

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

JAMES FREELS,

PETITIONER,

v.

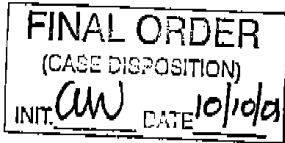
COMMISSIONER, GEORGIA
DEPARTMENT OF COMMUNITY
HEALTH, DIVISION OF MEDICAL
ASSISTANCE,

RESPONDENT.

:
:
:
:
:
:
:
:
:
:
:
:
:
:
:
:

CIVIL ACTION FILE NO.

01-CV-2932-10



ORDER REVERSING FINAL DECISION OF
GEORGIA DEPARTMENT OF COMMUNITY HEALTH

The above-styled action is before this Court for review of the Final Decision of the Commissioner of the Georgia Department of Community Health, affirming the Administrative Law Judge’s Initial Decision denying the Petitioner’s request for Medicaid reimbursement of Hyperbaric Oxygen Therapy (HBOT). The Petitioner contends that the Respondent’s Final Decision was based on an absence of facts to support the Decision and was contrary to law. Upon review of the record as a whole, including the applicable law, **the Final Decision of the Respondent is hereby REVERSED.**

O.C.G.A. § 50-13-19 (h) (4) allows for reversal of the Respondent’s Final Decision when it is “affected by other error of law”. O.C.G.A. § 50-13-19 (h) (5) allows for reversal of the Respondent’s Final Decision when the findings are “clearly erroneous in view of the reliable, probative, and substantial evidence of record.”

I. The Respondent Applied an Incorrect Legal Standard to the Petitioner's Request for Services.

Medicaid is governed by federal statute and regulations. 42 U.S.C. § 1396a and 42 C.F.R. § § 430-436, 440-442, 447, 455-56 (1994). Consistent with federal guidelines, each state is given flexibility in the categories of individuals covered and the scope of services provided. Norman v. St. Clair, 610 F.2d 1228, 1230 (5th Cir. 1980). While the Georgia Department of Community Health, Division of Medical Assistance is the sole agency in Georgia authorized to administer the Medicaid program (O.C.G.A. § 49-4-142), its obligation is to devise rules to carry out the Medicaid program in accordance with applicable federal law. See Harris v. James, 127 F.3d 993, 996 (11th Cir. 1997); Silver v. Baggiano, 804 F.2d at 1215. When a state chooses to participate in the federal-state program, as Georgia has done, it must provide required services to its citizens under the Medicaid statute. See Tallahassee Memorial Regional Medical Center v. Cook, 109 F.3d 693, 698 (11th Cir. 1997) (per curiam).

The Petitioner is a Medicaid eligible recipient under the age of twenty one (21). In the case of a Medicaid eligible recipient under the age of twenty one (21), the inquiry of whether Georgia is required to provide a particular service is governed by the Early, Periodic, Screening, Diagnostic and Treatment (EPSDT) provisions of the Medicaid statute, codified at 42 U.S.C. § 1396d (a) and § 1396d (r) (1-5). See 42 U.S.C. § 1396d (a) (4) (B); Pittman v. Secretary, Florida Department of Health & Rehabilitative Services, 998 F.2d 887 (11th Cir. 1993), cert. denied, 114 S.C. 650 (1994). The Medicaid statute mandates that participating states, such as Georgia, provide "[s]uch other necessary healthcare, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and

mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.” 42 U.S.C. § 1396d (r) (5). 42 U.S.C. § 1396d (r) (5) creates the framework under which the Respondent is required to promulgate rules consistent with the language and spirit of the federal statute. See Harris v. James, 127 F.3d 993, 996 (11th Cir. 1997); Silver v. Baggiano, 804 F.2d at 1211, 1215 (11th Cir. 1986). As part of this obligation, Georgia must evaluate any request for reimbursement for recipients under the age of 21 according to the language of the EPSDT provisions of the Medicaid statute. See id.

Georgia has a responsibility to create the framework in compliance with the federal program. See Harris v. James, 127 F.3d at 996; Silver v. Baggiano, 804 F.2d at 1215. Even the Respondent has recognized that the definition of “medical necessity” is broadly defined when it involves a recipient under the age of 21. See Hodges v. Smith, 910 F. Supp 646, 647 (N.D. Ga. 1995). The Department has failed to incorporate the requirements of the EPSDT provisions of the Medicaid statute into their State Plan and it was this omission which has prejudiced the Petitioner’s rights to services specifically mandated by the federal statutory scheme.

The statute requires that the Respondent provide “[s]uch other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.” 42 U.S.C. § 1396d (r) (5); Pittman v. Secretary, Florida Department of Health and Rehabilitative Services, 998 F.2d 887, 891 (11th Cir. 1993). Neither the statute nor the case law suggests that the Department has the right to expand its power so as to exclude coverage specifically included in the EPSDT provisions of the Medicaid statute.

