DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION
ON
REMAND
MPA-35/55311

PRELIMINARY RECITALS

Pursuant to a petition filed October 17, 2002, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Division of Health Care Financing in regard to Medical Assistance (MA), a hearing was held on November 20, 2002, at Merrill, Wisconsin.

The issue for determination is whether petitioner is eligible for payment by the MA program for reduction mammoplasty.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

(petitioner)

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309
By: Richard M Carr, MD
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:
Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN (redacted)) is a resident of Lincoln County. Petitioner is 21 years old and is certified for MA.

2. On September 18, 2002, the petitioner's provider, Dr. Stephen Fox, requested prior authorization for MA coverage of reduction mammoplasty.

3. Dr. Fox determined that he would remove 400 grams of breast tissue from each breast.

4. The Division denied the PA request on September 25, 2002 because the requested service was not medically necessary. The Division found that the requested procedure was not medically necessary because the petitioner did not meet the required body surface area (BSA) criteria.

5. Petitioner is 5' 3' tall, weighs about 204 pounds and wears a size 38DD bra. Her BSA is 1.95 m^2.

6. On December 11, 2002, the Division of Hearings and Appeals issued a Proposed Decision reversing the Division and approving the PA. On February 10, 2003, the Secretary reversed the DHA decision. While he agreed with the ALJ that the Division had incorrectly based its decision exclusively on the amount of breast tissue to be removed, he directed the ALJ to remand the matter to the Division to "interpret and fully apply the Schnur criteria to the facts of this case".

7. On February 12, 2003, the Chief Medical Officer of the Division, Dr. Richard Carr, submitted a written response. Dr. Carr again denied the PA request based on the failure to meet three criteria: the sufficient documentation of the failure of conservative measures, an adequate amount of tissue to be removed, and the documentation of four signs/symptoms of macromastia.

DISCUSSION

I will not restate the Discussion section of the Proposed Decision but incorporate it by reference. However, it is important that I highlight some key points. The petitioner's physician determined that he would remove at least 400 grams of breast tissue from each breast. Per Dr. Carr's October 31, 2002 letter, the Division denied the PA request because, based on the petitioner's BSA, the surgery would have to remove at least 575 grams of breast tissue. That was the only basis for the denial given.

The Division cited the criteria set forth by Dr. P.L Schnur in the above-cited professional journal (hereafter, the Schnur criteria) in its denial. The petitioner's provider attached what appears to be part of that journal article to the PA request. Dr. Schnur calculates the BSA for an individual by using her height and weight in a formula. Then he places her in one of three categories based on the amount of the removed tissue. The article stated the following:

> If the woman's data plot above the 22 percentile, her motivation is purely medical. If her data plot between the two lines, her motivation is mixed and *must be looked at individually*. If her data plot below the 5th percentile, her motivation is purely cosmetic. (Emphasis added.)

In the case at hand, the Department has chosen to cover medically necessary breast reduction surgeries. Therefore, the determination on what is medically necessary must be based on each individual recipient per previously cited federal case law. The Department has adopted the Schnur criteria as a standard to determine the medical necessity of each requested surgery. Those criteria clearly state that when the woman falls between the fifth and twenty-second percentile, her circumstances must be reviewed on an individual basis. The Division did not do so as the denial was based only on the amount of tissue to be removed. The petitioner clearly falls in that "between" category yet she was denied solely on her failure to reach the twenty-second percentile. That is clearly contrary to the basis of their current criteria, the Schnur criteria, as well as violating the federal Medicaid statute.

I reviewed the PA request and found that criteria 1 and 3 appeared to be met. Thus, I reversed the Division and found that the requested service is medically necessary for this individual in this case.

The Division's February 12, 2003 denial is based on its belief that the PA has failed to meet the three approval criteria for BRM set forth in the October 16, 2002 version of the Prior Authorization Guidelines Manual, 117.006.02, which are as follows:

1) Documentation that conservative treatment has been unsuccessful in alleviating clinical symptoms with a trial period of at least three months; *and*

2) An appropriate amount of breast tissue must be removed from each breast. (Determine by using the criteria set forth by P.L Schnur, et al MS Reduction Mammoplasty: Cosmetic or Reconstructive Procedure? Ann Plast Surg 1991 27:232-237.)

