further, the Vermont Supreme Court has repeatedly held that the Board owes no deference to any of the departments or offices in the Agency of Human Services in interpreting federal laws. Brisson v. Dept. of Social Welfare, 167 Vt. 148, 152 (1997); Cushion v. Dept. of PATH, 174 Vt. 475 (2002); Jacobus v. Department of PATH, 177 Vt. 496, 502 (2004).

Scooters are considered durable medical equipment (DME). The federal requirements for funding medically necessary DME are derived from the requirements to fund home health services and rehabilitative services. In particular, 42 U.S.C. § 1396d(a) states, in part:

(a) The term "medical assistance" means payment of part or all of the cost of the following care and services
. . .

(7) home health services;

. . .

(13) other diagnostic, screening, preventive, and rehabilitative services, including any medical or remedial services (provided in a facility, home, or other setting) recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level; . . .

Home health services include DME suitable for use in the home. 42 C.F.R. § 440.70(b)(3). Preventive services include DME that promote physical health and rehabilitative services or that help restore an individual to his/her best functional level. 42 C.F.R. § 440.130(c) and (d).

Vermont has adopted regulations governing the payment for DME. Prior authorization is needed for DME requests including requests for mobility devices. M840.5 and M841.5. DME is defined at M840.1 as:

. . .equipment that will arrest, alleviate or retard a medical condition and is:

- primarily and customarily used to serve a medical purpose;
- lasting and able to withstand repeated use;
- generally not useful to a person in the absence of illness, injury or disability; and
- suitable for use in the home.

The definition is consistent with the Medicare definition and the Medicaid definition found at 42 CFR §440.70(b)(3).

Regulations covering requests for wheelchairs and mobility devices (including scooters) are found at M841. Pursuant to M841.1, these devices "enable mobility for those beneficiaries unable to ambulate by other means". In addition, M841.1 incorporates the definition found in 42 CFR §440.70(b)(3).

Suitable for Use in the Home

The term "suitable for use in the home" is not defined in the applicable statutes and regulations. OVHA argues that petitioner's request for a scooter is not "suitable for use in the home" because petitioner's apartment is too small to use the scooter within the confines of his apartment even though the scooter is necessary for petitioner to access his mail, do his laundry, obtain necessary items and services such as food and medical care, and maximize his ability to live independently in the community. Petitioner argues that

"suitable for use in the home" means a particular item that can be used in the home.

The courts have grappled with the meaning of "suitable for use in the home". Their rulings are instructive and support the petitioner's argument.

The Second Circuit first looked at Medicaid coverage for services outside the home in Detsel by Detsel v. Sullivan, 895 F.2d. 58 (2nd Cir. 1990). The question was whether Medicaid covered private duty nursing services for a severely disabled child during the period the child was out of the home and in school. The state denied coverage of private duty nursing at school stating that the applicable federal regulation, 42 C.F.R. § 440.80 allowed for payment only in the home, hospital or skilled nursing setting. The Court found the state's interpretation to be too narrow as there was not a logical basis to restrict the setting for private nursing services noting that the interpretation of the Medicaid Act needed to take into account changing circumstances including technological advances in the provision of medical services. The Court looked at the current understanding of private nursing services stating that the service is setting independent.

In 1997, the Second Circuit decided that the limitation of home health services to services provided only in the home was arbitrary and capricious. Skubel v. Fuoroli, 713 F.3d. 330 (2nd Cir. 1997). The plaintiff was a severely disabled individual seeking Medicaid coverage for home health services in the community in order to participate in the community. Plaintiff's request was denied by the state agency who believed the applicable federal regulation, 42 C.F.R. § 440.70 limited home health services to the services provided at the plaintiff's residence. The Court noted that the Medicaid statute did not prohibit reimbursement for home health services outside the residence. Although such services may ordinarily be provided in the home, the home was not the exclusive location for services. Further, the Court noted that the state agency's interpretation ignored the consensus that community access was desirable for the disabled and in keeping with the purposes of the Medicaid Act.

Petitioner's request for a scooter or DME fits within the criteria for home health services. The Medicaid Act does not preclude the funding of the scooter in this case. Petitioner lives within an apartment complex where the tenants need to access other buildings for mail and laundry.

