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

In the Matter of	)	
	)	
D Z	)	OAH No. 21-0873-MDX
	)	Agency No.

DECISION

I. Introduction

D Z's medical provider submitted a travel preauthorization and accompanying travel escort services request for her to travel from her home in City A, Alaska, to City B, Alaska, for cardiac treatment. The Department of Health and Social Services, Division of Health Care Services (Division) approved authorization of the medical services but denied the request for travel escort, based on its conclusion that an escort was not medically necessary.

Ms. Z requested a fair hearing to contest the denial. A hearing was held May 25, 2021 with the record held open for additional briefing

Because Ms. Z established that the denial of travel authorization was incorrect, the Division's denial is reversed.

II. Facts[1]

A. Ms. Z's relevant medical history

D Z is a Medicaid recipient, and as such she is eligible for and receives Medicaid benefits for her health care. She lives in City A, Alaska, a rural community without significant medical resources. Ms. Z has a complicated medical history. Among other issues, her medical diagnoses include heart arrhythmia, hypertension, PTSD, anxiety, panic attacks, depression, chronic pain, and morbid obesity. Her heart condition required surgery to implant a pacemaker device in 2014. The surgery was done by Dr. L W. C, an electrophysiologist who works at the Medical Facility in City B.[2]

On March 15, 2021, Ms. Z's medical care provider, the Medical Facility, submitted a request for pre-authorization for round-trip travel for Ms. Z between City C and City B in order for her to attend a cardiac appointment regarding her persistent atrial fibrillation and adjust her pacemaker. The requested travel and accommodations were to take place March 16 and 17,

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[1] These facts were established by a preponderance of the evidence at the hearing.

[2] *See, In the Matter of D Z*, OAH 20-0074-MDX (Commissioner of Health and Social Services April 2020) p.2; Ex. F.

2021.[3] A request to approve her husband, X Z, as a medical escort accompanied the authorization request.[4] The preauthorization request was accompanied by a letter from Dr. C and nine pages of medical records.[5]

Dr. C's letter described Ms. Z's need for the medical treatment requested.[6] The nine pages of medical records accompanying the request for pre-authorization included significant detail regarding Ms. Z's cardiac issues. The records also included the following information regarding her mental health. Ms. Z has a history of pre-adolescent and possible adult sexual abuse. She also has a "history of depression and anxiety." She has "undergone mental health treatment for [her] history of PTSD, anxiety, and panic attacks." At the time the medical records were prepared on February 10, 2021, Ms. Z was experiencing "change in appetite, fatigue, headache, nocturnal movement, and poor sleep" associated with on-going anxiety and current chest pain, as well as other pain throughout her body.[7]

B. Prior Contact between Ms. Z and the Division

In addition to the pre-authorization request and accompanying physician's letter and medical records, the Division also had access to two prior decisions by the Commissioner of the Department of Health and Social Services regarding Ms. Z's health to review in conjunction with the request.[8] Those decisions primarily involve whether appropriate cardiac care can be provided for Ms. Z in City C or whether, as both decisions conclude, the Division should authorize travel to City B. The decisions also include explicit findings that Ms. Z's medical diagnosis included "PTSD, anxiety, panic attacks and depression" prior to 2018.[9] Both decisions were issued less than a year before Ms. Z's March 15, 2021 request for travel escort.

C. Relevant Procedural History

The Division determined the travel escort request should be denied because medical justification sufficient to allow approval of the request had not been provided. The Notice of Adverse Action sent to Ms. Z states:

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3 Ex. E.
4 *Id.*
5 Ex. F.
6 *Id.*
7 *Id.*
8 *In the Matter of D Z*, *supra*; *In the Matters of X Z and D Z*, OAH 19-1060/1161-MDX (Commissioner of Health and Social Services (January 2021). Notably, the Division included the former decision which ruled partially in its favor in its position statement to the Office of Administrative Hearings but did not include the latter decision which was more critical of its prior conduct.
9 Ex. G., p. 2.

