

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

In the Matter of)
)
 Q O) OAH No. 15-0460-MDX
) Agency No.
_____)

DECISION

I. Introduction

Q O is a Medicaid recipient. Her physician requested that the Medicaid program provide her with Ensure nutrition shakes. The Division of Health Care Services (Division) denied the request.¹ Ms. O requested a hearing to contest the denial decision.²

The hearing was held on May 19 and May 28, 2015. Ms. O represented herself and testified on her own behalf. Fair hearing representative Angela Ybarra represented the Division. Kristina Rice, the Division's durable medical equipment program manager, testified on the Division's behalf.

The evidence shows that Ms. O should be approved to receive her Ensure nutrition shakes, and as a result, the Division's decision denying payment authorization is REVERSED.

II. Facts

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

Ms. O suffered an injury to her jaw in 1996 when she slipped and fell on ice while shoveling snow.³ As a result of this injury, her temporomandibular joints deteriorated to such an extent that she had to have jaw joint replacement surgery in 1999.⁴ Ever since then, chewing has been very painful for her, and therefore it has been very difficult for her to eat solid food. In addition, she finds pureed food unpalatable, and because of this she will tend to lose weight if she does not have liquid nutrition shakes available to her.⁵

In the past, Ms. O was able to obtain nutrition shakes through a Medicaid payment authorization, but that ended in approximately 2006 when her condition improved and she

¹ Exh. D.

² Exh. C1.

³ O testimony.

⁴ *Id.*; see also Ms. O's medical documents (prior to the second day of hearing Ms. O submitted approximately 15 pages of medical records which were not paginated or marked with exhibit numbers – the Division did not object to admission of these records).

⁵ O testimony.

stopped seeing a physician who could provide the medical certification needed for Medicaid coverage.⁶ Five or six years ago, however, she was in a car accident, and as a result her jaw pain started to worsen and she started taking more pain medication. Recently, she started seeing her current physician for pain management.⁷ Through her pain management program, she has had some success in reducing her need for pain medications,⁸ and part of that process involves her minimizing her chewing as much as possible.⁹

Ms. O's medical provider submitted the request for payment authorization for nutrition shakes in January 2015. In support of the request, the physician submitted a "certificate of medical necessity" on a form provided by the Division's contractor, Xerox. On the form the physician included a statement confirming that Ms. O will lose weight if she is not provided nutrition shakes to supplement her dietary intake, and instead has to rely only on pureed food. The physician, by submitting this form, certified the medical necessity of the nutrition shakes.

In response to the request, the Division sent Ms. O a letter dated April 7, 2015 denying payment authorization for the nutrition shakes, which stated as follows:

The request for Ensure is denied. The department will not pay for a service that is not properly prescribed or medically necessary in accordance with criteria established under 7 AAC 105-7 AAC 160 or by standards of practice applicable to the prescribing provider. 7 AAC 105.110(2)[.] Information submitted does not meet Alaska Medicaid guidelines.¹⁰

III. Discussion

At the hearing, the Division's representatives elaborated on the explanation provided in the April 7 letter, explaining that the physician did not provide documentation in support of the claim that Ms. O would lose weight without the nutrition shakes. Ms. O's testimony on this point, however, was credible and emphatic. She testified that over the many years since her jaw joint replacement surgery, she has learned that it is a losing battle for her to try to obtain adequate nutrition through pureed or soft foods.¹¹ She explained that recently she has been purchasing nutrition shakes at Sam's Club (where they have only been sporadically available),

⁶ *Id.*

⁷ Ms. O testified that she also suffers from fibromyalgia.

⁸ Ms. O's determination to reduce her dependence on prescription pain medications is commendable.

⁹ *Id.*

¹⁰ Exh. D1.

¹¹ O testimony.

paying for them out of pocket on a very limited income. She also testified, credibly, that in recent months when she has not had a regular supply of nutrition shakes she has lost weight.¹² Ms. O's medical documents include a contemporaneous record documenting that she has lost weight in recent months (although the documented amount is less than Ms. O's estimate of her weight loss).

In arguing at the hearing that the physician's request for payment authorization did not "meet Alaska Medicaid guidelines," the Division relied on 7 AAC 120.240(2). That regulation provides that Medicaid payment can be authorized for oral nutritional products, such as nutrition shakes, if they are "certified as medically necessary" by the provider "on a form provided by the department;" the certification "must indicate that sufficient caloric or protein intake is not obtainable through regular, liquefied, or pureed food." Citing this regulation, the Division argued that Ms. O's physician failed to document that sufficient caloric intake is "not obtainable" in her case through pureed food. In this context, Ms. Rice testified that she needed to see evidence demonstrating Ms. O's weight loss and explaining how she could obtain adequate nutrition by drinking only nutrition shakes, which would provide her with only about 900 calories per day.¹³

First, it must be noted that the Division's April 7, 2015 denial letter did not cite 7 AAC 120.240(2) or provide any specific explanation for the denial, so arguably the Division's notice of the denial was defective.¹⁴ However, even assuming that the notice was effective and the Division was entitled to rely on the regulation at hearing, the argument misses the mark in this case. It appears to assume that the choice between nutrition shakes and "regular, liquefied or pureed food" is an all or nothing proposition, i.e., that Ms. O and her physician needed to demonstrate that she can obtain no nutrition from pureed food and that she can (and must) obtain adequate nutrition solely from nutrition shakes.

The Division's argument incorporates an overly literal interpretation of the regulation, in that it fails to acknowledge the possibility that a physician might determine a combination of nutrition shakes and pureed and softened foods to be medically necessary. In this case, Ms. O's physician recognized this distinction. The physician's notations on the certificate of

¹² *Id.*
¹³ Rice testimony.
¹⁴ *See* 7 AAC 49.070.

medical necessity indicated that Ms. O “is unable to chew food consistently to consume enough calories,” and “she loses weight [without] supplements;” the physician then prescribed “Ensure 4x daily ... in addition to soft food.”¹⁵ The physician’s certification regarding these facts and the medical necessity of the nutrition shakes,¹⁶ combined with Ms. O’s credible testimony regarding her physical condition and eating difficulties, are more than sufficient to satisfy the requirements of 7 AAC 120.240(2).

IV. Conclusion

Ms. O’s physician certified the medically necessity of Ensure nutrition shakes, and Ms. O’s own credible testimony supported and corroborated the physician’s certification. The Division’s denial of payment authorization for the nutrition shakes, therefore, is reversed.

DATED June 8, 2015

Signed _____
Andrew M. Lebo
Administrative Law Judge

Adoption

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

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 23rd day of June, 2015.

By: *Signed* _____
Name: Rebecca L. Pauli
Title: Administrative Law Judge

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

¹⁵ Exh. E2 (emphasis added).

¹⁶ “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. Reagan*, 886 F.2d 194, 200 (8th Cir. 1989).