

evidence. At some point in the process the petitioner purchased the chair himself, and he is now seeking reimbursement.

2. The petitioner's medical condition and his need to sit and sleep in a reclined position were detailed in the following report that was submitted by his treating family practice physician with the original request for coverage in September 2004 (but which inexplicably was not furnished to the Board until May 19, 2006):

[Petitioner] has severe, debilitating ankylosing spondylitis. Because of this he is unable to move his neck or back and has limited arm strength and hand mobility. He spends a great majority of his time--day and night--in a recliner-type chair as this affords him the most comfortable position. Currently he uses an electric recliner which, while helpful in some ways has been problematic as well. For one, the area he lives in is subject to power outages and may leave him stranded for hours at a time in the chair. The requested chair is not electric. Secondly the new chair has swivel motion that would allow him to rotate sideways to reach items placed lateral to him. Third, the current chair has a button located on the side of it that must be located then pushed in order for the chair to move. The lag time to raise the chair is 15-20 seconds. [Petitioner] often has to sit up quickly to avoid choking on medicines, food, or drink, and this delay has been problem for him in the past. The new recliner can be elevated in 1-2 seconds just with a shift in body weight. Lastly the rocking, swiveling motion of this new chair will help to shift the pressure points on his backside and may prevent pressure ulcers that he has been prone to.

3. The petitioner's treating physician then followed up with two additional reports.

a. The first was dated March 15, 2005:

[Petitioner] has been a patient in our practice for over ten years. During this time we have worked through countless medication regimes to modify his pain and to improve his quality of life.

[Petitioner's] mobility is extremely limited by his ankylosing spondylitis and there are certain modalities and modifications that could improve his comfort. He has made a simple request for an electronic recliner. Such a device would simplify his getting into and out of the chair where in fact he spends the majority of his time. There are times too, where the electronic device might be life saving. For example when taking his pills [petitioner] must often lean forward rapidly to prevent them from becoming stuck in his throat and the manual recliner does not do this quickly enough to prevent choking.

[Petitioner] has certainly availed himself of all pain management and warrants some situational modification, to improve his comfort.

b. The second was dated June 16, 2005:

I am appealing again to your organization to reconsider payment for [petitioner's] mechanical chair. I consider this device a key towards [petitioner's] recent medical improvement. Since his purchase of this chair [petitioner] has been able to rest more fully, has healed his pressure ulcers, and has been well able to avoid the previous choking incidences that he had been experiencing. Each incidental improvement has been motivational for him. As a result of this, his energy had been increased, motivating him to return to the rheumatologist to seek new treatments for his ankylosing spondylitis. Thus, in turn, lead to a trial of Embrel, which allowed him to rapidly decrease his use of costly and/or addictive

medications such as Oxycontin, Neurontin etc. His life has been dramatically changed at this time, all stemming, it would seem, from a simple mechanical device. Please consider reimbursement of this.

4. The record also contains the following report from the petitioner's treating arthritis and rheumatology specialist, dated June 29, 2005:

[Petitioner] has ankylosing spondylitis which substantially limits his ability to move due to fusion of his spine and restriction of joint movement in his extremities. He is not able to twist or turn his torso, neck, or low back, nor is he able to bend side to side. He stands from a seated position by rocking his body forward to gain momentum to get on his feet. He has chronic pain due to ankylosing spondylitis, and he is unable to lie flat or stand up straight anymore. The physical damage from ankylosing spondylitis is not correctable by any means because spine replacement is not available yet.

In my opinion, it is medically necessary for [petitioner] to use a recliner in which to sleep because a recliner will follow the contours of his permanently stooped posture, and it will allow him to stand without having to roll over or struggle to get out of bed. This is not an action any bed, even a hospital bed, could provide for him, since beds do not tip at the foot enough to allow someone to stand up without rolling over or without scooting one's bottom forward or to one side. It is my understanding that his home's electricity supply is not reliable, and that a manual control is more desirable for him to allow use of the recliner without power.

Should you have further need for information to clarify [petitioner's] health status or physical abilities or about any of this information, please contact me at my office by letter or by phone.

