

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

IN THE MATTER OF:

H N

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OAH No. 13-0067-MDS
Agency No.

DECISION

I. Introduction

On December 4, 2012, H N’ medical provider submitted a request for Medicaid travel benefits for H and her family to travel to Seattle for a third opinion regarding the need for surgery to treat her neuroblastoma. On December 14, 2012, the Department of Health and Social Services, Division of Health Care Services, through its contractor Xerox State Healthcare, LLC (division), denied the travel request. B N, H’s mother, requested a Fair Hearing on January 15, 2013.

Ms. N’ hearing was held on February 21, 2013. B N appeared by telephone. Gerry Johnson represented the division by telephone. The hearing was recorded.¹

Based on the record as a whole and after due deliberation, the division’s decision denying the application for travel benefits is AFFIRMED.

II. Facts

H N, age 2, was diagnosed with neuroblastoma in March 2012.² Chemotherapy did not shrink her tumor, so her local medical provider recommended surgery to remove it. B N requested that a doctor at New York hospital Sloan-Kettering provide a second opinion, which was done by a surgeon who remotely reviewed H’s records.³ He recommended against surgery based on a recent experience he had in a similar case. According to H’s doctor, “there is not great consensus within the field of oncology regarding the necessity of surgery” for this type of tumor.⁴ Surgery remains an option, however, and B N followed the Sloan-Kettering surgeon’s recommendation and opted at that time not to go forward with surgery.

¹ Ms. N indicated she would be submitting a letter from her doctor by email to the OAH email address, and the record was reopened to allow her to do that, but no letter was received from her.

² Exh. E, pg. 4.

³ *Id.*

⁴ *Id.*

Ms. N subsequently requested a third opinion regarding H's treatment from Seattle Children's Hospital in Seattle.⁵ H's local medical team is supportive of Ms. N' attempt to seek an additional opinion and acknowledges the "complexity" of her situation.⁶ However, according to Dr. Laura Schultz, H's physician, a third opinion is not "medically necessary" because "[a]ny specific standard medical treatment for [H's] type of neuroblastoma," including surgery, is available in Anchorage.⁷

On December 4, 2012, No Name Medical Center submitted a request for Medicaid travel benefits for airfare, lodging and meals for H and her family to travel to Seattle for a third medical opinion. On December 14, 2012, the Department of Health and Social Services, Division of Health Care Services, through Xerox State Healthcare, LLC (division), denied the travel request. The denial stated:

The Children's Hospital at No Name submitted a travel request for airfare, lodging and meals for you to travel to Seattle Children's Hospital for a third opinion. Your provider indicated that the family's desire to seek this opinion is not medically necessary. Any specific standard medical treatment for this type of neuroblastoma is available in Anchorage, Alaska, including surgery. The request for transportation services is denied. The service for which transportation and accommodations is requested is not considered to be medically necessary. 7AAC 120.405(a)(1).^[8]

B N requested a Fair Hearing on January 15, 2013.

III. Discussion

The issue in this case is whether the division correctly denied Ms. N' request for Medicaid travel benefits to Seattle for a third opinion regarding treatment for H's neuroblastoma. Ms. N⁹ has the burden of proving by a preponderance of the evidence¹⁰ that her request should have been approved.

Ms. N primarily had factual disagreements with Dr. Schultz's letter. She claims that Dr. Schultz had earlier written another letter stating that if H's condition changed that she would be referred out of state. Ms. N also claims that she was not seeking a third opinion in Seattle, but

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Exh. D at pg. 1.

⁹ 2 AAC 64.290(e).

¹⁰ Preponderance of the evidence is defined as: "Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. *Black's Law Dictionary* 1064 (5th Ed. 1979).

rather, additional treatment there because the neuroblastoma specialists at Seattle Children’s Hospital have more experience than H’s local doctors. Finally, Ms. N asserts that the local oncology surgeon told her that he would not be comfortable doing the surgery, and that is why she wanted to seek treatment for H in Seattle.

The division asserts that it was correct to deny Ms. N’ application for Medicaid travel benefits because a third opinion is not “medically necessary,” and because a patient cannot “self-refer” a travel request. The division added that if another medical provider determined that additional treatment out of state is “medically necessary,” that Ms. N should submit another request for travel benefits immediately.

Medicaid was established in 1965 to provide medical assistance to certain needy individuals and families.¹¹ It is a cooperative federal-state program that is jointly financed with federal and state funds.¹² In Alaska, the Department of Health and Social Services (department) administers the Medicaid program in accordance with applicable federal and state laws and regulations.

The cost for transportation and accommodations are provided by the department, so long as, among other things, the services are “provided to assist the recipient in receiving medically necessary services” and “those services are not available in the recipient’s community”¹³

The federal Medicaid Act does not define “medical necessity.”¹⁴ Absent a federal definition of medical necessity, the responsibility for defining medical necessity is left to the states. Similarly, the Alaska Medicaid regulations currently do not define the term “medically necessary.” Research indicates that although the term “medically necessary” is used in 42 different regulations with the Alaska Administrative Code, it is not defined except in the limited context of mental health rehabilitative services. The Alaska Statutes also do not provide an applicable definition of when a treatment is “medically necessary.”

Prior to 2010, regulation 7 AAC 43.860(p) defined “medically necessary and appropriate” as follows:

(p) In this section . . . (2) “medically necessary and appropriate” means

¹¹ 42 USC § 1396 *et. seq.*

¹² Wilder v. Virginia Hospital Association, 496 U.S. 498, 501, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

¹³ 7 AAC 120.405(a)(1) & 7 AAC 120.405(b)(1).

¹⁴ Thie v. Davis, 688 N.E.2d 182 (Ind.App.1997).

(A) reasonably calculated to diagnose, correct, cure, alleviate, or prevent the worsening of medical conditions that endanger life, cause suffering or pain, result in illness or infirmity, threaten to cause or aggravate a disability, or cause physical deformity or malfunction; and

(B) used because an equally effective more conservative or substantially less costly course of medical diagnosis or treatment is not available or suitable for the Medicaid recipient requesting the service; for purposes of this subparagraph, “course of treatment” includes mere observation or, if appropriate, no treatment at all.

However, this regulation was repealed in 2010, so as a result, neither the Alaska Statutes, nor the Alaska Administrative Code, contain a definition of “medically necessary.”

Ms. N is requesting Medicaid travel benefits to Seattle for the purpose of obtaining either a third opinion regarding H’s condition or additional treatment from oncology specialists at Seattle Children’s Hospital. Regardless of the ultimate purpose of having H seen in Seattle, H’s Anchorage doctor has stated that the trip is not “medically necessary” at this time, and also that the necessary treatment for H is available in Anchorage. Other than her testimony, Ms. N did not provide sufficient evidence to refute Dr. Schultz’s letter and establish that a trip to Seattle would be “medically necessary.” Ms. N stated she is in possession of another letter Dr. Schultz had written that says H would be referred out of state, but she did not provide the letter as agreed after the hearing.

According to the division, if H’s condition changes and either her current doctor or another provider indicate the trip would be “medically necessary,” that Ms. N should submit another request for Medicaid travel benefits.

IV. Conclusion

The division’s determination that H N is not entitled to receive Medicaid travel benefits to Seattle should be affirmed. Ms. N did not establish that a trip would be “medically necessary” at this time.

V. Decision

The division's December 14, 2012 decision denying Ms. N' request for Medicaid travel benefits to Seattle is AFFIRMED.

DATED this 4th day of April, 2013.

Signed _____
Kay L. Howard
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 16th day of April, 2013.

By: Signed _____
Name: Kay L. Howard
Title: Administrative Law Judge

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