

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. 17,547  
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Appeal of )  
 )

INTRODUCTION

The petitioner appeals a decision of the Department of Prevention, Assistance, Transition, and Health Access (PATH) denying her an exception for Medicaid coverage of acupuncture to treat fibromyalgia and other conditions. The issue is whether the Department abused its discretion in determining that the petitioner's condition was not unique and that she had not demonstrated that "serious health consequences" would occur if she did not have acupuncture.

PROCEDURAL HISTORY

A Recommendation was issued in this matter on May 14, 2002. In an Order dated May 24, 2002 the Board remanded the matter to the Department to consider additional evidence the petitioner had brought to the Board at its meeting on May 22, 2002.

On July 16, 2002 the Department notified the petitioner that upon reconsideration it was still denying coverage for

acupuncture under its M108 criteria. The primary basis of the Department's decision was that the petitioner had not demonstrated that she had exhausted all traditional forms of medical treatment for her condition. Following receipt of this decision the petitioner requested and was granted additional time to submit a statement from her doctor commenting on the Department's decision.

At a hearing on September 11, 2002 it appeared that the petitioner's doctor had not yet submitted anything to the Department. However, the petitioner reported that despite the Department's denial of Medicaid coverage she had begun acupuncture treatments in July 2002, paying for them herself "on a sliding scale". The petitioner and the Department agreed at that meeting that medical evidence of the efficacy of that treatment would be relevant to the Department's reconsideration of its M108 decision regarding Medicaid coverage. The parties agreed to continue the matter to allow the petitioner additional time to submit this medical evidence.

On October 1, 2002 the Board received a copy of a letter from the petitioner's acupuncturist stating that the petitioner had reported good results from the acupuncture she had been receiving thus far.

At a hearing on October 30, 2002 the Department submitted a written response from its medical consultant, dated October 29, 2002, stating the Department's position that the Petitioner still had not submitted unbiased evidence (from either her doctor or physical therapist) that acupuncture was the only effective means of treating her symptoms. The petitioner expressed surprise that her doctor had not provided any information to the Department, and it was agreed by the parties that the petitioner would be given additional time to submit a statement from her doctor that addressed the Department's concerns.

At a hearing on December 19, 2002 the Department acknowledged that it had received a brief written statement from the petitioner's doctor on November 22, 2002 and that its medical consultant had spoken by phone with her on December 17, 2002 soliciting a more detailed written statement. At that time, however, the petitioner's doctor had not provided the Department with a follow up statement in writing. The hearing officer advised the parties that the Department should proceed with a final decision in the matter based on the information it had in the record.

In a letter dated December 24, 2002, the Department's attorney informed the hearing officer and the petitioner that

the petitioner's doctor had emailed the Department on December 18, 2002. The Department stated that based on this information it was requesting that the Board affirm the denial of Medicaid coverage for acupuncture.

Following several additional continuances, on April 1, 2003 the Board received a statement dated March 13, 2003 from the petitioner's doctor reiterating her support for acupuncture for the petitioner, but not addressing her previous correspondence with the Department.

The following findings of fact are in large part a reiteration of those contained in the original Recommendation in this matter dated May 14, 2002. They include, however, additional findings regarding the evidence submitted following the Board's remand of this matter.

FINDINGS OF FACT

1. The petitioner is a fifty-two year old Medicaid recipient who has been diagnosed since the early 1980s with fibromyalgia, a condition which causes fatigue and generalized pain throughout her body. Although the petitioner also alleges other conditions, including arthritis, reports from her doctors indicate that her primary diagnosis is fibromyalgia.

2. Over the years she has received little relief from medications and exercise programs.

3. In 1994, while living in another state, the petitioner was treated with acupuncture and found it helpful in alleviating her pain.

4. In connection with her application for Medicaid coverage under M108 (see infra), the petitioner's treating physicians provided the following statement of medical necessity:

[Petitioner] was diagnosed with fibromyalgia in 1984 while living in Seattle. She has chronic pain in her neck, lower back, knee and foot. Pain is associated with severe spasms that can be disabling. Her condition is associated with chronic fatigue and difficulty sleeping.

Over the years, she has tried many medications including different NSADs and antidepressants without much relief. She has had acupuncture in the past, which has been helpful when used for a regular program.

When asked to describe extenuating circumstances that could be reasonably expected to produce serious detrimental health consequences if the petitioner was not provided these therapies, her doctors responded as follows:

Conventional medical treatment and a regular exercise program have not benefited [petitioner's] condition. Unfortunately, there is a vicious cycle. If there is no relief of lessening of her pain, her sleep and chronic fatigue become worse, which in turn worsen her pain.

Please consider coverage for acupuncture, a treatment known to be helpful in this patient that has not responded to other treatments.

(Emphasis in original)

5. In its initial decision the Department determined that the petitioner had not shown that she has unique extenuating circumstances that will lead to serious detrimental health consequences if acupuncture is not provided to her. The Department also determined that acupuncture has not been proven to be efficacious in the treatment of fibromyalgia and that the petitioner had not exhausted alternative therapies covered by Medicaid, namely, physical and occupational therapy, pharmacological treatment, and pain management.

6. Following the Board's initial consideration of this matter in May 2002 (see infra) the petitioner began regular acupuncture treatments at her own expense. In a written statement dated September 4, 2002 the petitioner's acupuncturist stated that the treatments she had received had been helpful in reducing the petitioner's pain and enabling her to sleep better, but that an "ideal" treatment plan would be a several-month regimen of more frequent acupuncture.

7. In a brief letter to the Department dated November 22, 2002 the petitioner's doctor essentially endorsed

acupuncture as an effective treatment plan for the petitioner's fibromyalgia.

8. In an email to the Department dated December 18, 2002 the petitioner's doctor stated that the petitioner had "maximized" pharmacological therapy for her symptoms. However, the doctor noted that the petitioner had not recently tried physical therapy, including "aquatic treatment". She also admitted that she had never referred the petitioner to a pain clinic. The doctor indicated that she would recommend these alternative treatments to the petitioner and stated: "I hope we can evaluate her progress in six months and consider acupuncture at that time if she has not had improvement in her symptoms".

9. In a note dated March 13, 2002 the petitioner's doctor stated that the petitioner wished to continue acupuncture treatments and reiterated the doctor's belief that studies have shown acupuncture to be an effective treatment for fibromyalgia. This statement makes no mention, however, of the doctor's previously expressed agreement (see supra) that trying other forms of traditional therapy would be appropriate.

ORDER

The decision of the Department is affirmed.

REASONS

The Medicaid regulations specifically exclude coverage of acupuncture for treatment of any condition. Medicaid Manual § M618. The petitioner does not challenge the overall validity of the above regulation.<sup>1</sup> Rather she has asked for an evaluation of her own situation pursuant to M108, a regulation adopted on April 1, 1999 which allows the Department to review individual situations pursuant to a set of criteria. M108 is reproduced in its entirety as follows.

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<sup>1</sup> The Board determined in Fair Hearing No. 15,645 that the Department's decision not to cover acupuncture for Medicaid recipients was a policy decision as it is not required by the federal Medicaid regulations. Fair Hearing No. 15,645.

In a decision that was affirmed by the Vermont Supreme Court, the Board extensively examined the criteria of M108 as it applies to acupuncture to treat fibromyalgia. Fair Hearing No. 16,223; aff'd; Cameron v. D.S.W., Vermont Supreme Court Docket No. 2000-339 (8/23/01). The Board held that M108 gives the Commissioner of PATH the authority to make exceptions for Medicaid coverage in cases which she deems meet certain criteria and that the Board may only overturn an M108 decision if it is shown to be arbitrary, unreasonable, or otherwise an abuse of discretion.

In this case the petitioner has now offered convincing anecdotal evidence (clearly believed by her doctors) that acupuncture has been effective in relieving her pain. It also appears clear that her doctor accepts certain studies finding that acupuncture is an effective treatment for fibromyalgia.

However, what the petitioner still has not shown is that she has exhausted more traditional forms of treatment. In fact, a recent medical report indicates that her doctor now supports a trial of more traditional therapies before continuing any acupuncture treatment. There is no indication that such a trial of traditional therapies would be unduly expensive, intrusive, or in any way medically contraindicated.

As was the case in Fair Hearing No. 16,223, it may well be that acupuncture gives the petitioner relief from her symptoms and it may well be cheaper than conventional therapies. Thus, under the circumstances, it is not unreasonable that her doctor would have referred her for acupuncture before prescribing other treatment.<sup>2</sup> However, as the Board stated in 16,233:

It cannot be said that the Department's desire not to pay for these therapies because they have not been adequately proven in trials and because the practitioners are not working with or under the supervision of physicians is unreasonable. Therefore, even if the Board might reach a different conclusion under the evidence, the discretionary decision of the Commissioner must be upheld.

In affirming the Board's decision in the above case the Supreme Court held that despite the petitioner's "personal experience with pain relief and the referrals from her care providers", in the absence of evidence as to "serious detrimental health consequences" and "the medical appropriateness and efficacy of the service (having) been demonstrated in the literature or by experts in the field" it could not be concluded that the Department's decision was "clearly erroneous". Id. at p. 3.

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<sup>2</sup> It is clear, however, that the Department is willing to provide Medicaid coverage for traditional therapies, and has been all along.

In this case, the Department's decision has the added support of the fact that the petitioner's doctor admits that the petitioner has not exhausted all traditional forms of treatment, which she is willing to prescribe and which the Department is willing to cover. If the petitioner tries such therapies and they prove to be ineffective, the petitioner is free to reapply for coverage for acupuncture. Until that time, however, in light of the foregoing the Department's decision in this matter must be affirmed.

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