

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph J. Crawford, :
Petitioner :
 :
v. : No. 1393 C.D. 2007
 : Submitted: December 21, 2007
Department of Public Welfare, :
Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN

FILED: January 30, 2008

Joseph J. Crawford (Crawford), proceeding *pro se*, petitions for review of the June 19, 2007, order of the Secretary of the Department of Public Welfare (DPW), which upheld the decision of DPW's Bureau of Hearings and Appeals (BHA) denying Crawford's request for an exception to cover a home hot tub under the Medical Assistance (MA) Program. We affirm.

Crawford's physician, Guy M. Fasciana, M.D., filed an "Outpatient Services Authorization Request" with DPW, requesting and prescribing a hot tub to assist in the treatment of Crawford's ongoing back and neck problems. (O.R. at Exhibit C-2.) Because hot tubs are not listed in the MA fee schedule, Crawford requested a program exception. DPW denied Crawford's request, concluding that hot tubs are not the type of item typically covered by the MA Program and, thus,

are not subject to a program exception. Crawford filed a timely appeal to the BHA, and a hearing was held before an administrative law judge (ALJ).

DPW presented the testimony of Glen Heise, M.D. Dr. Heise noted that, although the MA Program does sometime pay for items that are not on the fee schedule, the MA Program will not pay for equipment unless it meets the definition of durable medical equipment. Durable medical equipment is defined as an item or device listed within the MA Program fee schedule that can withstand repeated use, is used primarily and customarily to serve a medical purpose and is not customarily useful to a person in the absence of illness. 55 Pa. Code §1123.2. Dr. Heise opined that hot tubs are not designed for a medical purpose but are intended primarily for non-medical comfort and pleasure purposes, and, moreover, hot tubs are useful for individuals in the absence of an illness or injury. Thus, Dr. Heise concluded that hot tubs are not durable medical equipment subject to a program exception. (ALJ's Findings of Fact, Nos. 2-6.)

Crawford testified that he has significant low back and neck pain as the result of numerous injuries. Crawford explained that he uses hot tub or whirlpool therapy at his physical therapy sessions and that all of his physicians say that he would benefit significantly from having daily hot tub therapy sessions. However, according to Crawford, his Medicare/Medicaid pays for only twelve treatments, i.e., four weeks of treatment, whereas he needs ongoing hot tub or whirlpool therapy to treat his back pain. (N.T. at 10-13.)

After considering the testimony and DPW's regulations, the ALJ agreed with Dr. Heise's opinion that a hot tub is not durable medical equipment. Because the requested hot tub is not covered under the MA Program and is not subject to a program exception, the ALJ affirmed the denial of Crawford's request. The BHA issued a final administrative action order affirming the ALJ's decision. (O.R. at Item 4.) The Secretary subsequently upheld the BHA's decision, and Crawford now petitions this court for review.¹

Crawford asserts that the Secretary erred in denying him a program exception because a home hot tub meets the criteria set forth in DPW's regulations for such exceptions. We disagree.

Generally, DPW will not pay for any item or service not listed in the MA Program fee schedule. 55 Pa. Code §1123.61(1). However, under extraordinary circumstances, DPW will pay for a medical service or item that is not expressly covered by the MA Program. 55 Pa. Code §1150.63(b). DPW reviews requests for a program exception using the following guidelines:

- (1) Payment for the procedure is not allowable according to the fee schedule, [the service] *is a type of service covered by the program* and [the service] is generally accepted by the medical community.
- (2) The procedure is not experimental.

¹ Our scope of review of a DPW decision denying medical assistance is limited to a determination of whether the adjudication was in accordance with the law, whether any constitutional rights were violated and whether all necessary findings of fact were supported by substantial evidence. *Walizer v. Department of Public Welfare*, 611 A.2d 1359 (Pa. Cmwlth. 1992), *appeal denied*, 533 Pa. 619, 619 A.2d 701 (1993).

(3) The therapeutic effectiveness of the procedure has been scientifically documented.

55 Pa. Code §1150.63(d). (Emphasis added).

Crawford maintains that he is entitled to a program exception for a home hot tub because: DPW regularly covers hot tub or whirlpool therapy when prescribed by a physician as a part of a physical therapy regimen; hot tub or whirlpool therapy is generally accepted by the medical community; hot tub or whirlpool therapy is not experimental; and hot tub or whirlpool therapy has been used to treat chronic injuries for years.

DPW concedes that physical therapy modalities may include treatment in a whirlpool or hot tub, and DPW acknowledges that if Crawford had requested physical therapy that included such modalities, DPW likely would have approved the request. However, we agree with DPW that, in requesting the hot tub rather than physical therapy, Crawford overlooks a distinction between an outpatient *service* and the *equipment* that is used to deliver that service. This proves fatal to Crawford's argument.

In order to qualify for a program exception, the requested service or item must be the type of service or item *covered* by the MA Program. 55 Pa. Code §§1150.63(b) and (d). Crawford's request for a program exception for a home hot tub is the equivalent of his asking DPW to pay for his "medical supplies." Under DPW's regulations, the MA Program will *cover only* those medical supplies specified in chapter 1123 of title 55 of the Pennsylvania Administrative Code or in the MA Program fee schedule. 55 Pa. Code §§1123.1 and 1123.2. Of the medical

supplies listed in chapter 1123, the only possible category into which Crawford's requested hot tub arguably falls is durable medical equipment.² However, as stated, in order for an item to qualify as durable medical equipment, the item must, *inter alia*, be used *primarily and customarily* to serve a *medical purpose*, and must *not be customarily useful* to a person *in the absence of illness*. 55 Pa. Code §1123.2.

Here, Dr. Heise credibly testified that hot tubs *are not* primarily and customarily used to serve medical purposes but are intended for non-medical comfort and pleasure purposes, and hot tubs *are* customarily useful to a person who is not ill. This testimony constitutes substantial evidence to support the findings that a home hot tub: (1) does not constitute durable medical equipment, as defined by DPW's regulations; and (2) is not a type of service or item typically covered by the MA Program. Thus, we conclude that Crawford's requested home hot tub is not eligible for a program exception under 55 Pa. Code §1150.63.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

² The medical supplies specified as compensable under the MA Program include surgical supplies, durable medical equipment, orthoses, prostheses, visual and hearing aids and hemophilia products. 55 Pa. Code §1132.2.

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Department of Public Welfare,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 30th day of January, 2008, the order of the Secretary of the Department of Public Welfare, dated June 19, 2007, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge