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

In the Matter of:	)	
	)	
K X	)	OAH No. 13-0247-MDS
	)	HCS Case No.
	)	Medicaid ID No.

DECISION

I. Introduction

The Division of Health Care Services (Division) denied K X' request for prior authorization of certain Medicaid-funded travel. The Division initially denied Mr. X' travel prior authorization request on the basis that the suboxone program was already available in Mr. X' community.[1] The Division later issued an amended denial notice, this time asserting that travel outside Mr. X' community of residence, for the purpose of suboxone treatment, is not medically necessary.[2]

This decision concludes that the suboxone program is no longer available to Mr. X in his community of residence (No Name). Although the unavailability of the suboxone program to Mr. X in No Name may or may not have resulted from Mr. X' own actions, the applicable Medicaid regulations do not make any distinction on that basis. This decision further concludes that Mr. X' travel to another community to continue suboxone treatment is medically necessary. The Division decision to deny Mr. X' prior authorization request for the medical travel is reversed.

II. Facts

A. Mr. X' Relevant Treatment History

Mr. X has post-traumatic stress disorder (PTSD) and bipolar disorder.[3] He has had opiate dependency problems and takes suboxone.[4] Suboxone is a medication approved for the treatment of opiate dependence.[5] Suboxone is less tightly controlled than methadone (previously the main treatment for opiate dependence) because it has a lower potential for abuse and is less dangerous in

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1 Ex. D1.

2 Ex. F2. It is unclear from the record whether the Division's "not medically necessary" basis for denial was meant to *completely replace* the original "already available in Mr. X' community" basis for denial, or whether the later argument was asserted *in addition to* the original argument. Accordingly, this decision addresses both arguments.

3 K X hearing testimony.

4 Undisputed hearing testimony.

5 *See* U.S. Food and Drug Administration website at http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm191523.htm (date accessed April 9, 2013).

case of an overdose.[6] However, it is still classified as a Schedule III substance under the Controlled Substances Act (CSA), and only doctors with the necessary Drug Enforcement Agency (DEA) identification number are able to prescribe suboxone.[7]

V T, M.D. is a Fellow of the American Psychiatric Association.[8] The parties agree that she is the only physician in No Name who either can or will prescribe suboxone. She began treating Mr. X for behavioral health issues in January 2012 or before.[9] Part of this treatment involved the dispensing of suboxone to Mr. X for opioid misuse and dependence.[10]

Dr. T and Mr. X had a somewhat difficult doctor-patient relationship.[11] On August 7, 2012 Mr. X entered into a "Patient Treatment Contract" with Dr. T.[12] Pursuant to this contract, Mr. X agreed, among other things, (1) not to obtain medications from any doctors, pharmacies, or other sources without informing Dr. T; (2) to abstain from marijuana, opioids, and other addictive substances; and (3) to provide random urine samples.[13] The contract also provided that any violation of its terms would constitute grounds for Dr. T's termination of treatment.[14]

At some time prior to December 18, 2012 Mr. X' primary care provider (PCP), Dr. Q, prescribed him two diazepam (valium) tablets to help relieve the claustrophobia and related anxiety associated with taking an MRI.[15] Mr. X took one tablet prior to the MRI, and took the remaining tablet a few days later when his children were causing him stress.[16] On December 18, 2012 and January 28, 2013 Mr. X' urine was tested; the tests were positive for marijuana and benzodiazephines.[17] Sometime between January 21st and February 4, 2013 Dr. T told Mr. X that she would not be filling his suboxone prescription any longer due to the urine test results indicating

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6 *Id.*

7 *Id.*

8 Ex. G2.

9 Ex. G5.

10 Ex. G2.

11 *See* Dr. T's chart notes at Exs. G5 - G9; *see also* K X hearing testimony. However, based on the rationale of this decision, it is not necessary to decide the disputed factual issue of whether Mr. X actually breached his contract with Dr. T, or whether Dr. T otherwise had good cause to terminate her professional relationship with Mr. X.

12 Ex. G2; K X hearing testimony.

13 Ex. G2.

14 Ex. G2.

15 Ex. E4; K X hearing testimony. Mr. X testified that he told Dr. T that Dr. Q had prescribed these medications for him; Dr. T's hearing notes appear to indicate that he did not. However, based on the rationale of this decision, it is not necessary to resolve this disputed factual issue.

