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STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS

In the Matter of)
)
 [REDACTED],) OHA Case No. 11-FH-2396
)
 Claimant.) Division Case No. [REDACTED]

FAIR HEARING DECISION

STATEMENT OF THE CASE

Mr. [REDACTED] (Claimant) is a recipient of Medicaid benefits. (Ex. 1) On September 8, 2011, Claimant’s dentist requested advance authorization for Medicaid payment of an “implant supported removable denture for completely edentulous arch, mandible” coded as 6053. (Ex. E, p. 1) The Division of Health Care Services (DHCS) received this request on September 9, 2011. (Ex. E, p. 2; Ex. A, p. 2) On September 14, 2011, Claimant was notified by Affiliated Computer Services, Inc. (ACS)¹ that his dentist’s request was denied. (Ex. D, p. 1; Ex. A, p. 2) On October 12, 2011, Claimant requested a fair hearing. (Ex. C)

This Office of Hearings and Appeals has jurisdiction under authority of 7 AAC 49.020(4) and 42 C.F.R. § 431.200-431.250.

A Fair Hearing began on November 23, 2011 and continued on December 7, 2011. Claimant participated by telephone on both days of the hearing, represented himself and testified in his own behalf. Claimant was assisted by Mr. [REDACTED], M.D. [REDACTED] (Claimant’s primary care physician); by Mr. [REDACTED], D.D.S., Chief Dental Officer of the [REDACTED] (Claimant’s dentist); and Ms. [REDACTED], Services Unit Director, [REDACTED] Medical Facility. Each of these persons participated by telephone and testified on behalf of Claimant.

Mr. [REDACTED], the Division’s Hearing Representative, representing the Division of Health Care Services (Division) participated by telephone and testified on behalf of the Division. Mr. [REDACTED], Medical Assistance Administrator, Division of Health Care Services, also participated by telephone and testified on behalf of Claimant. All these persons participated in

¹ The State has contracted with ACS to process Medicaid requests and “provide[s] authorization review for certain medical services, supplies, and drugs for Medicaid recipients” among other functions. (Ex. D, p. 1)

the same manner and capacity on December 7, 2011 as they did on November 23, 2011. In addition, on December 7, 2011, Ms. [REDACTED] observed on behalf of the Division. The evidentiary record closed on December 7, 2011 at the end of the hearing. All offered exhibits were admitted.

ISSUE

On September 14, 2011, was the Division correct to deny Claimant's request for prior authorization of Medicaid payment for a new implant supported removable denture for completely edentulous arch, mandible?

FINDINGS OF FACT

The following facts are established by a preponderance of the evidence:

1. Claimant is a [REDACTED] year old Medicaid recipient. (Claimant's testimony) In November or December 2006, Claimant received mandibular dental implants. (Ex. G, p. 1) His "dentures are falling apart." (Claimant's testimony)

2. On September 9, 2011, Claimant's dentist sought prior authorization for Medicaid payment of an implant supported removable denture. (Ex. E) The prior authorization request stated the procedure code was "6053" and the specific services requested were described as "Implant supported removable denture for completely edentulous arch, mandible." (Ex. E, p. 1; *see also* Ex. F, p. 1) The dentist described "diagnosis and medical justification" as:

Non Usable, non repairable existing implant supported removable denture requiring replacement

3. On September 14, 2011, the Division denied Claimant's request. (Ex. C; Ex. D) The notice stated Claimant's request was denied because

D6053 implants supported removable denture requested for you is not covered by Medicaid. Unless otherwise provided in 7 AAC 43 or 7 AAC 105-160, the department will not pay for a service that is not reasonably necessary for the diagnosis and treatment of an illness or injury, or for the correction of an organic system, as determined upon review by the department. 7 AAC 105.110(1).

