

National Health Law Program

September 24, 2004

To: Health Advocates
From: Jane Perkins, National Health Law Program
Re: September 2004 Question & Answer

Coverage of Gastric Bypass Surgery¹

Question: T.R.'s physician submitted a request for Medicaid coverage of gastric bypass surgery. T.R. is 43 years old, weighs approximately 415 pounds and has a body mass index of 44. T.R.'s doctor says he is medically eligible for gastric bypass surgery because he has a body mass index over 40 and is more than 100 pounds overweight. He also suffers from diabetes, heart problems, and depression. His doctor says that, without this surgery, T.R. is in danger of suffering a fatal heart attack. The Medicaid agency has denied the request for coverage, and an administrative hearing has been scheduled. Should Medicaid cover the surgery?

Brief Answer: Probably. In making your case to the administrative law judge (ALJ), stress your client's medical needs and make clear that the surgery is not for aesthetic or cosmetic reasons. Submit a memorandum to the ALJ that explains the legal support for Medicaid coverage and points out that other insurers cover obesity treatments. As you work through the issue and arguments, remember that the process you are using here can be applied broadly to a number of Medicaid service questions involving, for example, weight loss treatments, gynecomastia, mammoplasty, keloid removal, and smoking cessation.

Discussion: The Medicaid Act requires participating states to cover some services, including inpatient hospital and physician services, *see* 42 U.S.C. §§ 1396a(a)(10), 1396d(a), and allows states to cover other services, such as prescription drugs,² *see id.* Beyond the requirements and options for the benefits package, coverage

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² The Medicaid Act allows states to exclude or otherwise restrict coverage of weight loss drugs. *See* 42 U.S.C. § 1396r-8(d)(2)(A). According to the American Obesity Association, the states that do not cover weight loss drugs include Illinois, Indiana, Nevada, New Hampshire, New York, Ohio, Oklahoma, South Carolina, South Dakota, and Wyoming. *See* Am. Obesity Ass'n, Morgan Downey, Jr., *Insurance Coverage for Obesity Treatments*, at <http://www.obesity.org/treatment/insurance2.shtml>. States

policies may vary from state to state as long as they are consistent with the federal regulatory guidelines governing services for individual over age 21.³ These guidelines require states to establish reasonable standards for determining the extent of medical assistance to be provided. *See* 42 U.S.C. § 1396a(a)(17). Each service must be covered “sufficient in amount, duration and scope to reasonably achieve its purpose,” 42 C.F.R. § 440.230(b), and states may not arbitrarily deny or reduce the amount, duration and scope of a required service solely because of the diagnosis, type of illness or condition, *id.* at § 440.230(c). States can place limits on services that are based on such criteria as “medical necessity or on utilization control procedures.” *Id.* at § 440.230(d). Federal Medicaid law does not mention coverage of gastric bypass surgery; however, the components of the surgery—inpatient hospital and physician services—are required Medicaid services. *See* 42 U.S.C. §§ 1396a(a)(10), 1396d(a).

State courts have applied these guidelines to decide whether Medicaid coverage of gastric bypass surgery is required. State law claims may also be available, so you should check your state Medicaid statute and regulations for helpful coverage rules. Usually, the cases have resulted from an appeal of a state Medicaid agency decision to deny coverage of the surgery because it is considered an aesthetic or cosmetic procedure. For example, in *McCoy v. Idaho Dep’t of Health and Welfare*, 127 Idaho 792, 907 P.2d 110 (1995), the court reviewed a request for gastric bypass surgery. It noted that surgery was medically necessary if “there is a stabilization or improvement in the functioning of a body part, or if the procedure removes pain.” 907 P.2d at 113. The court then held that exclusion of all treatments for obesity was overly broad and violated the Medicaid Act. *Id.* at 114. The case was remanded to the agency for a new decision consistent with the court’s ruling.

Some administrative tribunals have ordered state Medicaid programs to cover gastric bypass surgery as medically necessary for an individual claimant. *See, e.g., Todhunter v. Washington Dep’t of Soc. and Health Servs.*, No. 7696-5-1 (Wash. Ct. App. 1980), *reprinted in* Medicare & Medicaid Guide (CCH) ¶ 30,583; *In re Cleo M* (New Hampshire Division of Welfare Fair Hearings Decision July 1, 1980). These cases order coverage of the surgery as medically necessary for the patient—looking at a person’s body mass index, weight, and other health problems. Because of the high risk of complications, gastric bypass is generally considered a last resort for obese people. Thus, these cases have noted that coverage also depends on whether the person has tried and failed at other weight loss strategies. These cases may be particularly persuasive to the ALJ, and copies can be obtained from the National Health Law Program.

covering orlistat, sibutramine, and phentermine include California, Delaware, Hawaii, Kentucky, Maine, Massachusetts, Mississippi, Montana, New Mexico, Oregon, Rhode Island, Vermont and Virginia. *Id.* In some of these states, coverage is conditioned on recipients either being morbidly obese or having hyperlipidemia or type-2 diabetes. *Id.*³ The coverage rules for children and youth under age 21 are contained in the Early and Periodic Screening, Diagnostic and Treatment (ESDPT) service requirements and will not be discussed here. *See* 42 U.S.C. §§ 1396a(a)(10), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r).

