BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of	)	
	)	OAH No. 12-0525-MDS
M H	)	Agency No.
_____	)	

DECISION

I. Introduction

M H's doctor submitted a request for preauthorization of services for Ms. H. The Division of Health Care Services (division) denied authorization, and sent Ms. H a notice of denial. Ms. H requested a hearing.

Prior to the hearing, a status conference was held by telephone. During that conference, the division moved to dismiss the hearing, asserting that Ms. H's hearing request was untimely. No ruling was made on the motion at that time, and Ms. H was informed that she would need to respond to the motion at the beginning of the hearing.

The hearing was held on July 17, 2012. Ms. H participated by telephone. Ms. Shelly Boyer-Wood represented the division. Based on the evidence presented at the hearing, the motion to dismiss is denied, and the division's decision not to preauthorize this service is reversed.

II. Facts

The No Name Health Center submitted a Prior Authorization Request for authorization to provide a "fabricated athletic mouth guard" for Ms. H.[1] This request provided no additional information justifying the need for that mouth guard. A Notice of Denial dated January 23, 2012, was sent to Ms. H.[2] The notice informed Ms. H that authorization for the mouth guard was denied on the basis that it was "not reasonably necessary for the diagnosis and treatment of an illness or injury, or for the correction of an organic system," and that she could "**request a fair hearing to appeal the decision within 30 days of receipt of this letter**[.]"[3] Ms. H did request a hearing.[4]

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1 Exhibit E, page 1.
2 Exhibit D, page 1.
3 Exhibit D, page 3 (emphasis in original).
4 Exhibit C, page 1.

Ms. H testified that the mouth guard prevents her from biting her inner cheeks while sleeping. She stated that her teeth were too big for her mouth, and that a more permanent solution would be to remove her wisdom teeth, something she does not want to have done. The mouth guard corrects the problem without having to remove teeth.

The record includes a letter from Ms. H's dentist. He states:

> I am writing with a letter of medical necessity for a protective night guard for M H (DOB: 00/00/51). M has multiple indications for a night guard. First, as her chief complaint, she has chronic cheek biting bilaterally while she sleeps at night. M also displays moderate to severe anterior wear, consistent with a bruxism habit. Her posteriors do not display significant wear. When asked, M stated she has been diagnos[ed] with sleep apnea in the past. Some speakers on dental sleep medicine state there is evidence supporting anterior wear being associated with the body compensating for blockage of the airway experienced during sleep apnea through a defense mechanism manifested as night-time bruxism. This bruxism explains anterior wear without posterior wear.[5]

III. Discussion

A. Motion to Dismiss

The division asserted that Ms. H's request for a hearing was untimely. The division's assertion is in the nature of an affirmative defense. Hence, while Ms. H has the overall burden of proof in this matter, the division has the burden of proving its assertion of untimeliness.[6]

Hearings may be requested either orally or in writing.[7] Hearings are only available, however, if the request is made within "30 days after receipt of notice of the division action by which they are aggrieved."[8] Thus, there are two relevant dates that determine whether a request is untimely: first, the date the client received notice of the division's action and, second, the date the request was made.

The notice to Ms. H from the division is dated January 23, 2012.[9] There is no evidence in the record, however, of the date Ms. H *received* that notice. The only documentation of Ms. H's request for a hearing is shown in Exhibit C. That document is a

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5 Exhibit 1, page 1.

6 The party raising an affirmative defense generally has the burden of proof on that issue. *Shaw v. State*, 861 P.2d 566, 572 (Alaska 1993); *Anchorage Roofing Co., Inc. v. Gonzales*, 507 P.2d 501, 504 (Alaska 1973) 2 AAC 64.290(e) (burden of proof is on party who requested hearing or who made the motion under consideration).

7 7 AAC 49.030.

8 7 AAC 49.040.

9 Exhibit D, page 1.

"Fair Hearing Request" form that appears to have been partially completed based on information provided by Ms. H over the telephone, though it is possible that Ms. H typed this information herself and mailed in the form. The document is unsigned and undated.[10] Ms. H could not recall when she requested her hearing.

Ms. Boyer-Wood explained that when a hearing request is received, notes are entered into an electronic file indicating the manner in which the request was received and the date it was received. Those notes are then used to generate the hearing referral, and the notes are also used to determine the hearing request date shown in that referral. The notes are not in evidence, and there was no testimony that the normal process was followed in this case.

Given that the Notice of Denial was dated in late January, and the hearing request appears to have been made in June, Ms. H's request for a hearing may have been made more than 30 days after she received the Notice of Denial. But without any evidence of the date she did receive the notice, and without any evidence of the date the hearing request was made, the division has not proven that it is more likely true than not true that her hearing request was late. It is not appropriate to foreclose Ms. H's right to a hearing on this record.

In addition, the ability to deny or dismiss a hearing request is limited by regulation. The hearing authority[11] may only dismiss a hearing request or terminate a hearing if:

> (1) the issues by which the client is aggrieved are not those set out in 7 AAC 49.020;
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> (2) the client withdraws the request in writing;
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> (3) the sole issue is one of state or federal law requiring automatic benefit adjustments affecting groups of recipients or all recipients, and the issue is not one of incorrect benefit computation; or
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> (4) the client fails, without good cause as determined by the hearing authority, to appear in person, telephonically, or by authorized representative at the scheduled hearing.[12]

Given the specific limitations on the right to dismiss a hearing, it is unclear whether there is also an implied right to dismiss a hearing that was not requested in a timely manner

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[10] The date in the footer of the document, June 21, 2012, is after this hearing request was referred to the Office of Administrative Hearings for a hearing. Her hearing request must have been made some time on or before June 14, 2012, when the referral was made.

