

STATE OF VERMONT
HUMAN SERVICES BOARD

In re application for Medicaid benefits of

F.H. No. 18,328

BOBBI-JO BROWN,
Claimant

CLAIMANT'S MEMORANDUM OF LAW

FACTS¹

Claimant Bobbi-Jo Brown is a 30-year-old mother of three children. She is covered under Medicaid. She has severe and chronic tooth decay problems. Her treating dentist, Dr. Lattell, her former treating physician, Dr. Evans, and her treating physician, Dr. Richter, have all recommend a comprehensive plan of treatment including 17 restorations; one root canal for tooth #29; 4 cast crowns for teeth # 5, 12, 29, and 30; and cast posts and cores for teeth # 29 and 30. Dr. Latelle and the Department estimate the total cost of the recommended plan to be \$6326. (App. 16 - 17; App. 4)

All of the services sought as part of the treatment plan are covered services under Medicaid, except the cast crowns and cast posts and cores. However, provision of even the covered services is subject to an annual dollar cap of \$475. (App. 4)

The Department has denied the claimant's request to pay for the covered services in any amount in excess of the annual \$475 cap, and has denied, under its M108 "exception" policy, coverage for the cast crowns, posts, and cores. (App. 7) The Department offers the

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Claimant submitted, subsequent to her Fair Hearing request, a set of documents (29 pp.), copies of which are hereto annexed as Claimant's Appendix. References to this Appendix are herein denominated "App. ___". Together with this Memorandum, Claimant submits a further statement of the treating physician, received 4/16/03, which is separately annexed hereto as Claimant's Appendix 'B'.

opinion that prefabricated crowns (which are a covered service) “can perform as well as cast crowns, posts, and cores in the short term,” and characterizes Ms. Brown’s current risk of recurring infection, pain, and tooth loss as “more connected with the limitations on dental restoration coverage than . . . not receiving cast crowns, posts, and cores.” (App. 5) The Department in any case decided that – whatever the primary risk factor – recurring infection, pain, and tooth loss were not “serious detrimental” consequences. (App. 5)

The comprehensive treatment plan was proposed after the claimant had suffered a generalized facial infection subsequent to a tooth extraction in June, 2001. (App. 14; 19-29) The infection necessitated a three-day hospitalization, with IV antibiotics and both inpatient and follow-up CT scans. (App. 20, 22)

Since the hospitalization, the claimant has deferred treatment on different occasions because of lack of coverage for the costs. (App. 15: “11/26/01 . . . will call us when Bene renew”; “7/18/02 . . . she is maxed out and can’t come in until paid on 7/26.”)

The current treating physician, Dr. Richter, submitted, after the Department’s decision, a letter attesting that the claimant’s medical condition “makes her at risk for sepsis, heart disease, bone infection, and brain abscess,” which can be “permanently debilitating and even life-threatening.” She states that “the employment of half-measures such as prefabricated crowns is significantly more likely to lead to occurrences and reoccurrences of the serious detrimental health consequences listed above, than would be the use of cast crowns, posts, and cores.” Dr. Richter further states:

[A] proposal to provide only \$475 per year in oral health services for Ms. Brown, when the comprehensive treatment plan as proposed by Dr. Lattell is estimated to cost \$6296,

does not constitute acceptable medical practice. Such “piecemeal” provision of these services over a period of more than a dozen years would not be likely to accomplish its medical goals at all. The work done in the early stages would be significantly more likely to suffer early and continued deterioration due to continuing infection and bone loss in the as-yet-untreated portions of her jaws, with the result that the treatment might never achieve a satisfactory result and could indeed end up costing far more, even if it did *not* end up causing sepsis, heart disease, bone infection, or brain abcess, and requiring further hospitalizations. If cost savings are seriously a consideration to the Department, adherence to an arbitrary annual dollar “cap” on this kind of medical service for a given individual may well, in fact, be counterproductive. In my opinion, Ms. Brown presents such a case. (App. 1-2)

ARGUMENT

1. Ms. Brown’s medical providers’ recommended course of treatment is medically necessary and therefore must be covered as dental services.