Tribunals have placed great weight on whether the person's physician has deemed the surgery to be medically necessary. *E.g.*, *McCoy*, 907 P.2d 110, 127 Idaho 792 (1995); *In re George Bailey*, Case No. 339-010868 (Ohio 1988); *see generally Morgan v. Idaho Dep't of Health and Welfare*, 813 P.2d 345, 120 Idaho 6 (1991) (ordering Medicaid agency to pay for prescribed weight loss program). Courts quote from the legislative history of the Medicaid statute in according great deference: "The Committee's bill provides that the physician is to be the key figure in determining utilization of health services." S.Rep. No. 404, 89 Cong., 1st Sess., *reprinted in* 1965 U.S.C.C.A.N. 1943, 1986.

You should also point out that many other states have covered gastric bypass through Medicaid. For example, in 2004 (following a lawsuit, *Rudisill v. Nusbaum*, No. 01-AA-105 (Cir. Ct. Kanawha Co.)), West Virginia elected to cover certain types of gastric bypass surgery if specified criteria are met. *See* http://www.wvdhhr.org/bms/sProg_Instr/pima_files/bms_pima0364.pdf; *see also, e.g.*, Medicaid Bulletin to Physicians, Hospitals, and Managed Care (Jan. 31, 2003), at <http://www.dhhs.state.sc.us> (concerning South Carolina's coverage of gastric bypass). In states that do cover the surgery, prior authorization is usually required. The attached chart shows state Medicaid programs that have covered gastric bypass surgery.

Decisions regarding Medicaid coverage of other types of surgery may be helpful in gastric bypass cases. At least one court has held that abdominoplasty is covered when a treating physician finds it to be medically necessary. In *Holman v. Ohio Dep't of Human Servs.*, 143 Ohio App. 3d 144, 757 N.E.2d 382 (2001), the court held that Ms. Holman was entitled to the surgery to remove excess tissue that remained after she had lost more than 150 pounds. The excess tissue caused her pain and prevented her from working. The court quoted from the legislative history of the Medicaid statute in giving the treating physician's opinion great deference. *See* 75 N.E.2d at 389, quoting S.Rep. No. 404, 89 Cong., 1st Sess., *reprinted in* 1965 U.S.C.C.A.N. 1943, 1986.

You may also be able to draw an analogy to decisions regarding Medicaid coverage of breast reduction surgery. In *A.M.L. v. Dep't of Health*, 863 P.2d 44 (Utah Ct. App. 1993), the court ordered the state Medicaid agency to pay for mammoplasty. A.M.L. was taking Prednisone, a steroid, for lupus. Her breast size increased from a 36B to a 44DD as a result of taking this medication. Because she experienced pain and discomfort, her doctor recommended breast reduction surgery. The court gave deference to the treating physician's opinion and held the surgery was medically necessary. The court relied on testimony from experts and on the legislative history of the Medicaid statute. 863 P.2d at 389, quoting S.Rep. No. 404, 89 Cong., 1st Sess., *reprinted in* 1965 U.S.C.C.A.N. 1943, 1986. The court also cited an Eighth Circuit Court of Appeals decision, *Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989) ("The decision of whether or not certain treatment or a particular type of surgery is 'medically necessary' rests with the individual recipient's physician and not with clerical personnel or government officials."). *See generally Mendez v. Brown*, 311 F. Supp. 2d 134 (D. Mass. 2004) (denying motion to dismiss the § 1983 claim of women suing for medically necessary

breast reduction surgery under the Medicaid Act and Title II of the Americans with Disabilities Act; Medicaid agency refused coverage on the grounds that surgery would be unnecessary if the woman lost weight). *But compare In re Claimant*, Case No. 000482657*01 (Del. Dep't of Health and Social Servs. 2000) (denying request of 13-year-old boy for breast reduction surgery to treat gynecomastia, a condition that commonly occurs in males during puberty and leads to breast development; agency found that the surgery was for cosmetic reasons, that the boy was overweight, and that his breast size may decrease after he has completed puberty).

As you develop the case, there are a few additional considerations. First, judges are sometimes persuaded by Medicare's coverage rules—if Medicare is covering the service, this is evidence that it can be medically necessary and covered by public insurance. Therefore, you should make sure that the ALJ knows that the Medicare program has recently changed its view of obesity and that this could lead to increased coverage of gastric bypass and other obesity treatments.

