

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

FILED

Feb 08, 2016

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 15F-09410

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 09 Orange
UNIT: AHCA

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-styled matter January 5, 2016 at approximately 1:30 p.m.

APPEARANCES

For Petitioner:

[REDACTED]

For Respondent:

Lisa Sanchez
Senior Human Services Program Specialist
Agency for Health Care Administration

STATEMENT OF ISSUE

At issue is Respondent's denial of Petitioner's request for the extraction of four (4) wisdom teeth, as well as I.V. sedation. The burden of proof is assigned to Petitioner.

PRELIMINARY STATEMENT

Petitioner's mother represented her at the hearing. Petitioner arrived after the hearing began and gave testimony.

The following individuals were present as witnesses for Respondent:

- Dr. Richard Goren, Chief Dental Officer, Liberty Dental
- Dr. Richard Hague, California Dental Director and Utilization Management Director, Liberty Dental
- Stephanie Shupe, Regulatory Research Coordinator, Staywell
- Jamira Dixon, Ancillary Coordinator, Staywell

Petitioner and her mother gave oral testimony, but did not move any exhibits into evidence. Respondent moved Exhibits 1 through 12 into evidence at the hearing. The record was held open for Respondent to submit additional evidence. Respondent submitted additional evidence, entered as Exhibit 13.

The undersigned took administrative notice of the following:

- The Florida Medicaid Provider General Handbook, July 2012
- The Florida Medicaid Dental Services Coverage and Limitations Handbook, November 2011

FINDINGS OF FACT

1. Petitioner is a 17-year-old female. At all times relevant to this proceeding, Petitioner was eligible to receive Medicaid services.

2. Petitioner is enrolled with Staywell as her Managed Medical Assistance (MMA) plan. Liberty Dental Plan ("Liberty") is Staywell's dental vendor.

3. On October 23, 2015, Petitioner's dentist submitted a prior authorization request for removal of all four (4) of her wisdom teeth and deep anesthesia.

4. On October 27, 2015, Staywell issued a Notice of Action denying the request.

The reason given for the denial is that "Removal of asymptomatic (healthy) tooth/teeth is not a covered benefit," and [General anesthesia] is only a benefit when performed with covered Oral Surgery procedures." (Respondent's Exhibit 6).

5. Petitioner requested an internal appeal of the denial. A different dentist with Liberty who did not participate in the original decision reviewed the appeal. On December 8, 2015, Liberty issued an Appeal Recommendation upholding the denial.

6. The Appeal Recommendation stated “prophylactic extraction of asymptomatic impacted or erupted teeth is not a covered benefit.” (Respondent’s Exhibit 10). It also stated “Furthermore, the extraction of third molars based on general and inconclusive findings such as crowding, headaches, pressure, earaches or natural pains associated with eruption is not covered.”

7. Petitioner previously received braces. She first had them for two (2) years and had them removed. She subsequently needed them, and she had them for four (4) additional years. She currently uses a retainer. Petitioner’s mother said her daughter’s oral surgeon told her that if the wisdom teeth are not removed they will ruin some of the orthodontic work. Petitioner said she wasn’t sure of all of the details her dentist told her, only that the top two (2) wisdom teeth are impacted and the bottom (2) are not. She was told they are growing in sideways, which is putting pressure on her other teeth. Dr. Goren said the top two (2) teeth do not appear to be impacted, unless they are looking at the wrong records.

8. Petitioner testified she is in pain in all four (4) corners of her mouth, and the intensity is high enough where she cannot ignore it. Dr. Goren said pain from eruption of the teeth can last from one (1) to two (2) months on the low end and three (3) to four (4) months on the high end. Dr. Hague said the pain could last for six (6) months. Dr. Goren said the pain would vary over time, and that pain is per tooth.

