The proposed decision of the hearing examiner dated March 12, 2007 is modified as follows and as such is adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed December 4, 2006, 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 prior authorization under the Medical Assistance (MA) program for vestibuloplasty and IV sedation, a hearing was held on February 27, 2007, at Wisconsin Rapids, Wisconsin.

The issue for determination is whether petitioner is eligible for payment by the MA program for vestibuloplasty and IV sedation.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Respondent:

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: Robert Dwyer, DDS
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. The petitioner is a resident of Wood County. The petitioner is 49 years old and is certified for MA.
2. On October 16, 2006, the petitioner's provider, Marshfield Clinic, requested prior authorization for MA coverage of vestibuloplasty and IV sedation.
3. The Division denied the prior authorization request on October 22, 2006 because it believes that the requested service is not covered by the MA program.
4. The petitioner has had problems with an ill-fitting prosthesis. He is a type 1 diabetic and must maintain proper nutrition, which has been difficult given his problems with ill-fitting dentures.
5. His lower denture is ill-fitting because of the severity of bone loss in his lower jaw. Vestibuloplasty can be used to increase the alveolar ridge height in his lower jaw to make the proper fitting of the lower denture possible.

DISCUSSION
The Bureau 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 Bureau in advance of receiving the service. Finally, some services and equipment are never covered by the MA program.

There is no question that the requested service of vestibuloplasty is specifically listed as a non-covered service under the MA program per the Wisconsin Medicaid Provider Handbook for Dental Services, Appendix 5, p. B-45. In the past, regulations implied that it was a non-covered service. WI Admin Code § HFS 107.07(4)(r) and (t) (1996), stated that non-covered services included aveoplasty, stomatoplasty, and osteoplasty (except in certain cases). That is why the Division concluded that the requested vestibuloplasty and IV sedation in this case are not covered by the MA program.

The only problem is that the administrative code has changed but the Wisconsin Medicaid Provider Handbook for Dental Services has not. The following is from the current WI Admin Code, §HFS 107.07(2)(a):

(a) All of the following dental services require prior authorization in order to be reimbursed under MA, except for any service that is part of a dental assessment and evaluation for a recipient under 21 years of age or is found necessary as a result of such an assessment and evaluation:…

4. All of the following oral and maxillofacial surgery services:…

d. Other repair procedures including osteoplasty, alveoloplasty, and sialolithotomy.

Thus, osteoplasty, alveoloplasty, and sialolithotomy have been moved from the non-covered services section to the section with services that may be approved with prior authorization. Wisconsin Medicaid Provider Handbook for Dental Services is no longer in harmony with the underlying administrative rule.
This Office has frequently stated that the Wisconsin Medicaid Provider Handbook for Dental Services cannot conflict with an administrative rule as the rule is always controlling.

The petitioner’s medical provider has submitted such a PA request. The problem is that vestibuloplasty is not specifically listed as a service that can be covered if a PA request is submitted and meets with the approval criteria. First, I note that the Wisconsin Medicaid Provider Handbook for Dental Services had listed vestibuloplasty as a non-covered service even though it was not specifically mentioned in the now out-of-date administrative rule as a non-covered service. I see no reason that the term “including osteoplasty, alveoloplasty, and sialolithotomy” cannot be also interpreted to include it at this time, especially as the provision does not say “limited to”.

Additionally, there is a statutory rule of construction (ejusdem generis) that when several items are preceded by a general phrase (including), it is reasonable to conclude that the provision intended to include other items that fall within the same category. That is why the Wisconsin Medicaid Provider Handbook for Dental Services could include vestibuloplasty as a non-covered service even though it was not listed in the now out-of-date administrative rule provision. It would seem to me that vestibuloplasty is in the same category as alveoplasty. “Alveoplasty” is the surgical shaping and smoothing of the margins of the tooth socket after extraction of the tooth, generally in preparation for the placement of a prosthesis. Alveoplasty is used to smooth out uneven areas, flatten and taper overly thin ridges, and prepare the jaw to receive dentures successfully. “Vestibuloplasty” includes any surgical procedures designed to develop alveolar ridge height by repositioning the muscles attached to the buccal, labial, and lingual aspects of the jaws. It may involve skin grafting techniques. The primary objective of the procedure is also to prepare the mouth to receive dentures successfully. In the petitioner’s case, he needs the service in order to receive dentures successfully, and needs the dentures to receive proper nutrition which is important to a person who is a diabetic.