(Ex. D; *see also* Ex. E, p. 3)

4. At the hearing, testimony on Claimant's behalf established:

a. Claimant's lower jaw has not stopped receding and the bone is disappearing. The implants hold the lower denture in. Due to the chewing pressure on the dentures, which are up against the (jaw) bone, the denture is rapidly deteriorating. (Claimant's testimony)

b. Claimant's implants are in good shape. What he needs is replacement of the denture which is falling apart. He had to super-glue his denture together. (Claimant's testimony)

c. Claimant's implant supported denture no longer functions. This is because Claimant is losing bone in his mandible, due to a condition called mandibular atrophy. (Claimant's dentist's testimony) Because Claimant's bone loss is so pronounced, there is insufficient bone to retain a normal denture and Claimant must have an implant supported denture. (Ex. G; Claimant's dentist's testimony) Because of the mandibular atrophy, regular dentures do not work with an implant and therefore will not meet Claimant's need. (Ex. G; Claimant's dentist's testimony)

d. Claimant's present implant supported denture does not stay in place and food gets trapped under it. Everything which can be done to make the existing denture work has been done and Claimant must have a new denture. (Ex. G; Ex. H, pp. 1-8, 14-24; Claimant's dentist's testimony)

e. Claimant's denture is an implant related prosthesis. (Ex. G; Claimant's dentist's testimony)

f. Claimant suffers medical conditions which are subject to change and, in part, are dependent on his good nutritional status, medication and maintaining weight. He has four severe medical illnesses: cardiac disease with severe right side heart failure, renal failure, cancer of his gastrointestinal track (colon and esophageal), and stroke. These four main illnesses dictate that Claimant maintain good nutritional status and adequate weight. (Ex. I; Claimant's doctor's testimony) Claimant has suffered weight loss over the past year and this is being monitored very closely. (Ex. I, p. 1; Claimant's doctor's testimony) "Any problem which interferes with [Claimant's] ability to ingest and digest food will ...complicate his" medical situation. (Ex. I, p. 1; Claimant's doctor's testimony)

g. Claimant's inability to eat, due to the deterioration of his denture, is resulting in malnutrition, the loss of his general health and vigor, and he is getting too weak to walk. (Claimant's testimony) Claimant has continued to lose weight because he cannot eat enough. (Claimant's testimony; *see* Ex. H, p. 1)

h. Claimant seeks an exception to the regulation relied on by the Division in denying his request. (Claimant's testimony)

5. The Division's Medical Assistance Administrator did not know if there was any medical basis on which Claimant might receive the treatment requested, based on medical/physical necessity for a prosthesis (not dental necessity), in light of Claimant's four severe medical conditions. (Division's Medical Assistance Administrator's testimony) The Division's Medical Assistance Administrator knew of no exception to the Alaska prohibition of Medicaid payment for implant supported dentures as a dental service. (Division's Medical Assistance Administrator's testimony)

6. The Division Hearing Representative testified he believed the State Medicaid plan formerly had a regulation allowing for exceptions, but that regulation no longer is part of the State Medicaid plan. Therefore, the Division cannot make an exception to the dental regulation without violating its Medicaid plan. (Division Hearing Representative's testimony)

PRINCIPLES OF LAW

Burden of Proof and Standard of Proof

“Ordinarily the party seeking a change in the status quo has the burden of proof.” *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). The standard of proof in an administrative proceeding is a “preponderance of the evidence,” unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Com’n*, 711 P.2d 1170, 1183 (Alaska 1986) “Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the triers of fact that the asserted facts are probably true.” *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495 (Alaska 2003)

II. The Federal Medicaid Program.

Medicaid was established to provide medical assistance to those who cannot otherwise afford it, in particular certain low-income or needy individuals. 42 U.S.C. § 1396a, subd. (a). Regulations concerning the Medicaid program may be found in the Code of Federal Regulations (C.F.R.). General eligibility requirements for persons seeking Medicaid benefits are found at 42 C.F.R. § 435.400-435.407. In addition, specific eligibility requirements pertaining to specific types of Medicaid benefits are found in other sections of the C.F.R.

Benefits for dental services are optional under Title XIX of the Social Security Act, which establishes the Medicaid program. 42 U.S.C. 1396a(a)(13); 42 U.S.C. 1396d(a)(10). Although each state has broad discretion to adopt standards for determining the extent of assistance to be offered under its Medicaid program, such standards must be reasonable and consistent with the objectives of Title XIX. *Beal v. Doe*, 432 U.S. 438, 97 S.Ct. 2366, 53 L.Ed.2d 464, 472 (1977), 42 U.S.C. s 1396a(a)(17). A state plan must specify the amount and duration of each service provided. 42 CFR 440.230(a). The amount, duration, and scope of each service covered by a state plan must be sufficient to reasonably achieve the purpose of the service. 42 CFR 440.230(b).

