STATE OF NORTH CAROLINA

COUNTY OF PITT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12INS00364

Megan L Hartzog, Petitioner, v. North Carolina State Health Plan, Respondent.	**FINAL DECISION**

On January 25, 2013, Administrative Law Judge Beecher R. Gray heard this contested case in Greenville, North Carolina. At the conclusion of the hearing, the undersigned directed the parties to submit proposed decisions within thirty days after receipt of the hearing transcript. Both parties submitted proposed decisions between March 28, 2013 and April 2, 2013, and the record now is closed. The proposed decisions submitted by the parties were considered in the determination of the decision in this contested case.

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ISSUES

Whether Respondent's decision to apply the cost of the April 20, 2010, surgery to the Petitioner's maximum lifetime benefits for infertility services was 1) erroneous; 2) in excess of its authority; 3) a failure to act as required by rule or law; 4) the result of a failure to use proper procedure; or 5) was arbitrary and capricious.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. §135-48 et. seq. (2012)

State Health Plan for Teachers and State Employees Standard PPO Plan Benefits Booklet (2010)

EXHIBITS

For Petitioner, Exhibits (hereinafter "P. Exs") 1-14 were admitted into evidence.

For Respondent, Exhibits (hereinafter "R. Exs.") 1 -13 were admitted into evidence.

WITNESSES

For Petitioner: Megan Hartzog
Dr. Calvin Hayslip, by deposition testimony

For Respondent: Crystal Brewer, Fraud Investigator
Dr. Denis O'Connell
Donna Williams
Dr. Andrew Bonin

FINDINGS OF FACT

BACKGROUND

1. Petitioner Megan Hartzog is a member of the State Health Plan for Teachers and State Employees, administered by Blue Cross/Blue Shield of North Carolina. (T. p. 8)[1]

2. On the date of the procedure that is the subject of this dispute, Petitioner was a plan member.

[1] The hearing transcript is referenced as "T." The deposition transcript from the deposition of Dr. Calvin Hayslip is referenced as "P. Ex. 11, Depo. T."

3. Petitioner's physician, Dr. Larissa Gavrilova-Jordan, who, at all times relevant to the events in this contested case hearing, was a physician with ECU Physicians, recommended that Petitioner undergo laparoscopic surgery. That surgery was performed on April 20, 2010. (P. Ex. 1)

4. Whether the surgical services provided to Petitioner on April 20, 2010 were covered by her health insurance benefits is the subject of the dispute between Petitioner and Respondent.

5. If it were determined that the surgery and associated services of April 20, 2010, which is the subject of this dispute, were medically necessary for Petitioner's general health, then the surgery and associated services would be covered by Petitioner's covered health insurance benefits. (T. pp. 158, 159, 167, 168, 210)

6. Petitioner presented the testimony of an expert witness, Dr. Calvin Hayslip, a Board Certified physician in the field of obstetrics and gynecology. Dr. Hayslip has engaged in more than 35 years of active clinical practice in the field of obstetrics and gynecology with a subspecialty in the field of reproductive endocrinology and infertility, and his medical practice regularly treats women for gynecologic endocrine disorders. (P. Ex. 11, Depo. T. pp. 4-7)

7. Petitioner's treating physician, Dr. Gavrilova-Jordan, also was a specialist in Obstetrics and Gynecology. (P. Ex. 11, Depo. T. p. 21)

8. Dr. Hayslip was familiar with Dr. Gavrilova-Jordan's records. They routinely reviewed each other's records. (P. Ex. 11, Depo. T. pp. 8-9)

9. Dr. Hayslip reviewed Petitioner's medical records contained in Petitioner's Exhibit 1. (P. Ex. 11, Depo. T pp. 9; 51)

10. Dr. Hayslip testified that gynecologic endocrine disorders represent medical problems that may be distinct from infertility treatments and include abnormal bleeding, pelvic pain, endometriosis, or polycystic ovary syndrome. (P. Ex. 11, Depo. T. p. 6)