> Your provider requested you travel to City B with an escort. This request for escort is denied as the medical justification submitted does not warrant medical necessity for an escort.
>
> 7 AAC 120.430(a)(2). The Department will only approve transportation and accommodation services for an escort to accompany a recipient during travel authorized by the department for medical treatment if the recipient is over 18 years of age or older and the department determined that the escort is medically necessary for the recipient.[10]

The Notice of Denial provided to the Medical Facility on March 23, 2021 was more succinct. It stated: "Escort denied. We do not approve escort for anxiety."[11]

Ultimately, Ms. Z traveled to City B for her cardiac appointment at a time rescheduled to coincide with her husband's own Medicaid approved travel.[12]

Ms. Z appealed the denial of her request for travel escort.[13]

D. The Hearing.

The hearing was held May 25, 2021 with the record held open for additional briefing. Ms. Z represented herself, testified on her own behalf, and called her husband X Z as a witness. The Division was represented by Laura Baldwin. Medical assistance administrator and travel manager Maria Pokorny and health care program supervisor Carrie Silvers testified on behalf of the Division.

At the hearing, the Division acknowledged that the statement contained in the denial notice to the Medical Facility was not correct. The Division does approve travel escort for recipients with anxiety if the escort is medically necessary to assist the recipient.[14] Ms. Pokorny explained that, generally speaking, it is standard practice for the Division to deny requests for travel escorts. The Division does not authorize travel escort to assist recipients who suffer travel or treatment induced anxiety unless there is evidence of an established diagnosis and history of treatment.[15] Ms. Pokorny reviews a "list of things" to determine whether an established diagnosis and history of treatment exist. She testified neither the letter from Dr. C nor the accompanying medical records included sufficient information on which to base a finding Ms. Z

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10 Ex. D., p. 1.
11 Ex. E. p. 7.
12 D. Z testimony.
13 Ex. C.
14 Pokorny testimony; Silvers testimony.
15 Pokorny testimony.

suffered from anxiety or another mental health disorder or why she needed a medical escort to assist her. Ms. Pokorny testified she called the Medical Facility but the unnamed assistant she spoke with could not elaborate beyond the information already submitted. Therefore, she denied the request.[16]

Program manager Carrie Silvers agreed with Ms. Pokorny that the Division can and has approved medical escort for adult recipients with anxiety in the past. Ms. Silvers then testified that the Division was unaware Ms. Z was diagnosed with anxiety when it denied the pre-authorization request for medical escort. She specifically stated, "We don't know she has this."[17]

When questioned, Ms. Silvers acknowledged that she was present at two prior administrative hearings where Ms. Z's medical diagnosis, including anxiety, were discussed. She stated she discounted that information. Ms. Silvers testified she also disregarded the Commissioner's prior findings that Ms. Z had an on-going diagnosis of anxiety, depression, and PTSD because she "did not know what evidence" he used to make that decision.[18]

Ms. Silvers justified her position by testifying that the Division's computer records-which are the primary source of information in reviewing requests for authorization-are not programmed to store detailed information regarding Medicaid recipients for more than a year and did not include the information that Ms. Z was diagnosed with anxiety and PTSD. According to her testimony, the system was designed to coordinate with insurance billing codes which means details regarding the Medicaid recipient are not available when reviewers pull up a recipient's records.[1] Therefore, unless each request for pre-authorization includes all information about the recipient, including information previously presented to the Division, the Division will deny authorization.[19]

Finally, Ms. Silvers testified that she reviewed the records submitted in support of Ms. Z's medical travel authorization and travel escort request and, in her opinion, the information did not contain sufficient information to establish a diagnosis of anxiety or a history of treatment.

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16 *Id*.
17 Silvers testimony.
18 *Id.*
19 *Id.*

Further, based on those records, she did not perceive what benefit a travel escort would provide.[20]

In their testimony, Ms. and Mr. Z stated that Ms. Z requested a hearing primarily because the basis for the Division's denial was never made clear to her; her goal was to gain a better understanding of why the Division repeatedly refuses to authorize her requests for travel, despite knowing the full extent of her cardiac and other medical problems. In the past few years, the Division has denied travel authorization for multiple medical appointments for her. Each time Ms. Z appealed those decisions they were overturned, but the repeated "no-shows" and reschedules caused by the Division's denials have caused care providers to be loath to give her appointments.[21] Ms. Z testified that if she knows what information the Division needs, she can coordinate more closely with her care provider to submit it.[22]

Ms. and Mr. Z stated they believe that in the future the Division will likely respect directives from the Commissioner that providers in City C lack sufficient medical expertise to address Ms. Z's cardiac care, and, therefore, will authorize travel. They are grateful for prior help by the Division. However, they expressed concern that in the past the Division denied Ms. Z's travel requests despite being aware of her complicated medical history because the Division disagrees with her physician's plan of care in general. Pointing to language in the Commissioner's January 2021 opinion, they expressed additional concern the Division might deny Ms. Z's future requests for travel escort in retaliation for prior successful challenges to its decisions regarding lack of appropriate medical resources near her home.[23] Despite those concerns, both Ms. and Mr. Z testified that they were willing to make a fresh start and work with the Division to provide the information it needs.[24]