3) Documentation of at least 4 medical signs/symptoms of macromastia, such as: postural backache (ICD 724.5, 781.9), upper back and neck pain (ICD-9 724.1, 723.1), chronic breast pain due to breasts (ICD-9: 611.71), "true hypertrophy" (ICD-9 611.1), intertrigo (Severe and intractable inflammation and/or infection in the fold beneath breasts) (ICD-9 695.89), shoulder grooving and kyphosis (ICD-9 737.10), gross asymmetry of the breasts or absence of a breast, resulting from the resection of the opposite breast due to cancer or infection.

I have reviewed the original PA request in light of Dr. Carr's response. I now agree with Dr. Carr in that there could have been more documentation of the failure of conservative measures for a three-month period. I am also willing to find that my interpretation what constitutes four signs/symptoms of macromastia may have been incorrect in that I was counting the same sign/symptom twice. Thus, I must uphold the Division's most recent denial of the original PA request.

I should point out that the petitioner's provider can submit a new PA request that is clearer on criterion 1 and 3. However, I believe that even if the provider submits documentation of the failure of conservative measures for three months and documentation of four signs/symptoms of macromastia of tissue to be removed, the Division may still deny the PA request if it indicates that less than 575 grams breast tissue will be removed from each breast. Thus, the petitioner must be resolved to go through this hearing process again and possibly an appeal to circuit court to get the relief she is seeking.

CONCLUSIONS OF LAW

1. There is insufficient documentation in the PA request to show that the requested mammoplasty is a medically necessary and appropriate procedure for relief of the petitioner's medical symptoms.
2. The Division correctly denied the instant prior authorization request.

NOW, THEREFORE, it is **ORDERED**

That the petition for review be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found 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 no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 27th day of
May, 2003

/sJoseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
917/JAN

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MPA-35/55311

DECISION REVERSING PROPOSED DECISION AND REMANDING TO DIVISION OF HEALTH CARE FINANCING FOR FURTHER CONSIDERATION

This case requires application of the Schnur criteria. Under those criteria, if a woman's data plot above 22%, her motivation for breast reduction surgery is purely medical. Below 5%, the motivation is purely cosmetic. If the data plot between 5% and 22%, the motivation is mixed. Petitioner's data plot in the latter category.

The Administrative Law Judge (ALJ) correctly found that the Division appeared to base its decision exclusively on the amount of tissue to be removed. Having made that finding, the ALJ proceeded to interpret and apply the Schnur criteria. He concluded that he requested mammoplasty is medically necessary and that the Division incorrectly denied the prior authorization request.

The ALJ's decision is reversed. He is directed to remand this matter to the Division of Health Care Financing, in turn directing the Division to interpret and fully apply the Schnur criteria to the facts of this case.

Given under my hand at the City of Madison, Wisconsin, this 10th day of February, 2003.

/s_____
Thomas E. Alt, Deputy Secretary
Department of Health and Family Services

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

PROPOSED
DECISION

MPA-35/55311

PRELIMINARY RECITALS

Pursuant to a petition filed October 17, 2002, under Wis. Stats. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Division of Health Care Financing in regard to prior authorization (PA) under the Medical Assistance (MA) program for reduction mammoplasty, a hearing was held on November 20, 2002, at Merrill, Wisconsin.

The issue for determination is whether petitioner is eligible for payment by the MA program for reduction mammoplasty.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

(petitioner)

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309
By: Richard Carr, M.D.
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:
Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN (redacted)) is a resident of Lincoln County Petitioner is 21 years old and is certified for MA.

8. On September 18, 2002, the petitioner's provider, Dr. Stephen Fox, requested prior authorization for MA coverage of reduction mammoplasty.

9. Dr Fox determined that he would remove 400 grams of breast tissue from each breast.

10. The Division denied the PA request on September 25, 2002 because the requested service was not medically necessary. The Division found that the requested procedure was not medically necessary because the petitioner did not meet the required body surface area (BSA) criteria.

11. The petitioner has a rash around her breasts. She has four medical signs/symptoms of macromastia: back pain, neck pain, shoulder pain, and limitations on physical activities. More conservative approaches have been tried and have failed.

