

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-07/10-349
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department for Vermont Health Access (DVHA) "locking in" the petitioner to one primary care physician and one pharmacy for a two year period. The issue is whether the petitioner should be subject to the "locking in" procedure.

The following decision is based upon the testimony from petitioner at a hearing held on August 11, 2010, documentary evidence submitted at hearing and subsequently through status conferences held on August 30, 2010 and October 4, 2010. Subsequent to the August 30, 2010, petitioner obtained legal advice and decided to conclude the fair hearing process rather than continue negotiations with the Department. The Department was given the opportunity to reconvene the hearing and present testimony and/or cross-examine petitioner and declined to do so. The Department's case rests upon the documentary evidence submitted at hearing.

FINDINGS OF FACT

1. The petitioner is a forty-four year old disabled individual receiving Social Security Disability based on physical injuries, pain, and a panic disorder. Petitioner receives Medicare through the Social Security Administration and V-Pharm benefits from the Department for Children and Families. Prior to her disability, petitioner worked for a local police department for sixteen years.

2. The petitioner receives her primary care through Milton Family Practice, and has done so for the past four years. Milton Family Practice is part of Fletcher Allen Health Care.

Petitioner's primary care physician is Dr. M.R. When Dr. M.R. is unavailable, petitioner sees other physicians, residents, or physician assistants at the Milton facility.

3. Petitioner worked with C.L., a physician's assistant and pain counselor, at the Fletcher Allen Pain Clinic for three to four years ending in May 2010.

4. On or about May 28, 2010, C.L. made a referral to the DVHA's Program Integrity Unit. C.L. did a pill count with petitioner and found that the medications in petitioner's possession were for a higher dosage than prescribed. The information in the referral form alleged

that petitioner was prescribed 3/350 hydrocodone but that she had 10/650 hydrocodone.¹

5. The DVHA sent petitioner a Lock In Initial Notification dated July 16, 2010 stating that they decided to lock in petitioner to one primary care physician and one pharmacy. They based their decision on a review of petitioner's records from May 2009 through June 2010 showing the use of twelve different prescribers and four different pharmacies. Petitioner's appeal rights were attached.

6. The petitioner wrote to the DVHA in a letter dated July 19, 2010 disputing the allegations in the DVHA's analysis of her records. On or about July 29, 2010, petitioner's request for fair hearing was filed with the Board.

7. The DVHA submitted a Drug Report for the period of May 2009 through June 2010.

Of the 190 entries, there are 28 entries of pharmacies other than McGregor's Pharmacy or 15 percent of the entries. These pharmacies include Fletcher Allen Outpatient, Kinney's Drug #55, and Kinney's Drug #35.

¹The second number refers to the Tylenol dosage in the medication.

Of the 190 entries, there are 36 entries by medical providers other than Dr. M.R. and physician's assistant, C.L. or 19 percent of the entries.

8. The petitioner testified that she has not engaged in drug seeking behavior; specifically pain medications, through doctor shopping or using different pharmacies. Petitioner was forthcoming and credible in her testimony. Petitioner admitted that she tried a friend's medication that had a higher dose of Tylenol in the medication, and it was this medication that C.L. found during the pill count. Petitioner admitted making a mistake in doing so.

Petitioner explained that Dr. M.R., her treating physician, is part of the group practice at Milton Family Practice and is not always available to see petitioner when she calls for an appointment. On those occasions, petitioner sees the doctor, resident, or physician's assistant who is available. She does not know the names of every one she has seen at Milton Family Practice. She did not recognize a number of names that were on the Drug Report of prescribing doctors supplied by the Department. Petitioner recognized the following names from Milton Family Practice: Dr. M.G, Dr. J.S., and Dr. K.R.

During the time in question, C.L. managed petitioner's pain. C.L. was located at the Fletcher Allen Health Care Pain Clinic in South Burlington.

Both Dr. M.R. and C.L. were petitioner's primary health care providers during the time in question.

9. Petitioner normally used and uses McGregor's Pharmacy to fill her prescriptions because it is closer to her home. She has received permission by her treating providers to use Kinney's Pharmacy. During November 2009, petitioner was treated at Fletcher Allen Health Care in Burlington for treatment of a bowel obstruction and medications were filled at the Fletcher Allen Outpatient Pharmacy.

10. On November 24, 2009, petitioner filled eight prescriptions from Dr. J.K.G. at the Fletcher Allen Outpatient pharmacy. The prescriptions included Pantaprazole, Ondansetron, Senna-gen, DOK, and Polyethylene. All these medications are consistent with treatment for petitioner's bowel obstruction.