16 Ex. E4.

17 Exs. F1, G3, G4. Diazepam (valium) is a member of the benzodiazephine class of drugs.

his use of benzodiazepines.[18] Mr. X then contacted his PCP's office and requested a referral to either of two physicians in No Name who prescribe suboxone.[19] Before that referral occurred, Mr. X' PCP referred Mr. X to Dr. H T in No Name for continuing suboxone treatment.[20]

B. Relevant Procedural History

On February 13, 2013 Mr. X' PCP sent a request for prior authorization to Xerox State Healthcare, LLC (Xerox).[21] The request sought approval for travel by Mr. X from No Name to No Name and back.[22] On February 22, 2013 Xerox notified Mr. X that it had denied his prior authorization request.[23] The denial letter[24] stated in relevant part as follows:

> You have requested travel to No Name to see a physician for the suboxone program. This service is available in No Name. The requested suboxone program is available in the State of Alaska and/or recipient's community of residence. 7 AAC 120.405(b).

On February 18, 2013 Mr. X requested a hearing to contest the Division's decision.[25] On March 13, 2013 the Division issued a revised denial notice which stated in relevant part:[26]

> On February 13, 2013 your provider requested transportation for transfer of care to a No Name physician for the Suboxone program. Additional information obtained from Dr. T's office indicates that your . . . urine tested positive for Benzodiazephines on 12/18/12 and again on 1/28/13. Testing positive for Benzodiazephines is a violation of your Patient Treatment Contract signed by you on 8/7/12. Due to the violation, you were discharged from care as you were no longer a candidate for Suboxone treatment. The request for transportation to a No Name physician for the Suboxone program is denied as it is not medically necessary. The Department will pay a provider for only those transportation and accommodation services that are provided to assist the recipient in receiving medically necessary services. 7 AAC 120.405.

Mr. X' hearing was held on March 21, 2013. Mr. X participated in the hearing by phone, represented himself, and testified on his own behalf; his wife M also testified. Gerry Johnson participated in the hearing by phone and represented the Division. Pharmacist Chad Hope and

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[18] Exs. E4, G8. Again, the parties differ as to whether Dr. T had been advised of and/or consented to Mr. X' use of these drugs. However, because of the rationale of this decision it is not necessary to resolve this disputed factual issue.

[19] Ex. E4.

[20] Ex. E4.

[21] Exs. E2 - E6. Xerox reviews requests for prior authorization under a contract with the Department of Health and Social Services (DHSS) (Ex. D1).

[22] Exs. E2 - E6.

[23] Ex. D.

[24] Ex. D1.

[25] Ex. C.

[26] Ex. F.

Health Program Manager Jeri Powers participated by phone and testified for the Division. The record closed at the end of the hearing.

III. Discussion

The original issue in this case, as framed by the Division's initial (February 22, 2013) denial notice, was whether the suboxone program for which Mr. X' travel authorization was requested is available in Mr. X' community.[27] The Division's revised denial notice dated March 13, 2013 asserted that suboxone treatment is not medically necessary for Mr. X.[28] It is not clear whether the second denial notice was meant to completely replace the first notice, or whether the second notice was meant to supplement the original notice. Accordingly, this decision addresses the arguments asserted in both denial notices.

A. Is Suboxone Treatment Available to Mr. X in No Name?

The Division's first basis for denial asserts that the suboxone treatment is available in Mr. X's community of residence (No Name). The Division is correct that 7 AAC 120.405(b)(2) requires Medicaid payment for transportation and accommodation services only when the services at issue are not available in the recipient's own community. However, the evidence in the record indicates that Dr. T is the only doctor in No Name who provides suboxone treatment. The parties agree that Dr. T will no longer provide suboxone treatment (or any other services) to Mr. X. Since there is only one doctor in No Name who prescribes suboxone, and that doctor will not provide suboxone for Dr. X, it is clear that suboxone treatment is not available to Mr. X in his community of residence.

The Division's response is that Mr. X *caused* suboxone to no longer be available to him in No Name by breaching his treatment contract with Dr. T. Mr. X may or may not have violated his treatment agreement. However, even assuming that he did, this does not allow the Division to deny an otherwise valid transportation request on that basis. Under Medicaid, the remedy for a recipient's overuse or misuse of services is to place the recipient in the Care Management Program.[29]

The problem with the Division's interpretation of 7 AAC 120.405(b)(2) in this case is illustrated by the following example. Suppose a Medicaid recipient lives in a community where the desired service is available, but the providers in that community do not accept Medicaid. Is the treatment still "available in the recipient's community of residence" because it is available to those

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[27] Ex. D1.

[28] There was some confusion on this point at hearing because the Division's revised denial notice was not received by the Office of Administrative Hearings until late the day prior to the hearing.

[29] *See* 42 CFR § 431.54 and 7 AAC 105.600.

who have private insurance? No. It is therefore clear that, under 7 AAC 120.405(b)(2), an otherwise valid transportation request can only be denied if the desired services are available *to the particular recipient* is his or her community of residence. [30] The Division was therefore not correct to deny Mr. X' transportation request on the grounds that suboxone treatment is available to him in No Name.

