

FILED

Nov 04 2015

Office of Appeal Hearings
Dept. of Children and Families

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



APPEAL NO. 15F-06691

PETITIONER,

Vs.

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

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-styled matter on September 28, 2015 at approximately 10:30 a.m.

APPEARANCES

Petitioner:



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 Lumbar Spine Fusion surgery. The burden of proof is assigned to Petitioner.

PRELIMINARY STATEMENT

The following individuals were present as witnesses for Respondent:

- India Smith, Grievance and Appeals Coordinator, Sunshine Health.
- Donna Laber, Grievance and Appeals Manager, Sunshine Health.
- Dr. Ernest Bertha, Medical Director, Sunshine Health.

Tiffany Smith, Grievance and Appeals Coordinator with Sunshine Health

("Sunshine") was present as an observer. Petitioner gave oral testimony, but did not move any exhibits into evidence at the hearing. Respondent moved Exhibits 1 through 5 into evidence at the hearing. The record was held open until October 5, 2015 for both parties to submit additional evidence. Petitioner submitted additional evidence, entered as Exhibit 1. Respondent submitted additional evidence, entered as Exhibits 6 and 7.

The undersigned took administrative notice of the Florida Medicaid Provider General Handbook, July 2012 ("Handbook").

FINDINGS OF FACT

1. Petitioner is a 39-year-old female. At all times relevant to this proceeding, she was eligible to receive Medicaid services.
2. Petitioner is enrolled with Sunshine as her Managed Medical Assistance (MMA) program.
3. Petitioner has constant lower back pain. She is unable to stand for more than 10 minutes at a time without being in pain. Sitting and laying down causes her pain. The pain is so severe that Petitioner cannot even have her children rub BenGay on her lower back because it hurts her for them to touch it.
4. Petitioner had an MRI performed on her lower back on October 31, 2014, and an X-Ray performed on April 13, 2015. Both procedures found spondylolisthesis, which, according to Dr. Bertha, is slippage of vertebra bodies onto each other.
5. Petitioner was approved for three (3) visits of lumbar injections for pain management between June 8, 2015 and September 6, 2015. Petitioner received

one series of injections on June 18, 2015. Petitioner did not use her other authorized visits because the lumbar injections did not relieve the pain.

6. On July 29, 2015, Petitioner's neurosurgeon requested authorization for the Lumbar Spine Fusion surgery.

7. On August 4, 2015, Sunshine issued a Notice of Action denying the request. (Respondent's Composite Exhibit 3). The Notice stated the request did not meet paragraphs 2 and 4 of Florida Administrative Code Rule 59G-1.010, as well as "other authority". The reason for denial was listed as follows:

Request for Lumbar Spine Fusion (a surgery to join bones together in the back) is DENIED. The medical records from your Doctor do not show you neither taking pain medication, nor receiving physical therapy (a special exercise to help make the muscles stronger) to try to take away pain.

The facts that we used to make our decision are: InterQual Criteria Product: CP: Procedures Criteria Subset: Laminectomy, Lumbar, +/- Fusion Version: InterQual® 2014 Were used in making this decision.

8. After receiving the Notice of Action, Petitioner timely requested a Fair Hearing on August 7, 2015.

9. InterQual is the vendor product used by Sunshine to make medical necessity determinations. Dr. Bertha stated the criteria were not met because there was no documentation that Petitioner had any pain or paresthesia which were improved with forward flexion, no documentation that she had been on nonsteroidal anti-inflammatory drugs (NSAIDS) or acetaminophen for greater than or equal to three (3) weeks, no documentation of home exercise or physical therapy for greater than or equal to 12 weeks, and no documentation of activity modification for greater than or equal to 12 weeks.

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10. Dr. Bertha stated examples of NSAIDS include ibuprofen and naproxen. After reviewing Petitioner's pharmaceutical history from USscript (Respondent's Exhibit 5), he conceded the drug meloxicam taken by Petitioner satisfied the NSAID requirement, leaving only the physical therapy and activity modification criteria to be met.

11. Per Dr. Bertha, if it was documented that physical therapy was attempted, but that Petitioner could not tolerate it, then he would take that into consideration. Petitioner testified she had tried physical therapy on her lower back in the past, but that it did not work.

12. On October 2, 2015, Petitioner's family physician wrote a letter stating she is unable to do physical therapy because of inability to manipulate her back and previous physical therapy never improved her condition. (Petitioner's Exhibit 1).

13. Dr. Bertha said proof of activity modification for greater than or equal to 12 weeks is also required. The Notice of Action letter dated August 4, 2015 states no such requirement. It only states the surgery was denied due to the medical records failing to show her taking pain medication and receiving physical therapy. Further, the Inpatient Authorization Summary states at page 7 of 8: "home exercise or physical therapy for greater than or equal to 12 weeks, Or activity modification for greater than or equal to 12 weeks" is what is required. (emphasis added)(Respondent's Exhibit 7).

PRINCIPLES OF LAW AND ANALYSIS

14. 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 Section 120.80, Fla. Stat.

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

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

17. 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.).

18. 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.

19. In the instant matter, the Notice of Action states Petitioner's request for the Lumbar Spine Fusion surgery does not meet paragraphs 2 and 4 of Fla. Admin. Code R.59G-1.010, and is therefore not medically necessary.

20. Florida Administrative Code Rule 59G-1.010 states as follows:

(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

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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.

21. Regarding paragraph 2, the surgery is 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. Dr. Bertha conceded Petitioner has attempted NSAIDS for a minimum of three (3) weeks. The letter from her family physician, along with Petitioner's testimony, indicates physical therapy has been tried in the past and is not feasible at this time due to her current condition. While Dr. Bertha asserts that she also needs to show evidence of attempted activity modification, the undersigned concludes the plain language in the Inpatient Authorization Summary only requires one of the following: home exercise, physical therapy, or activity modification, and does not require all three.

22. Regarding paragraph 4, the surgery can be safely furnished, and there is no equally effective and more conservative or less costly treatment available statewide. Petitioner tried physical therapy and it did not work. Petitioner tried the lumbar injection and it did not help. Petitioner has tried having her children rub BenGay on her back and it is too painful for her to tolerate. The surgery is medically necessary at this time.

DECISION

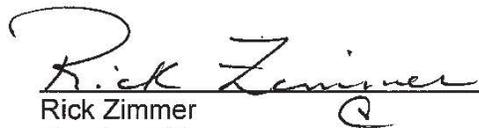
Based upon the foregoing, Petitioner's appeal is GRANTED. Respondent is directed to provide Petitioner the Lumbar Spine Fusion surgery, consistent with her neurosurgeon's request.

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 4th day of November, 2015,

in Tallahassee, Florida.



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