McBroom v. Department of Health and Human Services et al Doc. 19

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GRACIE E. MCBROOM,	
Plaintiff,	**Case No. 2:11-cv-772**
v.	**Judge Peter C. Economus**
KATHLEEN SEBELIUS, ***et al.***	**OPINION AND ORDER**
Defendants.	

This is an action instituted under the provision of 42 U.S.C. § 1395w-22(g)(5), which incorporates 42 U.S.C. § 405(g), for review of the final decision of the Secretary of the Department of Health and Human Services denying coverage for Plaintiff Gracie E. McBroom's requested bone grafts and dental implants. Plaintiff's request was denied based on § 1862(a)(12) of the Social Security Act, which precludes Medicare payment for the kind of dental care Plaintiff seeks. Because this Court concludes that there is substantial support in the record for this decision, the Secretary's decision must be affirmed.

I. BACKGROUND

The Medicare program, Title XVIII of the Social Security Act ("the Act"), 42 U.S.C. § 1395 *et seq.*, provides coverage for medical care for eligible elderly and disabled persons, as well as certain other individuals. 42 U.S.C. § 1395c. The Secretary ("the Secretary") of the Department of Health & Human Services ("HHS") administers the Medicare program through the Centers for Medicare & Medicaid Services (CMS) of HHS. Part C of the Medicare program, known as Medicare Advantage ("MA"), authorizes a Medicare beneficiary to pick an MA plan to provide services covered under Medicare Part A (hospital insurance benefits program) and Part B (supplemental medical insurance), as well as other subparts not relevant here. Under 42

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C.F.R. § 422.101(b), an MA plan must comply with all written coverage decisions by CMS and with all Medicare manuals and instructions.

There is no dispute that during the relevant period, Plaintiff was enrolled in Anthem Blue Cross Blue Shield's MA plan. Further, there is no dispute over the medical and dental facts underlying Plaintiff's request for coverage. The parties differ over whether the Administrative Law Judge ("ALJ") properly upheld the Secretary's decision to deny coverage.

A. The Plan

Section 1862(a)(12) of the Act precludes payment under Part A or B for dental costs,

> where such expenses are for services in connection with the care, treatment, filling, removal, or replacement of teeth or structures directly supporting teeth, except that payment may be made under part A in the case of inpatient hospital services in connection with the provision of such dental services if the individual, because of his underlying medical condition and clinical status or because of the severity of the dental procedure, requires hospitalization in connection with the provision of such services; . . .

The exceptions iterated above apply where a beneficiary is hospitalized for a covered medical procedure or for a severe dental procedure. Another exception is where "an otherwise noncovered procedure or service is performed by a dentist as incident to and as an integral part of a covered procedure or service performed by him/her, the total service performed by the dentist on such an occasion is covered." (Mem. In Opp., doc. # 15, citing Exh. A, Medicare Carrier's Manual (MCM) § 2136.) The examples provided to explain this exception pertain to dental services incidental to a separate underlying procedure, such as where a tumor is removed, requiring subsequent reconstruction of the mouth. (*Id.*) Other exceptions are explained elsewhere, such as MCM Section 2020.3 which permits coverage for certain dental work required as preparation for kidney transplant surgery.

B. Plaintiff's Claim and Appeal

Plaintiff requested "precertification from [Anthem] for an approval for placement of a bone graft to strengthen and augment the jaw structure in the posterior maxilla followed by placement of dental implants." (Complaint, doc. # 3, page 3, internal quotation marks omitted.) She asserts that due to bone thinning, her dentures no longer fit correctly, causing difficulty in chewing and, subsequently, digesting her food. Plaintiff consistently argues that this procedure is "medically necessary" as she suffers from medical conditions that are exacerbated by her ill-fitting dentures. (*Id.*, page 4.)

Anthem denied Plaintiff's requested coverage, determining that the procedure was not "medically necessary" as there was no substantiating documentation that Plaintiff's surgery was to correct a bone deformity. (A.R., 128.) Plaintiff appealed the denial, arguing that the procedure was medically necessary "not just for preparing the mouth for dental implants" but to address "problems related to the thinning of the jaw bone, such as osteopenia contributing to [her] bone resorption in the area of [her] dentures." (*Id.*, 120.) Anthem denied the appeal, citing to CMS guidelines. (*Id.*, 115, "[I]tems and services in connection with the care, treatment, filling, removal or replacement of teeth, or structures directly supporting the teeth are not a covered service.")

Anthem's denial was forwarded to MAXIMUS Federal Services, which conducted an independent review of the claim. Ultimately, Maximus agreed with Anthem, noting in particular that "Medicare will not pay for items and services involving the care, treatment, filling, removal or replacement of teeth or structures directly supporting the teeth." (*Id.*, 108.)