Ms. Z provided information regarding her need for a travel escort and the duties her husband would fulfill. Ms. and Mr. Z testified that authorization for Ms. Z to travel but without an escort is not helpful because she is unable to fully participate in her treatment without support. Ms. Z cannot participate fully in her treatment if she is having anxiety attacks or suffering from

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20 *Id.*

21 D. Z testimony; X. Z testimony

22 D. Z testimony.

23 X. Z testimony.

24 D. Z testimony; X. Z testimony. Division representatives Silvers and Pokorny testified that they, too, looked forward to an improved working relationship with the Zs in the future.

PTSD. Traveling alone is a known trigger for her. Being alone with men is also a known trigger.[25]

Ms. Z testified regarding the extent of her anxiety and PTSD and how they impact her ability to travel, be in strange places, or be alone with medical care providers, particularly men. It is unnecessary to discuss the trauma that led to Ms. Z's mental health issues. She credibly testified that a travel escort reduces that anxiety. When her anxiety is reduced, she is better able to cooperate with her physicians and remember what they tell her.[26]

In addition, according to Ms. Z, the Division was, or at least should have been, aware that she has crippling anxiety and PTSD. Not only has the Division received numerous medical authorization requests on her behalf in the past and participated in hearings regarding her overall condition, the Division has previously approved requests for accommodation for anxiety and PTSD. For example, for several years Ms. Z had a service dog to assist with her mental health. When she had the service dog, the Division routinely authorized travel for the dog to accompany her as medically necessary. The dog has since died, and Ms. Z has yet to obtain a replacement. In her opinion, the Division should not have an issue approving her husband as a medically necessary travel escort for her anxiety and PTSD when it previously approved the therapy dog escort. Her anxiety and PTSD remain the same; she will merely receive emotional stability from a substitute source.[27]

III. Discussion

A. Burden of proof

Ms. Z, as the party requesting the hearing, bears the burden of proof to establish, by a preponderance of the evidence, that the Division's denial of travel authorization was incorrect.[28] "Preponderance of the evidence" means that a fact is shown to be more likely true than not true.[29]

The *de novo* standard of review applies to both the law and facts in this case.[30] Here, evidence was presented at the hearing that was not available on April 22, 2021, when the

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25 *Id*.
26 *Id.*
27 D. Z testimony.
28 7 AAC 49.135.
29 *See, Robinson v. Municipality of City B,* 69 P.3d 489, 495 (Alaska 2003).
30 *See* ,*In the Matter of L.D.,* OAH No. 18-0011-MDS (Commissioner of Health and Social Services 2018) pp. 9-11. (Available online at https://aws.state.ak.us/OAH as are all OAH precedent cited herein).

Division's decision was made.[31] The Administrative Law Judge (ALJ) may independently weigh the evidence and reach a different conclusion than Division staff, even if the original decision was factually supported. Likewise, the Commissioner is not required to give deference to factual determinations or legal interpretations of her employees.[32]

B. Defining medical necessity

Medicaid pays for recipient travel and escort as long as, among other things, the services are "provided to assist the recipient in receiving medically necessary services."[33] However, "neither the federal Medicaid Act nor the accompanying regulations define medical necessity."[34] The responsibility for defining medical necessity is left to each state.[35]

The pertinent portions of the applicable Alaska regulation, 7 AAC 105.110, simply state that Medicaid "will not pay for a service that is (1) not reasonably necessary for the diagnosis and treatment of an illness or injury … as determined upon review by the department," or "(2) not … medically necessary in accordance with criteria established under [Department regulations] or by standards of practice applicable to the prescribing provider."[36] The determination of whether a service is medically necessary must be made on a case-by-case basis, taking into account the particular needs of the benefit recipient.[37]

Some guidance exists on how to do so. First, although the treating physician is not the sole arbiter of whether a treatment is medically necessary, the physician's opinion is entitled to weight.[38] 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."[39] What is "medically necessary" is ultimately a decision to be made by the treating physician rather than an administrative agency.[40] An individual's physician's opinion regarding whether a treatment is necessary is

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31 Ex. D., p.1.