12. Petitioner is 5' 3' tall, weighs about 204 pounds and wears a size 38DD bra. Her BSA is 1.95 m^2.

DISCUSSION

The Division may only reimburse providers for medically necessary and appropriate health care services and equipment listed in Wis. Stat. §§ 49.46(2) and 49.47(6)(a), as implemented by Wis. Admin. Code, Ch. HFS 107. Some services and equipment are covered if a prior authorization request is submitted and approved by the Division in advance of receiving the service. Finally, the MA program never covers some services and equipment. The MA program in this case does not cover the requested reduction mammoplasty unless the prior authorization is granted as is required by Admin Code § HFS 107.06(2)(z). The Division does not believe that prior authorization is warranted here.

In determining whether to grant prior authorization for services or equipment, the Division must always follow the general guidelines in §HSS 107.02(3)(e). That subsection provides that the Division, in reviewing prior authorization requests, must consider the following factors:

1. The medical necessity of the service;
2. The appropriateness of the service;
3. The cost of the service;
4. The frequency of furnishing the service;
5. The quality and timeliness of the service;
6. The extent to which less expensive alternative services are available;
7. The effective and appropriate use of available services;
8. The misutilization practices of providers and recipients;
9. The limitations imposed by pertinent federal or state statutes, rules, regulations or interpretations, including medicare, or private insurance guidelines;
10. The need to ensure that there is closer professional scrutiny for care which is of unacceptable quality;
11. The flagrant or continuing disregard of established state and federal policies, standards, fees or procedures; and
12. The professional acceptability of unproven or experimental care, as determined by consultants to the department.

The key factor of the 12 listed above is "medical necessity", which is defined in the administrative code as any MA service under chapter HFS 107 that is:

(a) Required to prevent, identify or treat a recipient's illness, injury or disability; and

(b) Meets the following standards:

1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability; . . .

7. Is not solely for the convenience of the recipient, the recipient's family or a provider;

8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; . . .

Section HFS 101.03, Wis. Adm. Code. In addition to these general regulations, there are others that are specific to each service or equipment. The MA program in this case covers the requested service if it meets the criteria the Prior Authorization Guidelines Manual.

The Division used to follow the policies set forth in the 1998 version of the Prior Authorization Guidelines Manual, 117.006.02. Those guidelines stated that the PA for BRM would not be approved unless:

> (1) at least 450 grams of tissue, per breast, requires resection, and (2) the weight of the recipient is no more than 120% of his/her ideal weight as calculated from the Metropolitan Life Insurance Company Chart. If the recipient does not meet (2), that criterion may be waived if an extenuating clinical circumstance exists. Per the Prior Authorization Guidelines Manual, **examples** of extenuating circumstances include:
>
> - severe scoliosis of the spine associated with respiratory embarrassment
> - severe and intractable inflammation and/or infection in the fold beneath the breasts
> - gross asymmetry of the breasts or absence of a breast, resulting from resection of the opposite breast due to cancer or infection

The Division now uses the policies set forth in the October 16, 2002 version of the Prior Authorization Guidelines Manual, 117.006.02, which state that the PA approval criteria for BRM is as follows:

The request indicates the medical need and appropriateness of the procedure with respect to the following:

4) Documentation that conservative treatment has been unsuccessful in alleviating clinical symptoms with a trial period of at least three months; *and*

5) An appropriate amount of breast tissue must be removed from each breast. (Determine by using the criteria set forth by P.L Schnur, et al MS Reduction Mammoplasty: Cosmetic or Reconstructive Procedure? Ann Plast Surg 1991 27:232-237.)

6) Documentation of at least 4 medical signs/symptoms of macromastia, such as: postural backache (ICD 724.5, 781.9), upper back and neck pain (ICD-9 724.1, 723.1), chronic breast pain due to breasts (ICD-9: 611.71), "true hypertrophy" (ICD-9 611.1), intertrigo (Severe and intractable inflammation and/or infection in the fold beneath breasts) (ICD-9 695.89), shoulder grooving and kyphosis (ICD-9 737.10), gross asymmetry of

> the breasts or absence of a breast, resulting from the resection of the opposite breast due to cancer or infection.

The petitioner is 63'' tall and weighs about 204 pounds. Her physician determined that he would remove at least 400 grams of breast tissue from each breast. Per Dr. Carr's October 31, 2002 letter, the Division denied the PA request because, based on the petitioner's BSA, the surgery would have to remove at least 575 grams of breast tissue. That is the only basis for the denial given.

