

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 13,752

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Appeal of )

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INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying him medicaid coverage for pedicle screw spinal implant surgery. The issue is whether this is a covered service within the meaning of the pertinent regulations.

This case was originally consolidated with Fair Hearing No. 13,573, and both matters were initially considered by the Board in a decision dated November 13, 1995. In that decision the Board remanded the matters to the Department to make a determination specific to each petitioner whether the surgery in question was "justified". Upon remand the Department resubmitted the matter to its private contractor for reviewing health care services under Medicaid, and then reiterated and provided further documentation for its determination that the surgery sought by the petitioner is not approved by the federal Food and Drug Administration (FDA) due to an unacceptable (to the FDA) statistical risk of serious failure and complications.

At that point, prior to resubmitting the matters to the Board, the hearing officer received the following updated medical report regarding the instant petitioner dated October 1, 1996, addressed to his attorney:

In response to your request of September 30, 1996, I feel that [petitioner] still is a candidate for surgery on the spine. Feel that, because of the delay due to Medicaid's attempt to refuse or defer this surgery, the patient would need a new MRI scan of the lumbar spine to insure that there is no new pathology.

Additionally the patient is currently on Medicare and not Medicaid and I am wondering if that has any ramifications for being able to go ahead with this fusion. The patient has cut down on his cigarettes to approximately 10 per week but would need to fully quit before undergoing the surgery.

Upon his receipt of the above report the hearing officer advised the petitioner's attorney that he did not consider the petitioner's case ripe for decision until the petitioner submitted evidence that his doctor felt that he was ready (i.e., quitting smoking and undergoing another MRI) to have the recommended surgery. The hearing officer then severed the petitioner's case from Fair Hearing No. 13,753, and sent his Recommendation in the latter case to the Board.

In a decision dated November 20, 1996 the Board held in Fair Hearing No. 13,753 that where the FDA has withheld approval of a particular surgical procedure due to clearly documented statistical evidence of serious risk and complications, the Department is within its authority and discretion under Medicaid Manual § M618 to deny a request for approval of Medicaid coverage. In such cases, the board held, even though the opinion of the patient's own doctor may not be specifically refuted, lack of FDA approval provides sufficient basis for the Department to conclude under § M618 that the procedure is not "justified" and, therefore, not "medically necessary".

Following the issuance of the Board's decision in Fair Hearing No. 13,753, the petitioner in the instant matter indicated that he had no further medical evidence to submit and that he wanted his case to be submitted to the Board.

#### ORDER

The Department's decision is affirmed.

#### REASONS

The facts and circumstances in this petitioner's case are indistinguishable from those in Fair Hearing No. 13,753. <sup>(1)</sup> For the reasons given by the Board in that case, the same result pertains in the instant matter.

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1. If anything, the facts in the petitioner's case have weakened considerably in that his doctor does not presently consider him to be a fit candidate for the surgery in question.