9. Petitioner testified she first noticed the pain in August of 2015 and she went to see a dentist. Her mother said they did not do anything at the time because she expected the pain to go away. The pain level in October was worse than it was in August. Petitioner visited a different dentist, Dr. Scott Lawson with Greenberg Dental, who requested the removal of the wisdom teeth.

10. When asked during the hearing what pain level she was currently experiencing, on a scale of one (1) through ten (10), Petitioner said it was an eight (8). She said she takes aspirin or Advil in the morning and at night to help control the pain. She said she doesn't take anything during the middle of the day because of school rules on bringing medications.

11. Dr. Goren said they ask for a narrative from the dentist, but have not seen one. He said Liberty does not have any documentation of Petitioner's discomfort. He said he does not have any reason to dispute Petitioner's claim that she is in pain, but that some people tolerate pain more than others.

CONCLUSIONS OF LAW

12. By agreement between the Agency for Healthcare Administration ("AHCA" or "Agency") and the Department of Children and Families ("DCF"), the Office of Appeal Hearings has jurisdiction to conduct this hearing pursuant to § 120.80, Fla. Stat.

13. The hearing was held as a *de novo* proceeding, in accordance with Florida Administrative Code Rule 65-2.056.

14. This is a Final Order, pursuant to Sections 120.569 and 120.57, Fla. Stat.

15. The standard of proof in an administrative hearing is a preponderance of the evidence. Fla. Admin. Code R.65-2.060(1). The preponderance of the evidence standard requires proof by “the greater weight of the evidence,” (Black’s Law Dictionary at 1201, 7th Ed.).

16. Legal authority governing the Florida Medicaid Program is found in Fla. Stat. Chapter 409, and in Chapter 59G of the Florida Administrative Code. AHCA is the single state agency that administers the Medicaid Program.

17. The Florida Medicaid Dental Services Coverage and Limitations Handbook, November 2011 (“Dental Handbook”), is promulgated into law by Chapter 59G of the Florida Administrative Code.

18. Page 1-2 of the Dental Handbook provides:

The adult Medicaid dental services program provides medically-necessary, emergency dental procedures **to alleviate pain** or infection to eligible Medicaid recipients age 21 and older. (emphasis added).

....

The children’s dental program provides full dental services for all Medicaid eligible children age 20 and below.

19. The Dental Handbook therefore provides for dental services for children under age 21 to alleviate pain.

20. Page 2-13 of the Dental Handbook lists covered oral surgery services. It states, in pertinent part:

Surgery services for recipients under age 21 include extractions, surgical and adjunctive treatment of diseases, injuries, deformities, and defects of the oral and maxillofacial areas.

21. Pursuant to page 2-2 of the Dental Handbook, Medicaid will only reimburse for services that are medically necessary.

22. The definition of medically necessary is found in Fla. Admin. Code R.59G-1.010, which states:

(166) "Medically necessary" or "medical necessity" means that the medical or allied care, goods or services furnished or ordered must:

(a) Meet the following conditions:

1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; statewide; and
5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

.....

(c) The fact that a provider has prescribed, recommended, or approved medical or allied care, goods or services does not, in itself, make such care, goods, or services medically necessary or a medical necessity or a covered service.

23. Since the Petitioner is under 21 years of age, a broader definition of medical necessity applies to include the Early and Periodic Screening, Diagnosis, and Treatment Services (EPDST) requirements. Section 409.905, Fla. Stat., Mandatory Medicaid services, provides that Medicaid services for children include:

(2) EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT SERVICES.--The agency shall pay for early and periodic screening and diagnosis of a recipient under age 21 to ascertain physical and mental problems and conditions and provide treatment to correct or ameliorate these problems and conditions. These services include all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations.

24. Under the above statute, the Agency offers dental services as an EPSDT service to Medicaid-eligible recipients less than 21 years of age.

