

**FILED**

**MAY 21 2015**

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

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DEPT. OF CHILDREN & FAMILIES



APPEAL NO. 15F-02142

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION  
CIRCUIT: 6, PASCO  
UNIT: AHCA

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on April 15, 2015 at approximately 3:05 p.m.

**APPEARANCES**

For Petitioner:



Petitioner

For Respondent:

Stephanie Lang, R.N. Specialist  
Fair Hearing Coordinator  
Agency for Health Care Administration

**STATEMENT OF ISSUE**

At issue is whether or not Respondent's action terminating Petitioner's three (3) cans of Boost High Protein Oral Liquid nutritional supplement per day was correct. Respondent's action represents a termination of existing services. In accordance with Fla. Admin. Code R. 65-2.060(1), the burden of proof is assigned to the Respondent.

**PRELIMINARY STATEMENT**

Petitioner, [REDACTED] ("Petitioner"), represented herself. Brandi Geoit, PAC Waiver Case Manager with West Coast Infectious Diseases ("West Coast"), appeared as a witness for the Petitioner. Petitioner gave oral testimony, but did not move any exhibits into evidence during the hearing.

Stephanie Lang, R.N. Specialist, appeared both as a witness and representative for Respondent, the Agency for Health Care Administration (hereinafter "AHCA" or the "Agency"). Dr. Barbara Cowley, M.D., Chief Medical Officer for Clear Health Alliance ("Clear Health"), and Lisvette Lopez, Grievance and Appeals Supervisor for Clear Health, appeared as witnesses for the Agency. Patricia Antonucci with the Office of Appeal Hearings, and Lou Esposito, Medical Healthcare Program Analyst with the Agency, were present as observers. Respondent's Exhibits 1 through 4 were entered into evidence during the hearing.

The undersigned held the record open until April 22, 2015 at 5:00 p.m. in order for the Petitioner and Respondent to provide additional evidence. Petitioner submitted additional evidence, which was marked for identification as Petitioner's Exhibits 1 through 7. Respondent submitted additional evidence, which was marked for identification as Respondent's Exhibits 5 through 12. Both parties were given until April 29, 2015 at 5:00 p.m. to respond to the additional evidence. Neither party submitted a response.

Administrative notice was taken of the following:

- Florida Statutes: § 409.905, § 409.910, § 409.962, § 409.963, § 409.964, § 409.965, and § 409.973.
- Florida Administrative Code: R.59G-1.001 and R.59G-1.010.

**FINDINGS OF FACT**

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Petitioner is a 66-year-old female.
2. At all times relevant to this proceeding, she was eligible to receive Medicaid services.
3. Petitioner's diagnoses include:
  - HIV-AIDS
  - Anemia
  - Muscular Wasting
4. Petitioner currently weighs approximately 96 pounds.
5. Petitioner became enrolled in Clear Health's Managed Medical Assistance (MMA) plan on June 1, 2014.
6. On June 24, 2014, Petitioner visited [REDACTED] ARNP with West Coast. At that time, Petitioner stated she consumes three (3) or four (4) drinks per day when drinking alcohol and that she drinks alcohol two (2) to three (3) times per week, has cut back from weekly, although she sometimes goes on a "binger." (Respondent's Exhibit 11).
7. On July 1, 2014, Mr. [REDACTED] wrote a prescription for 90 cans of Boost per month for the period of July 1, 2014 through October 28, 2014, to be taken three (3) times per day.
8. Petitioner received 24 cans of Boost High Protein drinks ("Boost") on August 7, 2014 from Univita-Miramar ("Univita"). Clear Health was listed as the payor for these drinks.

9. Petitioner received 90 cans of Boost on September 9, 2014 from Univita. Univita was listed as the payor for these drinks.

10. On November 4, 2014, Mr. [REDACTED] wrote a prescription for 90 cans of Boost per month for the period of August 4, 2014 through May 2, 2015, to be taken three (3) times per day. West Coast faxed the prescription on the same day to Pierre Jean at Univita to start the authorization process.

11. The authorization process was not initiated and West Coast faxed a new Medication Prior Authorization Form to Clear Health on January 2, 2015.

12. Univita received the fax from West Coast on January 2, 2015. Univita sent the prescription to Clear Health on January 23, 2015.

13. The Medication Prior Authorization Form indicated vitamin B-12, Ensure, and Megace had previously been tried to treat Petitioner's conditions. Megace did not increase her appetite. Petitioner was on Megace for five (5) years.

14. Petitioner sometimes goes days without eating because of lack of appetite. She drinks the Boost during these periods of time.

15. Petitioner has difficulty swallowing solid food and medications, but is able to absorb what she eats.

16. Boost High Protein is indicated for increased protein needs (Respondent's Exhibit 6).

17. Dr. Cowley concedes Boost is a covered service under Petitioner's managed care plan with Clear Health.

18. Clear Health issued a Notice of Action on January 26, 2015, denying the prescription for Boost.

19. Clear Health stated the prescription did not meet the definition of medically necessary because it "must be individualized, specific, consistent with symptoms or diagnosis of illness or injury and not be in excess of the patient's needs."

(Respondent's Exhibit 3).

20. Dr. Cowley testified that part of the reason Petitioner's Boost was denied was because, according to Petitioner's medical records, she consumes alcohol. Dr. Cowley stated excessive alcohol intake results in decreased appetite and malnutrition.

21. On February 5, 2015, Petitioner again visited Mr. [REDACTED] At this visit, Petitioner stated she consumes three (3) or four (4) drinks per day when drinking alcohol and that she drinks alcohol four (4) or more times per week, has cut back from weekly, although she sometimes goes on a "binger." (Respondent's Exhibit 12).

22. Petitioner timely requested a Fair Hearing on February 24, 2015.

#### **PRINCIPLES OF LAW AND ANALYSIS**

23. By agreement between the Agency for Health Care Administration (AHCA) and the Department of Children and Families, AHCA has conveyed jurisdiction to the Office of Appeal Hearings to conduct this hearing pursuant to § 120.80, Fla. Stat.

24. This hearing was held as a *de novo* proceeding pursuant to Fla. Admin. Code R. 65-2.056.

25. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," (Black's Law Dictionary at 1201, 7<sup>th</sup> Ed.).

26. Section 409.973, Fla. Stat. addresses the minimum benefits provided under

Medicaid managed care plans:

(1) MINIMUM BENEFITS.—Managed care plans shall cover, at a minimum, the following services:

...

(p) Medical supplies, equipment, prostheses, and orthoses...

(x) Prescription drugs.

27. "Medical supplies" are defined as "medical or surgical items that are consumable, expendable, disposable or non-durable and that are used for the treatment or diagnosis of a patient's specific illness, injury, or condition. Also see 'Supplies and appliances'." Fla. Admin. Code R. 59G-1.010(162).

28. "Supplies and appliances" means "items necessary for use by a patient during the course of an illness or injury." Fla. Admin. Code R. 59G-1.010(277).

29. "Prescription" is defined as "any order for drugs, medical supplies, equipment, appliances, devices, or treatments written or transmitted by any means of communication by a licensed practitioner...." Fla. Admin. Code. 59G-1.010(223).

30. Based upon the definitions in the Florida Administrative Code, Boost is a consumable medical supply, which is a minimum benefit under Medicaid managed care plans.

31. The July 2010 Durable Medical Equipment/Medical Supply Services Coverage and Limitations Handbook (DME Handbook) has been promulgated into rule by Fla. Admin. Code R. 59G-4.070.

32. Page 1-2 of the DME Handbook states: "Medical supplies are defined as medically necessary medical or surgical items that are consumable, expendable, disposable, or non-durable and appropriate for use in the recipient's home." The

DME Handbook requires any medical supplies provided to the Medicaid recipient to be medically necessary.

33. The definition of medically necessary is found in Fla. Admin. Code R. 59G-1.010 which 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.

...

(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.

34. Clear Health claims the Boost does not meet the requirements of the second paragraph in the definition of medical necessity. Since Clear Health has not challenged any of the other requirements, the undersigned's analysis will be based solely on the requirements of the second paragraph.

35. The Medication Prior Authorization Form submitted to Clear Health satisfies the requirements of the second paragraph of Rule 59G-1.010 because the prescription for Boost is individualized, specific, and consistent with Petitioner's diagnoses, and

not in excess of her needs. Specifically, Mr. [REDACTED] noted Petitioner spent five (5) years on an appetite stimulant, Megace, which did not help. Mr. [REDACTED] determined Petitioner is unable to consume sufficient food due to lack of appetite and difficulty swallowing. As her primary care provider, Mr. [REDACTED] is in the best position to determine whether or not Boost is consistent with her diagnoses of HIV-AIDS, anemia, and muscle wasting.

36. Respondent is limited to reviewing Mr. [REDACTED] prescription for medical necessity. Respondent failed to show Mr. [REDACTED] prescription for Boost is not individualized, specific, and consistent with Petitioner's diagnoses, and not in excess of her needs.

37. Dr. Cowley gave credible testimony that excessive alcohol intake can lead to decreased appetite and malnutrition. However, she failed to show Petitioner's level of alcohol intake is excessive, or at least excessive enough to cause decreased appetite and malnutrition. She did not show Petitioner's alcohol consumption impacts her prescription or is otherwise inconsistent with the second paragraph of medical necessity.

38. Respondent has failed to show, by the greater weight of the evidence, that it was proper to stop providing Petitioner's Boost. Respondent failed to prove Petitioner is able to obtain all of her nutrition from solid food alone.

39. The undersigned concludes the Boost is medically necessary for the treatment of Petitioner's conditions.

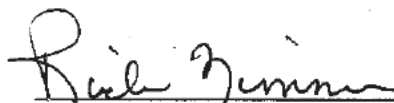
**DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Petitioner's appeal is GRANTED. Respondent is directed to reinstate providing three (3) cans of Boost per day for the service period at issue, consistent with her prescription.

**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 21 day of May, 2015,  
in Tallahassee, Florida.

  
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