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

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| In the Matter of: | ) | |
| | ) | |
| D.J. | ) | OAH No. 22-0858-MDX |
| | ) | Agency No. |

# DECISION

## I. Introduction

D.J. is a Medicaid recipient. His medical provider requested a travel authorization for him to travel from his home in City A, Alaska to City B, Washington for specialized medical treatment. The Division of Health Care Services denied the request on the basis that there are medical providers in City C, Alaska who provide the same services. D.J. timely requested an expedited appeal of the Division's denial.

D.J.'s expedited hearing was held on November 3, 2022. He testified under oath. The Division was represented by Laura Baldwin, and provided testimony through its witness, Division Program Supervisor, Carrie Silvers. The evidence in this case demonstrates that D.J. has proven that it is more likely true than not true that his travel to Washington for treatment was medically necessary and that there were no medical providers in Alaska who could competently perform these services. Accordingly, the Division's denial of D.J.'s travel authorization is reversed.

## II. Facts

D.J. has a history of atrial fibrillation over the past approximately 10 years. He has had eight endocardial ablations to convert/control his heart rhythm. He was seen in 2020 about having a "surgical maze" procedure performed, but never followed through.[1]

The cardiac surgical maze procedure is used to treat an irregular heart rhythm. In doing so, a surgeon creates a pattern (maze) of scar tissue in the upper chambers of the heart. The scar tissue does not conduct electricity. As such, it interferes with stray electrical heart signals that can cause atrial fibrillation.[2] The maze procedure is relatively invasive, requiring the surgeon to access the heart by incising the breastbone and performing a cardiopulmonary bypass with a

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[1] Ex. F, p. 20.

[2] *See* https://www.mayoclinic.org/tests-procedures/maze-procedure/pyc-20384973#:~:text=Maze%20is%20a%20surgical%20procedure,tissue%20doesn't%20conduct%20electricity.

heart-lung machine to take over the work of the heart while the surgeon operates. It can require up to several days of hospital recovery time.[3]

The maze procedure is to be contrasted with the mini-maze procedure. The mini-maze procedure is usually performed by using several small incisions and inserting surgical tools, such as high-definition cameras and instruments, through the chest to access the heart. Similar to the maze procedure described above, a pattern of scar tissue is created to assist in creating interference with stray electrical heart signals that cause atrial fibrillation. Recovery time is minimal, and it can frequently be performed with little hospitalization.[4]

The mini-maze procedure is a newer form of treatment and as such, it is not as commonly employed and is used less frequently by cardiologists. In Alaska there are no cardiologists who perform the mini-maze procedure, however, there are several who perform the maze procedure.[5]

In Alaska, D.J. has been treated by Clinic A, Clinic B and Clinic C. These entities and their treating practitioners ultimately referred him to Doctor M with Clinic D in Washington. He has pre-surgery and surgery appointments scheduled with Doctor M to begin in Washington on Tuesday, November 8, 2022.[6]

There was a previous referral and travel authorization request made on or about September 23, 2022, by Clinic A for D.J.'s travel to Washington and treatment with Doctor M.[7] Although the faxed documentation for this referral and request is dated October 10, 2022, Ms. Silvers testified that it was likely initially made by phone on or about September 23, 2022. That is why the faxed referral/request documentation reflects the date of October 10, 2022, whereas the Division's ultimate denial reflects the earlier phoned referral and request date of September 23, 2022.[8]

The Clinic A request specifically references that: 1) D.J. was evaluated for treatment several times by Clinic B; 2) however, Clinic B does not perform the "*mini Maze procedure D.J. requires*;" 3) "[t]he next closest state competent to perform this surgery would be Washington;" and 4) he has appointments scheduled at Clinic D.[9]

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[3] D.J. Testimony; *See* https://www.pennmedicine.org/for-patients-and-visitors/find-a-program-or-service/heart-and-vascular/cardiac-arrhythmia/treatments-and-procedures/maze-procedure.

[4] D.J. Testimony; *See* https://www.pennmedicine.org/for-patients-and-visitors/find-a-program-or-service/heart-and-vascular/cardiac-arrhythmia/treatments-and-procedures/maze-procedure.

[5] Carrie Silvers Testimony.

[6] Ex. F; Carrie Silvers Testimony; D.J. Testimony.

[7] Ex. F, pp. 1-18; Ex. D, p. 6; Carrie Silvers Testimony.

[8] Carrie Silvers Testimony; Ex. 6.

[9] Ex. F, p. 2 (emphasis added). This document, a letter from Clinic C, was included within the documentation supporting the travel authorization request from Clinic A.