The Department’s decision should be reversed because the course of treatment proposed by Ms. Brown’s medical providers is medically necessary, and the effect of the Department’s decision in Ms. Brown’s case is to frustrate the federal purpose of covering dental care at all. “[S]tates may restrict coverage as a matter of fiscal necessity. . . . Those constraints, however, must not interfere with the purpose of offering that medical service in the first instance.” *Cushion v. PATH*, 2001 Vt. 240, ___ Vt. ___ (2002), slip op. at p. 4 (citation omitted). The federal purpose, cited by the *Cushion* court, “includes the treatment of ‘[t]he teeth and associated structures of the oral cavity; and [d]isease, injury, or impairment that may affect the oral or general health of the recipient. 42 C.F.R. 440.100(a)(1) & (2).’” *Id.* at p. 3.

Dental care under Medicaid, since Vermont has chosen to cover it, must as provided

cast crowns, posts, and cores, was based in part on a finding that “there was no evidence to show that Ms. Brown would suffer serious detrimental health consequences” (App. 5) If the treating dentist’s statement that Ms. Brown would “likely experience dental pain and infection . . . which could very well lead to further tooth loss,” (App. 13) did not constitute such evidence, Dr. Richter’s statement that Ms. Brown’s untreated condition “makes her at risk for sepsis, heart disease, bone infection, and brain abcess,” which can be “permanently debilitating and even life-threatening,” (App. 1) surely does. However, there is no authority in the federal statute or regulations which permits Vermont to impose such additional conditions upon coverage of treatment options, if such treatment is medically necessary.

The Department’s M108 process was invented in response to the Second Circuit’s decision in *DeSario v. Thomas*, 139 F.3d 80 (1998). *DeSario* was subsequently vacated by the Supreme Court in *Slekis v. Thomas*, 525 U.S. 1098 (1999). As stated by the Vermont Supreme Court in *Cushion v. PATH*, 2001 Vt. 240, ___ Vt. ___, (2002), the *DeSario* case “does not control our inquiry.” (Slip op. at p. 4) “Those cases that have upheld fiscal limitations on coverage have done so where the limitations are not inconsistent with medical necessity.” *Ibid*. The presence of “extenuating circumstances that are unique to the beneficiary such that there would be serious detrimental health consequences if the service or item were not provided,” (App. 5), if that quoted language means anything more than simple “medical necessity,” may not be required as a condition of coverage. *Cushion v. PATH*, 2001 Vt. 240, ___ Vt. ___ (2002).

3. **The treatment plan must be covered as “medical and surgical services of a dentist.”**

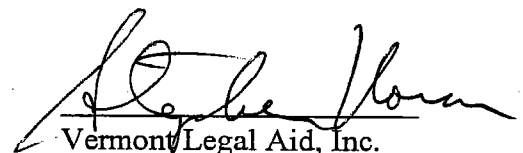
Dr. Richter has provided the claimant with her statement (copy attached as Appendix B, 1p.), attesting that the services proposed in Dr. Lattell’s proposed treatment plan “could lawfully be provided by a physician practicing in Vermont, and that if so provided, they would be considered physician’s services.” Pursuant to 42 U.S.C. §§ 1396a (10)(A) and 1396d(a)(5)(B) (*see also* 42 CFR § 440.50), coverage of such services is mandatory under all State plans. Therefore, the services proposed for Ms. Brown must be covered, the same as a medical doctor’s services are covered, without arbitrary annual dollar caps or exceptions processes.

CONCLUSION

For all of the foregoing reasons, the comprehensive treatment plan should be covered.

The Department’s decision must be reversed.

Dated: 4/16/03



Vermont Legal Aid, Inc.
Stephen Norman, of Counsel
P.O. Box 1367
Burlington VT 05402-1367
(802) 863-5620

cc: Wendy Burroughs, AAG

Partial

APPENDIX ~~-29~~ pp.

7 pp

FAMILY PRACTICE ASSOCIATE INC.

VERMONT 054

PAUL BER...
JENNIFER...
DONALD... M.D.
RICHARD... D.

LAURA...
DEBORAH...
PATRICIA...