B. Is Travel for Continued Suboxone Treatment Medically Necessary?

The requirement that medical services be "medically necessary" in order to be funded by Medicaid has its basis in 42 U.S.C. § 1396, which states in relevant part that the purpose of the Medicaid program is to enable each state to furnish medical assistance to individuals whose income and resources are insufficient to meet the cost of *necessary medical services*.[31] This language is now construed as requiring that all state Medicaid programs cover all medically necessary services.[32] However, neither the federal Medicaid Act nor its accompanying regulations define "medical necessity."[33] Absent a federal definition of medical necessity, the responsibility for defining medical necessity is left to the states.[34]

Many states have adopted their own regulations defining "medical necessity" or "medically necessary." The Alaska Medicaid regulations do not, however, provide a generally applicable definition of either term.[35] Although the term "medically necessary" is used in 42 different regulations within the Alaska Administrative Code, it is not defined there except in the limited context of mental health rehabilitative services. Similarly, the Alaska Statutes do not provide an applicable definition of when a treatment is "medically necessary."

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[30] This conclusion is reinforced by the fact that the Medicare Act is remedial and therefore to be construed liberally to effectuate the congressional purpose of insuring the availability of adequate medical care throughout this country. *See Pippin v. Richardson*, 349 F.Supp. 1365, 1369 (M. D. Fla. 1972); *see also Cowan v. Myers*, 187 Cal.App.3d 968, 995, 232 Cal.Rptr. 299, 316 (1986), *cert. denied* 484 U.S. 846, 108 S.Ct. 140, 98 L.Ed.2d 97 (1987) (in general, Medicaid statutes should be construed in favor of coverage for the recipient); *TLC Home Health Care, L.L.C. v. Iowa Dept. of Human Services*, 638 N.W.2d 708, 713 (Iowa 2002) (same).

[31] *See Rush v. Parham*, 625 F.2d 1150, 1155 note 9 (5th Cir.1980).

[32] *Beal v. Doe*, 432 U.S. 438, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977).

[33] *Thie v. Davis*, 688 N.E.2d 182 (Ind.App.1997); *Pharmcare Oklahoma, Inc. v. State Health Care Authority*, 152 P.3d 267 (Okla. Civ. App., 2nd Div., 2006).

[34] *Id.*

[35] Prior to February 1, 2010, 7 AAC 43.860(p) defined "medically necessary and appropriate" as follows:

> (p) In this section . . . (2) "medically necessary and appropriate" means
> (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, 7 AAC 43.860(p) was repealed on February 1, 2010.

In the absence of an applicable statutory or regulatory definition, it is appropriate to look at how the courts have defined the term "medically necessary" in Medicaid cases. The United States Supreme Court has broadly defined "medically necessary" as a professional judgment made by a physician considering the physical, emotional, psychological, and familial factors relevant to the well-being of the patient.[36] The Medicaid statutes and regulations create a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment.[37]

The Division asserts that suboxone treatment is no longer medically necessary for Mr. X because Dr. T discharged him as a patient. However, there is no evidence in the record indicating that Dr. T ceased treating Mr. X because he no longer needed suboxone treatment. Rather, all the evidence indicates that Dr. T refused to continue treating Mr. X because she believed, rightly or wrongly, that he had violated his treatment agreement. Further, the fact that Dr. Q was willing to refer Mr. X to another suboxone-dispensing physician, and the fact that this physician (Dr. T) was willing to accept the referral, shows that two physicians (one of them a treating physician) believe that suboxone treatment is still medically necessary for Mr. X, and that travel for that treatment is medically necessary. Finally, the Division did not submit any medical opinion to the contrary. Accordingly, the Division was not correct to deny Mr. X' request for Medicaid-funded travel on the basis that the travel, to obtain suboxone treatment, was not medically necessary.

IV. Conclusion

The suboxone program is no longer available to Mr. X in his community of residence (No Name), and Mr. X' travel to another community to continue suboxone treatment is medically necessary. Accordingly, the Division was not correct to deny Mr. X' request for prior authorization for the medical travel at issue, and the Division's decision is therefore reversed.

Dated this 17th day of April, 2013.

Signed
Jay Durych
Administrative Law Judge

[36] *See Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973); *Beal v. Doe*, 432 U.S. 438, 444, 97 S.Ct. 2366, 2371, 53 L.Ed.2d 464 (1977).
[37] *Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989).

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 29th day of April, 2013.

By: *Signed*
Name: Jay D. Durych
Title: Administrative Law Judge, DOA/OAH

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