
In the Matter of the Appeal of _____ :
 _____ :
 _____ :
 _____ : DECISION
 _____ : AFTER
 _____ : FAIR
 from a determination by the New York State Department of : HEARING
 Health, Office of Health Systems Management (hereinafter :
 called the Agency) :
 _____ :
 _____ :

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of the Regulations of the New York State Department of Social Services (Title 18 NYCRR, hereinafter Regulations), a fair hearing was held on May 23, 1989, in Monroe County, before Raymond Sweeney, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

_____, Appellant; _____, Representative; Melanie Kachala, Registered Nurse; Eileen Abbott, Physical Therapist; Donna Gilmore, Recreational-Therapist; Sharon Vincent, Director of Social Services, _____ Hospital; Nancy Lincoln, Social Worker, _____ Hospital.

For the Local Social Services Agency

Documentation submitted in lieu of personal appearance

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant is forty four years of age. She is married with a nine year old daughter.
2. Appellant suffers from Parkinson's disease, a slowly progressive disease manifested by a characteristic tremor of resting muscles, a slowing of voluntary movements, peculiar posture, and weakness of the muscles.
3. Since May 1988, the Appellant has been a patient at the _____ Hospital receiving skilled nursing care. Appellant's Husband and Daughter visit her weekly.
4. Appellant is in receipt of Medical Assistance benefits.

5. Appellant is foot inches in height and weighs approximately pounds. She has Parkinsonism with "marked rigidity, decreased head control with exterior tone throughout and quadripareisis". She is unable to sit in a standard wheelchair due to her stature and the manner in which Parkinson's disease has affected her body. Hospital Staff, therefore, are presently compelled to treat Appellant in a "geriatric chair" (which is similar to a chaise lounge) making it extremely difficult for Appellant to be moved and maneuvered (due to the size and weight of the "geriatric chair"). Appellant herself is unable to move this "geri-chair" in any manner.

6. Appellant is generally in poor body alignment in the geri-chair. She experiences pain and discomfort when sitting. When being transported by hospital staff, Appellant additionally experiences severe neck pain due to lack of neck support and, on occasion, has to be medicated.

7. Appellant's Physician, the registered nurses who attend her, and the Chief Physical Therapist at Hospital assigned to Appellant, state, without reservation, that a custom-made wheelchair is essential for the efficacy of Appellant's on-going medical treatment and to avoid acceleration of the symptoms of Parkinson's Disease.

8. On August 8, 1988, the Appellant, by her Physician, requested the Agency to provide the Appellant with a custom-made wheelchair for which the Appellant had been specifically measures in respect to seat width, seat depth, footrest, seat height, arm height, and back height. The features of such custom-made wheelchair for the Appellant include a solid seat 16 inches in width, 14.75 inches high, back support with extended headrest, desk arms, swing away legrests with heel loops, measured seatbelt, measured hand projections on lower armrests for propulsion of the wheel by Appellant.

9. Appellant's Physician, stated in such request, that such manual wheelchair, measured precisely for Appellant and her range of motion, would provide her with overall correct posture and ability to sit upright during the day.

10. On August 12, 1988, such request of Appellant was returned without determination by the Agency to the Appellant's medical provider, Surgical Supply Company, with the following notation on the order form: "Included in the facility rate". A covering letter from the Agency to the Provider dated August 12, 1988, explained that "All equipment not designed to suit the unique needs of a specific Medicaid-eligible recipient (i.e. cannot be used by another patient) must be supplied by the residential health facility (RHCP)". (The Agency's initial documentation submitted for this case on January 24, 1989, takes the position that the requested wheelchair in this case "although made to the client's measurements, does not preclude its use by another resident").

11. On September 15, 1988, Appellant's Doctor renewed his request to the Agency for the same custom-made wheelchair as described in Appellant's first request. This time, Appellant's Physician submitted clinical assessments from eight members of Appellant's "Patient Care Team" including, in addition to his own assessment, that of the registered nurse attending Appellant, a report from Appellant's Physical Therapist at Hospital, and an evaluation made by the Hospital's Social Services

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Department. All assessments specified the essentiality of a custom-made wheelchair for Appellant in order for Appellant to receive benefit from their particular medical expertise. (Approximately ten months after the initial medical request was made by the Appellant's Physician, Appellant's Physical Therapist is still unable to initiate a particular rehabilitation program to lack of a custom-made wheelchair for Appellant to avail herself of this therapy).

12. Appellant's second request on September 15th was similarly returned without determination by the Agency to the Appellant's medical provider, Surgical Supply Company, with the the same notation on the doctor's order but without a covering letter.

13. The Agency did not inform the Appellant at any time of the manner in which it acted on her two requests for prior approval nor did it ever advise the Appellant of her rights in respect to a conference or a fair hearing.

14. Hospital has been unable to provide the requested wheelchair for the Appellant inasmuch as it considers the particular wheelchair as custom-made and, accordingly, not within its Medical Assistance rates.

15. On January 5, 1989, the Appellant requested this Fair Hearing to review the Agency's denial of her August 1988 and September 1988 requests for prior approval. On March 27, 1989, the Appellant also requested that the manner of the Agency's disposition of her requests for prior approval be reviewed in respect to the Agency's failure to provide Appellant with written and adequate notice of its determinations affecting her Medical Assistance.

ISSUE

Was the determination of the Agency to deny prior approval, on two occasions, for the requested item of durable medical equipment, correct?

Was the determination of the Agency to dispose of Appellant's requests for prior approval without providing Appellant with written and adequate notice of its determinations, correct?

APPLICABLE LAW

Section 305-a(2) of the Social Services Law defines Medical Assistance as follows: "Medical Assistance" shall mean payment of part or all of the cost of care, services and supplies which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with this title, and the regulations of the department.

Section 364 of the Social Services Law provides, in part, that the Department of Health shall be responsible for establishing and maintaining standards for all institutional and non-institutional health care services rendered pursuant to the Medical Assistance Program.

Section 2.2.2.B. of the MMIS Durable Medical Equipment Provider Manual defines "Durable Medical Equipment" as:

devices and equipment, other than prosthetic or orthotic appliances, which have been ordered by a qualified practitioner in the treatment of a specific medical condition and which have all of the following characteristics:

- Can withstand repeated use for a protracted period of time;
- Are primarily and customarily used for medical purposes;
- Are generally not useful to a person in the absence of an illness or injury; and
- Are usually not fitted, designed or fashioned for a particular individual's use.
- Where equipment is intended for use by only one patient, it may be either custom made, or customized.

"Custom-made" means fabricated solely for a particular individual and cannot be readily changed to conform to another recipient's needs. It usually requires the recipient to be measured for custom fitting and/or molding of components.

"Customized" refers to a stock item that has modifications made and/or attached (to it) to meet a recipient's needs. These modifications may be changed (by adding or deleting items such as armrests, etc.) to return the item to stock.

The Health Department's Regulations at 10 NYCRR 415.1 enumerate the items of care, service and supply that operators of nursing homes are responsible to furnish, and which are included in the prevailing Medicaid rates allowable to such facilities. Included among required services for aids to daily living is assistance with ambulation. However, the admission agreement may be altered upon express written orders of the patient's physician stipulating specific services and supplies not included in the admission agreement. Items of customized durable medical equipment, however, are not included in such required aids for nursing homes.

Section 358-4.1 of the Department's Regulations provides that every recipient shall be provided with a written notice in accordance with Section 358-3.3 at the time of any agency action affecting his receipt of assistance or services of his or her right to a fair hearing, the method of obtaining a hearing, that he may be represented at the hearing and of the community legal services available to assist him at a hearing.

DISCUSSION

The record in this case clearly establishes that a custom-made wheelchair was prescribed by Appellant's physician for Appellant rather than a customized wheelchair (which could be used by other patients). The record

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further establishes that such wheelchair is medically necessary for the Appellant. In addition to the eight clinical assessments from Appellant's health care "team" at _____ Hospital which had been submitted to the Agency with Appellant's September 15, 1988 request for prior approval, five members of such team (including the Registered Nurse attending Appellant at the Hospital and Appellant's Physical Therapist) personally testified, candidly, credibly, and in detail, as to Appellant's need for the requested custom-made manual wheelchair to receive the medical benefits available to her at _____ Hospital and to enable them to assist her in a meaningful and efficacious manner. The Agency did not personally appear to support its position that the wheelchair prescribed by Appellant's Physician for Appellant is not custom-made. Nor did the documentation prepared by the Agency (both on January 24, 1989 and on May 10, 1989) and presented by it at the hearing contain any evidence to support such a determination. The Agency's failure to provide the Appellant with prior approval for purchase of such a custom-made manual wheelchair under the Medical Assistance program, therefore, was incorrect.

The Appellant's representative further contended that the Agency erred in failing to send notice of its determination to the Appellant. The Agency contends that "prior approval is not appropriate in instances where payment for the service or item is already provided through the facility rate"; that all such requests should be "returned to the orderer or provider with no action taken on them... (but that) a note should be included with the returned request, explaining that the item or service is included in the facility's rate"; and that, in such instances, "the Area Office (of OHSM) is not required to issue a notice of fair hearing rights" since the question does not go to eligibility for the service but rather the means by which it is to be provided.

A review of the appropriate legal authorities indicates that the Appellant's Representative is correct and that notice is required when the Agency determines to reject a request for prior approval of durable medical equipment for a patient at a facility on the basis that it is the facility's responsibility to provide the equipment. It is clear that the Appellant has a right to challenge this determination in a fair hearing. However, that right is of dubious value unless the recipient is informed of that right. Furthermore, there is the question of ownership of the item or durable equipment. If prior approval is granted, then the item belongs to the recipient and if the recipient is discharged from the facility, then he can take the item with him. If the facility must provide the item, then upon discharge from the facility, the recipient cannot take the item with him since it is the property of the facility.

Appellant's Memorandum of Law requested that, inasmuch as such Department's Regulations were not followed by the Agency in this and similar cases which constitute a pattern or practice in violation of the Department's Regulations, that a letter from the State Commissioner accompany the copy of this decision directed to the Agency in accordance with the provisions of Section 358-6.3 of the Department's Regulations. In this case, the Agency will be directed to send notice whenever prior approval is not granted on the basis that it is the facility's responsibility to provide the item of durable medical equipment.

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DECISION AND ORDER

The determination of the Agency to deny prior approval, on two occasions, for the requested item of durable medical equipment, is not correct and is reversed.

The Agency is directed to provide prior approval to the Appellant for a custom-made manual wheelchair in accordance with the Appellant's request of August 8, 1988 and September 15, 1988.

The determination of the Agency to dispose of Appellant's requests for prior approval without providing Appellant with written and adequate notice of its determinations, is not correct and is reversed.

Additionally, pursuant to Section 358-6.3 of the Department's Regulations, the Agency is directed to send adequate written notice to any medical assistance recipient who requests prior approval for durable medical equipment and whose request is not granted on the basis that it is the facility's responsibility to provide the item in question.

As required by Department Regulations at 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York

CESAR A. PERALES
COMMISSIONER

OCT 13 1989

By



Commissioner's Designee