February 28, 2003

To Whom it May Concern:

I have been Ms. [redacted] Brown's treating physician since January 20, 2002. I have had three clinical appointments with her. I have reviewed the PATH Commissioner's "M108 Request Decision" in Ms. Brown's case, and Ms. Brown's medical and dental treatment history, and in my opinion the comprehensive treatment plan recommended by Dr. [redacted] is medically appropriate and necessary, and the alternatives suggested by the Commissioner are medically inadequate to meet her needs.

Ms. Brown has serious tooth decay and is predisposed to tooth abscesses. She was hospitalized in June 2001 for a facial cellulitis resulting from a tooth abscess. Her multiple, severely decayed teeth make her at risk for sepsis, heart disease, bone infection, and brain abscess. These events are indeed "serious detrimental health consequences." They can in fact be permanently debilitating and even life-threatening.

The Commissioner's suggestion that Ms. Brown be treated with prefabricated crowns, rather than cast crowns, posts, and cores, is not acceptable medical practice. The Commissioner states that prefabricated crowns, "... can perform as well as cast crowns, posts, and cores in the short term," but a rational physician must plan for any younger patient's *long term* health care needs. Ms. Brown is presently only 30 years old. In the long term, the employment of half-measures such as prefabricated crowns is significantly more likely to lead to occurrences and reoccurrences of the serious detrimental health consequences listed above, than would be the use of cast crowns, posts, and cores.

I can also state that a proposal to provide only \$475 per year in oral health services for Ms. Brown, when the comprehensive treatment plan as proposed by Dr. [redacted] is estimated to cost \$6296, does not constitute acceptable medical practice. Such "piecemeal" provision of these services over a period of more than a dozen years would not be likely to accomplish its medical goals at all. The work done in the early stages would be significantly more likely to suffer early

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and continued deterioration due to continuing infection and bone loss in the as-yet-untreated portions of her jaws, with the result that the treatment might never achieve a satisfactory result and could indeed end up costing far more, even if it did *not* end up causing sepsis, heart disease, bone infection, or brain abcess, and requiring further hospitalizations. If cost savings are seriously a consideration to the Department, adherence to an arbitrary annual dollar "cap" on this kind of medical service for a given individual may well, in fact, be counterproductive. In my opinion, Ms. Brown presents such a case.

Sincerely,



Deborah , M.D.



DEPARTMENT OF PREVENTION, ASSISTANCE,
TRANSITION, AND HEALTH ACCESS
COMMISSIONER'S OFFICE

103 South Main Street
Waterbury, Vermont 05671-1201
Tel: (802) 241-2853
Fax: (802) 241-2830
www.path.state.vt.us

November 22, 2002

Ms. Eileen I. Brown

103 South Main Street

Waterbury, Vermont 05671-1201

RE: Your M108 Request for Cast Crowns, Posts and Cores

Dear Ms. Brown:

The Department's Medical Director and Dental Health Consultant, staff at the Office of Vermont Health Access and I have reviewed your request for cast crowns, posts and cores. Based upon the record before me, I have determined that I cannot approve your request because it did not meet the criteria for approval under M108. The enclosed decision describes our analysis of the request under the ten criteria in Rule M108.

You have the right to appeal this decision to the Human Services Board by asking for a Fair Hearing. You can request a hearing in person, in writing, or over the telephone if you do not agree with the decision. To ask for a Fair Hearing by telephone, call the Health Access Member Services Unit at 1-800-250-8427. Also, if you want legal assistance, you may contact the Vermont Office of Health Care Ombudsman at 1-800-917-7787 or call your local Vermont Legal Aid office listed in your telephone book.

You can ask for a Fair Hearing any time up to 90 days after this letter was mailed to you.

Sincerely,

Eileen I. Elliott
Commissioner

EIE/mbd
W/encls.

Cc: Gretchen Naylor, HCO ✓

M108 Request Decision

Ms. [redacted] Brown

[redacted]
Vermont

Ms. [redacted] Brown is a 29 year-old beneficiary who currently resides with her family in Underhill, Vermont. Ms. [redacted] Naylor from the Office of Health Care Ombudsman submitted the application on Ms. Brown's behalf seeking coverage for a comprehensive dental plan.

