



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR

[REDACTED]
MI [REDACTED]

Date Mailed: May 16, 2023
MOAHR Docket No.: 23-001809
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 42 CFR 431.200, *et seq.*, and upon Petitioner's request for a hearing.

After due notice, a hearing was held via video conferencing on May 3, 2023. Petitioner [REDACTED] (Petitioner) appeared and testified on her own behalf. Emily Piggott, Appeals Review Officer, represented the Respondent Department of Health and Human Services (DHHS or Department). Dr. David Wartinger, a consultant physician, testified as a witness for the Department.

During the telephone hearing, the Department submitted an evidence packet that was admitted into the record as Exhibit A, pages 1-69. No other proposed exhibits were submitted.

ISSUE

Did the Department properly deny Petitioner's prior authorization request for a bilateral mastopexy?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material, and substantial evidence on the whole record, finds as material fact:

1. Petitioner is an enrolled Medicaid beneficiary. (Exhibit A, page 9).
2. On February 3, 2023, the Department received a prior authorization request for a bilateral mastopexy submitted on Petitioner's behalf by her doctor. (Exhibit A, pages 11-66).
3. In that request, Petitioner's doctor identified Petitioner's diagnoses as breast asymmetry and a history of left breast cancer. (Exhibit A, page 12).

4. The doctor also wrote:

[Petitioner] with left breast IDC diagnosed in 2019 s/p neoadjuvant chemotherapy, s/p left breast lumpectomy with left axillary lymph node dissection 8/13/19, s/p adjuvant radiation 11/7/19, with breast asymmetry after lumpectomy with the left breast smaller and higher than the right. She has been evaluated and we are ready to proceed with bilateral breast mastopexy and fat grafting to bilateral breasts.

Exhibit A, page 13

5. Medical documentation attached to the request also stated in part:

-patient desires improved nipple-areolar position and slightly larger breast. We discussed the best course of action would be to perform bilateral breast mastopexy with fat grafting to bilateral breasts, grafting slightly more to the left than the right for improvement in symmetry

* * *

presenting to discuss breast asymmetry. Patient has noted breast asymmetry after lumpectomy with the left breast being smaller and higher than the right. She is also noted contour irregularities around the lumpectomy incision on the left nipple-areolar complex. She is okay with breast size although she would like her breast to be slightly larger.

Exhibit A, page 32

6. On February 6, 2023, the Department sent Petitioner written notice that the request for a bilateral mastopexy had been denied. (Exhibit A, pages 9-10)

7. With respect to the reason for the denial, the notice stated:

The policy this denial is based on is Section 8.3 of the General Information for Providers chapter of the Medicaid Provider Manual.

- Based on the information reviewed, your request for bilateral mastopexy has been denied by Medicaid. Elective cosmetic surgery or procedures, and all services or supplies that are not medically necessary are not covered by the Medicaid program.

Exhibit A, page 9

8. On March 28, 2023, the Michigan Office of Administrative Hearings and Rules (MOAHR) received the request for hearing filed in this matter regarding the Department's decision. (Exhibit A, pages 5-8).
9. Along with the request, Petitioner included a letter from her doctor in which the doctor stated in part:

[Petitioner] has been denied approval for bilateral breast mastopexy and fat grafting. On exam, she has significant breast asymmetry with the right breast being significantly more ptotic and larger than the left breast. This is due to her prior left breast lumpectomy and adjuvant radiation. These are quite visible asymmetries that are distressing to the patient. We continue to recommend bilateral breast mastopexy (CPT 19316) and bilateral breast fat grafting (CPT 15770), ICD10 N64.89

Exhibit A, page 8

CONCLUSIONS OF LAW

The Medical Assistance Program is established pursuant to Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). It is administered in accordance with state statutes, the Social Welfare Act, the Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

Medicaid covered benefits are addressed for the practitioners and beneficiaries in the Medicaid Provider Manual (MPM) and, with respect to the delivery of services, the applicable version of the MPM states in part:

SECTION 8 - DELIVERY OF SERVICES

8.1 FREE CHOICE

Beneficiaries are assured free choice in selecting an enrolled licensed/certified provider to render services unless they are patients in a state-owned and-operated psychiatric facility, enrolled in a Medicaid Health Plan (MHP), or otherwise specified.

