

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 18,364
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Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Prevention, Assistance, Transition, and Health Access (PATH) denying coverage of orthodontic treatment under the Medicaid program. This matter came before the Board in March, 2004 at which time it was remanded to the hearing officer to review the record and to amend the findings and recommendation if warranted.

FINDINGS OF FACT

1. The petitioner is currently fourteen years old and under the care of an orthodontist for a number of malocclusions. On February 4, 2003, her orthodontist applied for authorization from PATH to cover "Comprehensive Orthodontic Treatment" for the petitioner.

2. The request was made on a form supplied by PATH which contains a list of criteria to be checked off by the orthodontist. If two of the minor or one of the major criteria listed are met, the child is considered to have a

severe condition. The petitioner's orthodontist described her as having Class II, division II malocclusions and mandibular retrograthia. He checked off that the petitioner has "two blocked cuspids per arch (deficient by at least 1/3 of needed space)", "crowding per arch (10+mm)" and "deep traumatic bite impinging on her palate."

3. PATH's dental office reviewed the request and determined that the only criterion actually met is the deep bite impinging on her palate. PATH found that the cuspids were not actually blocked and the degree of crowding was 3-4 mm, not 10+mm. The petitioner and the orthodontist were notified that her request was denied on February 14, 2003.

4. The petitioner's orthodontist agrees that the petitioner does not exactly meet more than one of the listed criteria (the deep bite impinging on her palate) but he says that the petitioner has conditions which still pose a significant health risk for her. He believes that the blocked cuspids and crowding he found are functionally and medically significant regardless of what kind of measurement is involved in the problem.

5. In addition to the problems he originally checked off, the petitioner's orthodontist has also found that the petitioner has early symptoms (clicking in the joint) of

temporomandibular joint disease (TMD) due to a post-locked position in her lower jaw; two partially blocked and anteriorally displaced cuspids and a mandibular bicuspid in complete buccal cross-bite.

6. It is the opinion of the petitioner's treating orthodontist, a specialist with close to thirty years of experience, that failure to treat these conditions through orthodonture will create a significant likelihood that her malocclusions will worsen causing a breakdown of supportive bone around the upper teeth. He is particularly concerned that without repositioning of the retrograthic lower jaw that the petitioner will have a significant likelihood of increased worsening of her TMD and irreversible derangement bilaterally of the joint complex. This will lead to a compromise of her ability to chew, and to function orally without pain. The existence of the other malocclusions which have resulted in a dysfunctional cuspid relationship will also, he feels, significantly increase the possibility that the TMD problem will worsen. He feels that there is no other course of treatment than comprehensive orthodonture that will address these problems. Without this treatment, he fears she may need expensive and more complicated surgery.

7. On December 5, 2003, the petitioner's molds, X-rays and records were reviewed by PATH's expert in orthodonture, a specialist of experience equal to the treating orthodontist. With the exception of the TMD, he agrees that the petitioner has the malocclusions described by her orthodontist. However, he describes those conditions as being only moderately severe. He believes that the petitioner is not likely to experience the loss of her dentition from these conditions alone absent the presence of plaque and bacteria. He believes that there is a functional difference between conditions that have different values, for example 3-4mm of crowding versus 10 mm of crowding. He describes the degree of cuspid blocking as not ideal but as functionally adequate. He believes the buccal cross-bite could be a future problem but presents none now. He says that the petitioner's condition is not handicapping and that she is not likely to lose her functioning or need surgery in the future. With regard to the TMD, he could not tell whether she actually has it without examining her, which he did not do.¹ However, he believes

¹ In his opinion, the consultant attempted to rely on the observation of yet another consultant who saw the petitioner and reported that she did not appear to have TMD. As the second consultant's report is not in the record, the first consultant's repetition of that report was rejected as hearsay.

that even if she does have this disease, it should be treated with a splint and not orthodonture. Of those who have TMD symptoms, he believes that less than ten percent need further treatment.

8. The petitioner's treating orthodontist rejects the efficacy of treatment of the TMD with a splint alone and characterizes it as a temporary measure that masks the etiology of the petitioner's problem and is insufficient given the impact of the other malocclusions on her TMD. It was his opinion that the petitioner's condition should be treated with comprehensive orthodonture while she is still in the early stages of the disease because the condition is difficult to treat or reverse as it progresses.

9. It is found that the consultant's opinion that an individual condition on the listing can exist without being severe if the values adopted by PATH are not met is credible. However, the consultant's opinion that the combination of these impairments is not as severe for the petitioner as for others with two listed impairments is found to lack substance because he cannot assess the severity of the petitioner's TMD without seeing her. In addition, the expert's opinion that the petitioner's condition is "not handicapping" is meaningless as he did not explain how he defines that term.

10. The petitioner's orthodontist, who, unlike the consultant, has seen the petitioner's dentition several times is found to be more credible in his opinion that the petitioner has TMD, as well as the other described malocclusions and that orthodonture is the treatment most likely to meet with success and to prevent future complications from this disease. His opinion that a splint can be an appropriate additional treatment to orthodonture but alone is only a temporary stopgap method of treatment for the particular combination of TMD and other malocclusions which the petitioner experiences is found to be credible as he is the expert most familiar with her condition.

ORDER

The decision of PATH denying orthodontic coverage is reversed.

REASONS

While the petitioner may not have orthodontic conditions that match up with the "major and minor malocclusions" adopted by PATH in M622, she is not precluded from receiving orthodontic treatment if it is necessary for treatment of temporomandibular joint disease. See Fair Hearing No. 15,885. That is because in addition to treatment of the listed

malocclusions, PATH also specifically covers treatment for "temporomandibular joint disorders" under M621.4. The Board has repeatedly said that "dental services cannot be denied to a recipient when they are needed to alleviate a clearly covered condition even if a by-product of the treatment is the provision of some treatment that is usually not covered.

See Fair Hearing Nos. 10,379, 11,207, 11,625, 12,180, and 13,978.

In April of 1999, at a time subsequent to the above Board decisions, PATH adopted a regulation attempting to limit the type of treatment that can be rendered for TMD:

Non-surgical treatment of temporomandibular joint disorders is limited to the fabrication of an occlusal orthotic appliance (TMJ splint).

M621.4

Once PATH has determined to provide services to ameliorate dental problems of children, federal law requires PATH to ensure that those services are "sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 CFR § 440.230(b). There is no question here that PATH has chosen to cover treatment of TMD and as such must provide treatments of a sufficient scope to carry out the purpose of the program, that is the amelioration of TMD. PATH has offered no justification as to why orthotic splints and

surgery are available to treat TMD but orthodonture is not. According to the credible testimony of the petitioner's orthodontist, splints are temporarily useful but are an ultimately ineffective way of dealing with the petitioner's TMD while surgery is a more complicated, expensive and less successful way of dealing with the problem than orthodonture. There is no provision of a middle-ground treatment that is more permanent than orthotics but less invasive and expensive than surgery. Given these facts, it must be concluded that PATH has arbitrarily limited the treatments available for a covered condition and has thereby provided an insufficient scope of services to carry out the purpose of ameliorating the petitioner's TMD. See Brisson v. Department of Social Welfare 167 Vt. 148 (1997).

In order to cure the impermissible restriction in the regulation, it is necessary to read it as allowing for the coverage of all medically necessary treatment for TMD in children. Thus, as her orthodontist has confirmed the medical necessity of the requested treatment, PATH is obliged to provide this treatment to fulfill the regulatory purpose of the amelioration of TMD found in M621.4.

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