

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

D. E. and N.E.,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 1899 C.D. 2007
	:	
Department of Public Welfare,	:	Submitted: June 27, 2008
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: October 10, 2008

D.E., on behalf of her minor son, N.E., petitions for review of an order of the Secretary of Public Welfare (Secretary). The Secretary set aside and denied the order of Administrative Law Judge Robert R. Brittain, Jr. (ALJ), in which the ALJ had granted D.E.'s request that the Department of Public Welfare (Department) pay for a right breast mastectomy for N.E.

N.E. is a teenage boy who suffers from gynecomastia, the development of abnormally large mammary glands in males. N.E.'s treating physician, Paul M. Glat, M.D., submitted a request to AmeriChoice, in January 2007, for approval to perform a right breast mastectomy in order to correct N.E.'s gynecomastia.

AmeriChoice is a managed care provider with which the Department has contracted to provide medical services for Medical Assistance recipients, including N.E. In January 2007, AmeriChoice denied Dr. Glat's request, explaining that it was merely a cosmetic procedure and, thus, was not medically necessary. D.E. filed a grievance with AmeriChoice, requesting that the decision be reconsidered. In February 2007, AmeriChoice denied D.E.'s grievance, again stating that the surgery was cosmetic and that the condition typically resolves without treatment within three years in 90% of boys.¹

In March 2007, D.E. submitted a letter to the Department requesting a fair hearing as to AmeriChoice's denial of the requested treatment. The Department appointed the ALJ, who conducted hearings and heard testimony from: D.E. and N.E. in support of the mastectomy; Kathy House, AmeriChoice's Quality Management

¹ The denial letter offered the following reasons for the denial:

AmeriChoice's Chief Medical Officer has reviewed your grievance file including your grievance, a copy of the PreCertification Department's file, a copy of the denial letter dated 1/26/07 and the Letter of Medical Necessity dated 1/23/07 including photographs.

This is cosmetic.

Ninety percent of unilateral gynecomastia in teenage boys resolves by 3 yrs.

(Letter from AmeriChoice to Parent/Guardian of N.E., February 26, 2007.)

Coordinator, in opposition to the mastectomy; and Shahzad Kahn, M.D., for AmeriChoice, in opposition to the mastectomy.

Before the ALJ, D.E. testified that N.E. has suffered from gynecomastia for more than two years and that the condition is progressively getting worse. N.E. testified that the enlarged breast tissue sometimes causes him moderate pain. D.E. also presented a letter from Dr. Glat in which Dr. Glat noted that N.E. has had gynecomastia for one-to-two years and that it is psychologically impacting him. The AmeriChoice representatives repeated their basis for denying payment for the procedure, which was augmented by Dr. Kahn elaborating on the medical rationale for the decision. Dr. Kahn testified that: “the guidelines for any kind of surgical intervention of any kind of gynecomastia, of male breast reduction [are that] the individual has to be above 18 years of age, and have a history of gynecomastia for at least three years or more.” (ALJ Hr’g Tr. at 6, July 13, 2007.) Additionally, “we also require [that] the surgeon who reviewed the case, should be able to tell if the tissue, if the tissue underneath [is a] a non-fatty tissue” (ALJ Hr’g Tr. at 6, July 13, 2007.)

Based on the evidence presented, the ALJ found that “[N.E.’s] gynecomastia has resulted in a disfigurement which impairs his ability to function as a high school student.” (ALJ’s Adjudication, Findings of Fact (FOF) ¶ 2.) In explaining his rationale, the ALJ reasoned that, although the Department’s regulation at 55 Pa. Code § 1141.59 prohibits the Department from paying for cosmetic surgery, Section 1141.2 of the Department’s regulations, 55 Pa. Code § 1141.2, provides an exception to that prohibition when the surgery is necessary “to correct a visible

disfigurement which would affect the ability of the person to obtain or hold employment.” (ALJ’s Adjudication at 5.) The ALJ analogized attendance at school with employment and found that since N.E.’s condition adversely affected his functioning as a student, the surgery fell into Section 1141.2’s employment exception. Accordingly, the ALJ sustained D.E.’s appeal and granted D.E.’s request for AmeriChoice to pay for a mastectomy.

The Department filed a request for reconsideration, arguing that the employment exception does not apply to students and that N.E. offered no evidence, other than his own and D.E.’s testimony, to refute the Department’s expert’s testimony that this medical condition typically resolves itself within three years. The Secretary granted the reconsideration request, “limit[ing her review] to the facts contained in the record developed before the [ALJ]” (Secretary’s Order Granting Reconsideration, August 21, 2007), and issued a final order setting aside the ALJ’s order and denying D.E.’s grievance. (Secretary’s Final Order (Final Order), September 14, 2007.)