PETITIONER'S MEDICAL TREATMENT

11. Petitioner was referred to Dr. Gavrilova-Jordan for an evaluation of her infertility. This evaluation involved several diagnostic tests. In the process of her evaluation, she underwent a hysterosalpingogram ("HSG") which showed abnormalities. Specifically, the test showed that there was a mass in the uterus consistent with either an endometrial polyp or a fibroid. There also was a swollen, obstructed fallopian tube, which is categorized as a hydrosalpinx. (P. Ex. 11, Depo. T. pp. 9-10)

12. The HSG showed clearly that there was gynecologic disease that needed to be evaluated and treated. (P. Ex. 11, Depo. T. pp. 10, 51)

13. The medical record for Petitioner's office visit to Dr. Gavrilova-Jordan on March 4, 2010, indicated that Dr. Gavrilova-Jordan discussed correction of the abnormalities seen on the HSG. The record indicates that, although Petitioner continued to carry the diagnosis of " 628.8, infertility, unspecified origin," the office visit reflected the following: (1) the chief complaint was "discuss HSG;" (2) her physician counseled her for twenty-five minutes and summarized the counseling as follows: "We have reviewed fertility testing results suggestive tubal and uterine factors. We have discussed further treatment options including laparoscopic resection of the hydrosalpix, adhesiolysis and hysteroscope resection of myoma and polypectomy. ***We discussed fertility treatment options after surgery*** …" [emphasis added] (P. Ex. 1, p. 25; P. Ex. 11, Depo. T. p. 12)

14. Petitioner testified that Dr. Gavrilova-Jordan's plan of care on March 4, 2010, was to stop infertility treatments and address the medical issues associated with the abnormalities seen on the HSG. (T. p. 13) Petitioner testified that her physician had advised her that endometriosis could become very invasive and attack other organs, such as her appendix, kidneys, and lungs. (T. p. 15)

15. Petitioner's expert, Dr. Hayslip, established through his uncontroverted testimony that it was not possible to confirm a diagnosis of endometriosis without visualizing the tissue, and in Petitioner's case, as in 98% of such cases, that only could be done by laparoscopy or surgery, unless endometriosis is present in the vagina and available for biopsy. (P. Ex. 11, Depo. T. pp. 18-19, 70)

16. The indication for surgery in this case was the abnormal HSG, indicative of gynecologic disease, which needed to be evaluated and treated. It was not necessary that Petitioner display overt symptoms of her gynecological disease in order to justify treatment of the disease because a properly qualified physician, such as Dr. Gavrilova-Jordan or Dr. Hayslip, knows that there is a natural progression to endometriosis, which can spread and affect organs outside of the uterus. (P. Ex. 11, Depo. T. pp. 51, 71, 72; T. p. 145)

17. Dr. Gavrilova-Jordan requested approval of Petitioner's surgery in a medical record titled "Surgery/Admission Request." The record notes that the authorization request was directed to Respondent and that confirmation and authorization from Respondent was received. The Surgery/Admission Request stated that surgery was indicated for "abnormal hysterosalpingogram, questionable polyp versus submucous leiomyoma and a right hydrosalpinx." (P. Ex. 11, Depo. T. p. 14; P. Ex. 1, p. 27; T. p. 153)

18. The admitting diagnoses on Dr. Gavrilova-Jordan's Surgery/Admission Request all were gynecological diseases, irrespective of fertility issues. (T. p. 153)

19. Infertility was not mentioned anywhere in Dr. Gavrilova-Jordan's Surgery/Admission Request. (T. p. 145)

20. Dr. Hayslip testified that "we often have patients who are not seeking fertility evaluation or treatment who have the exact same disorders and diagnoses [as Petitioner] that go to surgery." (P. Ex. 11, Depo. T. pp. 14-15)

21. Although Petitioner carried the diagnosis of infertility throughout her medical treatment with Dr. Gavrilova-Jordan, the diagnosis does not mean that all of her treatment was infertility treatment. Although Petitioner is not currently being treated for infertility, she still carries a diagnosis of infertility. (P. Ex. 11, Depo. T. pp. 31, 46)

22. Petitioner was scheduled for a hysteroscopy to evaluate the abnormal mass in her uterus and also was scheduled for a diagnostic laparoscopy because of the tubal obstruction, suspected pelvic adhesive disease, and possible endometriosis. Petitioner underwent surgery during which the polyp was resected. The laparoscopic findings revealed dense pelvic adhesions associated with endometriosis and an obstructed right fallopian tube. The fallopian tube was removed, adhesions were resected, and suspected endometriosis was removed. (P. Ex. 11, Depo. T. p. 10)

23. Petitioner also was placed on progestin (birth control pills) to treat the endometriosis. Progestin was not a fertility treatment and is, in fact, designed to prevent pregnancy. It is a pharmacological, medical treatment for endometriosis. (P. Ex. 11, Depo. T. p. 11)

24. Petitioner remained on progestin between March 4, 2010 and August 25, 2010. (P. Ex. 1, pp. 25, 29, 30, 32, 40, 43, 50; T. pp. 18, 55)

25. Petitioner's medical records also indicate that she was given a prescription for "Norethindrone acetate," a drug commonly used to treat endometriosis.

26. Respondent admitted that there was no indication that the progestin treatment was provided for any reason other than treating gynecologic disease and no indication that the attending physician intended the progestin treatment to address infertility issues. (T. p. 148)

27. Petitioner's expert witness, Dr. Calvin Hayslip, gave uncontroverted expert testimony that, although Petitioner eventually was interested in resuming infertility treatment, the gynecologic disease should have been corrected because, if uncorrected, there would have been consequences to her health down the road, irrespective of whether she had fertility treatment. The consequences of untreated endometriosis would have been progressive pelvic pain, pain with periods, pain with intercourse, as well as the possibility that if not treated earlier, trying to correct the problem later would be more difficult and would carry more risk and more complications. (P. Ex. 11, Depo. T. pp. 13-14)

28. Dr. Hayslip opined that, within a reasonable degree of medical certainty, given the abnormalities on the hysterosalpingogram, surgery clearly was indicated to evaluate and remove the polyp and to evaluate the scar tissue in the pelvis, which had a high likelihood of endometriosis, and which was important to Petitioner's ultimate health. Petitioner needed, medically speaking, to have her condition evaluated and treated because of the abnormal findings on the diagnostic tests. Dr. Hayslip's uncontroverted expert medical opinion was that only Petitioner's gynecologic disease indicated surgery, not her infertility. (P. Ex. 11, Depo. T. pp. 19-20, 31-32)

29. Whether Petitioner's operation was for infertility treatment or the treatment of gynecologic disease depends on the surgeon's intent. The indication for surgery, which was identified by Dr. Gavrilova-Jordan in her Surgery/Admission Request to Respondent for approval of the surgery as a covered benefit, was the abnormal HSG. (P. Ex. 11, Depo. T. pp. 47, 52)

30. The procedures performed by Dr. Gavrilova-Jordan on April 20, 2010 were not part of an infertility treatment. For instance, Petitioner had a fallopian tube removed, which was not an infertility treatment. If Dr. Gavrilova-Jordan were trying to improve Petitioner's fertility by means of this surgery, she would more likely have tried to open up the fallopian tube rather than removing it. (P. Ex. 11, Depo. T. pp. 32, 72)

31. According to Dr. Hayslip, it is not necessary to identify every diagnosis that a person has for each procedure, so it was reasonable to discard primary infertility as the preoperative diagnosis because the comprehensive list of surgical indications made it clear that the surgery was for the diagnosis and treatment of abnormalities seen on the HSG. (P. Ex. 11, Depo. T. pp. 52, 55, 69)

32. According to Dr. Hayslip, although one can say that the operation performed by Dr. Gavrilova-Jordan had the possibility of impacting Petitioner's fertility, it was not an operation to correct infertility and was not a direct fertility treatment. (P. Ex. 11, Depo. T. pp. 33-34)

33. Petitioner's infertility is the result of diminishing ovarian reserve, not endometriosis. Petitioner continues to carry the diagnosis of infertility because of diminishing ovarian reserve. (T. p. 53)

34. Petitioner's gynecological expert, Dr. Hayslip, established through his testimony that Petitioner was carrying and continues to carry a diagnosis of infertility but that the surgery she experienced on April 20, 2010 was indicated by her gynecologic disease and not her ongoing infertility diagnosis. Dr. Hayslip gave his expert opinion that the gynecologic medical professionals cannot say whether the surgery impacted Petitioner's fertility one way or another and that this surgery was an attempt to correct abnormalities in Petitioner's pelvis.

THE MEDICAL RECORDS

35. The medical record dated April 20, 2010 is a record of the operative procedure performed by Dr. Gavrilova-Jordan and her surgical team on April 20, 2010. The record contained a pre-operative diagnosis that stated "primary infertility with abnormal HCG"[2] and a post operative diagnosis that stated "primary infertility. Endometrial polyp. Severe pelvic endometriosis. Right hydrosalpinx. Pelvic, Left peritubal and periovarian adhesions. Small subserosal leiomyoma." (P. Ex. 1, p. 36)

[2] Dr. Hayslip noted that the indication of "hCG" was incorrect and should have been corrected by an addendum or amendment to this record. (P. Ex. 11, Depo. T. p. 51)

36. Dr. Gavrilova-Jordan amended the typed operative report from Petitioner's surgery. (P. Ex. 1, p. 35)

37. Dr. Gavrilova-Jordan's amendment to the typed operative report was an accurate description of her patient's medical condition and also was consistent with her preoperative notes and Surgery/Admission Request. (P. Ex. 11, Depo. T. p. 16)

38. The diagnosis contained in the addendum actually was the diagnosis that was contained on Dr. Gavrilova-Jordan's Surgery/Admission Request. (P. Ex. 11, Depo. T. pp. 27-28; P. Ex. 1, p. 35)

39. Based on the addendum and based on the original diagnosis, Petitioner was being treated surgically for gynecologic disorders on April 20, 2010. (P. Ex. 11, Depo. T. p. 31)

40. Respondent admitted that the diagnosis codes contained in the corrected claims submitted by ECU Physicians was consistent with Dr. Gavrilova-Jordan's admitting diagnosis. (T. pp. 153-155; R. Ex. 3)

41. The operative report actually was completed by a medical resident, Dr. Elizabeth Cole. Dr. Cole also completed the handwritten post-operative notes contained in the medical record and dictated the operative report which eventually was transcribed. Respondent admitted that the differences in the handwriting on the request for surgery form and the post-operative notes were apparent from the medical records. (P. Ex. 11, Depo. T. pp. 43, 46, 57-58, 59, 150; R. Ex. 8, pp. 3-4, 10, 13 (operative reported dated 4/20/2010, "page 3 of 3"); T. p. 147)

42. When a resident who is not the primary physician following the patient over a period of time dictates the record for a specific procedure, it is not unusual to find discrepancies between what the primary physician has stated and what the resident has stated. (P. Ex. 11, Depo. T. p. 58; T. pp. 151-152)

43. While it was Dr. Gavrilova-Jordan's responsibility to review the operative report dictated by the resident, she also had a responsibility to correct the report once she discovered a discrepancy. (P. Ex. 11, Depo. T. p. 60; T. pp. 152, 157)

44. Given the inconsistencies in the medical chart, especially between what had been written by Dr. Gavrilova-Jordan and what had been written by the medical resident, Dr. Elizabeth Cole, the addendum was needed for clarity of the medical records. There was nothing unusual about a provider providing clarity to a record that needed clarification. (P. Ex. 11, Depo. T. pp. 16, 48, 50)

45. The fact that Dr. Gavrilova-Jordan signed an incorrectly-dictated operative report did not mean that the information in the operative report was accurate simply because it was signed. (T. p. 203)

46. Petitioner's expert witness testified that there is nothing clearly in the records stating that the indication for surgery was infertility treatment. (P. Ex. 11, Depo. T. pp. 47-48)

RESPONDENT'S CLAIMS PROCESSING AND INVESTIGATIVE PROCEDURE

47. Respondent's witness Crystal Brewer ("Fraud Investigator Brewer") is a health care Fraud Investigator with Respondent who testified regarding Respondent's claims process. (T. p. 61)

48. Fraud Investigator Brewer testified that when medical providers submit claims for payment to the Respondent, the claims are analyzed for benefit coverage based on the first diagnostic code used by the provider. (T. p. 75)

49. Fraud Investigator Brewer also testified as to the usual procedure used by Respondent to investigate benefits coverage when there is a complaint or issue as to coverage. She stated that as part of her duties, she typically would gather two years' worth of medical records, and if "we see a problem within that two year range, we then typically consult with our SIU medical director to see if he thinks that there's an issue with the claims data ***based on that specialty of the provider.***" [emphasis added] (T. p. 65) Fraud Investigator Brewer further testified that after a determination is made as to whether there is an issue based on the provider's specialty, "if an issue does look suspicious" medical records will be ordered and a patient will be interviewed. Following this procedure, "a calculation/determination" is made as to whether a refund is owed to Respondent. (T. p. 66)

50. When Dr. Gavrilova-Jordan amended the operative report, her office changed the diagnostic codes so that 614.1, the diagnostic code for chronic salpingitis, was the primary diagnosis. (T. pp. 79, 154; R. Ex. 3)

51. Respondent admitted that once Dr. Gavrilova-Jordan amended her operative report, it was sensible for her office to make corrections on the claim forms submitted for payment. (T. p. 158)

52. Dr. Gavrilova-Jordan sent a letter to Respondent explaining why she had submitted a corrected claim form. (P. Ex. 8; T. p. 24)

53. The corrected claims from Pitt County Memorial Hospital and ECU Physicians that were resubmitted to Respondent were paid because the primary diagnosis referred to gynecological disease rather than infertility treatment. (R. Ex. 3; T. p. 80)

54. Fraud Investigator Brewer testified that Petitioner's claims were referred to her in the Special Investigative Unit ("SIU") because a corrected claim form had been submitted from Pitt County Memorial Hospital and ECU Physicians, and the diagnosis codes for infertility treatment was switched from the first position to the second position. (T. p. 71)

55. Fraud Investigator Brewer testified that not every corrected claim that is submitted by a provider is referred to her investigative unit, but Petitioner's claims were referred because "there were several calls that Ms. Julie Faenza had noticed . . . and there was a lot of questioning about infertility . . . and that she had noticed some of the claims . . . had been switched to a different diagnosis code when it was submitted for correction." The corrected claims did not have different diagnostic codes; the same diagnostic codes were switched in their position. (T. pp. 72, 79)

56. Fraud Investigator Brewer also testified that the telephone calls or email inquiries which had raised concern warranting referral to her investigative unit occurred on January 21, 2010, May 4, 2010, May 4, 2010, May 7, 2010, May 10, 2010 and May 21, 2010 [sic]. (T. p. 103; R. Ex. 4; P. Ex. 12)

57. The calls referenced by Fraud Investigator Brewer occurred either prior to surgery (T. p. 99) or prior to the time when Petitioner would have had any knowledge as to whether the claims submitted by her provider had been denied (T. pp. 100, 101, 103). Fraud Investigator Brewer testified that there was no indication from Petitioner's inquiries that they reflected any motivation other than a member's reasonable interest in what her health benefits were in anticipation of medical treatment. Fraud Investigator Brewer admitted that there was nothing suspicious about Petitioner's aforementioned inquiries to Respondent. (T. p. 102, 103)

58. Fraud Investigator Brewer testified that the only inquiries made by Petitioner indicating that Petitioner had any knowledge of the claims adjustment activity for claims submitted by her medical providers for the April 20, 2010 medical procedure was an inquiry made on May 19, 2010 and an email sent on May 24, 2010. (T. pp. 103, 105; R. Ex. 4, pp. 22-23)

59. Petitioner testified that she was told on May 19, 2010 by a customer service representative that her claims were denied because of an error in coding. (T. pp. 22, 24-25)

60. Respondent admitted it had no evidence to refute Petitioner's testimony that a customer service representative had told Petitioner that her claims were denied because of a coding error. (T. pp. 104-105)