The Division cited the criteria set forth by Dr. P.L Schnur in the above-cited professional journal (hereafter, the Schnur criteria) in its denial. The petitioner's provider attached what appears to be part of that journal article to the PA request. Dr. Schnur calculates the BSA for an individual by using her height and weight in a formula. Then he places her in one of three categories based on the amount of the removed tissue. The article stated the following:

> If the woman's data plot above the 22 percentile, her motivation is purely medical. If her data plot between the two lines, her motivation is mixed and *must be looked at individually*. If her data plot below the 5th percentile, her motivation is purely cosmetic. (Emphasis added.)

Medicaid (and WMAP) is based on the principle that the determination of medical necessity through a thorough medical evaluation of the individual will ensure that those individuals genuinely requiring a particular service will be able to obtain it but will deny benefits to persons not demonstrating such medical necessity. Such a requirement is consistent with applicable Federal statutes concerning the funding of Medicaid. See, 42 U.S.C.A. s 1396. See also Doe v. Department of Public Welfare, 257 N.W. 816 (1977). The state has the right to set reasonable parameters when defining medical necessity. See, Beal v. Doe, 432 U.S. 438, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977). 519, 521 (8th Cir.1993). "Although [the Medicaid Act] does not require States to provide funding for all medical treatment falling within ... categories [of medical services], it does require that state Medicaid plans establish 'reasonable standards ... for determining ... the extent of medical assistance under the plan which ... are consistent with the objectives of [the Medicaid Act].' " Beal, 432 U.S. 438, 441 (quoting 42 U.S.C. § 1396a(a)(17) (1970)). Once a state decides to provide certain optional medical services, it is bound to act in compliance with the statute and its applicable regulations, which include the requirement that each service be "sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 C.F.R. § 440.230(b) (2000); *see Weaver v. Reagen*, 886 F.2d 194, 197 (8th Cir.1989).

An example of where an outright restriction of services was held to be impermissible can be found in the decision of the Vermont Supreme Court in Cushion v. Department of PATH, 807 A.2d. 425 (2002). That court held that an outright prohibition on partial dentures violated federal law, because the limitation on service was not rationally related to the purpose of offering dental services, which Vermont does. That court declined to interpret a Vermont State statute that included a statement that neither dental implants nor partial plates were included as a Medicaid benefit. The reason was that such a rule would conflict with federal law. Instead, the court interpreted the statute as a prohibition on cosmetic partial dentures, rather than medically necessary partial dentures. The court also cited the Medicaid Act, § 1905(a)(10), 42 U.S.C. § 1396d(a)(10); 42 C.F.R. § 440.100(a)(1, 2); Laws 1998, No. 147, § 128(a)(4). The point is that the court found that where an individual assessment found the requested service to be cosmetic, it could be denied. If medically necessary, it had to be covered by that state's Medicaid program as part of its overall dental services.

In the case at hand, the Department has chosen to cover medically necessary breast reduction surgeries. Therefore, the determination on what is medically necessary must be based on each individual recipient. This is especially true in this situation. The Department has adopted the Schnur criteria as a standard to determine the medical necessity of each requested surgery. Those criteria clearly states that when the woman falls between the fifth and twenty-second percentile, her circumstances must be reviewed on an

individual basis. The Division did not do so as the denial was based only on the amount of tissue to be removed. The petitioner clearly falls in that "between" category yet she was denied solely on her failure to reach the twenty-second percentile. That is clearly contrary to the basis of their current criteria, the Schnur criteria, as well as violating the federal Medicaid statute as discussed above.

I have reviewed the PA request and find that criteria 1 and 3 appear to be met. Thus, I will reverse the Division and find that the requested service is medically necessary for this individual in this case.

CONCLUSIONS OF LAW

3. The requested mammoplasty is a medically necessary and appropriate procedure for relief of the petitioner's medical symptoms.
4. The division incorrectly denied the instant prior authorization request.

NOW, THEREFORE, it is

ORDERED

That the petitioner's provider, Dr. John Noon, provide the requested service, and send his bill and a copy of this decision to EDS-Federal for Payment by the MA Program. However, these actions may only be completed ***if and only if***, this Proposed Decision is adopted therein by the Secretary.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P. O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15 day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health & Family Services for final decision-making. The process relating to Proposed Decisions is described in WI Stat. § 227.46(2).

Given under my hand at the City of
Madison, Wisconsin, this 11th day of
December, 2002.

/s

Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
917/JAN