D.E. filed a petition for review with this Court, pro se, challenging the Secretary’s determination.² On appeal, D.E. argues first that the Department erred as a matter of law in its interpretation of Sections 1141.2 and 1141.59 of Title 55 of the Pennsylvania Code. Relatedly, D.E. argues that Dr. Kahn did not clearly explain his

² “Our scope of review in cases of this nature is to determine whether the adjudication by [the Department] is in accordance with the law, whether the fact findings are supported by substantial evidence and whether any constitutional rights have been violated.” Juras v. Department of Public Welfare, 457 A.2d 1020, 1022 n.3 (Pa. Cmwlth. 1983).

criteria in determining that surgery was not medically necessary to treat N.E.'s gynecomastia.³ D.E. requests that the Department ask Dr. Glat to complete Department medical evaluation forms per Section 1141.2.⁴

Preliminarily, we provide a brief exposition of the Medical Assistance Program as a helpful prelude to our discussion of N.E.'s arguments. Pennsylvania is a participant in the Medical Assistance Program, which was established under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396i. Wengrzyn v. Cohen, 498 A.2d 61, 62 (Pa. Cmwlth. 1985). "The stated objective of Title XIX is to provide medical assistance for those persons unable to afford necessary medical services. 42 U.S.C. § 1396." Roe v. Casey, 464 F. Supp. 487, 500 (E.D. Pa. 1978), aff'd, 623 F.2d 829 (3d Cir. 1980) (quoted in Wengrzyn, 498 A.2d at 63). While Title XIX

³ For clarity and completeness of discussion, we have recharacterized the issues raised by D.E. in the pro se brief before this Court. The issues, as framed by D.E., are:

1. The determination made by the Department of Public Welfare was incorrect.
.....
2. Interpretation of a [sic] Pennsylvania Code regarding a Cosmetic surgery was unclear.

(D.E.'s Br. at 7.)

⁴ Section 1141.2 defines the term "[m]edical examination requested by the Department" as:

A medical evaluation conducted by the attending physician of the patient whether a general practitioner or specialist at the request of the Department. The evaluation shall consist of a physical examination, the evaluation of diagnostic studies, the recording of findings in the file of the patient and the completion of medical evaluation forms supplied by the Department.

55 Pa. Code § 1141.2.

does not state that *all necessary* medical services must be provided by the states, our courts have found such a requirement to be implicit within Title XIX's stated objectives. Wengrzyn, 498 A.2d at 63 (adopting this rationale from Casey, 464 F. Supp. at 500).

The Medical Assistance Program for Pennsylvania is administered by the Department under Sections 441.1-451 of the Public Welfare Code.⁵ Wengrzyn, 498 A.2d at 62-63. Pennsylvania, like all participating states, has “broad discretion in setting standards for determining the extent of medical assistance” it will provide. Marsh v. Department of Public Welfare, 409 A.2d 926, 927 (Pa. Cmwlth. 1979). The Department's regulations define “medically necessary” procedures as “(ii) [n]ecessary to the proper treatment or management of an illness, injury or disability[, and] (iii) [p]rescribed, provided or ordered by an appropriate licensed practitioner in accordance with accepted standards of practice.” 55 Pa. Code § 1141.2. Cosmetic surgery is defined as a noncompensable service, unless certain qualifications are met:

Cosmetic surgery is a covered service when performed in order to improve the functioning of a malformed body member, to correct a visible disfigurement which *would affect the ability of the person* to obtain or hold employment, or as postmastectomy breast reconstruction.

55 Pa. Code § 1141.59(13) (emphasis added). The party seeking medical assistance benefits has the burden of proving he is eligible and qualifies for benefits. Wengrzyn, 498 A.2d at 64 n.5.

⁵ Act of June 13, 1967, P.L. 31, added by Section 5 of the Act of July 31, 1968, P.L. 904, as amended, 62 P.S. §§ 441.1-451.

In this case, the Secretary agreed with the ALJ and rejected the Department's argument that school attendance is not analogous to employment for the purposes of the employment exception.⁶ In doing so, the Secretary essentially found that the Department would be required to pay for the surgery if N.E.'s condition "would affect the ability of the person" to attend school. 55 Pa. Code § 1141.59(13). Before this Court, both sides essentially acknowledge this point of law. In deference to the Secretary's interpretation of regulations within her expertise, and in the absence of any meaningfully developed challenge on this point before this Court, we find no error with this component of the Secretary's decision.