The Respondent's Final Decision stated that "Petitioner has failed to satisfy the requisite burden of proof that HBOT treatments are an acceptable standard of medical practice and has not proven that HBOT is medically necessary for Petitioner." Thus, the Respondent has determined that HBOT is not the accepted standard medical practice for cerebral palsy patients and that it is not medically necessary as that term is defined for adult Medicaid eligible recipients.

The law requires States such as Georgia to cover services necessary to correct or ameliorate the Petitioner's condition. See 42 U.S.C. § 1396d (r) (5); Pittman v. Secretary, Florida Department of Health and Rehabilitative Services, 998 F.2d at 891. It does not allow the Respondent to create rules which circumvent the purpose of the EPSDT provisions of the Medicaid statute by subjecting beneficiaries of those provisions to the same standards set for adults. However, it did just that when it required a showing that the requested service meets the definition of medical necessity reserved for adult Medicaid recipients. See 42 U.S.C. § 1396d (r) (5); see also Harris v. James, 127 F.3d at 996; Silver v. Baggiano, 804 F.2d at 1215. The Respondent's failure to incorporate the correct legal standard to the facts in this case renders its decision "affected by ... error of law" thus constituting reversible error.

The applicable standard of law which should have been applied to the Petitioner's request for Medicaid reimbursement was whether the treatment was necessary to correct or ameliorate a physical or mental defect or condition and whether Medicaid must reimburse that treatment regardless of whether it is covered under the State Plan. See 42 U.S.C. § 1396d (r) (5). The Respondent merely found that the treatment was not the accepted standard medical practice. The Courts have already determined that this is an appropriate basis for the denial of services. See Rush v. Parham, 625 F.2d 1150, 1156 (5th Cir. 1980). In Rush v. Parham, the court found that

when a treatment is not commonly used, novel, or relatively unknown, authoritative evidence must be presented that it is safe and effective. See id. As discussed *infra*, the Petitioner has made the requisite showing that HBOT is safe and effective in treating CP patients through expert testimony of physicians versed in its use and who, incidentally, the Respondent attempted to contact as an expert. The Respondent failed to evaluate this claim based on the appropriate standard of law and that failure prejudiced the rights of the Petitioner, requiring reversal.

II. The Respondent's Findings of Fact Were Clearly Erroneous in View of the Reliable, Probative, and Substantial Evidence of Record.

Expert testimony was presented by Dr. Paul Harch that HBOT was correcting and ameliorating the mid-brain injury causing the Petitioner's cerebral palsy. The Respondent instead chose to rely upon the hearsay statement made by a non-physician employee in that expert's office rather than the expert's live testimony. Dr. Harch testified not only that there was far greater proof of HBOT's effectiveness for treating pediatric CP patients than for other Medicaid approved indications, but that the treatment worked for the Petitioner. (Record at 29:104). Dr. Harch's conclusion was well supported by his testimony which included the scientific basis for how HBOT corrects mid-brain injury and extensive data supporting its effectiveness. (Record at 29:91, 104). More importantly, however, Dr. Harch used objective data from the before and after SPECT-Scans to support his conclusion that HBOT is correcting the Petitioner's mid-brain injury.

The Respondent misinterpreted the evidence with such disregard that despite Dr. Harch's testimony that he had examined the Petitioner, the Respondent's Final Decision stated that no physician who actually examined or treated the Petitioner testified at the hearing. This finding is

flawed as Dr. Harch, whom the Department contacted as an expert, testified that he examined the Petitioner in April 2000. (Record at 29:113). Dr. Harch testified that after examining the Petitioner, reviewing the objective studies, and obtaining the history from the Petitioner's family, he concluded that HBOT was correcting and ameliorating the mid-brain injury which causes CP in the Petitioner. (Record at 29:104).

The experts called by the Respondent agency admitted they knew nothing about using HBOT to treat brain-injured patients. (Record at 11:116, 179, 188, 203, 204, 211, 212, 218, 222, 224, 225). The Respondent's experts have never utilized HBOT, have no background in utilizing and evaluating the practical significance of SPECT-Scans which are the objective test by which functional improvement in the brain is measured, and provide no treatment to the brains of CP patients. (Record at 11:116, 179, 188, 203, 204, 211, 212, 218, 222, 224, 225).

In attributing any weight to the opinions of the Respondent's witnesses, the Respondent would have to conclude that the Petitioner's tremendous functional improvement during the two (2) months he received HBOT treatments could be attributed to a number of factors such as the growth process or the physical therapy, occupational therapy, or speech therapy he ceased receiving more than two (2) years before the introduction of HBOT. This explanation for the Petitioner's dramatic functional improvement is implausible and does not constitute reliable, probative, or substantial evidence.