61. Although Fraud Investigator Brewer testified that their usual procedure included interviewing the patient, Respondent neither interviewed Petitioner nor her medical providers as part of its investigation of the corrected claims. (T. pp. 96, 143, 203)

62. Once Fraud Investigator Brewer had gathered medical records and other information, including the information pertaining to Petitioner's communication with Respondent and the claim forms submitted by Petitioner's medical providers, Fraud Investigator Brewer gave the file to Dr. Denis O'Connell for review. (T. p. 73)

63. Dr. Denis O'Connell was tendered and accepted as an expert in the field of coding. (T. pp. 111-114)

64. Dr. O'Connell testified that whether coding on a claim is correct or incorrect depends on whether the coding accurately depicts the physician's intention in performing the medical procedure. (T. p. 143)

65. Dr. O'Connell reviews claims solely to determine if the claims are coded correctly based on "what the coding books state is correct and does not base [his] determinations of whether claims should be accepted or denied on any professional judgment." (T. p. 139)

66. Dr. O'Connell had been a professional coder for approximately one year at the time that he reviewed Petitioner's claims. (T. p. 138)

67. Respondent did not review the claims submitted by Petitioner's providers for the purpose of determining whether Petitioner's treatment was a medically necessary item of service. (T. p. 135)

68. Respondent admitted that there are medical standards for treating endometriosis and the person in the best position to determine appropriate treatment methods is the treating physician. (T. p. 157)

69. Dr. O'Connell indicated that he had no grounds--based on skill, experience, or knowledge and training as a physician--for applying professional judgment to determine whether Petitioner's endometriosis was treated to address infertility. (T. pp. 149, 157)

70. Dr. O'Connell based his determination that Petitioner's medical treatment was treatment for infertility on discussions that had occurred prior to Petitioner's HSG. (T. p. 144)

71. Respondent did not review the letter from Dr. Gavrilova-Jordan explaining why she had submitted corrected claims nor did Respondent ever consider whether Dr. Gavrilova-Jordan's explanation for amending the operative report was consistent with the original request for approval for Petitioner's surgery. (T. pp. 96, 97, 142-143)

72. Although it was clear from the medical records that the operative report had been dictated by a resident, while the request for surgery had been completed by the attending physician--Dr. Gavrilova-Jordan--Respondent did not investigate whether the differences between the request for surgery and the dictated operative report might be accounted for by the unfamiliarity of the resident with Petitioner's plan of care. (T. pp. 96, 150)

73. Respondent's investigation did not reach any conclusion as to whether there was fraud or misrepresentation on the part of Petitioner or her medical providers. (T. pp. 98-99)

PETITIONER'S APPEAL

74. Petitioner's appeal of the denial of benefits was reviewed by Respondent to determine if the services provided were related to the benefit that Respondent is applying to the claim. (T. p. 178)

75. Dr. Andrew Bonin, medical director in Respondent's appeal department, testified for Respondent. Dr. Bonin reviewed Petitioner's appeal of the denial of her provider's claims for benefits. (T. pp. 181, 186)

76. Dr. Bonin testified that he reviewed Petitioner's claim to determine whether it was appropriate to apply the $5,000.00 lifetime limit on infertility benefits to the surgical procedures that were done by Dr. Gavrilova-Jordan. (T. p. 186)

77. Dr. Bonin was not tendered to the court as an expert witness. (T. pp. 181-195)

78. Dr. Bonin is not a surgeon, did not have a surgical residency as part of his training, and does not have the knowledge, skill, or training to judge whether surgery is an appropriate treatment of endometriosis. (T. pp. 195, 196)

79. If the physician's intention in performing the medical services is not consistent with the appeals analyst's interpretation of the physician's intention, the appeals analyst does not have the skill, knowledge, or background to determine if Respondent is analyzing the benefit application in a way that is consistent with the physician's intention. (T. pp. 178-179)

80. Respondent's policies provide that a member has a right to discuss all treatment options candidly with their health care provider regardless of cost or benefit coverage. (R. Ex. 12)