I am writing this as a proposed decision because the Division must deal with its failure to implement the administrative rule change. Then, if it agrees that vestibuloplasty should be treated the same as osteoplasty, alveoloplasty, and sialolithotomy, it can review this PA request to see if it should be covered by the MA program. I did not discuss the IV sedation as that is not an issue if the Division approves MA coverage of the vestibuloplasty.

CONCLUSIONS OF LAW

1. The Wisconsin Administrative Code has been revised such that oral and maxillofacial surgery services can be covered by the MA program if a PA request is submitted and the Division approves it.

2. Vestibuloplasty is one of those surgical services.

NOW, THEREFORE, it is ORDERED

That the Division of Health Care Financing review Petitioner’s request for Medicaid coverage of vestibuloplasty under the applicable prior authorization review criteria set forth in Wis. Admin. Code § HFS 107.02(3).

REQUEST FOR A REHEARING

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 rehearing. You may also ask for a rehearing if you have found new evidence
which 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 as “PARTIES IN INTEREST” in the proposed decision. 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 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Wisconsin Statutes § 227.49. A copy of the statutes can be 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 30 days after the date of this hearing decision (or 30 days after a denial of a rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Department of Health and Family Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 650, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other ‘PARTIES IN INTEREST’ named in the proposed decision. The process for Circuit Court is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of Madison, Wisconsin, this 24th day of April, 2007.

/s
Reginald L. Bicha, Deputy Secretary
Department of Health and Family Services
Pursuant to a petition filed December 4, 2006, 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 prior authorization under the Medical Assistance (MA) program for vestibuloplasty and IV sedation, a hearing was held on February 27, 2007, at Wisconsin Rapids, Wisconsin.

The issue for determination is whether petitioner is eligible for payment by the MA program for vestibuloplasty and IV sedation.

There appeared at that time and place the following persons:

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Petitioner:
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Respondent:
Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
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By: Robert Dwyer, DDS
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ADMINISTRATIVE LAW JUDGE:
Joseph A. Nowick
Division of Hearings and Appeals
FINDINGS OF FACT

1. The petitioner is a resident of Wood County. The petitioner is 49 years old and is certified for MA.

2. On October 16, 2006, the petitioner's provider, Marshfield Clinic, requested prior authorization for MA coverage of vestibuloplasty and IV sedation.

3. The Division denied the prior authorization request on October 22, 2006 because it believes that the requested service is not covered by the MA program.

4. The petitioner has had problems with an ill-fitting prosthesis. He is a type 1 diabetic and must maintain proper nutrition, which has been difficult given his problems with ill-fitting dentures.

5. His lower denture is ill-fitting because of the severity of bone loss in his lower jaw. Vestibuloplasty can be used to increase the alveolar ridge height in his lower jaw to make the proper fitting of the lower denture possible.

DISCUSSION

The Bureau 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 Bureau in advance of receiving the service. Finally, some services and equipment are never covered by the MA program.

There is no question that the requested service of vestibuloplasty is specifically listed as a non-covered service under the MA program per the Wisconsin Medicaid Provider Handbook for Dental Services, Appendix 5, p. B-45. In the past, regulations implied that it was a non-covered service. WI Admin Code § HFS 107.07(4)(r) and (t) (1996), stated that non-covered services included aveoplasty, stomatoplasty, and osteoplasty (except in certain cases). That is why the Division concluded that the requested vestibuloplasty and IV sedation in this case are not covered by the MA program.

