

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DHR 01733**

FINAL DECISION

APPEARANCES

ISSUE

1

WITNESSES

For Petitioners: Norman Mazer, Petitioner

For Respondent: Nicole Gates, Department of Health and Human Services

EXHIBITS

For Petitioners: Exhibits 1 through 3 and 5 through 7 were admitted.

For Respondent: Exhibits A through H were admitted.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner is a Durable Medical Equipment (DME) supplier. Petitioner filed a Petition for a Contested Case Hearing to appeal the decision of the North Carolina Department of Health and Human Services, Division of Medical Assistance (DMA) on March 19, 2012. Petitioner contests an amount of \$13,644.54 which Respondent contends is a Medicaid overpayment due back to Respondent.

2. Respondent alleges Petitioner supplied a wheelchair to a Medicaid beneficiary without obtaining a physician prescription. Nicole Gates, a Nurse Consultant with the Division of Medical Assistance, reviewed this matter in preparation of this hearing at the Office of Administrative Hearings (OAH) and asserted that Medicaid DME wheelchair providers must obtain a physician prescription for a wheelchair as a first step to supplying the chair to the beneficiary.

3. Petitioner, American Mobility, received a signed and dated Certificate of Medical Necessity and Prior Approval Form signed by a "Provider/Board Certified Practitioner" on February 3, 2011 and a "Physician, Physician Assistant, Nurse Practitioner" on February 10, 2011

for the Medicaid patient. (Res. Ex. C) Petitioner did not receive a prescription from an ordering physician since the Medicaid patient called American Mobility directly. Petitioner did have the signed *Certificate of Medical Necessity and Prior Approval Form for Durable Medical Equipment and Prosthetic Devices*, as well as other documentation before ordering and supplying the Durable Medical Equipment listed on the Certificate of Medical Necessity to the beneficiary on or about March 22, 2011.

4. On or about June 1, 2011, the wheelchair recipient telephoned a complaint about receiving a wheelchair she did not order. The evidence shows that this was done after she had surgery and needed a Bi-Pap machine and that “Medicaid denied her the Bi-Pap machine because of the wheelchair.” (Res. Ex. A) It appears the complaint was resolved with no penalty to the Petitioner and is not an issue in this case.

5. In accordance with the February 13, 2012 Notice of Decision regarding the Reconsideration Review held by the Respondent, a witness for DMA, Ms. Lukosius, stated that “the medical necessity of the equipment for Recipient J. [was] not at issue.” The issue and findings according to the Notice of Decision was that Petitioner failed to obtain a prescription. (Res. Ex. H)

6. Attachment C, How a Recipient Obtains Durable Medical Equipment and Supplies, of Respondent's Clinical Coverage Policy No. 5A sets forth the steps on “how a recipient receives DME and related supplies.” It goes on to state that the “steps are in the order that they are usually accomplished.” Ms. Lukosius stated at the Reconsideration Review that the “DMA interprets this to mean that obtaining the physician’s prescription is a different step; required in addition to the step 2, involving the completion of the Certificate of Medical Necessity/Prior Approval (CMN/PA).” She went on to state that “DMA interprets the word *usually* as referencing the order in which the required steps are accomplished.” (Res. Ex. H)

7. Petitioner had provided the recipient with a power chair in 2006 and her conditioned had worsened since that time. Petitioner testified that American Mobility tries to help clients obtain services they need. Mr. Mazer stated that to do that in this case he accepted a self referral, and then the proper Certificate of Medical Necessity and Prior Approval Form was completed and submitted to the recipient’s physician and appropriate prior approval was received.

8. Ms. Gates testified that a reason for the prescription was for the physician to list on it the type of power wheelchair and all its accessories needed so that the provider would deliver to the patient exactly what the physician ordered and assists Respondent in maintaining the accuracy of its records.

9. Petitioner stated that in his years of experience, physicians rarely list on the prescription the details of a wheelchair. Petitioner attached to his proposal copies of prescriptions which were taken from some of the files that we were audited by Dionne Manning and Robin Wilkins from DMA/Program Integrity Dept on April 12, 2011 in support of his assertion.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. Respondent's Clinical Coverage Policy No. 5A broadly sets out "Requirements for and Limitations on Coverage" regarding durable medical equipment. Section 5.1 states that a "referral authorization must be obtained from the primary care physician before providing DME ... to a Carolina ACCESS participant." Section 5.1 goes on to state that the "referral authorization is required in addition to other requirements for the service, such as prior approval."

3. Attachment C , How a Recipient Obtains Durable Medical Equipment and Supplies, of Respondent's Clinical Coverage Policy No. 5A sets forth the steps on "how a recipient receives DME and related supplies." It goes on to state that the "steps are in the order that they are usually accomplished."

4. In accordance with 42 U.S.C. § 1396a, State plans for medical assistance, and particularly § 1396a (a)(17), the federal law mandates that a state's plan must include "reasonable standards . . . [[to] the extent of medical assistance" in accordance with the purpose of the Medicaid statute. Moreover pursuant to 42 U.S.C. § 1396a(a)(19), the state must furnish "safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients."

5. The federal Medicaid program has the broad primary objective to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of medically necessary services and equipment.

6. The Petitioner in this case obtained the proper Certificate of Medical Necessity and Prior Approval Form signed by a "Provider/Board Certified Practitioner" on February 3, 2011 and a "Physician, Physician Assistant, Nurse Practitioner" on February 10, 2011 which was prior to the recipient receiving a wheelchair. The Respondent has stated that the medical necessity of the wheelchair is not an issue.

7. Though not receiving a prescription, Petitioner did have prior referral authorization as set forth and evidenced in the title of Respondent's own form. Though the usual order of obtaining the referenced wheelchair would normally perhaps involve a prescription, in light of the language of the federal law and even Respondent's own policy, it is not an absolute requirement, as Petitioner did have the required prior approval by a physician, physician assistant and/or nurse practitioner. This conclusion particularly fulfills the federal mandates of "simplicity of administration and the best interests of the recipients" in light of the fact that the recipient had previously received a wheelchair from the Petitioner and she and/or her agent initiated the request for the current wheelchair which she owns and operates.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based on those conclusions and the facts in this case, the Undersigned holds that Petitioner has properly complied with the purposes and letter of both federal and State law. The Undersigned holds that the Petitioner has carried its burden of proof by a greater weight of the evidence that recoupment by Respondent would be erroneous, arbitrary or capricious, and not in accordance with applicable law.

NOTICE

With cases filed at the Office of Administrative Hearings (OAH) on or after January 1, 2012, the OAH issues a final decision appealable to North Carolina Superior Court with some exceptions. Pending approval by federal authorities of a State Plan Amendment waiving the single state agency requirement under the federal Medicaid program, the final decision in this case is presently issued by the North Carolina Department of Health and Human Services.

The agency making the final decision in this contested case shall adopt the Decision of the Administrative Law Judge unless the agency demonstrates that the Decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency is required to give each party an opportunity to file exceptions to this Decision issued by the Undersigned, and to present written arguments to those in the agency who will make the final decision.

In accordance with the former N.C. Gen. Stat. § 150B-36 (now repealed), the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to

the opportunity of the Administrative Law Judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

The North Carolina Department of Health and Human Services is required to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

IT IS SO ORDERED.

This the 20th day of November, 2012.

Augustus B. Elkins II
Administrative Law Judge