5. On December 1, 2005 the Department informed the petitioner and the Board that based on the above reports it would agree to furnish the petitioner with a hospital bed. At a status conference held on December 6, 2005 the hearing officer (not having seen the September 2004 report from the treating physician [*supra*]) instructed the Department to attempt to contact the petitioner's arthritis specialist to solicit her opinion (in the hope that it would matter to the Department in light of what he perceived to be the Department's inflexibility [see *infra*]) regarding the relative merits of a hospital bed versus a reclining chair. In a letter dated December 20, 2005 the Department reported that it had attempted to contact the petitioner's doctor and had left a message for her to call the Department's medical consultant, but that she had not returned the Department's call.

6. The petitioner does not dispute that as a matter of comfort and pain relief while he is sitting and sleeping, a full hospital bed, while not as quick or easy to transfer in and out of, would function the same as a reclining chair. However, the above evidence is clear that the petitioner often has to sit up quickly to prevent choking, even while he is sleeping; and that a hospital bed simply cannot perform

this function, especially if there is a power outage or malfunction.

7. The above evidence is now clear that the petitioner's physicians are recommending a mechanical chair, not an electric one, and that the March 15, 2005 letter from the treating physician (paragraph 3[a], *supra*) mistakenly confused this issue. Only a mechanical lift chair enables the petitioner to sit up quickly if he is choking.

ORDER

The Department's decision is reversed.

REASONS

Based on the above medical evidence the Department has agreed to provide Medicaid coverage to the petitioner for a hospital bed, which is a covered item under the regulations defining "durable medical equipment". W.A.M. M840.3.

That section also covers "seat lift chairs when the beneficiary is unable to achieve a standing position without assistance". At least from the above medical evidence, it appears that while the petitioner has some difficulties getting up from a seated position, he is able to stand without assistance. Thus, strictly reading the above

regulation, it cannot be concluded that he meets the definitional requirement for a "seat lift chair".

However, this analysis is problematic in that the petitioner's primary medical need is for a *reclining* chair. There is no dispute that the petitioner's chair has both a recliner and a seat lift mechanism. As the above reports indicate, the petitioner has been advised to use the chair not only for sitting, but also for sleeping.

In light of the above, the Department also reviewed this matter under its M108 criteria, which is a procedure for requesting exceptions to a non-covered item. Those criteria are set forth below:

1. Are there extenuating circumstances that are unique to the beneficiary such that there would be serious detrimental health consequences if the service or item were not provided?
2. Does the service or item fit within a category or subcategory of services offered by the Vermont Medicaid program for adults?
3. Has the service or item been identified in rule as not covered, and has new evidence about efficacy been presented or discovered?
4. Is the service or item consistent with the objective of Title XIX?
5. Is there a rational basis for excluding coverage of the service or item? The purpose of this criterion is to ensure that the department does not arbitrarily deny coverage for a service or item.

The department may not deny an individual coverage of a service or item solely based on its cost.

6. Is the service or item experimental or investigational?
7. Have the medical appropriateness and efficacy of the service or item been demonstrated in the literature or by experts in the field?
8. Are there less expensive, medically appropriate alternatives not covered or not generally available?
9. Is FDA approval required, and if so, has the service or item been approved?
10. Is the service or item primarily and customarily used to serve a medical purpose, and is it generally not useful to an individual in the absence of an illness, injury, or disability?

The Board has held that M108 decisions are within the discretion of the Department and will not be overturned unless OVHA has clearly abused its discretion by either failing to consider and address all of the pertinent medical evidence under each criterion set forth above or by reaching a result that cannot be reasonably supported by the evidence. See, e.g., Fair Hearing No. 19,425.

In this case, as noted above, the Department has determined that a hospital bed, which is a covered item of durable medical equipment, can adequately meet the petitioner's medical need to sit and sleep in a reclined position. However, this conclusion ignores or arbitrarily

discounts the uncontroverted opinions of the petitioner's doctors that the petitioner occasionally has an emergency need (i.e., potentially "life saving") to be able to sit up quickly if he is choking, and that a hospital bed would not enable him to do this. Certainly, this constitutes a "serious detrimental health consequence" as set forth in the M108 regulations.

In light of the fact that the petitioner's needs are long-term, there is also no question that a reclining chair is also significantly less expensive than a hospital bed. Thus, it must be concluded that the Department's position in this matter is contrary to the medical evidence, arbitrary, and inconsistent with the criteria under M108.

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