He uses his scooter to meet many of his basic needs as well as fully participate in the community. The Medicaid Aid favors services that allow recipients to maintain independence. OVHA's interpretation is unduly restrictive as it adds limitations not expressly found in the federal Medicaid law nor found in decisions interpreting the applicable sections of federal law.

Further, his situation is similar to a person in senior housing who needs a scooter or mechanized wheelchair to access meals in a common dining room. OVHA would allow payment in that case. This case should not be treated differently because the needs are equivalent. To treat petitioner differently than others in need of mechanized scooters because his apartment is small leads to a result that would violate the comparability requirements and the amount, duration and scope requirements of the federal Medicaid program. 42 C.F.R. §§ 440.230 and 440.240.

Medical Necessity

The parties agree that petitioner's medical condition limits his mobility. Petitioner seeks a motorized scooter to overcome the limitations on his mobility and to fully access services and necessities.

Under the prior authorization program, an individual's request needs to be individually assessed. Part of the assessment includes medical documentation from the individual's medical providers. Petitioner's medical providers support his request for a scooter. The decision whether a particular service or treatment is medically necessary is in the purview of the treating physicians. Pinneke v. Preisser, 623 F. 2d 546, 550 (1980).

OVHA overlooks the recommendations of petitioner's treating physicians. Instead, OVHA decided that the scooter was not medically necessary, in part, because OVHA further limited the definition of "suitable for use in the home" by narrowly interpreting a policy statement that a mechanized wheelchair or scooter must be used for basic ADLs. OVHA found that petitioner did not need the scooter for basic ADLs.³

The provision for basic ADLs is found in a PP&D opposite M841.3 page 3. A PP&D is a policy statement interpreting a state regulation. PP&Ds are not promulgated through the

³The Medicaid manual does not define ADLs. However, ADLs are defined in the Choices for Care 1115 Long-Term Care Waiver Regulations at III.1. The Choices for Care program is a Medicaid waiver program administered by the Department of Disabilities, Aging and Independent Living of the Agency of Human Services. Their definition includes mobility in and around the home.

Administrative Procedure Act and are not accorded the same weight as a regulation.

The PP&D states:

"Suitable for use in the home" means a wheelchair or other mobility device suitable for use in environments routinely encountered in the course of accomplishing their basic activities of daily living (ADLs), including but not limited to the home environment. . . .

There are no requirements in federal Medicaid law limiting DMEs such as scooters to the requirements found in the PP&D.⁴ Just as OVHA's interpretation of "suitable for use in the home" to mean the device needed to be used within petitioner's home is unduly narrow, OVHA's additional requirements create an unduly narrow interpretation of federal law.

In terms of the Medicaid program, the Vermont Supreme Court has stated that the Board need not defer to the state Medicaid agency in interpretation of federal law. Jacobus, supra and Brisson, supra. In petitioner's case, OVHA's interpretation will leave petitioner without the means to meet his needs and maintain his independence in the community. OVHA's interpretation is unduly narrow and should be set aside.

⁴It should be noted that OVHA does not use this requirement for other DMEs such as apnea monitors, helmets, oxygen tanks, etc. There is no reason to treat wheelchairs and scooters differently.

OVHA also points to prior fair hearings involving petitioner to infer this matter has been previously decided. OVHA does not argue res judicata or collateral estoppel. These arguments are not available to OVHA. OVHA points to Fair Hearing No. 19,724 dealing with a M108 request for chiropractic visits; this decision is not on point.

In addition, OVHA points to Fair Hearing No. 20,082 (2006) involving a request by petitioner for a different motorized scooter characterized as a heavy duty scooter. In that request, petitioner did not have a medical prescription or documentation from a medical provider to support his case. This decision is not on point because the request was for different equipment and not medically supported. Petitioner's present request is well supported by his medical providers. More importantly, petitioner was informed on page 3 of the above decision that:

The Department has made clear that it stands willing to provide Medicaid coverage for the petitioner for any mobility device necessary for him to ambulate in and around his home that is duly prescribed by a medical provider.

Petitioner has done so through his present request for prior authorization.

In conclusion, petitioner has demonstrated that his request for a mechanized scooter is medically necessary.

OVHA's decision is reversed. 3 V.S.A. § 3091(d); Fair
Hearing Rule 1000.4(D).

#