Petitioner filled a total of 15 prescriptions at Kinney Drug #55. All of these medications were prescribed by C.L., one of petitioner's treating providers.

Petitioner filled a total of five prescriptions at Kinney Drug #35. Three prescriptions were from her treating providers. Dr. C.S. prescribed Clonidine HCL on June 1, 2010; the medication is for high blood pressure. Dr. K.R. prescribed Gabapentin on June 4, 2010.

11. The drug report shows prescriptions for narcotics including Hydrocodone, Methadone, and Morphine. These medications were only prescribed by Petitioner's treating medical providers, Dr. M.R. and physician's assistant C.L.

The Drug Report lists three doctors with no connection to Milton Family Practice. The doctors are Dr. T.S. of Milton who prescribed Benzonatate (a nonnarcotic cough suppressant on January 14, 2010), Dr. D.S. of Fletcher Allen Health Care who prescribed Gavilyte-G on July 7, 2010 (preparation used for colonoscopies), and Dr. J.K.G. who prescribed medications for petitioner's bowel problem as set out in finding of fact No. 10.

Three doctors are listed as staff doctors at Milton Family Practice. They include Dr. M.G., Dr. J.S., and Dr. K.R. Dr. M.G. prescribed Propranolol, a beta blocker indicated for high blood pressure or migraines on May 4 and June 3, 2009. Dr. J.S. prescribed Promethazine, an

antihistamine, on September 11, 2009. Dr. K.R. prescribed Gabapentin on June 4, 2010.

The other four doctors are listed as being part of Fletcher Allen Health Care; all were residents at the time in question. They may be among the residents who saw petitioner on occasion at Milton Family Practice.

Petitioner receives a prescription for Amerge on a regular basis. Amerge is used to treat migraines. In addition to Dr. M.R. prescribing Amerge, Dr. L.W. and Dr.S.D. also prescribed the medication. Dr. I.F. prescribed chantix twice (smoking cessation product), Trazedone HCL (anti-depressant), Clonazepam (treats panic attacks), and Carisoprodol (muscle relaxant indicated for muscle injuries). Dr. C.S. prescribed Clonidine HCL.

12. Petitioner's pharmacy use is not consistent with drug seeking behavior.

13. Petitioner's use of medical providers is not consistent with drug seeking behavior.

ORDER

The DVHA's decision to lock in petitioner to one medical provider and one pharmacy is reversed.

REASONS

Section 1902(a)(30) of the Social Security Act gives States the authority to adopt utilization reviews and controls. 42 C.F.R. § 431.54(e) includes lock in as a tool and provides, in part:

If a Medicaid agency finds that a recipient has utilized Medicaid services at a frequency or amount that is not medically necessary, as determined in accordance with utilization guidelines established by the State, the agency may restrict the recipient for a reasonable period of time to obtain Medicaid services from designated providers only.

The Department has adopted regulations for utilization control. W.A.M. § 7107. The pertinent section on beneficiary abuse states at W.A.M. § 7107.1 that:

When recipient abuse is identified, the recipient's access to care will be limited through a requirement for prior authorization, restriction to selected providers, or other appropriate action. Instances of recipient abuse include, but are not limited to:

Obtaining an inordinate supply of a prescription drug, especially those which are potentially addictive; or

Consistently requesting care at a hospital emergency facility for non-emergency ailments; or

Obtaining concurrent service from two or more practitioners for the same condition without medical referral, on an ongoing basis or for the purpose of obtaining prescriptions necessary for the implementation of (i) above. This is not to preclude reasonable access to a "second opinion" of a diagnostic nature or taking action on such opinion.

The Department based their decision on the information contained in the Drug Report alleging that petitioner used an inordinate number of medical providers and pharmacies. In taking negative action to diminish a benefit, the burden of proof is on the Department to show by a preponderance of evidence that they have a basis for locking in the petitioner to one medical provider and one pharmacy.

The petitioner gave credible testimony that she did not engage in drug seeking behaviors by seeking out other doctors or using other pharmacies.

Petitioner belongs to a group practice. When her primary or treating doctor is not available, petitioner sees others within that practice including staff doctors and residents. The records show that petitioner obtained her narcotics prescriptions through either her treating doctor, Dr. M.R., at Milton Family Practice or her pain treatment provider, C.L.

The records do not support that petitioner was seeing other doctors or using other pharmacies to obtain more of her pain medications.

Once petitioner rebutted DVHA's presumptions about her use of doctors and pharmacies, the burden of proof shifted back to DVHA to demonstrate that petitioner should be locked

in. DVHA has not done so. The Drug Report is insufficient to do so once petitioner credibly explained the history of her treatment.

Based on the foregoing, DVHA's decision is reversed. 3
V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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