Federal Medicaid regulation 42 C.F.R. § 440.100, in relevant part, defines “dental services” as:

- (a) diagnostic, preventive, or corrective procedures provided by or under the supervision of a dentist in the practice of his profession, including treatment of –
 - (1) The teeth and associated structures of the oral cavity; and
 - (2) Disease, injury, or impairment that may affect the oral or general health of the recipient.

Medicaid regulation 42 C.F.R. § 440.120(c) defines “Prosthetic devices” as:

means replacement, corrective, or supportive devices prescribed by a physician or other licensed practitioner of the healing arts within the scope of his practice as defined by State law to (1) Artificially replace a missing portion of the body; (2) Prevent or correct physical deformity or malfunction; or (3) Support a weak or deformed portion of the body.

Dental services are services a state may elect to provide. Dental services are not among the services required to be provided to individuals deemed categorically needy (42 C.F.R. § 440.210) or medically needy (42 C.F.R. § 440.220). Medicaid regulation 42 C.F.R. § 440.225 titled “Optional services” states:

Any of the services defined in subpart A of this part that are not required under §§ 440.210 and 440.220 may be furnished under the State plan at the State’s option.

(42 C.F.R. Part 440, Subpart B – Requirements and Limits Applicable to All Services, Section 440.225).

Part 440, titled “Services: General Provisions, includes Subpart A, referenced in 42 C.F.R. § 440.225. Subpart A “interprets and implements section 1905(a) of the Medicaid act, including defining the term “medical assistance”, dental services, and other terms. See 42 C.F.R. § 440.1-440.185.

III. Alaska Medicaid Adult Dental Services.

A. Statutes

The Medicaid program is administered in Alaska, in part, by the Department of Health and Social Services’ Division of Health Care Services (DHCS). The State of Alaska’s Medicaid statutes are set forth at A.S. 47.07.010 – A.S.47.07.900.

Alaska Statute 47.07.030, Medical services to be provided, includes all mandatory services required by 42 U.S.C. 1396-1396p (Title XIX of the Social Security Act). AS 47.07.030(a). This statute also provides “the department may offer only the following optional services” which includes “adult dental services” and “prosthetic devices and eyeglasses.” AS 47.07.030(b).

Alaska Statute (AS) Section 47.07.067, payment for adult dental services, provides in relevant part:

(a) ... the department shall pay for minimum treatment and for preventative and restorative adult dental services provided under AS 47.07.030(b) Regulations adopted under this section must include the following: (1) ... , a maximum amount of benefits for preventative and restorative adult dental services of \$1,150 for each eligible recipient in a fiscal year; and (2) specification of the scope of coverage for preventative and restorative adult dental services.

...

(e) As used in this section, “minimum treatment” means the application or prescription of a medication or material deemed necessary by a licensed dentist for the immediate relief of pain or to reduce the spread of infection.

B. Regulations

Alaska regulations implementing its state Medicaid plan are found in the Alaska Administrative Code (AAC), Title 7, Chapter 43 and Chapters 100 – 160. Regulations concerning Medicaid coverage and professional services are found in Chapter 110. The regulations pertaining to Medicaid dental services are 7 AAC 110.140 – 7 AAC 110.160.

The State Medicaid plan allows payment for regular dentures but not for implant supported dentures. 7 AAC 110.145. Regulation 7 AAC 110.145, titled “Dental Services for Adults,” provides in relevant part as follows:

(b) Except as provided in (c) of this section, the department will pay, up to an annual limit of \$1,150 per recipient 21 years of age or older, for the following dental services:

....

(6) prosthodontics, including complete or partial dentures and denture repair or relines; the department will pay for replacement of complete or partial dentures only once per five calendar years;

(c) The department will not pay for...: (8) implant or implant-related dental services....