The information submitted includes a request for 17 restorations, one root canal for tooth # 29, 4 cast crowns (teeth #5, 12, 29 and 30) and 2 cast posts and cores (teeth #29 and 30). It is estimated, based upon the treatment plan submitted, that the charges for her overall dental plan of care may total to approximately \$6, 296.

It should be noted that the M108 process is only available for services that are not covered. The only items in her treatment plan that are not covered are the cast crowns, cast posts and cores. All other services are covered but subject to a cap of \$475.00 per annum. If, however, a dental emergency arose after the beneficiary has exhausted the adult cap, further emergency dental care might be available through the general assistance program (otherwise known as GA). It is not known whether or not Ms. Brown has ever utilized the general assistance program to address any immediate dental health needs nor if she would qualify for emergency assistance at some future time.

Because the M108 process is available to request items/services that are not already on a pre-approved list, this M108 decision will address only the items and services requested that are not covered – cast crowns, cast posts and cores.

The following medical evidence was submitted with this request:

- Undated Medical Need Form submitted by [redacted] MD received by the OVHA on 9/110/02
- Undated Medical Need Form submitted by [redacted] DDS and received by the OVHA 9/10/02
- Copies of emergency room and other dental notes dated 6/26/01 through to 9/5/02 received by the OVHA 9/10/02

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Analysis of the Criteria

1. Are there extenuating circumstances that are unique to the beneficiary such that there would be serious detrimental health consequences if the service or item were not provided?

The Department's Medical Director and Dental Health Consultant have concluded that Ms. Brown's health condition is not unique from all others and that she will not suffer serious detrimental health consequences in the event she does not receive cast crowns, posts and cores.

The medical evidence submitted showed that in June of 2001, Ms. Brown was treated and released from the hospital as a result of pain and infection just days following a tooth extraction from her lower jaw. In his report, Dr. [redacted] stated that Ms. Brown suffered from recurrent dental abscesses requiring hospitalization and multiple office visits. He concluded that in the event she did not receive a comprehensive dental treatment plan, that she was at risk for possible sepsis resulting from recurrent abscesses. In his report, Dr. [redacted] referred to the overall treatment plan and concluded that Ms. Brown will likely experience dental pain and infection from time to time which could very well lead to further tooth loss. There was no medical evidence submitted to show that Ms. Brown suffered from other health conditions that might compromise her health status should she continue to experience future infections.

The evidence did not demonstrate that Ms. Brown's health condition was unique from all others. There are many individuals with poor oral health that are at risk of infection and tooth loss. Furthermore, the risk of infection and tooth loss are more connected with the limitations on dental restoration coverage than it is caused by not receiving cast crowns, cast posts and cores. Prefabricated crowns are covered for adults. They can perform as well as cast crowns, posts and cores in the short term. As noted above, if an emergency occurs and the restoration cap has been reached, General Assistance funding for emergency services would be the next available resource. Services covered under GA will provide basic treatment for pain and infection. Finally, the Department's Medical Director and Dental Health Consultant conclude there was no evidence to show that Ms. Brown would suffer serious detrimental health consequences in the event she did not receive the cast crowns, posts and cores. In the absence of uniqueness and serious detrimental health consequences, this request will be considered as a request on behalf of all Vermont Medicaid beneficiaries.

2. Does the service or item fit within a category or subcategory of services offered by the Vermont Medicaid program for adults?

Yes. Prefabricated crowns are on the pre-approved list of covered dental services for adults. Cast crowns are specifically excluded under M621.6.

3. **Has the service or item been identified in rule as not covered, and has new evidence about efficacy been presented or discovered?**

Cast crowns are specifically excluded under M621.6. No new evidence has been presented or discovered regarding the merits of cast crowns versus prefabricated crowns.

4. **Is the service or item consistent with the objectives of Title XIX?**

The use of cast crowns instead of prefabricated crowns could be consistent with the objectives of Title XIX when their use is required by a medical condition that has been established by supporting clinical documentation.

5. **Is there a rational basis for excluding coverage of the service or item? The purpose of this criterion is to ensure that the department does not arbitrarily deny coverage for a service or item. The department may not deny an individual coverage for a service or item solely based on its cost.**

Yes. The exclusion was adopted in rule. As such it was subject to review and comment by dental experts and advocates. No concerns arose.

6. **Is the service or item experimental or investigational?**

No.

7. **Have the medical appropriateness and efficacy of the service or item been demonstrated in the literature or by experts in the field?**

Yes. Cast crowns are commonly used in dentistry.

8. **Are there any less expensive medically appropriate alternatives to the requested service or item that are covered by Medicaid?**

Yes. Prefabricated crowns are less expensive and are covered by Vermont Medicaid for adults.

9. **Is FDA approval required, and if so, has the service or item been approved?**

No. The use of a cast crown is not subject to FDA approval.

10. **Is the service or item primarily and customarily used to serve a medical purpose, and is it generally not useful to an individual in the absence of an illness, injury, or disability?**

Yes, crowns have only a medical purpose. It is generally not useful to use any type of crown in the absence of an illness, injury, or disability.

Discussion

The Department's Medical Director and Dental Health Consultant, staff at the Office of Vermont Health Access and I have reviewed the evidence submitted with this request. While Ms. Brown is in need of dental care, her health condition has not been found to be unique from all others and she will not suffer serious detrimental health consequences in the event she does not receive cast crowns, posts and cores as requested. These are the only items germane to this M108 request. In the absence of uniqueness and serious detrimental health consequences, this request was considered as a request on behalf of all Vermont Medicaid beneficiaries.

While Ms. Brown's comprehensive treatment plan is not at issue in this M108 decision, we know that Ms. Brown has reached her dental care limit of \$475. for this year. Based on the estimate of charges, carrying out the proposed dental care plan will exceed the yearly regulatory limit for Ms. Brown for many years to come. However, review by the Department's Medical Director and Dental Health Consultant indicate that, while they would not disagree that Ms. Brown is in need of the dental work proposed, they believe that this plan could be implemented over a period of time and within the regulatory limit of coverage provided. With proper planning and prioritizing and selecting less costly methods, Ms. Brown's needs can be met. Finally, in the event Ms. Brown does suffer from dental pain or infection, she can apply to the General Assistance program if and when she has exhausted her yearly dental limit.

I have considered the request under the ten criteria set forth above, as required by Vermont Medicaid Policy M108. These criteria, considered in combination, do not present grounds for authorizing Medicaid coverage for cast crowns, posts and cores for Ms. Brown. Therefore, authorization and coverage for cast crowns, posts and cores is denied and coverage for these items will not be added to the list of pre-approved services.

Signature: _____

Eileen I. Elliott

Eileen I. Elliott, Commissioner

Dated: _____

11/21/02

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APPENDIX 'B' – 1 p.

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FAX COVER SHEET

TO: ~~Medical Center~~ Medical Center
ATTN: Dr. Deborah Richter

FAX NUMBER: 644-5573

FROM: Stephen Norman, Staff Attorney

RE: ~~Dr. Richter~~ Brown

DATE: April 14, 2003

PAGES: 2 (including this one)

Dear Dr. Richter,

I am preparing the written legal argument that will accompany your "To Whom it May Concern" letter in the appeals process. I asked you once on the phone about a second issue that could also result in coverage of the dental care plan, but I didn't give you the exact language. I would like to ask you whether you can respond "yes" to each of the following questions:

1. Under Vermont law governing medical practice, if a medical physician possessed the required skills and equipment, would it be lawful for that physician (rather than a dentist) to furnish the services that are proposed in Dr. Richter's comprehensive treatment plan? Yes/No **Yes**

2. If such a physician furnished those services, would the provision of those services by that physician be considered "physician's services"? Yes/No **Yes**

I concede that the second question may seem rather dumb, but please answer it straightforwardly, if you can. For your information, I enclose a copy of the federal Medicaid regulation that may be said to apply to the situation. It basically requires coverage of physicians' services, and says that dentist's services should be covered on the same basis as physicians' services if a physician could legally provide the same services. Thanks again.

Stephen Norman, Staff Attorney

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE ADDRESSEE AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED AND CONFIDENTIAL. IF YOU ARE NOT THE INTENDED RECIPIENT, PLEASE NOTE THAT ANY DISSEMINATION OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US BY TELEPHONE IMMEDIATELY.