8.2 RENDERING SERVICES

Enrollment in Medicaid does not legally require a provider to render services to every Medicaid beneficiary seeking care, except as noted below. Providers may accept Medicaid beneficiaries on a selective basis. However, a Medicare participating provider must accept assignment for Medicare and Medicaid dual eligibles.

Hospitals must provide emergency services as required by the Emergency Medical Treatment and Active Labor Act (EMTALA), 42USC 1395dd.

If a Medicaid-only beneficiary is told and understands that a provider is not accepting them as a Medicaid patient and asks to be private pay, the provider may charge the patient for services rendered. The beneficiary must be advised prior to services being rendered that their **mihealth** card is not accepted and that they are responsible for payment.

All such services rendered must be in compliance with the provider enrollment agreement; contracts (when appropriate); Medicaid policies; and applicable county, state, and federal laws and regulations governing the delivery of health care services. (Refer to the Billing Beneficiaries Section of this chapter for more information.)

8.3 NONCOVERED SERVICES

The items or services listed below are not covered by the Medicaid program:

- Acupuncture
- Autopsy
- Biofeedback
- All services or supplies that are not medically necessary
- Experimental/investigational drugs, biological agents, procedures, devices or equipment
- Routine screening or testing, except as specified for EPSDT Program or by Medicaid policy
- Elective cosmetic surgery or procedures
- Charges for missed appointments
- Infertility services or procedures for males or females, including reversal of sterilizations
- Charges for time involved in completing necessary forms, claims, or reports

When the beneficiary needs a medical service recognized under State Law, but not covered by Medicaid, the service provider and the beneficiary must make their own payment arrangements for that noncovered service. The beneficiary must be informed, prior to rendering of service, that Medicaid does not cover the service. A Medicaid beneficiary in a nursing facility can use his patient-pay funds to purchase noncovered services subject to MDHHS verification of medical necessity and the provider's usual and customary charge. (Refer to the Nursing Facility Chapter for additional information.)

Moreover, regarding breast reconstruction surgery, the MPM further states:

12.2 BREAST RECONSTRUCTION SURGERY

Medicaid covers breast reconstruction surgery following the diagnosis and treatment of breast cancer. Covered services include procedures related to the affected and the contralateral unaffected breast following a medically necessary mastectomy. The prior authorization requirements for these specified breast reconstruction procedure codes are waived when billed with appropriate ICD breast cancer diagnosis codes. The specified CPT codes subject to this PA waiver are identified in the Medicaid Code and Rate Reference tool. (Refer to the Directory Appendix for website information.)

*MPM, January 1, 2023 version
General Information for Providers Chapter,
Pages 23-24*

Here, as discussed above, Respondent denied Petitioner's request for a bilateral mastopexy pursuant to the above policies.

In support of that decision, Dr. Wartinger testified that the request for a mastopexy, *i.e.*, a breast lift, is a request for a cosmetic procedure that he has never seen approved by the Department.

With respect to this case specifically, he described Petitioner's medical history and noted that it is complicated by Petitioner's history of weight loss and bariatric surgery. He also testified that Petitioner's weight loss is the cause of ptosis, or sagging, in her breasts, with more ptosis in her right, uncancerous breast. Dr. Wartinger further testified that the requested mastopexy would address the ptosis, with the requested fat grafting adding fullness to the breasts, and that it is a noncovered, cosmetic procedure.

Regarding what could be approved, Dr. Wartinger testified that the Department would approve reconstructive surgery on Petitioner's left breast if there was a cosmetic defect following the lumpectomy. He similarly testified that the Department would approve therapy on the left breast to restore contour or improve appearance. He further testified that the Department would have approved reconstruction of the left breast if a mastectomy had been performed, or reconstruction of both breasts if a bilateral mastectomy had been performed. However, he also testified that the request in this case includes purely cosmetic surgery on the breast that was not touched by cancer or treatment, and that it must therefore be denied given what was requested.