Nonetheless, in discussing the particulars of this case, the Secretary explained that D.E. presented insufficient evidence that N.E. was visibly disfigured "to the extent that he [could not] attend ('obtain or hold') school." (Final Order.) The Secretary reasoned that N.E.'s "condition is not uncommon during puberty, and he has not shown that it will not go away over a period of months without surgical intervention. . . . [N.E.] has not shown that the requested surgery is medically necessary for him." (Final Order.)

Our review of the record supports the Secretary's determination. As correctly noted by AmeriChoice before the Secretary, D.E. offers no medical evidence to

⁶ In examining an administrative agency's decision, this Court recognizes that such agencies have "wide discretion when establishing rules, regulations and standards, and also in the performance of [their] administrative duties and functions. Therefore, this court cannot overturn an agency's exercise of its discretion absent proof of fraud, bad faith or blatant abuse of discretion." Wengrzyn, 498 A.2d at 62 (citation omitted) (citing Wolf v. Department of Public Welfare, 452 A.2d 574 (Pa. Cmwlth. 1982)).

counter the medical opinion of AmeriChoice's Dr. Kahn that this procedure is not medically necessary because, in most cases, gynecomastia spontaneously regresses within three years after its onset. Dr. Glat merely notes that N.E.'s "glandular breast tissue" had been developing for "approximately 1-2 years" and that, during that time, "[t]here has not been any spontaneous regression" of the tissue. (Letter of Dr. Paul M. Glat, M.D., to AmeriChoice, January 23, 2007.) Dr. Glat did not opine that N.E.'s gynecomastia would not regress. Thus, the evidence offered by N.E. not only fails to refute the Department's expert opinion as to the *typical* course of the condition, but it also fails to show that N.E.'s case is *atypical*.

Additionally, in considering the employment exception, neither N.E.'s testimony, nor D.E.'s testimony, contains an indication that N.E. was unable to attend school. Instead, their testimony indicated that he has been "told [that] he's a very good student" and that "he cannot sign [up] for swim team in his school" because the condition has made him "shy". (ALJ Hr'g Tr. at 9, June 8, 2007.) Similarly, Dr. Glat's letter contained no indication that this condition prevented N.E. from attending school. (Letter of Dr. Paul M. Glat, M.D., to AmeriChoice, January 23, 2007.) Rather, Dr. Glat merely opined that "[t]his medical issue has become a psychological problem for [N.E.], causing [N.E.] to be extremely self-conscious of his appearance" to the point that N.E. "avoid[s] situations, e.g. swimming or gym that require [N.E.] to change clothes in front of classmates." (Letter of Dr. Paul M. Glat, M.D., to AmeriChoice, January 23, 2007.) Noticeably absent, is any evidence that N.E.'s condition affected his ability to attend school; D.E. does not argue that N.E.'s avoidance of gym is a sufficient basis upon which to base a finding that his ability to attend school has been affected. We, therefore, cannot reverse the Secretary's

conclusion that, from the evidence presented, this procedure is precluded by the regulations as being not medically necessary because it is merely a cosmetic procedure that does not qualify for any of the available exceptions.

This Court acknowledges D.E.'s heartfelt concern for her child, which she eloquently and movingly presented in her testimony before the ALJ and in her brief before this Court.⁷ Additionally, this Court notes that, while the evidence D.E. presented in the current case was not sufficient to meet her burden, it seems likely that sufficient time has elapsed since the hearing before the ALJ for a more accurate assessment of N.E.'s condition, in line with the three year period of time testified to by Dr. Kahn. It is anticipated that, should D.E. pursue another claim for this treatment, N.E. could have a physician opine, to a reasonable degree of medical certainty if the physician believes this condition will resolve without treatment.

⁷ For instance, D.E. argues that:

[N.E.'s] enlarged breast [led] him to be unable to function as a normal teenager and does not seem it would resolve on its own without surgical intervention. It has gotten worse and bigger. It has become very noticeable and painful. As a mother I noticed emotional distress and I am afraid that this devastating condition will have psychosocial consequences.

(D.E.'s Br. at 7.) Nonetheless, the evidence presented *in this case* simply does not meet the standard it needed to meet to satisfy the regulatory requirements, and our decision must remain grounded in the law.

For these reasons, we are compelled to affirm the Secretary's order.

RENÉE COHN JUBELIRER, Judge

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ORDER

NOW, October 10, 2008, the order of the Secretary of Public Welfare is affirmed.

RENÉE COHN JUBELIRER, Judge