

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 19,138
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families (DCF) denying her an exception under Section M108 of the Medicaid regulations for Medicaid coverage of massage therapy to treat fibromyalgia. The issue is whether the Department abused its discretion under Section M108 of the regulations in evaluating the petitioner's condition and the efficacy of the treatment she is seeking.

DISCUSSION

The petitioner is a forty-eight-year-old Medicaid recipient who has been diagnosed with fibromyalgia, a condition which causes her to feel generalized pain throughout her body. She participates in a number of different therapies to alleviate her pain, including medication, psychotherapy, pool therapy, and chiropractic services. She has also been treated with massage therapy. She and her doctors agree that massage therapy helps alleviate her pain, especially when practiced in conjunction with other treatments. The

Department has denied the petitioner Medicaid coverage for massage therapy.

Attached to this recommendation, and incorporated by reference herein, is the "reanalysis" by the Department of the petitioner's M108 application submitted in September 2004 pursuant to this fair hearing. It is found that this decision thoroughly reviewed and accurately summarized all the medical evidence submitted to the Department by the petitioner and her service providers. In addition, the record reflects that the Department has thoroughly reviewed voluminous copies of articles submitted by the petitioner taken from the Web regarding the efficacy of massage therapy. A written review by the Department of these materials is also attached and incorporated by reference.

There does not appear to be any dispute in this matter that virtually all the petitioner's health care providers recommend, or at least support, massage therapy as a component of the petitioner's overall treatment for fibromyalgia. There also does not appear to be any dispute that massage therapy provides the petitioner with temporary alleviation of her pain. However, based on all the evidence submitted, it cannot be found that the Department ignored or misread the evidence, or otherwise abused its discretion, in its conclusions

regarding the temporary nature of the pain relief afforded by massage therapy, the lack of a specific treatment plan supervised by a physician, the lack of uniqueness to the petitioner's symptoms, and the lack of evidence as to any serious detrimental health consequences if she could not obtain massage therapy.

ORDER

The decision of the Department is affirmed.

REASONS

The Medicaid regulations specifically exclude coverage of "massage therapy" for treatment of any condition. W.A.M. § M618.1. In general, Medicaid will pay for the services of licensed medical personnel such as physicians, chiropractors, nurse practitioners, dentists audiologists, ophthalmologists and *rehabilitation* therapists working under the supervision of a physician. See e.g. §§ M640 and M510(10).

The petitioner does not challenge the general validity of these regulations. 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. A copy of this regulation is attached hereto and incorporated herein.

Unfortunately for the petitioner, this is not a case of first impression before the Board. The facts and circumstances of her case are nearly identical to those in at least four prior decisions. Fair Hearing Nos. 18,227; 17,547; 16,223; and 15,645. One of these (No. 16,223) was affirmed by the Vermont Supreme Court. See Cameron v. Dept. of PATH, Docket No. 2000-339 (unreported, August 23, 2001). All of these decisions, including that of the Supreme Court, contained the following essential analysis.¹

Section M108 does not guarantee any benefit to any particular applicant. What it does provide is a right to have a denial of Medicaid coverage individually reviewed, and it gives the Commissioner of the Department the authority to make exceptions in cases she deems meet the specific criteria of the regulation. The regulation vests a good deal of discretion in the Commissioner in reviewing and applying the specified criteria. In any case involving a matter in which regulatory discretion has been vested in a specific individual or agency, the Board may overturn that agency's decision *only* if it is shown to be arbitrary or unreasonable, or that it otherwise demonstrates an abuse of discretion. The Board may

¹ All of the prior cases concerned the denial of M108 coverage for acupuncture to treat fibromyalgia. Fair Hearing No. 16,223 (the case

not overturn a decision simply because it would have reached a different decision based on the same evidence. Huntington v. Dept. of S.R.S., 135 Vt. 416 (1981), 3 V.S.A. § 3091(d), and Fair Hearing Rule No. 17.

In this case, the Department's decisions (see attached) clearly indicate that all of the information submitted by the petitioner was reviewed and that the Commissioner considered all of the pertinent M108 criteria required. It cannot be said that her analysis of either the evidence or the M108 criteria is inaccurate, cursory, or unreasonable.

The petitioner has offered substantial anecdotal, albeit credible, evidence that massage therapy provides at least temporary medical benefits for her condition. However, she has not shown that it was unreasonable for the Department to determine that such therapy does not have any proven medical efficacy for the long-term treatment of fibromyalgia.

The petitioner also has not shown any clear error in the Department's finding that she will not suffer serious detrimental health consequences if the service is not provided. Although it appears that her inability to obtain massage therapy will deprive her of opportunities to obtain short periods of alleviation of her pain, there is no credible

affirmed by the Supreme Court) involved acupuncture and massage therapy.

evidence that massage therapy is likely to arrest or ameliorate any degenerative aspect of her disease, or that her overall health would be seriously harmed without this therapy.

The Board has repeatedly noted that these are difficult cases because the petitioners clearly suffer from chronic pain and can credibly show that these therapies have helped them to get some measure of relief. It can also be argued as a general matter (though disputed by the Department in this and some of the other cases) that these therapies are often cheaper than "conventional" treatments that would be covered under Medicaid. However, 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.

#