

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. 21,077  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals the decision by the Office of Vermont Health Access (OVHA) denying his request for a titanium frame wheelchair. The issue is whether the petitioner's request for durable medical equipment meets the medical necessity criteria of the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program.

The following recommendation is based upon stipulated exhibits<sup>1</sup>, partial stipulation of facts, and testimony adduced at hearing.

FINDINGS OF FACT

1. The petitioner is currently seventeen years old and a junior at Burlington High School. Petitioner is 4'11" tall and weighs approximately 90 pounds.

2. The petitioner is a T3 paraplegic related to the removal of a spinal ganglioma when he was an infant. In

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<sup>1</sup> Stipulated exhibits include affidavits from P.W., J.D., M.M. supporting petitioner's position and the original Medical Basis Statement and addenda from S.M. at OVHA.

addition, petitioner has scoliosis and residual spinal deformity. Petitioner had a spinal fusion in 2002, and as a result, has significantly limited movement in his back and neck. Petitioner had a course of physical therapy from December 2005 to February 2006 due to shoulder pain caused by repetitive strain in his upper trapezius muscles; petitioner's shoulders were injured from the strain of self-propelling his wheelchair over uneven terrain during a Colorado vacation.

3. Petitioner uses a manual wheelchair. Petitioner has good upper extremity strength and full range of motion in his shoulder area. Petitioner is able to self-propel his wheelchair and sit in a stable position without using his hands. Petitioner is able to transfer into and out of his wheelchair independently. Petitioner testified that he has problems using his wheelchair on uneven surfaces. He described shoulder and neck pain that he controls with the use of Tylenol and rest.

4. Petitioner is an active high school student who values his independence. Petitioner plays sled hockey, a sport created for individuals with similar disabilities. He is involved with school and community activities. His goal is to attend college and find a job in sports media.

Petitioner received his driver's license recently and has a car with modified controls. Petitioner can transfer between the car and wheelchair independently, but he cannot fold his current wheelchair to put into and out of the car.

Petitioner is helped by family and friends who place the wheelchair in his car. Petitioner does not receive special transportation services to and from school. Petitioner is looking for a lightweight wheelchair so that he can also fold and put the wheelchair in his car on his own and have greater independence. In addition, he wants a lightweight wheelchair to prevent repetitive stress injuries to his shoulders.

5. Petitioner's current wheelchair is an Otto Bock Voyager manual wheelchair. Petitioner is in his wheelchair 12 to 14 hours daily. Petitioner's wheelchair is approximately four years old and shows the effects of wear and tear. Petitioner needs a replacement wheelchair.

6. Petitioner is seeking a TiLite ZR ultralight titanium chair. Petitioner's doctor, J.M., and physical therapist, P.W., prescribed this model on or about April 2, 2007.

7. Petitioner was evaluated by P.W. for a new wheelchair in the spring of 2007. P.W. is a licensed physical therapist. P.W. is a physical therapy consultant

with the Vermont Department of Health, Children with Special Needs division, and he is associated with the University of Vermont (UVM) Center of Disability and Inclusion. P.W. has worked with petitioner over a seven year period. As part of the evaluation process, P.W. had petitioner test a variety of wheelchairs to determine which wheelchair would meet the medical necessity standard.

8. Petitioner's prescription was reviewed by S.M. at OVHA. S.M. is a physical therapist who reviews requests for prior authorization for medical services including durable medical equipment (DME) such as wheelchairs. S.M. stated that OVHA expects that wheelchairs will last four to five years. S.M. also drafts OVHA policies. According to S.M., she receives hundreds of requests for prior authorization each week from medical providers in which she must determine whether there is medical necessity for a particular request. S.M. described her process which includes review of the documentation submitted in support of the prior authorization request, independent research, and contacts with the medical providers for more information. S.M. basically does a paper review. In very rare situations, S.M. may meet with the applicant.

