EFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH

In the Matter of	)	
	)	
E. J.	)	OAH No. 24-0444-MDX
	)	

DECISION

I. Introduction

E. J. is a 65-year-old woman with a number of medical diagnoses, including chronic pain associated with incomplete C5-8 paraplegia/spasticity. She is on long-term opioids. Through ProCare Home Medical, she asked that Medicaid authorize payment for a "high calorie nutritional supplement" (Boost). The Division of Health Care Services (Division) denied the request as not being medically necessary. She requested a hearing to challenge the denial.

The hearing was held on July 30, 2024. Ms. J. was present telephonically and represented herself as well as testifying as a witness on her own behalf. She also called her Personal Care Assistant, J. E., to testify as a witness. Laura Baldwin, a Fair Hearing representative with the Division, represented the Division. Karen Benson, who oversees the Medicaid durable medical equipment program, testified for the Division. In addition, Dr. John Botson, D.O., testified for the Division in his capacity as State Medicaid Director. The record closed at the end of the hearing.

The evidence shows that the request for "enteral formula" in the form of Boost VHC requested for Ms. J., although her preferred means of caloric intake, is not medically necessary within the meaning of 7 AAC 105.100. Ms. J., who had the burden of proof, did not satisfy that burden. Accordingly, the Division's denial of the request is AFFIRMED.

II. Facts

Ms. J. is a 65-year-old woman with multiple diagnoses, including hypertension, chronic obstructive pulmonary disease, chronic low back pain, incomplete C5-8 paraplegia/spasticity, neurogenic bladder, and depression.[1] She smokes tobacco heavily (variously described as a cigarette every hour, 30 cigarettes a day, or 12-15 cigarettes a day). Ms. J. was reported to weigh 100 pounds in April 2024, which her provider described as both "Underweight" and "stable".[2]

[1] *See* Ex. E, pgs. 3-10.
[2] Ex. E, pg. 6.

More recently, according to Ms. E., Ms. J. was weighed by "the nurse" as 94 pounds on July 24, 2024. It is her opinion that she is losing too much weight.

Ms. E. prepares food for Ms. J., mostly sandwiches cut into small pieces (peanut butter and jam, or tuna) but also potatoes and some finely chopped meat. In her experience, Ms. J. does not like soup, and was not able to tolerate the soup she prepared; that she had diarrhea afterwards. Her observation is that, over the seven months she worked for her, Ms. J. was thin and getting thinner. Ms. J. does not have a blender to prepare pureed foods and possesses only "one pot and one pan."[3] She testified that she had offered soup, but Ms. J. did not like it, and that some foods seemed to cause Ms. J. to have diarrhea. Ms. J. smokes 10 or 12 cigarettes a day from what Ms. E. observed.

On Ms. J.'s behalf, ProCare requested Medicaid payment of "Boost VHC" liquid drink, 3 servings per day, as enteral nutrition.[4] The April 16, 2024 Certificate of Medical Necessity was accompanied by April 10, 2024 chart notes of D. W., PA-C, stating "3. Underweight Continue Boost Very High Calorie Liquid, as directed, Orally" and noting that Ms. J. was

> Stable, BMI at 18%, continue with increased caloric intake with PCA offered/prepared meals and high calorie supplementation, will continue with home and clinical monitoring. Patient requires enteral nutrition due to chronic health conditions. Patients caloric/protein intake is not obtainable through regular, liquified or pureed foods.
>
> **4. Body mass index (BMI) less than or equal to 19 in adult**
> Notes; BMI at 18%, continue with high calorie nutritional supplements.[5]

No other medical information was submitted on Ms. J.'s behalf, although, according to Ms. Benson the Division requested further information in May. The Division notified Ms. J. on June 20, 2024 that her request for enteral nutrition was denied because her

> [p]rovider failed to identify why adequate nutrition is not obtainable through dietary adjustment with regular, liquefied, or pureed food and therefore medical necessity has not been established. Enteral nutrition is covered for a member who requires feeding via an enteral access device to provide sufficient nutrients to maintain weight and strength commensurate with the member's overall health status and has a permanent full or partial non-function or disease of the structures that normal permit food to

[3] Testimony of Ms. E. (whole paragraph).
[4] *Id*. at pg. 2.
[5] *Id*. at pgs. 6-7.

> reach the small bowel or a disease that impairs digestion and/or absorption of an oral diet, directly or indirectly, by the small bowel.[6]

Ms. J. then requested this hearing to challenge the denial, saying that she was losing weight very quickly, that she weighed 95 pounds, and that she had no teeth and a "hard time chewing solid foods."[7]

Ms. Benson reviewed the request. In her view, the notes did not reference the kind of condition for which enteral nutrition would be covered under Alaska's Medicaid regulations. The request was not for enteral nutrition required to be delivered by a "enteral access device" (i.e., feeding tube), nor was it for a disease that impairs digestion or absorption of an oral diet, directly or indirectly, by the small bowel, such as multiple sclerosis or some cancers.[8]

Dr. John Botson, Alaska State Medicaid Medical Director, is an internal medicine physician with 20 years of experience in Alaska. He also reviewed the medical record submitted with the request, and also concluded that it did not demonstrate medical necessity for Boost. He did not see a diagnosis that required enteral nutrition because of disease or loss of function. To Dr. Botson, the record showed a patient with multiple health challenges. Moreover, in his view, a statement on the Certificate of Necessity that Ms. J. consumes less than 200 calories a day as highly unlikely. Instead, he noted that, despite the PCA's urging of high calorie foods, Ms. J. did not *want* to eat. In his opinion, her heavy smoking, specifically nicotine, is an appetite suppressant, as is, to some degree, her use of opioids. In his opinion medication to stimulate appetite (in addition to stopping smoking) would be medically appropriate in her case. He notes the description of Ms. J.'s weight as "stable" in the medical record and her ability to take medications orally without difficulty.[9]

Ms. J. could use her SNAP benefits to buy Boost.[10] However, she has never tried to buy Boost using her SNAP benefits.