In July 2004, the Centers for Medicare & Medicaid Services (CMS) announced that it was eliminating language in the Medicare Coverage Issues Manual stating that obesity is not a disease. CMS clarified in the Manual that

Obesity may be caused by medical conditions such as hypothyroidism, Cushing's disease, and hypothalamic lesions or can aggravate a number of cardiac and respiratory diseases as well as diabetes and hypertension. Services in connection with the treatment of obesity are covered services when such services are an integral and necessary part of a course of treatment for one of these medical conditions. However, program payments may not be made for treatment of obesity unrelated to such a medical condition since treatment in this context has not been determined to be reasonable and necessary.

See www.cms.hhs.gov/mcd/viewtrackingsheet.asp?id=57. The CMS notification was posted electronically and is available at www.cms.hhs.gov/medicarereform/issueoftheday/07152004iotd.pdf. This acknowledgement of obesity as a medical condition did not automatically change any of the current coverage determinations regarding treatment. To date, CMS has taken the position that there is not enough data on the long-term benefits of gastric bypass surgery for Medicare to cover it unless it is medically necessary and a person has another disease that has caused or been exacerbated by obesity. Thus, as before, Medicare may cover surgeries and procedures as part of the treatment of diseases resulting in or made worse by obesity. However, Medicare coverage should be monitored because, as new requests for coverage of obesity treatments are made by the public, Medicare will review the scientific evidence using its determination procedures, see www.cms.gov/coverage, to decide whether coverage will be allowed. And in November 2004, a Medicare advisory committee is to consider covering gastric bypass. See www.hhs.gov/news/press/2004pres/20040715.html.

Second, your client may have third party insurance coverage. Medicaid is the payer of last resort, so these insurance sources (including Medicare under the circumstances discussed above) should be tapped first. *See* 42 U.S.C. § 1396a(a)(25). Some private insurers cover gastric bypass surgery, finding it cheaper than long-term treatments for problems associated with obesity, such as diabetes and high blood pressure. If your client does have third party coverage, you should explore whether the procedure can be covered through that source. In addition, if private insurers in your state are covering gastric bypass surgery, you should inform the ALJ of this.

Finally, insurance coverage of gastric bypass surgery and other obesity treatments should be monitored for developments. There are a number of activities underway that could be important to your client's case. For instance, in Louisiana (where 23 percent of the population is considered obese), forty state employees who are obese will receive gastric bypass surgery in 2004. The State chose the forty best candidates out of 1,200 employees who applied for the surgery. The State estimates that a morbidly obese person costs the state \$12,000 per year. The State is willing to pay a \$25,000 capped fee for a person to receive gastric bypass surgery if the surgery is deemed to be medically necessary and the person consents to the surgery. Because it is a capped fee, the hospital and doctor assume the financial risks of any complications that may result from the surgery. The Louisiana Office of Group Benefits covers 250,000 state employees and public school teachers. *See*

www.abcnews.go.com/sections/GMA/Living/gastric_bypass_experiment_04721-1.html

There are a number of on-line resources that will assist you in monitoring developments, including:

<http://www.asbs.org>

American Society of Bariatric Surgeons

<http://www.obesity.org>

American Obesity Association

<http://www.niddk.nih.gov>

National Institute of Diabetes & Digestive & Kidney Diseases

<http://www.obesitylaw.com>

Obesity Law and Advocacy Center

<http://www.obesityhelp.com>

Association for Morbid Obesity Support

State Medicaid Coverage of Gastric Bypass Surgery, September 2004*

	Covered	Not Covered	No Reference		Covered	Not Covered	No Reference
Alabama	X			Montana		X	
Alaska	X			Nebraska	X		
Arizona	X			Nevada	X		
Arkansas	X			New Hampshire	X		
California	X			New Jersey	X		
Colorado	X			New Mexico	X		
Connecticut	X			New York	X		
D.C.			X	North Carolina	X		
Delaware			X	North Dakota	X		
Florida	X			Ohio		X	
Georgia	X			Oklahoma	X		
Hawaii	X			Oregon	X		
Idaho	X			Pennsylvania	X		
Illinois	X			Rhode Island	X		
Indiana	X			South Carolina	X		
Iowa	X			South Dakota	X	X	
Kansas	X			Tennessee	X		
Kentucky	X			Texas		X	
Louisiana	X			Utah	X		
Maine	X			Vermont		X	
Maryland	X			Virginia	X		
Massachusetts	X			Washington	X		
Michigan	X			West Virginia	X		
Minnesota	X			Wisconsin	X		
Mississippi	X			Wyoming	X		
Missouri	X			TOTAL	44	5	2

***Source:** Information from state Medicaid offices' websites, as well as the Association for Morbid Obesity Support's listing of insurance coverage for individual surgeries (<http://www.obesityhelp.com>).