IV. Judicial Interpretation of Medicaid Dental Services

In the Alaska case of *Garner v. State, Dept. of Health & Soc. Serv.*, 63 P.3d 264 (Alaska 2003) the Supreme Court held it was error for the department to “fail to apply exceptions found in its own regulations or, at the very least, to inquire into their applicability.” In *Garner* the Court discussed Alaska Medicaid regulation 7 AAC 43.080 (providing for exceptions based on unusual circumstances or undue hardship) in relation to Mr. Garner’s request for dental care.² This regulation, 7 AAC 43.080, was repealed, effective December 30, 2006.

In the case of *Anderson v. Dir., Dep’t. of Soc. Serv.*, 300 N.W.2d 921 (Mich. App. 1980), the Court stated, in relevant part:

With respect to the denial of the request for a partial denture, the underlying rationale of [the state’s] standards is based on the assertion that such services are a covered benefit only where there are chewing *difficulties likely to impair general health*. (Emphasis added.)

IV. Other Legal Principles Applicable to This Case.

“Administrative agencies are bound by their regulations just as the public is bound to them.” *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851 (Alaska 2010).

Alaska Fair Hearing regulation 7 AAC 49.170, provides, in relevant part:

² The Court also considered the issue of disability-based discrimination and decided the department was obligated to consider reasonable accommodations for Mr. Garner’s need. *Id.* at 63 P.3d 264, 270-272. The issue of discrimination is not alleged in this case.

Except as otherwise specified in applicable federal regulations ... the role of the hearing authority is limited to the ascertainment of whether the laws, regulations, and policies have been properly applied in the case and whether the computation of the benefit amount, if in dispute, is in accordance with them.

ANALYSIS

I. Issue

On September 14, 2011, was the Division correct to deny Claimant's request for prior authorization of Medicaid payment for a new implant supported removable denture for completely edentulous arch, mandible?

II. Burden of Proof and Standard of Proof

Claimant has the burden of proof by a preponderance of the evidence because he is applying for benefits and therefore seeking to change the status quo.

III. Facts

All of the material facts in this case are undisputed. Resolution of the issue is a matter of applying these undisputed facts to the relevant law. Claimant seeks Medicaid payment for a new implant supported mandibular denture. Claimant can only use an implant supported removable denture. Without replacement of Claimant's implant supported denture, Claimant's health continues to deteriorate. This deterioration includes his inability to obtain and maintain good nutritional status and his weight. Failure to maintain good nutritional status and his weight is life-threatening due to his four existing medical/physical conditions of cardiac disease with severe right side heart failure, renal failure, cancer of his gastrointestinal track (colon and esophageal) and stroke.

IV. Claimant's Request Must be Denied Pursuant to 7 AAC 110.145(c)(8).

Claimant requested Medicaid payment for his implant supported mandibular denture through the Medicaid dental services of the Alaska Medicaid plan.

State Medicaid regulation 7 AAC 110.145, titled "Dental Services for Adults," provides in relevant part as follows:

(c) The department will not pay for...: (8)implant or implant-related dental services....

Claimant's dentist's testimony was unequivocal that the services Claimant seeks are implant related. Therefore, this regulation precludes the department from authorizing Claimant's request. The Division properly denied Claimant's request for implant-related dental related services.

However, the Alaska Supreme Court has interpreted Alaska's Medicaid dental plan to include requiring the department to "at the very least, inquire" into the applicability of potential

exceptions to the prohibiting regulation. *Garner v. State, Dept. of Health & Soc. Serv.*, 63 P.3d 264, 269 (Alaska 2003)

V. The Division Must Specifically Investigate If Claimant's Request Can be Authorized on Other Grounds

Unlike Mr. Garner, in the case of *Garner v. State, Dep't. of Health & Soc. Serv.*, 63 P.3d 264 (Alaska 2003), Claimant is not a disabled person, and the regulation (7 AAC 43.080) on which the *Garner* court ruled Mr. Garner was entitled to the dental service he sought no longer is in effect. However, the principle established in *Garner*, that the department is obliged to investigate whether the dental services might be provided, is still valid.

The Division was aware there may be other grounds on which Claimant might seek and/or obtain the requested service. It did not know what possible grounds until the Fair Hearing. In its denial notice, it wrote:

Unless otherwise provided in 7 AAC 43 or 7 AAC 105-160, the department will not pay for a service that is not reasonably necessary for the diagnosis and treatment of an illness or injury, or for the correction of an organic system, as determined upon review by the department. 7 AAC 105.110(1). (Emphasis added.)

Under the *Garner* reasoning, the Division is obliged to investigate whether Claimant's need can be met under any other Medicaid regulation applicable in the State's Medicaid Plan. In the case of *Anderson v. Dir., Dep't. of Soc. Serv.*, 300 N.W.2d 921 (Mich. App. 1980) that court identified the fundamental question concerning Medicaid dental services to be provided is if the claimant's chewing difficulties were likely to impair his general health.

In this case, the Division did not consider Claimant's request in light of his general health, that is, in terms of his medical/physical need to maintain good nutritional status and his weight to prevent his demise from his four severe medical conditions. During the Fair Hearing, Claimant supplied a preponderance of the evidence that his physical health was substantially dependent on maintaining good nutritional status because his ability to survive any or all of four life-threatening conditions rested on being able to maintain weight and good health.

The Division Medical Assistance Administrator testified he did not know of any regulations allowing an exception to the dental implant prohibition. But the Division did not thoroughly investigate whether Claimant's implant supported denture might be provided as a prosthetic based on his medical/physical needs. The Division merely looked at whether his requested dental service was covered by Medicaid dental laws. Therefore, under the *Garner* decision, it is unclear if the Division met its obligation to Claimant.³

³ The scope of the Fair Hearing in this case was limited to determining if the Division had properly applied the regulations pertaining to the coded dental procedure for which he sought Medicaid authorization. 7 AAC 49.170. Claimant did not apply for prior authorization on grounds of medical/physical necessity for a prosthetic device, which is governed by other regulations, therefore the Division did not have notice of this issue until the Fair Hearing. Also, the scope of the Fair Hearing did not address a claim related to immediate relief of pain or acute

A possible consequence would be to remand this case to the Division for further consideration in light of the *Garner* mandate. However, Claimant requested authorization solely as a dental service and supported his request solely on grounds he needed dental services. Claimant first raised the issue of his need for the implant supported denture as a medical/physical (i.e., non-dental) need at the Fair Hearing through testimony. Because this issue was raised after the Division took its action, the jurisdictional scope of this case does not extend to the new issue. 7 AAC 49.170. Claimant may re-apply or may appeal this decision.

VI. The Division of Health Care Services Is Unable to Create Exceptions to the State's Medicaid Plan

At the Fair Hearing, Claimant argued an exception should be made based on his need.

The Division is prohibited from violating its regulations or the Alaska Medicaid plan by making an exception based on Claimant's need. The Medicaid Program is a federal program administered pursuant to specific laws and regulations which cannot be changed or disregarded, absent legislation or rule-making. 7 AAC 40.020 *et. seq.*; 7 AAC 100.400 *et. seq.* The administration of the federal Medicaid program by the State of Alaska requires the State to abide by and implement the federal laws and regulations, including the provisions of the Alaska Medicaid plan. There is no regulation providing for a hardship or good cause exception or other means to "flex" the bar on payment for implant or implant-related dental services.

The Division does not have the authority to create an exception to the law concerning Medicaid and is required to implement the law as it exists. "Administrative agencies are bound by their regulations just as the public is bound to them." *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868-869 (Alaska 2010).

VII. The Office of Hearings and Appeals Does Not have the Power to Make Exceptions.

The authority of the Office of Hearings and Appeals is limited to the scope identified in 7 AAC 49.170. Regulation 7 AAC 49.170 provides, in relevant part:

Except as otherwise specified in applicable federal regulations ... the role of the hearing authority is limited to the ascertainment of whether the laws, regulations, and policies have been properly applied in the case and whether the computation of the benefit amount, if in dispute, is in accordance with them.

Therefore, the Office of Hearing and Appeals has no authority to deviate from its application of the facts to the statutes and regulations governing the administration of the Medicaid Program, and has no authority to create exemptions from the requirements of the law for any reason(s).

infection (7 AAC 110.145(a)) although Claimant, and his dentist, both testified that food becomes trapped under the denture.