9. In petitioner's case, S.M. agreed that petitioner needs an ultralight wheelchair with the same configuration as the TiLite wheelchair (titanium wheelchair) petitioner requested. S.M. modified the approval to an aluminum wheelchair that has the same configuration as the titanium wheelchair. The titanium wheelchair weighs 18.5 pounds and the aluminum wheelchair weighs 20.33 pounds. The aluminum wheelchair is 1.7 pounds heavier than the titanium wheelchair.<sup>2</sup> Aluminum wheelchairs generally cost less than titanium wheelchairs; the notes on page 1 of OVHA's Nurse Reviewer Worksheet (Exhibit 5) indicate a \$400 price difference for the base price of the wheelchairs not counting any accessories. S.M. sent a Notice of Decision dated August 7, 2007 approving an ultralight aluminum wheelchair.

10. Petitioner appealed the decision on September 5, 2007 stating that the weight difference between a titanium and aluminum wheelchair is medically significant. Pending the hearing, petitioner submitted additional materials to OVHA for review including affidavits from P.W., J.D., and M.M. OVHA considered the additional information but did not change their decision. As will be more fully spelled out

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<sup>2</sup>The parties have described the weight difference as two pounds in most of the documentation and testimony.

below, S.M. made certain assumptions that were not accurate since her information was based on a paper review without the first hand knowledge of petitioner's medical, physical therapy, and occupational therapy providers. Petitioner's providers have given consistent and credible evidence regarding petitioner's physical strengths and weaknesses, the reasons the 1.7 pound difference is significant, and the medical necessity for petitioner's request.

11. In the pertinent sections of his affidavit, P.W. stated:

[Petitioner] has poor trunk strength and stability and very limited spinal mobility. He is paralyzed from his chest down. [Petitioner] has fairly good upper extremity strength, but he has experienced pain in his upper extremities and neck due to repetitive stress from propelling his wheelchair, sufficient to require physical therapy.

The requested chair . . . was selected for several reasons. First, the frame construction of this chair allows [petitioner] to transfer in and out of the chair independently, including in and out of his car. The frame configuration allows [petitioner] to position the chair close to other surfaces so that he can use his upper body strength effectively.

Having the lighter weight frame is medically necessary . . . Even the seemingly small weight difference will have a significant impact . . . He relies entirely on his upper extremities for both propulsion and support. The cumulative effect of the extra chair weight on his arms and shoulders create a significant impact, and has already led to significant pain in those areas.

. . . given [petitioner's] mobility limitations, small weight and stature, and history of repetitive stress injury from propelling his chair, having a lower weight chair will help maintain his health, by minimizing the possibility of further injury.

12. P.W. testified at the hearing. According to P.W., he looks at the least expensive medically necessary wheelchair in making his recommendation. P.W. said that independent mobility and best seating/positioning are goals in determining wheelchair recommendations. P.W.'s opinion is that the titanium wheelchair is the least expensive medically necessary wheelchair for petitioner to self-propel and to use for transfers.

P.W. took into account petitioner's medical condition. According to P.W., petitioner has poor trunk support so that petitioner uses his shoulder and arm strength to provide stability to maneuver and self-propel his wheelchair. Petitioner has enough shoulder extension to get a good stroke. P.W. testified that self-propelling a wheelchair is a form of aerobics that helps petitioner keep generally fit and specifically helps his cardio-vascular fitness. P.W. stated that self-propelling is important to petitioner's independence and self-esteem. P.W. explained that the wheelchair's configuration allows petitioner to minimize the

distance during transfers between his wheelchair and other surfaces such as bed, bath bench, car, etc.

In addition, P.W. took into account how petitioner sits or positions himself in the wheelchair. P.W. recommended a lighter weight seat and back even though the configuration gives less support to a person's back. According to P.W., they compromised with back support because petitioner does not sit back in his wheelchair. Petitioner sits forward and does not use the back support except briefly for some stretching.