Plaintiff appealed that denial to an administrative law judge. (A.R. 61-105.) She once again argued that the procedure was "medically necessary" (*id.*, 63) because the procedures

would address her difficulty in chewing and, ultimately, in digesting (*id.*, 64). Plaintiff waived her right to a hearing before the ALJ and provided additional support for her appeal. (*Id.*, 57-58.) That support included her assertion that the bone graft was a covered procedure under § 1862(a)(12) of the Act. Plaintiff provided the following additional statement:

> Bone grafting is a surgical procedure that replaces missing bone with a material called a bone graft. This material not only replaces missing bone, but also helps my body regrow[] lost bone. This new bone growth strengthens the grafted area by forming a bridge between your existing bone and the graft. Over time, the newly formed bone will replace much of the grafted material. GBR is a procedure in which a membrane is placed over the bone graft site.
>
> Bone grafts [and] GBR are needed when a part of your body is missing bone. This missing portion of bone is frequently called a "bony defect." Examples of jaw bone defects are: defects surrounding roots of teeth (periodontal defects); defects which occur following tooth extraction; generalized decrease in quantity of jaw bone from trauma or long-term tooth loss; defects in surrounding dental implants; defects resulting from cyst.

(*Id.*, 58-59.) Plaintiff's appeal was denied by the ALJ, who cited to the "overwhelming evidence" supporting the purpose of the requested procedure as preparation for dental implants. The ALJ pointed to the lack of evidence to support the necessity of maxillary surgery and the irrelevance of any additional medical problems that resulted from Plaintiff's difficulty in chewing. (A.R., 32-42.) In sum, the ALJ concluded that Plaintiff's requested procedure was excluded from coverage under § 1862(a)(12) of the Act. (*Id.*, 42.)

Plaintiff appealed to the Medicare Appeals Council ("MAC"), and she included with her appeal a letter from her dentist detailing that she would "require maxillary surgery consisting of bilateral defect sinus lifts and guided bone regeneration (bone grafting)" as part of the dental implant procedure. (A.R., 19.) The MAC upheld the ALJ's decision, after reviewing the

underlying record and considering the additional information included in the appeal. In a thorough and thoughtful decision, the Administrative Appeals Judge noted, as follows:

> The enrollee seems to be under the impression that because the root cause of the present problems for which she seeks bone grafting and dental implants is osteopenia, and osteopenia is a "medical" condition and not a "dental" condition, she should be exempted from Medicare's general exclusion of coverage of dental services. Her position that the services at issue are medically necessary is plainly evident based on several letters of medical necessity she obtained in support of her claim during lower levels of review. But where, as in this case, the excluded procedure is the primary procedure involved, Medicare may not cover it, regardless of its complexity or difficulty. Stated simply, whether or not osteopenia is a "medical" condition, and whether the grafting/implant procedure is medically necessary or advisable for the beneficiary, ultimately are not determinative of the coverage question presented herein.

(*Id.*, 7.) After denial of coverage by MAC, Plaintiff filed the instant action.

II. LAW AND ANALYSIS

An enrollee of an MA plan "who is dissatisfied by reason of the enrollee's failure to receive any health service to which the enrollee believes the enrollee is entitled" may, after a hearing before the Secretary, seek "judicial review of the Secretary's final decision as provided in section 405(g)" of Title 42 of the United States Code. 42 U.S.C. § 1395w-22(g)(5).

Pursuant to 42 U.S.C. § 405(g), judicial review of the administrative decision is limited to determining whether the findings of the administrative law judge are supported by substantial evidence and employed the proper legal standards. *Richardson v. Perales*, 402 U.S. 389 (1971). Substantial evidence is more than a scintilla of evidence but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Kirk v. Secretary of Health & Human Servs.*, 667 F.2d 524, 535 (6th Cir. 1981), *cert. denied*, 461 U.S. 957 (1983). This Court does not try the case *de novo*, nor does it resolve conflicts in the

evidence or questions of credibility. *See Brainard v. Secretary of Health & Human Servs.*, 889 F.2d 679, 681 (6th Cir. 1989); *Garner v. Heckler*, 745 F.2d 383, 387 (6th Cir. 1984).

In determining the existence of substantial evidence, this Court must examine the administrative record as a whole. *Kirk*, 667 F.2d at 536. If the agency decision is supported by substantial evidence, it must be affirmed even if this Court would decide the matter differently, *see Kinsella v. Schweiker*, 708 F.2d 1058, 1059 (6th Cir. 1983), and even if substantial evidence also supports the opposite conclusion, *see Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986) (*en banc*).

Plaintiff seeks coverage for the "placement of a bone graft to strengthen and augment the jaw structure in the posterior maxilla followed by placement of dental implants." (Complaint, doc. # 3, page 3, internal quotation marks omitted.) Clearly, this procedure is related to the "replacement of teeth or structures directly supporting teeth" and, as such, it is expressly excluded from coverage under § 1862(a)(12) of the Act. Therefore, Medicare, via Anthem, offers no coverage for the procedure. Because the decision of the Secretary is supported by substantial evidence, the decision is **AFFIRMED**.

IV. CONCLUSION

For the reasons discussed above, the Court hereby **AFFIRMS** the decision of the Secretary of Health and Human Services. This action is hereby **DISMISSED.** The Clerk shall enter **FINAL JUDGMENT** in this case.

IT IS SO ORDERED.

/s/ Peter C. Economus
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE