STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

[redacted]

APPEAL NO. 15F-01880

PETITIONER,

Vs.

CASE NO.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 17 Broward
UNIT: AHCA

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, the undersigned hearing officer convened an administrative hearing in the above-referenced matter telephonically on April 6, 2015, at 1:20 p.m.

APPEARANCES

For the Petitioner: Pamela Perez
Bariatric Surgical Coordinator
Division of General and Bariatric Surgery
Memorial Physician Group

For the Respondent: Carol King, R.N.
Registered Nurse Specialist/Fair Hearing Coordinator
Agency for Health Care Administration

STATEMENT OF ISSUE

Did the petitioner prove by a preponderance of the evidence that the Agency for Health Care Administration incorrectly denied her request for a Laparoscopic Sleeve Gastrectomy?

PRELIMINARY STATEMENT

Pamela Perez, Bariatric Surgical Coordinator with the Division of General and Bariatric Surgery at Memorial Physician Group, appeared on behalf of the petitioner, [redacted] ("petitioner"), who was present as a witness. Ms. Perez may sometimes hereinafter be referred to as the petitioner's "representative".

Carol King, R.N., Registered Nurse Specialist and Fair Hearing Coordinator with the Agency for Health Care Administration (sometimes hereinafter referred to as "AHCA" or "Agency"), appeared on behalf of the Agency for Health Care Administration. Barbara Cowley, M.D., Chief Medical Officer of Better Health, and Lisvette Lopez, Grievance and Appeals Supervisor at Better Health, appeared as witnesses on behalf of the Agency.

The petitioner introduced Exhibits "1" through "13", inclusive, at the hearing, all of which were accepted into evidence and marked accordingly. The respondent introduced Exhibits "1" through "7", inclusive, at the hearing, all of which were accepted into evidence and marked accordingly.

FINDINGS OF FACT

1. The petitioner is a 29-year-old female.

2. The petitioner is a Managed Medical Assistance Program (MMA) recipient living in Broward County, Florida. The petitioner was enrolled in Better Health MMA on July 1, 2014.

3. Better Health is a managed care agency authorized by the Agency for Health Care Administration to provide services to certain Medicaid-eligible individuals in Broward County.

4. The petitioner is five foot one inch tall and currently weighs 216 pounds. The petitioner is morbidly obese.

5. On or about November 26, 2014, the petitioner's physician submitted a request to Better Health for a Laparoscopic Sleeve Gastrectomy.

6. A Laparoscopic Sleeve Gastrectomy is a type of bariatric surgery.

7. Better Health sent a letter dated December 10, 2014 to the petitioner denying her request for the procedure. The letter explains the procedure was denied because "...according to the information we received it is not medically necessary."

8. The petitioner's physician sent a letter to Better Health on or about December 11, 2014 asking it to reconsider its decision to deny the Laparoscopic Sleeve Gastrectomy.

9. On January 5, 2015, Better Health forwarded a letter to the petitioner's physician advising that Better Health was upholding the denial because, based on the information it had received, it determined the petitioner had not made a diligent effort to achieve a healthy body weight.

10. The petitioner filed a timely request for a fair hearing and this proceeding ensued.

11. Better Health used the InterQual criteria to evaluate petitioner's request for a Laparoscopic Sleeve Gastrectomy. InterQual has five criteria that must be met before the medical procedure can be approved. If any one of the five is not met, the procedure will be denied.

12. The first requirement set forth by the InterQual criteria is that a person's body-mass index ("BMI") must be greater than 35. The petitioner's BMI is currently 40.

13. The second InterQual requirement is that the individual must have a documented history of weight loss attempts and is unable to maintain sustained weight loss.

14. The petitioner has been able to lose some weight in the past. Petitioner has always regained any weight she has lost.

15. The petitioner underwent a 12 month physician administered diet plan with exercise in 2011. She lost 30 pounds and subsequently gained 45 pounds. Petitioner underwent a six-month physician administered diet plan in 2012. She lost 20 pounds and subsequently gained 20 pounds.

16. The petitioner underwent a six-month weight management program in preparation for bariatric surgery. This program included nutritional counseling.

17. Nutritional counseling does not necessarily equate to making an effort to lose weight.

18. The respondent's witness testified that, in her opinion, the petitioner did not make concerted and consistent attempts at weight loss.

19. Petitioner changed her eating habits and made other life-style changes in an effort to lose weight during the six-month weight management program. These changes included: not skipping meals; eating breakfast and lunch in addition to dinner; eating more vegetables; eliminating juice and soda from her diet entirely; and not eating food from fast food restaurants.

20. Petitioner also implemented several behavioral modifications during the pre-surgical weight management program including: separating her fluids from her meals; chewing her food thoroughly; and reducing her bit size.

21. The petitioner began to exercise regularly during the weight management program. She started to walk regularly and even began to run occasionally.