13. J.D. is a licensed physical therapist and assistant clinical professor in the Department of Rehabilitation and Movement Science at UVM. J.D. provided physical therapy for petitioner from December 2005 to February 2006 due to pain caused by a repetitive strain in petitioner's upper trapezius muscle. In her affidavit, J.D. stated her opinion that the lightest possible wheelchair is medically necessary for petitioner for the following reasons:

Given his existing shoulder injury, the lighter chair will maintain his health by minimizing the risk of new or repeat injury. This chair is medically necessary because it will prevent deterioration of his condition. It will do this for two reasons. First, it will lessen the risk of reinjury. Second, when [petitioner's] shoulder is in pain, his overall activity is lessened. As a young person, still growing and developing, he needs to keep as active as possible in order to maintain

his overall health. The lighter chair is needed for him to achieve proper growth and development, by allowing him to maintain an active and healthy lifestyle.

J.D. further explained that petitioner has to rely on his shoulder and arm muscles to self-propel and to compensate for the work that would be done by his torso because he cannot flex his back, has little strength in his torso, and has some upper extremity muscles that are weak. Self-propelling on uneven surfaces can exacerbate petitioner's situation. J.D. stated that a weight difference of two pounds is significant for petitioner.

14. M.M. is an occupational therapist and a Certified Driver Rehabilitation Specialist. M.M. is the program coordinator of the Driver Rehabilitation Program at Fletcher Allen Health Care. M.M. submitted an affidavit and testified at the hearing.

M.M. began working with petitioner during July 2006. M.M. evaluated the type of controls petitioner needs in a car and trained petitioner to properly use the controls. As a result, M.M. has observed petitioner in different settings including his high school. The high school is located on a slight hill. M.M. observed petitioner use greater exertion to self-propel his wheelchair at the high school; she stated at times petitioner appeared to be straining. M.M. has also

worked with petitioner to properly disassemble his wheelchair and lift the wheelchair parts across his body into the car; this process puts more stress on petitioner's shoulders.

According to M.M., a two pound weight difference is significant over time because petitioner will exert himself more through repeated use of a heavier wheelchair. The following parts of M.M.'s affidavit best summarize her testimony:

Most people who manually propel a wheelchair use their back and neck muscles along with their shoulder and arm muscles to push the wheels. Because [petitioner] has very little back and neck range of motion, he has to put more stress on his upper extremity muscles to propel the chair. The stress is added to his already compromised upper extremity strength.

People with spinal cord injuries are very prone to joint injuries in their upper extremities. This is particularly true of young people who use manual wheelchairs . . . For someone of [petitioner's] age, it is critical to conserve joint integrity as much as possible. . . . If [petitioner] develops musculoskeletal impairments in his shoulders he may prematurely end up in a power chair. This, in turn, will have adverse affect on his overall health, since he relies on manual propulsion of his chair to maintain cardiovascular and pulmonary health.

15. S.M. reviewed petitioner's request for a titanium wheelchair. In her original Medical Basis Statement, S.M. agreed with petitioner that he met the medical necessity standard for an ultralight wheelchair due to his neck and arm discomfort. S.M. found that the petitioner had the strength

and range of motion to self-propel an ultralight wheelchair. However, S.M. did not consider the titanium wheelchair the least expensive medically necessary wheelchair for petitioner. S.M. focused on petitioner's desire to have a wheelchair that was easier to load into a car. In addition, S.M. did not consider the approximately two pound weight difference to be significant in terms of propulsion. S.M. did not specifically address the EPSDT criteria.

16. S.M. continued to review petitioner's request after receipt of affidavits from P.W., J.D., and M.M. S.M. contacted the above individuals. As S.M. obtained information, she analyzed the information and wrote addenda. In her analysis, S.M. focused on several issues including (1) her conclusion that the original prescription "skimped" on back support or positioning, (2) petitioner should consider a power or power-assisted wheelchair (more expensive than the titanium wheelchair) to prevent stress to his shoulders and arms, and (3) petitioner's request seemed to be more directly related to his ability to use a car than his ability to self-propel a wheelchair.