25. The United States Court of Appeals for the Eleventh Circuit clarified the states' obligation for the provision of EPSDT services to Medicaid-eligible children in *Moore v. Reese*, 637 F.3d 1220, 1255 (11th Cir. 2011). The Court provided the following guiding principles in its opinion, which involved a dispute over private duty nursing:

(1) [A state] is required to provide private duty nursing services to [a child Medicaid recipient] who meets the EPSDT eligibility requirements, **when such services are medically necessary to correct or ameliorate [his or her] illness and condition.**

(2) A state Medicaid plan must include "reasonable standards ... for determining eligibility for and the extent of medical assistance" ... and such standards must be "consistent with the objectives of" the Medicaid Act, specifically its EPSDT program.

(3) A state may adopt a definition of medical necessity that places limits on a physician's discretion. A state may also limit required Medicaid services based upon its judgment of degree of medical necessity so long as such limitations do not discriminate on the basis of the kind of medical condition. Furthermore, "a state may establish standards for individual physicians to use in determining what services are appropriate in a particular case" and a treating physician is "required to operate within such reasonable limitations as the state may impose."

(4) The treating physician assumes "the primary responsibility of determining what treatment should be made available to his patients." Both the treating physician and the state have roles to play, however, and "[a] private physician's word on medical necessity is not dispositive."

(5) A state may establish the amount, duration, and scope of private duty nursing services provided under the required EPSDT benefit. **The state is not required to provide medically unnecessary, albeit desirable, EPSDT services.** However, a state's provision of a required EPSDT benefit, such as private duty nursing services, "must be sufficient in amount, duration, and scope to reasonably achieve its purpose."

(6) A state "may place appropriate limits on a service based on such criteria as medical necessity." In so doing, a state "can review the medical necessity of treatment prescribed by a doctor on a case-by-case basis" and may present its own evidence of medical necessity in disputes between the state and Medicaid patients. (see (citations omitted)) (emphasis added).

26. Consistent with these requirements, the state is obligated to provide services to recipients under 21 years of age, but only to the extent such services are medically necessary. The definition of medical necessity for services provided under the EPSDT benefit is established by the state and the state is authorized to establish the amount, duration, and scope of such services.

27. In the instant-matter, Dr. Goren and Dr. Hague agreed that, based upon the records they have, they do not see any evidence that the wisdom teeth need to be removed, and that doing so would be a prophylactic measure. However, Dr. Goren did not dispute Petitioner's claim that she is experiencing pain. He and Dr. Hague both stated pain associated with the eruption of wisdom teeth would vary over time and eventually end.

28. Petitioner has been experiencing pain since August of 2015. The pain worsened in October of 2015, which resulted in the request to have the teeth removed. At hearing in January of 2016, Petitioner gave credible testimony that her pain level had not improved since October. She said her pain level that day was an eight (8) on a scale of one (1) through ten (10). As Dr. Goren stated, pain is subjective and different people have different tolerances to pain.

29. It may very well be that what Petitioner experiences as an eight (8), someone else might experience as a much lower number. But she indicated that she takes medicine for the pain both in the morning and at night. The fact that she pointed out she is unable to take it during the day at school bolsters her claim that she is unable to ignore the pain because it implies she would take the medicine then if she could.

30. The undersigned has reviewed all pertinent rules and regulations, including EPSDT requirements. Petitioner has met her burden of proof to show, by the greater weight of the evidence, that the extraction of her wisdom teeth is medically necessary, because it would serve to ameliorate her ongoing pain.

DECISION

Based upon the foregoing, Petitioner's appeal is GRANTED. The Agency is directed to provide Petitioner with removal of all four (4) of her wisdom teeth, along with the deep sedation, consistent with her request.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the agency. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, FL 32308-5403. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The petitioner is responsible for any financial obligations incurred as the agency has no funds to assist in this review.

DONE and ORDERED this 08 day of February, 2016,
in Tallahassee, Florida.

Rick Zimmer

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Copies Furnished

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Judy Jacobs, Area 7, AHCA Field Office