

Office of Hearings and Appeals
3601 C Street, Suite 1322
P. O. Box 240249
Anchorage, AK 99524-0249
Ph: (907)-334-2239
Fax: (907)-334-2285

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

In the Matter of)
)
 [REDACTED]) OHA Case No. 11-FH-2297
)
 Claimant.) Div. Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) is a Medicaid recipient. On July 20, 2011, he requested that the Medicaid program preauthorize his receipt of an inpatient video electroencephalographic monitoring (CPT code 95951¹) procedure (VEEG). (Ex. E, pp. 1 – 2) The Division of Health Care Services (Division) denied the Claimant’s request on July 21, 2011. (Ex. D) The Claimant requested a fair hearing on July 28, 2011. (Ex. C)

This office has jurisdiction pursuant to 7 AAC 49.010.

The Claimant’s hearing was held on January 10, 2012. The Claimant appeared telephonically. He represented himself and testified on his own behalf. [REDACTED], a Medical Assistance Administrator III employed with the Division, appeared in person. He represented the Division and testified on its behalf. Dr. [REDACTED], M.D., an associate medical director employed by Qualis Health, attended telephonically and testified on the Division’s behalf.

The record was left open, after the January 10, 2012 hearing, until January 20, 2012 for the parties to submit additional medical documentation. Neither party submitted additional information.

¹ “CPT” codes are “Current Procedural Terminology” codes. For a list of the CPT codes for procedures that require preauthorization by the Alaska Medicaid program, see the *Select Diagnoses and Procedures Pre-certification List* found at <http://www.qualishealth.org/sites/default/files/AK-Medicaid-Precert-List.pdf> (date accessed February 28, 2012).

ISSUE

Was the Division correct to deny the Claimant's request for an inpatient VEEG?

FINDINGS OF FACT

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

1. The Claimant is a Medicaid recipient. He has a history of seizures along with possible pseudoseizures.² (Ex. E, p. 2) His seizures occur both while sleeping and while awake. (Claimant testimony) He has been on a number of different medications to control the seizures, but the seizures are still occurring. *Id.*
2. On February 23, 2011, Dr. [REDACTED], a neurosurgeon, recommended the Claimant receive both neuropsychiatric testing and an electroencephalogram³ procedure (EEG). (Ex. E, p. 3)
3. The Claimant has not received either neuropsychiatric testing or an EEG. (Ex. E, p. 3)
4. Qualis Health (Qualis) is a non-profit business that reviews requests for medical treatment for the Alaska Medicaid program. ([REDACTED] testimony)
5. On July 20, 2011, Qualis received a request that the Alaska Medicaid program authorize a three day hospital stay for an inpatient VEEG (CPT Code 95951) for the Claimant. (Ex. E, p. 1) That request came from Dr. [REDACTED], a neurosurgeon who was referred by Dr. [REDACTED]. (Ex. E, p. 3) Dr. [REDACTED] has not treated or examined the Claimant. *Id.*
6. On July 21, 2011, Dr. [REDACTED], MD, a senior medical director employed by Qualis, denied the request for an inpatient VEEG procedure. (Exs. D, E, pp. 1 – 2) Dr. [REDACTED] has not had contact with the Claimant, i.e., he did not treat or examine the Claimant. ([REDACTED] testimony) Qualis denied the inpatient VEEG request as not medically necessary, because the Claimant had not yet had an outpatient EEG performed. (Ex. D, E, pp. 1 – 2, [REDACTED] testimony)
7. An inpatient VEEG is generally only performed after an outpatient EEG is performed. ([REDACTED] testimony) An inpatient VEEG is a very sophisticated EEG that is

² A pseudoseizure is “an attack resembling an epileptic seizure but having purely psychological causes; it lacks the electroencephalographic characteristics of epilepsy and the patient may be able to stop it by an act of will.” *Dorland's Illustrated Medical Dictionary* 1569 (31st Edition, 2007)

³ An electroencephalogram measures electrical currents within the brain. *Dorland's Illustrated Medical Dictionary* 607 - 608 (31st Edition, 2007)

performed when the outpatient EEG does not provide diagnostic information and there is a need to determine medical treatment for seizures. *Id.*

PRINCIPLES OF LAW

A party who is 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 normal standard of proof in an administrative proceeding, unless otherwise stated, is the preponderance of the evidence standard. *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (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).

The Medicaid program will pay for an inpatient VEEG (CPT Code 95951). Inpatient VEEGs (CPT Code 95951) must be preauthorized by the Division. 7 AAC 105.130(a)(11); 7 AAC 160.900(d)(3).⁴ The factors that the Division uses in making its prior authorization determination with regard to a particular service “include the service’s medical necessity, clinical effectiveness, cost-effectiveness, and likelihood of adverse effects The department may . . . require other services before the recipient receives the requested service.” 7 AAC 105.130(c).

The federal Medicaid statutes and federal Medicaid regulations do not define the term “medical necessity.” *Thie v. Davis*, 688 N.E.2d 182, 187 (Ind.App.1997) The Alaska Medicaid statutes, AS 47.07.010 *et. seq.*, and Alaska Medicaid regulations, 7 AAC 100 – 160, do not define the term “medical necessity.” In comparison, the California statutes explicitly define the term “medical necessity.” “A service is ‘medically necessary’ or a ‘medical necessity’ when it is reasonable and necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain.” Ca. Welf. & Inst. Code §14059.5.

