


STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: February 6, 2018

AGENCY: Suffolk

FH #: 7699653M

In the Matter of the Appeal of	:
	: DECISION
	AFTER
	: FAIR
	HEARING
from a determination by the Suffolk County	:
Department of Social Services	

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on April 6, 2018, in Suffolk County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For the Agency or MLTC


Medical Assistance Managed Long Term Care Organization (MLTC)
Agency (MLTC) appearance waived by the Office of Administrative Hearings

ISSUE

Was the MLTC's determination to deny the Appellant's Physician's prior approval request for pharmaceutical prescription item Ensure Pudding on the grounds that the request is not a covered benefit under her Medicaid Managed Care benefit package correct?

FINDINGS OF FACT

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, age , has been in receipt of Medical Assistance authorization for just herself and is enrolled in Centers Plan For Healthy Living, New York, a Medical Assistance Managed Long Term Care Organization.

2. On September 6, 2017, November 7, 2017, and November 10, 2017, the Appellant's Physician requested prior approval for pharmaceutical prescription grade Ensure Pudding for the Appellant, for the Appellant's primary diagnosis of Advanced Dementia, characterized by Acute Weight Loss due to Recurrent Aspiration Pneumonia Dysphagia.

3. The Appellant's Physician established medical necessity for the requested pharmaceutical item for the Appellant.

4. On January 26, 2018, the MLTC determined to deny the Appellant's Physician's prior approval request for pharmaceutical prescription item Ensure Pudding on the grounds that the request is not a covered benefit under her Medicaid Managed Care benefit package.

5. The item in question is classified as a supplement and medical food, albeit a prescription item. Furthermore, it is not covered in the Medicaid fee-for-service benefit package and it is not covered or listed in the New York State Department of health pharmacy preferred Drug List (PDL), also sometimes known as the formulary.

6. On February 6, 2018, the Appellant requested this fair hearing.

APPLICABLE LAW

Section 365-a of the Social Services Law provides in part:

2. "Medical Assistance" shall mean payment of part or all of the cost of medically necessary medical, dental and remedial care, services and supplies, as authorized by this title or the regulations..., which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with such person's capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with this title and the regulations...

Section 364.2 of the Social Services Law provides in part, as follows:

The Department of Health shall be responsible for . . .

- (b) establishing and maintaining standards for all non-institutional health care and services rendered pursuant to this title, . . .

* * *

Pursuant to regulations at 18 NYCRR 513.0, where prior approval of medical, dental and remedial care, services or supplies is required under the MA program, such prior approval will be granted when the medical, dental and remedial care, services or supplies are shown to be medically necessary to prevent, diagnose, correct or cure a condition of the recipient which: (1)

causes acute suffering; (2) endangers life; (3) results in illness or infirmity; (4) interferes with the capacity for normal activity; or (5) threatens to cause a significant handicap. Pursuant to 18 NYCRR 513.6, the determination to grant, modify or deny a request initially must be made by qualified Department of Health professional staff exercising professional judgment based upon objective criteria and the written guidelines of the Department of Health and regulations, and commonly accepted medical practice.

DISCUSSION

This Fair Hearing proceeded without the direct testimony of the Appellant. There was no direct contact between the Appellant and the MLTC during the processing of this Medicaid request. The Appellant's attorney possesses the requisite knowledge for this Fair Hearing to proceed. Furthermore, the only issue for this Fair Hearing concerns matters of law only based upon the documentary evidence available at the hearing. The factual issues were not in dispute, and thus, the hearing proceeded without the participation of the Appellant. Based on the review of the record therefore, none of the facts of this case was in dispute. Consequently, the in-person testimony of the Appellant is not required pursuant to *Varshavsky v. Perales*. The dispute stemmed from the legal interpretation of the issues posed. The Appellant's attorney waived the receipt of the MLTC's evidentiary packet prior to proceeding with the hearing and opted to proceed without having that packet to follow along.

The record established that the MLTC determined to deny the Appellant's Physician's prior approval request for pharmaceutical prescription item Ensure Pudding, as a matter of law, on the grounds that the request is not a covered benefit under her Medicaid Managed Care benefit package. The MLTC's position is strictly that medical necessity notwithstanding; it had no procedure within which to approve the Appellant's Physician's request. The issue essentially is that since the subject item, prescription grade or otherwise, is not on the formulary list, the medical necessity rules was not applied, therefore, even though the Appellant's medical necessity is uncontroverted, it was not the relevant factor in the determination because from the MLTC's perspective, that would be a consideration if the drug in question were on the list.

At the hearing, the Appellant's attorney contended that the MLTC erred in its position. She indicated that the argument proffered by the MLTC is arbitrary and capricious in that the Appellant is approved for other meals which she cannot eat due to her medical diagnosis and she questioned why the Plan is able to send those other meals but would not send the Ensure Pudding, which she needs and could swallow. She stated that the issue is literally a matter of life and death for the Appellant at this point because she had lost 30 pounds and ongoing in a few weeks due to her inability to eat even pureed food, she is now just wasting away and it is accelerating her terminal state. She explained that to implement the determination will be unnecessarily punitive to the Appellant due to the Appellant's fragile state.

To buttress her position, the Appellant's attorney referenced the prescription requests already submitted into the record of this hearing which elucidated the Appellant's medical complications she alluded to and which were also the physician's medical necessity documentations.

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It is uncontroverted that the prior approval pharmaceutical prescription grade item is not and cannot be considered a pharmacy item (therefore not on formulary list) because it is not considered a drug, hence, that principle behind the denial in this case was sound. The item would be considered a medical food covered by DME/medical supplies group. However, since the Appellant's Physician established that the item is medically necessary based on the specific and unusual medical circumstances of this Appellant, this case met the exceptions in the applicable law pursuant to regulations at 18 NYCRR 513.0, relating to medical, dental and remedial care, services or supplies which are shown to be medically necessary, in order to warrant the approval for the item which was denied in this instance. As such; the MLTC is hereby directed to approve the item. The MLTC could refer to the attached NYS Department of Health link regarding the billing code for enteral products, including Ensure Pudding.

<https://www.emedny.org/ProviderManuals/DME/PDFS/EnteralClassificationListRevised012218.pdf>

DECISION AND ORDER

The MLTC's determination to deny the Appellant's Physician's prior approval request for pharmaceutical prescription item Ensure Pudding on the grounds that the request is not a covered benefit under her Medicaid Managed Care benefit package was not correct and is reversed.

1. The MLTC is directed to approve the Appellant's physician's prior approval request for pharmaceutical prescription item Ensure Pudding with written notification.

As required by 18 NYCRR 358-6.4, the Agency (MLTC) must comply immediately with the directives set forth above.

DATED: Albany, New York
04/20/2018

NEW YORK STATE
DEPARTMENT OF HEALTH

By



Commissioner's Designee