22. The hearing officer finds that the petitioner has made genuine attempts at traditional weight loss methods. Despite this, the petitioner has been unable to manage her weight.

23. The petitioner has multiple progressive diseases as a result of her obesity including hypertension, high cholesterol, and diabetes.

24. The petitioner meets all other Interqual criteria for bariatric surgery including having successfully completed a cardiac evaluation, pulmonary evaluation, psychological evaluation, and her lab work. The petitioner's primary care physician cleared her for bariatric surgery on November 20, 2015.

CONCLUSIONS OF LAW

25. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to § 409.285, Fla. Stat. This order is the final administrative decision of the Department of Children and Families under § 409.285, Fla. Stat.

26. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code R. 65-2.056.

27. The petitioner in the present case is requesting a change. Therefore, in accordance with Fla. Admin. Code R. 65-2.060 (1), the burden of proof is assigned to the petitioner.

28. § 409.912, Fla. Stat. states, in relevant parts:

> Cost-effective purchasing of health care.—The agency shall purchase goods and services for Medicaid recipients in the most cost-effective manner consistent with the delivery of quality medical care. To ensure that medical services are effectively utilized, the agency may, in any case, require a confirmation or second physician's opinion of the correct diagnosis for purposes of authorizing future services under the Medicaid program.
> (3) The agency may contract with health maintenance organizations certified pursuant to part I of chapter 641 for the provision of services to recipients. This subsection expires October 1, 2014.

29. The Florida Medicaid Provider General Handbook, incorporated by reference in the Medicaid Services Rules under Fla. Administrative Code Chapter 59G-4, states on Page 1-22, in part:

> Medicaid contracts with Health Maintenance Organizations (HMOs) to provide prepaid, comprehensive, cost-effective medical services to enrolled Medicaid recipients.
>
> Medicaid pays each HMO a monthly capitation fee for managing and providing care to each enrolled recipient. In accordance with certain contractual agreements with Medicaid, the HMO provides a specified, comprehensive package of medical services for this monthly Medicaid fee.

30. Although the terms medically necessary and medical necessity are often used interchangeably and may be used in a variety of contexts, their definition for Florida Medicaid purposes is contained in the Florida Administrative Code. Fla. Admin. Code R 59G-1.010 states:

> (166) "Medically necessary" or "medical necessity" means that the medical or allied care, goods or services furnished or ordered must:
> (a) Meet the following conditions:
> 1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
> 2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;

3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; statewide; and
5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.
(b) "Medically necessary" or "medical necessity" for inpatient hospital services requires that those services furnished in a hospital on an inpatient basis could not, consistent with the provisions of appropriate medical care, be effectively furnished more economically on an outpatient basis or in an inpatient facility of a different type.
(c) The fact that a provider has prescribed, recommended, or approved medical or allied care, goods or services does not, in itself, make such care, goods, or services medically necessary or a medical necessity or a covered service.

31. The InterQual standards used by the Agency as a guideline state:

Patients who seek bariatric surgery should be able to provide a history of prior attempts at weight loss including medically supervised weight loss plans, pharmacotherapy, and weight loss programs (e.g., Weight Watchers) (Blackburn et al. Obesity (Silver Spring) 2009, 17 842-62). Pharmacologic therapy (e.g. Oristat Qsymia) can be offered but a trial of medication is not required prior to consideration of bariatric surgery. Research continues to assert that bariatric surgery is more effective than conventional management (Schauer et al, N Eng J Med 2012, 366 1567-76; Colquitt et al, Cochrane Database Syst Rev 2009 CD003641)

32. As shown in the Findings of Fact, it is the respondent's position that the evidence does not support the medical necessity for the requested procedure because the petitioner has not made concerted and consistent attempts at traditional weight loss.

33. The petitioner argued that the evidence submitted shows she is in need of bariatric surgery and that she has fulfilled all of the prerequisites for the surgery.

34. For the case at hand, the evidence presented indicates that the petitioner has fulfilled the requirements for a Laparoscopic Sleeve Gastrectomy. The petitioner is morbidly obese; she suffers from one or more progressive life-threatening illnesses due

to her weight; she has attempted traditional weight loss methods but has been unable to sustain the weight loss; and she has obtained all the necessary clearances for surgery including a cardiac clearance, pulmonary clearance, psychological clearance, laboratory clearance, and a clearance from her primary care physician.

35. After considering the evidence and all of the appropriate authorities set forth above, petitioner has met her burden to prove by a preponderance of the evidence that the Agency incorrectly denied her request for a Laparoscopic Sleeve Gastrectomy.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, this appeal is hereby GRANTED.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the agency. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, FL 32308-5403. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The petitioner is responsible for any financial obligations incurred as the agency has no funds to assist in this review.

DONE and ORDERED this 12th day of May, 2015,

in Tallahassee, Florida.

Peter J. Tsamis

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