The federal courts have held that an individual’s physician’s opinion regarding whether a treatment is necessary is presumed to be correct:

The Medicaid statute and regulatory scheme create a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment.

Weaver v. Reagen, 886 F.2d 194, 200 (8th Cir. 1989). In general, more weight is given to a treating physician’s opinion than the opinions of those who do not treat a claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) An examining physician’s opinion is

⁴ VEEGs (CPT Code 95951) are listed in the *Select Diagnoses and Procedures Pre-certification List*, which is referenced in 7 AAC 105.130(a)(11) and adopted by reference in 7 AAC 160.900(d)(3). The *Select Diagnoses and Procedures Pre-certification List* is found at <http://www.qualishealth.org/sites/default/files/AK-Medicaid-Precert-List.pdf> (date accessed February 28, 2012).

“entitled to greater weight than the opinion of a nonexamining physician.” *Id.* at 830 – 831.

ANALYSIS

The issue in this case is whether the Division was correct when it denied the Claimant’s request that Medicaid authorize his request for an inpatient VEEG (CPT Code 95951). The Claimant has the burden of proof by a preponderance of the evidence because he is the party seeking to change the status quo by requesting the inpatient VEEG (CPT Code 95951).

The factors that the Division uses in determining whether to authorize an inpatient VEEG (CPT Code 95951) are set out in regulation 7 AAC 105.130(c). They are “medical necessity, clinical effectiveness, cost-effectiveness, and likelihood of adverse effects.” 7 AAC 105.130(c). In addition, the Division “may require other services” before authorizing the requested service. *Id.*

In this case, the Division denied the Claimant’s request for an inpatient VEEG (CPT Code 95951) on grounds of medical necessity, because, as explained by Dr. [REDACTED], an inpatient VEEG (CPT Code 95951) is only ordered after an outpatient EEG is performed and does not provide adequate diagnostic information. *See* Findings of Fact 6 and 7 above.

It should first be noted that Dr. [REDACTED], the physician who requested preauthorization for the inpatient VEEG (CPT Code 95951), did not treat or examine the Claimant. Because he is not either a treating or examining physician, his opinion, as shown by his request for the inpatient VEEG (CPT Code 95951), that the inpatient VEEG (CPT Code 95951) was medically necessary is not entitled to more weight than the opinion of the Qualis medical reviewer, who also did not examine or treat the Claimant.⁵

The Alaska Medicaid statutes and regulations do not define “medical necessity.” The California statutes provide a useful definition. “A service is ‘medically necessary’ or a ‘medical necessity’ when it is reasonable and necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain.” Ca. Welf. & Inst. Code §14059.5. There was no evidence presented that an inpatient VEEG (CPT Code 95951) was reasonable and necessary as defined in the California statute. In addition, no outpatient EEG had been performed, which according to Dr. [REDACTED]’s testimony, is a normal precursor to having an inpatient VEEG (CPT Code 95951) performed. The Claimant did not present any evidence that an initial outpatient EEG should be dispensed

⁵ In general, more weight is given to a treating physician’s opinion than the opinions of those who do not treat a claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) An examining physician’s opinion is “entitled to greater weight than the opinion of a nonexamining physician.” *Id.* at 830 – 831.

with because it was inadequate or inappropriate. In other words, the Claimant has not shown that the inpatient VEEG (CPT Code 95951) was medically necessary.⁶

In summary, because the Claimant did not have an outpatient EEG performed, which is a normal precursor to having an inpatient VEEG (CPT Code 95951) performed, the Claimant failed to meet his burden of proof by a preponderance of the evidence, and did not establish that it was medically necessary for him to receive the inpatient VEEG (CPT Code 95951). As a result, the Division's action in denying the Claimant's prior authorization request for an inpatient VEEG (CPT Code 95951) was correct.

CONCLUSIONS OF LAW

1. The Claimant had the burden of proof by a preponderance of the evidence to establish that it was a medical necessity for him to receive an inpatient VEEG (CPT Code 95951) procedure. The Claimant did not satisfy his burden of proof.
2. The Division was therefore correct when it denied the Claimant's prior authorization request for an inpatient VEEG (CPT Code 95951) procedure.

DECISION

The Division was correct when it denied the Claimant's July 20, 2011 prior authorization request for an inpatient VEEG (CPT Code 95951) procedure on July 21, 2011.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. If the Claimant appeals, the request must be sent within 15 days from the date of receipt of this Decision. Filing an appeal with the Director could result in the reversal of this Decision. To appeal, send a written request directly to:

Kimberli Poppe-Smart
Division of Health Care Services
P.O. Box 240249
Anchorage, AK 99524-0249

⁶ The other prior authorization factors contained in the applicable regulation are "clinical effectiveness, cost-effectiveness, and likelihood of adverse effects." 7 AAC 105.130(c). Neither party presented evidence regarding these factors.

DATED this 1st day of March, 2012.

/Signed/
Larry Pederson
Hearing Authority

Certificate of Service

I certify that on this 1st day of March 2012, true and correct copies of the foregoing were sent to:

Claimant, by U.S.P.S First Class Certified Mail, Return Receipt Requested

and to the following by secure e-mail:

[REDACTED], Director
[REDACTED], Agency Representative
[REDACTED], Policy & Program Development
[REDACTED], Staff Development & Training

/signed/
J. Albert Levitre, Jr.
Law Office Assistant I