This was followed by a similar referral and travel authorization request made on October 4, 2022, by Clinic B for D.J.'s travel to Washington and treatment with Doctor M.[10] As with the earlier referral and request made by Clinic A, the Clinic B referral/request initially occurred on or about October 4, 2022, whereas the documentation from Clinic B reflects a later date of November 10, 2022.[11]

The Clinic B request and referral specifically recommends that D.J. undergo the surgical maze procedure.[12] It fails to reference the mini-maze procedure. However, on October 26, 2022, a subsequent letter was received from Doctor N with Clinic B. He indicates that they have treated D.J. since 2021, they do not offer the mini-maze procedure at Clinic B and they are unaware of any provider in Alaska who does.[13]

There were three separate travel authorization denials made by the Division based on the above-referenced referrals and travel authorization requests by Clinic A and Clinic B.[14] In the first, occurring on September 28, 2022, the Division denied the travel authorization on the basis that Doctor M was not a currently enrolled Medicaid provider.[15] The second denial, occurring on October 7, 2022, indicated that it again was denied on the basis that Doctor M was not a currently enrolled Medicaid provider.[16] Hearing testimony revealed that shortly thereafter, Doctor M's Alaska Medicaid provider status was completed and as such, that issue was fully resolved.[17]

Finally, on October 13, 2022, the Division issued a third travel authorization denial. It indicated that Medicaid coverage only exists for travel to the closest available location that is medically necessary. Further, "[t]here are providers in City C such as Clinic B, Clinic C and Clinic E that provide the services you are traveling for."[18]

D.J. timely appealed these denials.[19] A hearing was initially conducted on November 2, 2022. At that time, the Division represented that it had been in communication with Clinic B in Alaska, as a follow-up to the letter it received from Clinic B and Doctor N on October 26, 2022, referenced at Exhibit 1. The Division explained it was now awaiting an additional letter from Clinic B, expected by the close of business on November 2, 2022, that would potentially establish

10 Ex. F, pp. 19-24; Ex. D, pp. 1, 4; Carrie Silvers Testimony.
11 Carrie Silvers Testimony.
12 Ex. F, p. 23.
13 Ex. 1,
14 Ex. D, pp. 1, 4, and 6.
15 Ex. D, p. 6.
16 Ex. D, p. 4.
17 Carrie Silvers Testimony; D.J. Testimony.
18 Ex. D, p. 1.
19 Ex. C, p. 1.

the medical necessity needed for the Division to approve the travel authorization at issue. Based on this information, the parties agreed to postpone the hearing for 24 hours to allow for the Division's potential receipt of the Clinic B letter.[20]

However, when the parties reconvened for the hearing on November 3, 2022, the Division indicated that it had still not received the letter from Clinic B. As such, the parties opted to proceed with the hearing.

## III. Discussion

The Alaska Fair Hearing regulations, which apply to Medicaid cases such as this, are clear that D.J., as the party requesting the Medicaid benefit here, bears the burden of proof to establish by a preponderance of the evidence that the Division's denial of travel authorization was incorrect.[21]

The Alaska Medicaid program will pay for medically necessary transportation for a Medicaid recipient.[22] Absent an emergency, for which there was none in this case, transportation for a Medicaid recipient must be requested by a medical provider and preapproved by the Division.[23] Finally, the Division will approve transportation and accommodation services outside of the recipient's community of residence only if those services are not available in the recipient's community.[24]

Federal courts have held that an opinion by an individual's treating physician regarding treatment is presumed correct: "[t]he 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."[25] In general, more weight is given to a treating physician's opinion than the opinions of those who do not treat a claimant.[26] An examining physician's opinion is "entitled to greater weight than the opinion of a nonexamining physician."[27] An administrative law judge must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either a treating or examining physician.[28] Even when a treating or examining physician's opinion is contradicted, that opinion "can only be rejected for specific and

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20 Order Rescheduling Hearing (November 2, 2022).

21 7 AAC 49.135, applicable here, places the burden of proof on a party pursuing a claim for "new or additional benefits," and places the burden on the Division where it is seeking to reduce or terminate benefits.

22 7 AAC 105.100(5); 7 AAC 105.130(a)(1); 7 AAC 120.405.

23 7 AAC 105.130(a)(1); 7 AAC 120.410.

24 7 AAC 120.405(b)(1).

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

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

27 *Id.* at 830 – 831.