[11] The hearing authority is the Commissioner of Health and Social Services or the Commissioner's delegee. OAH Standing Order No. 2012-01. http://doa.alaska.gov/oah/pdf/OAH-standing-order-2012-01.pdf

[12] 7 AAC 49.100.

pursuant to 7 AAC 49.040. No ruling need be made on this question because, as discussed above, the division has not proven that Ms. H's request was late.

The division's Motion to Dismiss is denied.

B. Whether the mouth guard is a covered service

The primary issue in this case is whether Medicaid covers the mouth guard prescribed by Ms. H's dentist. The Notice of Denial states that her claim was denied for "**the following reasons, based on the following legal authority:**"[13]

> The athletic mouthguard requested for you is not covered by Medicaid. Unless otherwise provided in 7AAC 43 or 7AAC 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. 7AAC 105.110(1).[14]

The only authority relied on by the division for stating that the mouth guard is not covered by Medicaid is 7 AAC 105.110(1). That regulation states that no payment will be made for a service not reasonably necessary for the treatment of an illness or injury, or the correction of an organic system.

As shown above, Ms. H's dentist stated that the mouth guard was medically necessary because of her chronic cheek biting while sleeping.[15] Ms. H testified that the biting of her cheeks at night puts her at risk for infection. She testified that she had one severe infection in the past requiring hospitalization. While that infection was apparently not caused by the cheek biting, Ms. H is understandably concerned about a possible reoccurrence.[16] Ms. H also testified that the cause of her cheek biting is a small mouth. She said that her teeth are too large for the size of her mouth, and everything is crowded.

L X testified for the division that the original request for preauthorization[17] provided no medical justification for the request. There was no diagnostic code, and there was insufficient information to determine if the mouth guard was medically necessary. In

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13 Exhibit D, page 1 (emphasis in original).

14 Exhibit D, page 1 (the original text was printed in all capital letters. It is modified here to improve readability).

15 Exhibit 1.

16 Ms. H also argued that a simple cost benefit analysis shows it is better for the division to pay for the mouth guard than it is to have to pay for the cost of a subsequent infection, or for the removal of her wisdom teeth which would also solve the cheek biting problem. The division is required to apply the regulations as written. Currently, a cost benefit analysis is not permitted in this situation. Whether statutes or regulations should be modified to allow that is a policy question for the legislature and the Department of Health and Social Services.

17 Exhibit E, page 1.

addition, she testified that the procedure code listed on the request was a code for a service that is not covered by Medicaid. She testified that there are two codes for mouth guards. The code D9940 is used for mouth guards, and D9941 is used for fabricated mouth guards. Ms. X testified that neither is a covered service. She stated that mouth guards are not covered regardless of medical necessity.

The notice sent to Ms. H stated that the reason for denial was 7 AAC 105.110(1), which precludes payment for any service that is not medically necessary. It did not inform Ms. H that a mouth guard would not be covered under any circumstance (*i.e.*, even if medically necessary). A notice of denial must "detail" the "reasons for the proposed adverse action, including the statute, regulation, or policy upon which that action is based."[18] Because the Notice of Denial did not cite to any authority that states mouth guards are never a covered service, it cannot base its denial on that reason at the hearing.

The letter from Ms. H's dentist shows that the mouth guard is medically necessary. That information was not available to the division at the time it made its original decision, but it is available now. Accordingly, the division should provide preauthorization for this mouth guard to Ms. H's dentist who will then be able to bill for this service.[19]

IV. Conclusion

The only reason stated by the division in its Notice of Denial to deny this preauthorization was that the mouth guard was not medically necessary. Because Ms. H has proven by a preponderance of the evidence that it is medically necessary, her claim should have been preauthorized. The division's denial of that preauthorization is reversed.

Dated this 26th day of July, 2012.

Signed
Jeffrey A. Friedman
Administrative Law Judge

[18] 7 AAC 49.070.

[19] Authorization to bill for a service is not a guarantee that the service will be paid for. It is simply one step in the billing process. Whether the bill should be paid is not at issue in this appeal.

Non-Adoption Options

C. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

The Decision in this matter published by Jeffrey A. Friedman, Administrative Law Judge, on July 26, 2012 is modified to include the statement, "Based upon evidence provided by the parties and testimony at the July 17, 2012 hearing, the division was correct to deny the prior authorization for 'fabricated athletic mouth guard' on January 23, 2012 based upon the lack of sufficient evidence to support medical necessity of this item. This factual finding does not, however, alter the decision issued on July 26, 2012 that the letter from Ms. Gilbert's dentist produced into evidence on July 17, 2012 does not show that the mouth guard is medically necessary."

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 5th day of September, 2012.

By: *Signed*
Signature
Kimberli Poppe-Smart
Name
Deputy Commissioner
Title

[This document has been modified to conform to the technical standards for publication.]