There is no dispute as to the efficacy of SPECT-Scans in measuring brain blood flow and thus metabolism and neither of the Respondent's experts disputed the findings showing a 25.4% increase in brain blood flow in the Petitioner illustrated by the SPECT-Scans. Neither of the Respondent's experts, however, could provide any explanation for why the Petitioner would have

a 25.4% increase in brain blood flow through formerly dormant and thus non-functioning brain cells, although neither disputed the objective findings.

The Respondent's citation to a peer-review medical journal, *Neurology*, contradicted their own experts' testimony with respect to the use of SPECT-Scans to evaluate functional improvement in the brain. Although the Respondent's experts testified that SPECT-Scans tell the examiner nothing about function, articles in the peer-review journal cited by the Respondent clearly contradict this conclusion. The evidence shows that there was no basis to accept the opinions of the Respondent's witnesses. Therefore, their testimony is without any significance since it is clear they do not have the experience necessary to evaluate whether HBOT is correcting or ameliorating the Petitioner's mid-brain injury.

The only medical evidence presented by the Respondent was testimony from two (2) witnesses who do not have any experience with the use of HBOT even for approved neurological indications, or in the methods upon which treatments can be shown to effect increased brain function. Therefore, there was no evidence to refute the Petitioner's evidence that HBOT is correcting the mid-brain injury which is the pathological basis for CP. Findings to the contrary were "clearly erroneous in view of the reliable, probative, and substantial evidence of record."

III. The Respondent's Final Decision Affirming the Administrative Law Judge's Initial Decision Denying Petitioner's Request for Medical Reimbursement for Hyperbaric Oxygen Therapy (HBOT) Treatments Must Be Reversed.

The Respondent applied an incorrect standard in evaluating the Petitioner's request for reimbursement of HBOT. Instead of requiring proof that HBOT is the accepted standard medical practice, or that it meets the definition of medical necessity reserved for adult Medicaid

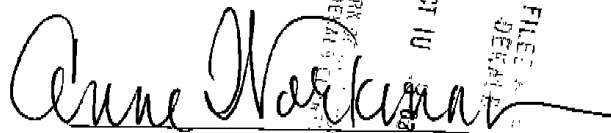
recipients, the Respondent should have focused its inquiry on whether HBOT was necessary to correct or ameliorate the Petitioner's physical condition. The Respondent's failure to properly evaluate the Petitioner's request constitutes legal error which prejudiced the Petitioner and therefore its Findings are **REVERSED**.

The Respondent's Final Decision was based on findings that were "clearly erroneous in view of the reliable, probative, and substantial evidence of record." That the Administrative Agency gave any weight to the Respondent's witnesses, who admitted they were unfamiliar with the medical literature on HBOT for use on neurological indications, including those reimbursed by Medicaid, as well as their unfamiliarity with the SPECT-Scans as a diagnostic tool to measure increased function, was clearly erroneous in light of the evidence of record. The Respondent's Final Decision included a statement that the Petitioner had failed to call a witness who actually examined or treated the Petitioner, which was clearly erroneous since Dr. Harch, who was contacted as an expert by the Respondent, testified that he examined and treated the Petitioner. It was based on his examination of the Petitioner, along with the objective data and the reports of the Petitioner's parent that led Dr. Harch to conclude that HBOT was correcting and ameliorating the Petitioner's condition. Overall, the Respondent's Final Decision was without basis in fact. By contrast, the evidence of record clearly demonstrates that HBOT is a safe and effective treatment for CP and specifically for the Petitioner. The reliable, probative, and substantial evidence demonstrates that HBOT is correcting and ameliorating the Petitioner's mid-brain injury. Since this is the showing required for Medicaid reimbursement of services pursuant to 42 U.S.C. § 1396d (r) (5), the findings of the Respondent are reversed and the Respondent is ordered to honor the Petitioner's request for Medicaid reimbursement for HBOT.

Therefore, it is **HEREBY ORDERED** that the Decision of the Georgia Department of Community Health be reversed and that the Respondent be required to reimburse the services requested by the Petitioner in this action.

IT IS SO ORDERED.

This 10th day of October, 2001.


 ANNE WORKMAN, JUDGE
 DEKALB COUNTY SUPERIOR COURT
 STONE MOUNTAIN JUDICIAL CIRCUIT

CLERK
 DEKALB COUNTY
 OCT 10
 FILED
 DEKALB COUNTY

Copy to: Michael Rosetti, Attorney for Petitioner
Charles Hoffecker, Attorney for Respondent