In response, Petitioner testified that the requested procedure is not cosmetic. She also testified that she only has half a breast on one side; and that it, and the uncomfortable prosthetic she wears on it, are constant reminders of her breast cancer and the worst experiences of her life. She further testified that she continues to feel the effects of the cancer treatment and she cannot look in a mirror or allow her husband to look at her.

Petitioner also testified that her weight loss has nothing to do with her current request, and that, while her breasts sagged even before her weight loss and bariatric surgery, they were symmetrical before she had her lumpectomy.

She further testified that the doctors cannot fix the cancerous breast without fixing the noncancerous breast; or one of her breasts will be significantly higher than the other sagging one.

Petitioner also testified that a lumpectomy is a partial mastectomy, and that; based on what the Department is telling her, it would have been better for her if the cancer had spread to both breasts, or if she had had a double mastectomy, with the Department punishing her for what occurred.

Petitioner bears the burden of proving by a preponderance of the evidence that the Department erred in denying her prior authorization request. Moreover, the undersigned Administrative Law Judge is limited to reviewing the Department's decision in light of the information available at the time the decision was made.

Given the record and applicable policy in this case, Petitioner has failed to meet her burden of proof and the Department's decision must be affirmed.

As clearly provided by the above policies, elective cosmetic surgery or procedures are not covered by the Medicaid program. Accordingly, procedures to address a person's appearance, such as ptosis or asymmetry in breasts; no matter how understandably distressing, are not covered.

Moreover, to the extent Petitioner seeks the mastopexy as part of her treatment following the diagnosis of breast cancer, her request still must be denied. While the above policy provides for coverage of breast reconstructive surgery following the diagnosis and treatment of breast cancer; Petitioner seeks a mastopexy/breast lift for both her breasts, including the noncancerous breast with more ptosis, and the Department's witness credibly explained why such a procedure is considered cosmetic; as opposed to procedures that the Department would approve, such as therapy on the left cancerous breast to restore contour or improve appearance following the diagnosis and treatment of breast cancer.

In response, Petitioner testified that the other options suggested by the Department did not exist, because no surgeon will work on just one breast, or are unworkable, because a procedure on just the left breast would leave it significantly higher than the right breast, where she has more ptosis. However, Petitioner's testimony is unsupported; tends to support the contention that the mastopexy is being sought to address ptosis in the breasts; and does not alter the applicable policy.

Petitioner did correctly point out; and the Department's witness agreed, that; if Petitioner's breast cancer had spread to both breasts or if she had had a prophylactic mastectomy on her right breast, then reconstructive surgery on both breasts would be covered. However; while true, that does not change the policy, its application to this case, or the correctness of the Department's decision. Petitioner is not being "punished" as she fears for only having cancer in one breast or electing to have a lumpectomy; instead, the Department is only responding as it must to the request that was made and in light of the circumstances that exist.

To the extent Petitioner has additional or updated information to provide regarding her need for a bilateral mastopexy, then she and her doctor can always request the procedure again in the future along with that information. With respect to the decision at issue in this case however; the Department's decision must be affirmed given the available information and applicable polices.

DECISION AND ORDER

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, decides that the Department properly denied Petitioner's prior authorization request.

IT IS THEREFORE ORDERED that:

The Department's decision is **AFFIRMED**.

SK/sj



Steven Kibit
Administrative Law Judge

NOTICE OF APPEAL: Petitioner may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules
Reconsideration/Rehearing Request
P.O. Box 30763
Lansing, Michigan 48909-8139

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, to their last-known addresses in the manner specified below, this 16th day of May 2023.

S. James

S. James
**Michigan Office of Administrative
Hearings and Rules**

Via Electronic Mail:

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