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6 Ex. D, pg. 1.
7 Ex. C, pg. 2.
8 Benson testimony (whole paragraph).
9 Botson testimony (whole paragraph).
10 Botson testimony. *See also* the following grocery chain websites indicating that SNAP benefits may be used to by Boost nutritional drinks:
https://www.carrsqc.com/shop/search-results.html?q=boost%20nutritional%20drink&sort=&brand=BOOST;
https://www.fredmeyer.com/search?query=boost%20nutritional%20drink&searchType=default_search;
https://www.walmart.com/search?q=boost%20nutritional%20drink&typeahead=boost

Ms. J. confirmed at the hearing that she does not like soups or drinks like hot cocoa. She liked to eat chicken wings, ribs, and mashed or fried potatoes. She also likes Hershey's chocolate, without nuts.

III. Discussion

The critical question here is whether the use of Boost VHC drink is medically necessary. This is because the Alaska Medicaid regulations explicitly state that Medicaid will only pay for reasonably necessary medical services.[11] It will not pay for services that are

> (1) not reasonably necessary for the diagnosis and treatment of an illness or injury, or for the correction of an organic system, as determined upon review by the department, or that is not identified in a screening required under 7 AAC 110.205;
>
> (2) 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;[12]

Regulations provide that Medicaid will only pay for enteral or oral nutritional products if they are prescribed, certified as medically necessary, and the certification indicates that "sufficient caloric or protein intake is not obtainable through regular, liquefied, or pureed food."[13]

The Division's Policy Article Guidance states that "Enteral nutrition for beneficiaries with a functioning gastrointestinal tract whose need for enteral nutrition is not due to reasons related to the non-function or disease of the structures that normally permit food to reach the small bowel will be denied as non-covered, no benefit."[14] The associated Local Coverage Document Guidance states that:

> Enteral nutrition is covered for a beneficiary who requires feedings via an enteral access device to provide sufficient nutrients to maintain weight and strength commensurate with the beneficiary's overall health status and has a permanent:
>
> A. full or partial non-function or disease of the structures that normally permit food to reach the small bowel; OR,
>
> B. disease that impairs digestion and/or absorption of an oral diet, directly or indirectly, by the small bowel.[15]

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11 7 AAC 105.100(5),
12 7 AAC 105.110.
13 7 AAC 120.240(a).
14 Ex. B, pg. 17.
15 Ex. B, pg. 29.

The federal courts have held that an individual's physician's opinion regarding whether a treatment is necessary is rebuttably 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.[16]

For this reason, more weight is given to a treating physician's opinion than the opinions of those who do not treat a claimant.[17] An examining physician's opinion is "entitled to greater weight than the opinion of a non-examining physician."[18] An administrative law judge must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either a treating or examining physician.[19] Even when—as here—a treating or examining physician's opinion is contradicted, that opinion "can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record."[20] "The opinion of a non-examining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician *or* a treating physician."[21]

Here, the opinion supporting the request for coverage of Boost comes from a physician's assistant. This decision will assume, without deciding, that such an opinion is entitled to the same deference as that of a "treating physician."

Although PA-C W.'s note states that Ms. J. "requires enteral nutrition due to chronic health conditions" and that her "caloric/protein intake is not obtainable through regular, liquified or pureed foods," he does not identify which chronic health conditions either impair or prevent the absorption or digestion of food by the small bowel or that prevent food from reaching the small bowel.

Ms. J. herself testified that she likes to eat certain foods (like chicken wings, ribs, and fried potatoes) and dislikes others. Notably, moreover, PCA E. testified that when Ms. J. resided in a "old folks home" she had lots of people to care for her and her weight was higher. Her

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16 *Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989).
17 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Although *Lester* was decided in the context of Social Security benefits, the same principles are applied in Medicaid cases. *See, e.g., Holman v. Ohio Dep't of Human Serv.,* 757 N.E.2d 382 (Ohio App. 2001).
18 *Lester* at 830.
19 *Lester* at 830 – 831.
20 *Lester* at 830 – 831.
21 *Lester* at 831.

alleged weight loss coincides with beginning to live alone, with Ms. E. preparing and leaving food (mostly sandwiches cut into small pieces) for Ms. J. in the refrigerator.

Here Ms. J.'s own testimony is clear and convincing evidence that she does not suffer from a non-function or disease of the structures that normally permit food to reach the small bowel. She *can* eat, but she lacks the appetite for (and some equipment to prepare) any but a very restricted choice of foods, such as ribs, potatoes, popcorn, and chocolate bars. She doesn't care much for soup, custards, pies, or applesauce, but she did not say that she could not eat them. Thus, while it may be advantageous for her to supplement her diet with nutritional drinks like Boost, it is not "reasonably necessary for the . . . treatment of an illness or injury, or the correction of an organic system. Dr. Botson's view that a better approach would be to focus on stimulating her appetite was wholly convincing. Therefore, the request for Medicaid authorization for Boost VHC oral liquid as enteral nutrition is properly denied as not being medically necessary.

IV. Conclusion

The Division's denial of the authorization request for enteral nutrition in the form of Boost VHC oral liquid is AFFIRMED.

Dated: August 5, 2024.

By: *Signed*
Signature
Kristin S. Knudsen
Name
Administrative Law Judge
Title

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

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 21 day of August, 2024.

By: *Signed*
Signature
Kristin S. Knudsen
Name
Administrative Law Judge
Title