32 *In the Matter of L.D., supra; In the Matter of F.D.*, OAH No. 15-0540-MDS (Commissioner of Health and Social Services 2015).

33 7 AAC 120.405.

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

35 *In the Matter of L.D, supra.*

36 7 AAC 105.110(1), (2).

37 *In the Matter of L.D., supra,* at 9-11.

38 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996).

39 *Doe v. Bolton*, 410 U.S. 179 (1973); *Beal v. Doe*, 432 U.S. 438, 444 (1977).

40 *Id.; See also Vista Hill, Inc. v. Hecklar*, 767 F.2d 556, 561 (9th Cir. 1985); *Pinneke v. Preisser* , 623 F.2d 546, 550 (8th Cir. 1980).

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.[41] More weight is given to a treating physician's opinion than the opinions of those who do not treat a claimant.[42]

Second, the professional who evaluates the request for the Division must rely on objective standards to guide the assessment decision. Those standards include professionally established "norms" of care, diagnosis, and treatment. Professional norms permit differing but acceptable modes of treatment so long as they are "within the range of appropriate diagnosis and treatment of such illness or health condition, consistent with professionally recognized and accepted patterns of care."[43]

Lastly, the totality of circumstances is considered.[44] This includes the Medicaid recipient's overall health status, the risks and consequence of having or foregoing treatment, the existence of other options, and the probable success of the plan of care.

C. The travel escort was medically necessary

The Division's denial determination in this case was based on 7 AAC 120.405(a)(1), which covers Medicaid "transportation and accommodation covered services." The regulation provides that Medicaid "will pay a provider for only those transportation and accommodation services that are provided to assist the recipient in receiving medically necessary services." A procedure that may benefit a member is not always covered as medically necessary under Medicaid.[45] However, the line between a treatment that is merely "beneficial" and one which is "medically necessary" is often only a matter of degree and can be the subject of reasonable disagreement.

Whether a procedure is medically necessary is a question of fact. When determining whether a service is medically necessary the authorization or claims administrator should consider the member's health status, peer-reviewed medical literature, reports and guidelines from nationally recognized health care organizations, recognized professional standards, the opinion of health professionals in the health specialty involved, and any other relevant

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41 *Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989).

42 *Lester v. Chater*, 81 F.3d at 830-31 (An examining physician's opinion is "entitled to greater weight than the opinion of a non-examining physician.")

43 42 U.S.C. § 1320c-5(a).

44 *In the Matter of L.D., supra,* at 9-11.

45 *Id.*

information in light of the Medicaid recipients personal records.[46] Whether treatment is medically necessary looks to the existence of benefit as well as whether the approach is supported or corroborated by medical literature or an explanation by a health care professional as to why, in this case, the procedure was medically necessary.[47] Here, the facts to be considered include Ms. Z's health status, the contents of her medical records, and generally accepted medical practices for when a medical escort is considered medically necessary for a sex abuse survivor diagnosed with anxiety and PTSD who will be required to disrobe as part of her medical treatment.

The Division did not dispute that medical escorts can be medically necessary for recipients with Ms. Z's diagnosis and history. The Division did not argue that Dr. C's recommendation was inconsistent with generally accepted medical practices or outside acceptable modes of treatment. The Division did not reject Dr. C's request because it presented some risk to Ms. Z or was unlikely to be successful. The Division did not offer any reason why it failed to apply a presumption of accuracy to Dr. C's opinion and give it weight during the decision-making process. Instead, the Division took the position that it properly denied authorization for travel escort because it had insufficient information that Ms. Z had a diagnosis of anxiety with a history of treatment that could lead to the conclusion a travel escort was medically necessary. Both Division representatives testified the Division denied the request for travel escort because the Division had insufficient evidence that Ms. Z had an anxiety diagnosis or had been treated for anxiety in the past.[48]

The Division's conclusion was not supported by the evidence. First, the medical records accompanying the March 2021 request for travel escort contain explicit details regarding Ms. Z's anxiety diagnosis and a lengthy history of treatment for anxiety and co-occurring PTSD. The records document a diagnosis of anxiety apparently since late adolescence or early adulthood with past mental health treatment. The records describe on-going current symptoms related to her anxiety and chest pain. The records received by the Division on March 15, 2021 standing alone established that a diagnosis and history of treatment for anxiety existed.

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46 *Id.*
47 *Id.*
48 Pokorny testimony; Silvers testimony.