81. If a medical record reflects that a broad discussion took place in the physician's office, Respondent cannot rely on that discussion to determine that certain treatment is or is not related to a particular benefit because Respondent is not in a position to determine the intention of the discussion. (T. p. 209)

82. In order to determine if a discussion that is referenced in a medical record is dispositive of the physician's intention in providing a particular service, Respondent would need to speak with the physician, the patient, or be a witness to the conversation. (T. p. 209)

83. Dr. Bonin admitted that he relied on the resident's inaccurate handwritten pre-operative and post-operative notes and the resident's inaccurately-dictated operative report in making his determination that Petitioner's lifetime limit on infertility benefits should be applied to the surgical procedure performed by Dr. Gavrilova-Jordan and admitted that he did not rely on Dr. Gavrilova-Jordan's admitting diagnosis on her request for approval of the surgery. (T. p. 204)

84. Dr. Bonin admitted that the issue of whether Petitioner's medical treatment was related to her general health benefits or treatment for infertility was a "gray zone" and that he made the determination based upon his subjective judgment, given the information that he was provided. (T. p. 211)

85. Dr. Bonin admitted that if Petitioner's physician had determined that her surgery was medically appropriate for Petitioner's health because, for instance, delaying the surgery could pose greater health risks for the future, he has no basis, based on his skill, knowledge, or understanding of Petitioner's case, for disagreeing with Petitioner's physician. (T. pp. 214-215)

86. A covered medical service is defined as "any medically necessary, reasonable, and customary items of service, including prescription drugs, and medical supplies included in the [State Health] Plan." N.C. Gen. Stat. §135-48.1

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter under Chapter 150B of the North Carolina General Statutes.

2. All parties correctly have been designated and there is no question as to misjoinder or nonjoinder.

3. The State Health Plan for Teachers and State Employees is controlled by its governing statute, Article 3B of Chapter 135 of the North Carolina General Statutes.

4. Surgical benefits by a professional or facility provider on an inpatient or outpatient basis are covered by the Plan, including services of the surgeon or medical specialist, assistant, anesthetist or anesthesiologist, together with pre-operative and post-operative care. *Standard PPO Plan Benefits Booklet,* p. 17

5. The denial of surgical benefits at issue in this matter is subject to the provisions of N.C. Gen. Stat. §150B-23(a) and the decision of Respondent may be reversed if Petitioner shows, by a preponderance of the evidence, that in denying her claim Respondent (a) exceeded its authority or jurisdiction; (b) acted erroneously; (c) failed to use proper procedure; (d) acted arbitrarily or capriciously; or, (e) failed to act as required by law or rule.

6. Respondent acted erroneously in determining that it was not required to make a determination as to the medical necessity of the April 20, 2010 surgery *for Petitioner's general health*. Respondent has admitted that if the surgery were medically necessary for Petitioner's general health it would have been a covered benefit. Yet Respondent did not consider performing such an analysis and, instead, relied upon individuals who could not make such determinations.

7. Although Respondent is due deference for those areas where the demonstrated knowledge and expertise of the agency is applied to facts and inferences, Respondent did not apply demonstrated expertise to the question of whether Petitioner's surgery was covered under her general health benefits. Respondent did not tender an expert, qualified under Rule 702 of the North Carolina Rules of Evidence, to opine as to whether Petitioner's surgery medically was necessary for her general health and therefore fell within the definition of covered services in N.C. Gen. Stat. §135-48.1.

8. Respondent acted erroneously when Dr. Bonin applied a subjective basis--in the absence of specialized expertise in gynecologic disease--for deciding that Petitioner's surgery, which he admitted was in a "gray zone," was fertility treatment.

9. Petitioner proved by the preponderance of the evidence that the April 20, 2010, surgery was a medical necessity for her general health.

10. Petitioner proved by the preponderance of the evidence that her April 20, 2010, surgery was not a fertility treatment subject to the lifetime maximum benefits of $5,000.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Administrative Law Judge determines that Respondent's denial of general health insurance benefits to Petitioner was erroneous and not supported by the evidence which should be, and the same hereby is, **REVERSED.**

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 6th day of July, 2013.

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Beecher R. Gray
Administrative Law Judge