17. At the hearing, S.M. had the opportunity to observe petitioner during the hearing; the hearing lasted over two hours. As a result of her observation, S.M. saw that

petitioner does not use his back support. S.M. testified that if the petitioner does not use the back support, the adequacy of the back support was no longer an issue. As a result, S.M. pulled back from her analysis that the petitioner's providers had "skimped" on positioning.<sup>3</sup> S.M. concurred with P.W. that physical therapists use judgment and compromise in determining a prescription.

18. S.M. testified that the weight differential of 1.7 pounds between the titanium and aluminum wheelchairs was not significant. S.M. testified that if petitioner gained 1.7 pounds that his weight gain would negate the impact of the difference in the two wheelchairs' weight. S.M.'s testimony ignores that the weight differential remains and that petitioner will continue to have an easier time using the lighter weight wheelchair.

19. S.M. suggested a power wheelchair or power assisted wheelchair in her written analysis as a way for petitioner to avoid repetitive strain to his shoulders. As a result, P.W. and petitioner explored this option and determined that the suggestion was not appropriate for petitioner.

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<sup>3</sup> S.M. testified regarding a conversation with J.D. J.D. did not testify at the hearing. When S.M. spoke to J.D., she asked whether J.D. was aware that petitioner's providers had "skimped" on the prescription. "Skimp" is a value laden word and could have skewed the exchange between S.M. and J.D. As a result, the Board will consider J.D.'s affidavit but will not consider S.M.'s reporting on her subsequent contact with J.D.

Both S.M. and P.W. testified that there are separate regulations governing power wheelchairs and that those regulations include a requirement that the applicant is unable to self-propel a manual wheelchair. Power assisted wheelchairs would be included in these regulations. According to S.M., any request by petitioner for either type of power wheelchair would have to be considered in light of the regulations; there is no guarantee that petitioner would be eligible for such a wheelchair. P.W. testified that he does not consider petitioner a candidate for a power or power assisted wheelchair because petitioner is physically able to self-propel a manual wheelchair.<sup>4</sup>

The evidence does not support the suggestion that petitioner request a power or power assisted wheelchair since petitioner does not meet the criteria of being unable to self-propel a manual wheelchair.

20. S.M. testified that EPSDT supersedes state regulations and that EPSDT includes prevention as well as consideration of a youth's growth and development.

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<sup>4</sup> In addition, P.W. and petitioner testified regarding the different problems caused by using a power or power assisted wheelchair including heavier frames, less accessibility because of the larger frames, mechanical breakdowns, and the need for a specialized vehicle. S.M. concurred that these problems exist.

21. Dr. J.M. submitted a letter dated October 17, 2007 in support of petitioner's request. The letter iterates the underlying medical diagnosis and difficulties. Dr. J.M. added that part of his efforts is to encourage petitioner to develop his physical strength since petitioner's condition will be life-long.

ORDER

OVHA's decision is reversed.

REASONS

Petitioner's request for the TiLite ZR titanium wheelchair to replace his four year old wheelchair triggered a review of whether the petitioner's request meets the requirements of the applicable Medicaid programs.

Wheelchairs are considered durable medical equipment (DME) and the cost of a replacement wheelchair may be covered by Medicaid. M840.1 and M841. The pertinent portions of M841.3 provide:

Purchase of Manual Wheelchairs Payment will be made for standard manual wheelchairs for beneficiaries who have documented long-term medical needs and are capable of upper body function sufficient to self-propel.

Purchase of Custom Wheelchairs, Battery Operated Wheelchairs, Three Wheeled Power Vehicles, and Other Mobility Devices Payment will be made for a custom-

manual wheelchair . . . when a beneficiary's needs cannot be reasonably met by a provision of a standard manual chair.

Purchase of Replacement Wheelchair Payment will be made for replacement wheelchairs . . . when as a result of normal wear and tear, it no longer safely addresses the medical needs of the beneficiary.

The parties agree that petitioner needs a new wheelchair due to the wear and tear his present wheelchair has undergone the past four years. The evidence demonstrates that petitioner is capable of self-propelling a manual wheelchair. Petitioner's and his providers' concern is to maintain his ability to do so for as long as possible by recommending an ultralight titanium wheelchair.

Pursuant to M841.5, petitioner's request for the titanium wheelchair went through the prior authorization process. The criteria for prior authorization are set out in M106. Requests for prior authorization will be approved if the request meets certain criteria including medical necessity, appropriately and effectively meeting petitioner's needs, and being the least expensive appropriate service. M106.3(1)(2)and(4).

The crux in petitioner's case is how medical necessity is defined for EPSDT eligible beneficiaries. M107 states:

"Medically necessary" means health care services, including diagnostic testing, preventive services, and

aftercare, that are appropriate, in terms of type, amount, frequency, level, setting, and duration to the beneficiary's diagnosis or condition. Medically necessary care must be consistent with generally accepted practice parameters as recognized by health care providers in the same or similar specialty as typically treat or manage the diagnosis or condition, and

1. help restore or maintain the beneficiary's health; or
2. prevent deterioration or palliate the beneficiary's condition; or
3. prevent the reasonably likely onset of a health problem or detect an incipient problem.

Additionally, for EPSDT-eligible beneficiaries, medically necessary includes a determination that a service is needed to achieve proper growth and development or prevent the onset or worsening of a health condition. (emphasis added)

Vermont has recognized through its regulations that EPSDT provides "more extensive coverage" for children than adults. M100. EPSDT covers individuals up to 21 years old. S.M. in her testimony indicated that EPSDT trumped state regulations. M107 incorporates the broader standard.

The pertinent section of M100 incorporates 42 U.S.C. § 1396d(r)(5) by stating:

The scope of coverage for children under . . . EPSDT . . . is different and more extensive than coverage for adults. The EPSDT provisions of Medicaid Law specify that services that are optional for adults are mandatory for all Medicaid-eligible children . . .

Further, M100 incorporates 42 U.S.C. § 1396d(a)(13) which requires States to provide EPSDT-eligible children with:

. . . other diagnostic, screening, preventive, and rehabilitation services including any medical or remedial services (provided in a facility, home, or other setting) recommended by a physician or other licensed professional of the healing arts within the scope of their practice under State Law, for the maximum reduction of physical or mental disability and restoration of an individual to the best functional level. (emphasis added)

In creating the Medicaid program, the federal government took special care to provide for the needs of children.

Rosie D. v. Romney, 410 F.Supp.2d 18 (D.Mass. 2006 at page 25, "As broad as the overall Medicaid umbrella is generally, the initiatives aimed at children are far more expansive.")

In addition, the Court in Rosie D., supra at page 26 stated:

Courts construing EPSDT requirements have ruled that so long as a competent medical provider finds specific care to be "medically necessary" to improve or ameliorate a child's condition, the 1989 amendments to the Medicaid statute require a participating state to cover it. See, e.g., *Collins* 349 F.3d at 375 (holding that if a competent medical service provider determines that a specific type of care or service is medically necessary, state may not substitute a different service that it deems equivalent); see also *Rosie D.*, 310 F.3d at 232; *John B. v. Menke*, 176 F.Supp.2d 786, 800 (M.D.Tenn.

2001) (noting that a state "is bound by federal law to provide 'medically necessary' EPSDT services").

See also Weaver v. Reagen, 886 F.2d 194 (8<sup>th</sup> Cir. 1989) and Hilburn by Hilburn v. Maher, 795 F.2d 252 (2<sup>nd</sup> Cir. 1986) for proposition that deference is given treating doctors in Medicaid cases.