28 *Id.*

legitimate reasons that are supported by substantial evidence in the record."[29] "The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician."[30]

Here, the only Division denial now at issue is the one made on October 13, 2022.[31] Although the denial itself is less than clear on this point, the Division offered testimony at hearing that the heart of the issue in this case is that the prior travel authorization requests did not indicate that the required travel was for the mini-maze procedure. Instead, those requests simply indicated that the requested travel was for the purpose of treatment for the maze procedure. As the Division has acknowledged, while there may be several providers in Alaska who perform the maze procedure, there are none who perform the mini-maze procedure.[32] As such, the problem according to the Division, is that none of previous travel authorizations specifically identify that it is the mini-maze procedure for which D.J. is seeking treatment in Washington, and for which the travel is required.[33]

The Division has also acknowledged that because the mini-maze procedure was less invasive, requires a shorter recovery time, and is far simpler, it is usually less expensive and may well be more beneficial for both the Department from a cost perspective as well as to D.J. from a treatment perspective. However, to secure the needed travel authorization, the Division testified that it still needs a travel authorization request/referral identifying that it is the mini-maze procedure as the treatment for which travel is required. Further, it indicated that the requesting/referring entity also needs to supply a cost/benefit analysis explaining why the mini-maze procedure is recommended versus the maze procedure. Finally, when asked about whether the requested travel authorization needs to come from Doctor M and Clinic D or from Clinic B or Clinic A, the Division indicated that it needed to come from Clinic B.[34]

However, based on a review of the record in this case, it appears that the Division is mistaken in its contention that neither the Clinic A nor Clinic B failed to previously identify that the requested travel is in association with the mini-maze procedure. To the contrary, Clinic A did so in its initial request via a letter from Clinic C: "D.J. has been evaluated by Clinic B here in Alaska several times, *but unfortunately they do not perform the mini Maze procedure D.J.*

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29 *Id.* at 830 – 831.
30 *Id.* at 831.
31 Ex. D, p. 1.
32 Carrie Silvers Testimony.
33 Carrie Silvers Testimony.
34 Carrie Silvers Testimony.

*requires*. The next closest state competent to perform this surgery would be Washington. D.J. is scheduled for the following appointments at Clinic D. ."[35]

This also occurred via the letter that Clinic B and Doctor N submitted on October 26, 2022. As that letter provided, "[w]e do not offer the mini maze procedure here at Clinic B. We are unaware of any provider in the state of Alaska that offers the Mini Maze procedure."[36]

Further, the Division's contention that a cost/benefit analysis as between the maze and mini-maze procedures is required from a medical provider of D.J. before the Division can approve a travel authorization is belied by the applicable regulations in this case. Although the regulations note that a recipient is required to demonstrate that the treatment is "medically necessary," there is no requirement that a provider supply a cost/benefit analysis weighing the various costs, savings, advantages, and disadvantages of all potential treatments. There is simply no support for such a position in the regulations and this is not something that medical providers typically provide. The Division's insistence on a cost/benefit analysis may explain why Clinic B has not provided the documentation at issue, or as quickly as the Division expected it.

In this instance, Clinic B, Clinic A, and Clinic C have indicated that it is the mini-maze procedure for which travel is required. This occurred very explicitly in the case of Clinic A/Clinic C and impliedly based on the information furnished by Clinic B and Doctor N on October 26, 2022.[37] Based on the information provided, it is reasonably concluded that Clinic A, Clinic C, and Clinic B have all treated D.J. Further, they have either explicitly indicated that he requires the mini-maze procedure or strongly implied that he requires it. Accordingly, the needed medical necessity has been established in this case.[38]

Because treating physicians at Clinic B, and Clinic A/Clinic C have made it clear that the mini-maze procedure is what D.J. is travelling to Washington to have performed and is what is needed in this instance, and because the Division has conceded that this treatment is likely both less expensive and intrusive, D.J. is deemed to have met his burden of proof in this case.

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35 Ex. F, p. 3 (emphasis added).
36 Ex. 1, p. 4.
37 Ex. 1, p. 4; Ex. F, p. 3.
38 Ex. F, p. 3.

## IV. Conclusion

The Division's denial of D.J.'s travel authorization request to go from City A to City B for purposes of receiving the mini-maze cardiac procedure with Clinic D, is reversed.

DATED this 4th day of November 2022

By: *Signed*
Name: Z. Kent Sullivan
Title: Administrative Law Judge

# Adoption

The undersigned, by delegation from the Commissioner of Health, 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 9th day of November, 2022.

By: *Signed*
Name: Z. Kent Sullivan
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.]