Second, on two occasions, the Commissioner of the Department of Health and Social Services, the head of the Division, has specifically recognized that Ms. Z has established mental health diagnoses of anxiety and PTSD in addition to her other medical problems. This information cannot be disregarded by the Division.

Third, the Division's witnesses were personally present on repeated occasions when Ms. Z's health and diagnosis were discussed in detail on the record in contested adjudicatory hearings.[49]

More than a preponderance of evidence was presented to establish that the Division possessed information that Ms. Z had a diagnosis and history of treatment for anxiety. The denial of travel escort on the basis claimed cannot be upheld.

The Division also argued in alternative that even if Ms. Z had a history of diagnoses and treatment for anxiety and PTSD, the letter from Dr. C and medical records accompanying the request for travel escort authorization did not establish a sufficient nexus between her diagnoses and the need for assistance from the requested escort. While it is true that the records from Dr. C do not provide a description of the travel escort's anticipated duties, Dr. C is Ms. Z's treating physician and has an extensive history with her. His opinion on medical necessity was entitled to a presumption of correctness and weight that was not rebutted by the Division.[50]

As stated above, the Division did not reject Dr. C's request because it was inconsistent with professional standards or outside acceptable modes of treatment. Nor did the Division reject Dr. C's conclusion regarding medical necessity because the action requested presented some risk to Ms. Z or was unlikely to be successful. To the contrary, Ms. Z is at risk of less beneficial treatment without the medical escort. If she is not able to communicate accurately due to panic or anxiety, her care givers will receive a less complete picture of her needs. Similarly, if she experiences elevated blood pressure and heart rate, a correct diagnosis of her cardiac issues and proper reset of her pacemaker will be impacted. Given the information in her medical

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[49] Pokorny testimony; Silvers testimony.

[50] Ms. Pokorny testified that an unidentified person she spoke with in Dr. C's office could not provide additional detail. That out-of-hearing statement carried no weight with this tribunal. First, the Division should only be speaking with health care providers who have information about the request. If the employee does not know the answer, they should be requested to find and send the information. Second, the fact that an unnamed employee in the doctor's office does not know details regarding the physician's reasoning does not negate the physician's recommendation.

records regarding the purpose of her appointments in City B and testimony from the Zs, the probable success of Ms. Z's medical treatment will be increased with an escort.

In addition, the information in Dr. C's letter was not intended to be read in a vacuum. Its contents must be evaluated in light of the accompanying medical records, existing professional standards, the medical training and experience of the evaluator, and common sense. Read in that manner, the nexus between the anxiety that would be experienced by the victim of long-term sexual abuse who will be required to travel a long distance to disrobe for strangers and the need for mental health support is obvious. A sufficient nexus between Ms. Z's diagnoses and the medical necessity for a travel escort is clear from an educated, common-sense reading of the authorization request. The evidence was sufficient to establish it was more likely than not a medical necessity for the travel escort existed.

The Division's preference for more details in the authorization request regarding the rationale for the travel escort is commendable. More information is always better. However, the information in the authorization request established it was more likely than not that a travel escort was medically necessary for Ms. Z's cardiac appointment. Ms. Z's testimony at the hearing provided further, compelling justification.

On a final note, the hearing in this matter proceeded on somewhat untraditional lines that permitted the parties to exchange a significant amount of information with one another in a supervised setting. The parties did so in a thoughtful and open manner. It was clear the Division received information regarding Ms. Z's medical and mental health needs of which it was previously unaware. It was equally clear that Ms. and Mr. Z previously held some incorrect assumptions regarding how much information had been submitted to the Division in support of Ms. Z's medical requests in the past. Ms. Z testified that she will do her best in the future to ensure subsequent requests are more detailed now that she is aware of the limitations on the Division's computer record-keeping system. Before the hearing, Ms. Z assumed the reviewer could access all information previously submitted to the Division. It is anticipated that future contact between the parties will be improved by the cooperation and willingness to work with one another exhibited during the hearing.

IV. Conclusion

While the information accompanying the March 15, 2021 request for travel escort authorization could have been more detailed, Ms. Z met her burden to prove it was more likely than not that a travel escort was medically necessary for her scheduled March 16 and 17, 2021 cardiac treatment. The Division's denial of Ms. Z's requested travel authorization is Reversed.

Dated: September 1, 2021

Signed
Carmen E. Clark
Administrative Law Judge

Adoption

The undersigned, by delegation from 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 15th day of September, 2021.

By: *Signed*
Name: Carmen Clark
Title: Administrative Law Judge

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]