The only problem is that the administrative code has changed but the Wisconsin Medicaid Provider Handbook for Dental Services has not. The following is from the current WI Admin Code, §HFS 107.07(2)(a):

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Thus, osteoplasty, alveoloplasty, and sialolithotomy have been moved from the non-covered services section to the section with services that may be approved with prior authorization. Wisconsin Medicaid Provider Handbook for Dental Services is no longer in harmony with the underlying administrative rule. This Office has frequently stated that the Wisconsin Medicaid Provider Handbook for Dental Services cannot conflict with an administrative rule as the rule is always controlling.
The petitioner’s medical provider has submitted such a PA request. The problem is that vestibuloplasty is not specifically listed as a service that can be covered if a PA request is submitted and meets with the approval criteria. First, I note that the Wisconsin Medicaid Provider Handbook for Dental Services had listed vestibuloplasty as a non-covered service even though it was not specifically mentioned in the now out-of-date administrative rule as a non-covered service. I see no reason that the term “including osteoplasty, alveoloplasty, and sialolithotomy” cannot be also interpreted to include it at this time, especially as the provision does not say “limited to”.

Additionally, there is a statutory rule of construction (ejusdem generis) that when several items are preceded by a general phrase (including), it is reasonable to conclude that the provision intended to include other items that fall within the same category. That is why the Wisconsin Medicaid Provider Handbook for Dental Services could include vestibuloplasty as a non-covered service even though it was not listed in the now out-of-date administrative rule provision. It would seem to me that vestibuloplasty is in the same category as alveoplasty. “Alveoplasty” is the surgical shaping and smoothing of the margins of the tooth socket after extraction of the tooth, generally in preparation for the placement of a prosthesis. Alveoplasty is used to smooth out uneven areas, flatten and taper overly thin ridges, and prepare the jaw to receive dentures successfully. “Vestibuloplasty” includes any surgical procedures designed to develop alveolar ridge height by repositioning the muscles attached to the buccal, labial, and lingual aspects of the jaws. It may involve skin grafting techniques. The primary objective of the procedure is also to prepare the mouth to receive dentures successfully. In the petitioner’s case, he needs the service in order to receive dentures successfully, and needs the dentures to receive proper nutrition which is important to a person who is a diabetic.

I have reviewed the PA request and the petitioner’s testimony at the hearing and evaluated it using only the general criteria of medical necessity. I find that it meets that standard. However, I realize that there may be other considerations in terms of approval criteria for such a PA request that have not yet been promulgated. I am writing this as a proposed decision because the Division must deal with its failure to implement the administrative rule change. Then, if it agrees that vestibuloplasty should be treated the same as osteoplasty, alveoloplasty, and sialolithotomy, it can review this PA request to see if it should be covered by the MA program. I did not discuss the IV sedation as that is not an issue if the Division approves MA coverage of the vestibuloplasty.

CONCLUSIONS OF LAW

3. The Wisconsin Administrative Code has been revised such that oral and maxillofacial surgery services can be covered by the MA program if a PA request is submitted and the Division approves it.

4. Vestibuloplasty is one of those surgical services.

NOW, THEREFORE, it is ORDERED

That if the DHFS Secretary adopts this decision as the Final Decision in this matter, the petitioner’s provider, Marshfield Clinic, perform the requested vestibuloplasty with the use of an IV sedation and send the bill to EDS-Federal for payment.

NOTICE TO RECIPIENTS OF THIS PROPOSED REHEARING DECISION:

This is a Proposed rehearing Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL REHEARING DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.
If you wish to comment or object to this Proposed rehearing 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 rehearing decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed rehearing Decision and the parties’ objections and argument will be referred to the Secretary of the Department of Health and Family Services for final rehearing decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Madison, Wisconsin, this 12th day of March, 2007.

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