Looking at the particular evidence in this case, the petitioner has demonstrated that his requests meet the EPSDT criteria. Petitioner has provided competent medical testimony from providers supporting his position that the titanium wheelchair is medically necessary. These providers have first hand experience regarding petitioner and their evidence should be given deference. Rosie D., supra; Weaver v. Reagen, supra.

In this case, there is a marked disparity in the quality of analysis and evidence from the respective parties. In part, the disparity is caused by the large caseload the OVHA reviewer carries as well as her reliance on a paper review. OVHA made assumptions that were not accurate in light of the actual evidence as detailed in the findings of fact. As a result, petitioner's witnesses carry greater weight.

Here, providing the titanium wheelchair addresses prevention of "the onset or worsening of a health condition".

M.M. explained that individuals who have spinal injuries are prone to upper extremity joint injuries because of the way in which they use their shoulders over time to self-propel their wheelchairs.

Petitioner has suffered one such injury to his trapezius muscles necessitating physical therapy. The medical professionals who work with or have worked directly with petitioner believe the titanium wheelchair is medically necessary to reduce the risk of reinjury and to reduce the likelihood of deterioration to petitioner's shoulder. Petitioner's experts are concerned about the real risk of reinjury to petitioner's shoulder and that petitioner could find himself in a power wheelchair prematurely; their emphasis has been on prevention. In OVHA's written Medical Basis Statement and addenda, OVHA does give credence that petitioner is at risk to further shoulder injury. What OVHA does not give credence to is that the weight difference between the titanium and the aluminum wheelchairs is consequential and that the lower weight wheelchair is necessary to prevent "the onset or worsening of a health condition".

On its face, a 1.7 pound differential may not appear meaningful. However, the evidence demonstrates that the 1.7

pound differential is significant because of the cumulative impact of the added daily stress that petitioner would undergo as he self-propels his wheelchair and as he transfers to and from his wheelchair. In addition, this differential impacts petitioner's growth and development.<sup>5</sup>

Moreover, providing the titanium wheelchair is necessary to "achieve proper growth and development". Petitioner is a seventeen-year-old-boy who is still developing and growing. To date, petitioner has lived an active life despite the constraints he faces. Dr. J.M., his treating physician, emphasized the need to give petitioner the opportunity to develop and maintain his strength. J.D. noted the importance of petitioner remaining active to maintain his overall health. In OVHA's analysis, "achieving proper growth and development" was not specifically addressed.

In addition, P.W. and M.M. spoke to petitioner's ability to self-propel as petitioner's method to do aerobic activities that maintain and strengthen his overall health,

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<sup>5</sup> OVHA emphasized the effect on petitioner's shoulder from carrying a wheelchair into his car and minimized the effect from the repetitive stress of self-propelling a wheelchair. Petitioner is a typical teenager with his first license and car; he is focused on easing the transfer of his wheelchair into his car. However, petitioner's medical providers considered much more than the effects of transferring the wheelchair into a car when listing their concerns about the weight differential for petitioner. Their concerns stem from the daily repetitive impacts of both self-propelling a wheelchair and from all transfers.

and in particular, his cardio-vascular health. Petitioner uses his self-propelling throughout the course of a day in much the same way as many incorporate aerobic and cardio activities throughout the course of a day through walking.

Looking at 42 U.S.C. § 1396d(a)(13), Congress emphasized maximum reduction of disability and maximum restoration of functional ability. The standard for medical necessity must incorporate Congressional intent in determining medical necessity in EPSDT cases. OVHA did not speak to the particular factors comprising an analysis of an EPDST case. Instead, their analysis followed the analysis in a medical necessity case for an adult.

The evidence supports a finding that the weight differential between the titanium and aluminum wheelchairs is significant. The titanium wheelchair is medically necessary for "the maximum reduction of physical or mental disability and restoration of an individual to the best functional level". Accordingly, OVHA's decision should be reversed and authorization should be granted for the TiLite ZR wheelchair. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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