

IN RE: DEPARTMENT OF HEALTH AND HUMAN SERVICES
APPEAL NUMBER: OFFICE OF MEDICARE HEARINGS AND APPEALS, IRVINE, CA
MEDICARE NUMBER: HEARING: SEPTEMBER , 2007

MEMORANDUM OF LAW IN SUPPORT OF APPEAL REGARDING MEDICARE COVERAGE OF MEDICAL-RELATED DENTAL SERVICES

I. INTRODUCTION

This is an appeal of a Reconsideration Determination dated April , 2007 (“Reconsideration”), in which the Qualified Independent Contractor (“QIO”), Maximus, upheld the denial by Regence Blue Cross Blue Shield of Utah, Inc. (“Regence”) of extraordinary dental services prescribed for Appellant (“Appellant”). A request for a Rehearing based on additional evidence that was made by Appellant on June , 2007 was denied by the QIO on July , 2007. Medicare coverage was denied based on a ruling of law that the Medicare program does not cover dental services. The amount at issue for the prescribed services is \$.¹

II. ARGUMENT

A. Facts: The Dental Services Needed By Appellant Are Directly Related To Medical Treatment Received For His Oral Cancer.

1. The Destructive Effects of Treatments For Oral Cancer Are Well Established

Radiation and chemotherapy treatments are often prescribed for individuals like Appellant with oral cancer. However, these treatments in turn cause serious dental

¹ Dr. 's services total \$. and Dr. 's services total \$, for a combined total of \$. However, after this appeal was filed Appellant's prior Medicare contractor agreed to pay \$ that it had formerly disputed toward Dr. 's services, leaving a total in controversy of \$.

problems. Radiation and chemotherapy can result in mucositis, altered salivary gland function, and risk of mucosal infection.² Mucositis is an “inflammation and ulceration of the oral mucosa,” which together with xerostomia (dry mouth) increases susceptibility to infection.³ Radiation therapy can also cause fibrosis and changes in the bone of teeth, jaws and surrounding tissues.⁴ The resulting dental problems, requiring care such as fillings, crowns, root canals, etc., may appear years after the radiation and chemotherapy treatments. Failure to provide needed dental care can affect the individual’s overall health, and lessen the likelihood of recovery from the cancer.

2. Appellant’s Dental Problems Are Caused By His Cancer Treatments And Pose Further Threats To His Health

Appellant was diagnosed with squamous cell cancer of the oral tongue in 2002. The initial treatment was surgical excision of the carcinoma (subtotal glossectomy). This was followed by chemotherapy and radiotherapy to the area of primary disease and to the left neck. See letter from , M.D., Ex. A. These treatments caused Appellant to experience mucositis, dysphagia, and xerostomia. See letter from , Ex. B; and report from , Ex. C. As a result of the necrosis of the mandible bone caused by his radiation, Appellant has difficulty when he tries to eat. See letter from , M.D., Ex. D. Appellant has already been diagnosed with some malnutrition due to inability to obtain inadequate intake, and dental treatment is needed to prevent further nutritional deficiencies. See Ex. D, supra; letter from B.

² Pamela J. Hancock, Joel B. Epstein & Georgia Robins Sadler, *Oral and Dental Management Related to Radiation Therapy for Head and Neck Cancer*, 69 J. Can. Dental Assn. 585 (2003).

³ *Id.*, 586-587.

⁴ *Id.*, 585-587.

, Ex. E; letter from , DDS, PC, Ex. F.

Appellant's oncologists and radiologists knew that his chemoradiation treatment would cause dental problems, and they specifically included provision for follow up dental care in his original cancer treatment plans. See Ex. A, supra; Ex. B, supra. The dental services that Appellant needs are not routine, but are an integral part of the medical treatment for his cancer. See Ex. A, supra; Ex. D, supra.

B. Law: The QIO Erred In Holding That Medicare Does Not Covered Extraordinary Dental Care Related To Medical Treatment

1. The Statute Excludes Only Routine Dental Services

a. The Medicare Statute Must Be Construed Liberally

In reading the Medicare statute, the first consideration should be the rule of construction that because the underlying purpose of this statute is remedial. It should be liberally construed to effectuate its purpose of providing affordable medical care for the elderly and disabled. *Rosenberg v. Richardson*, 538 F.2d 487, 490 (2d Cir. 1976); *Mayburg v. Secretary of Health & Human Services*, 740 F.2d 100, 103 (1st Cir. 1984).

b. The Dental Services Exclusion Is Found In A Group of Routine Health Services That Are Excluded From Medicare Coverage

The provision in the Medicare statute that excludes coverage of dental services is set out in a list of excluded services, all of which are routine in nature. This section of the statute reads as follows:

(a) Items or services specifically excluded. Notwithstanding any other provision of this title . . . no payment may be made under Part A or Part B . . . for any expenses incurred for items or services -- . . .

(7) where such expenses are for routine physical checkups, eyeglasses . . . or eye examinations for the purpose of prescribing, fitting, or changing

- eyeglasses, procedures performed (during the course of any eye examination) to determine the refractive state of the eyes, hearing aids or examinations therefore, or immunizations . . . ;
- (8) where such expenses are for orthopedic shoes or other supportive devices for the feet, other than shoes furnished pursuant to section 1861(s)(12) . . . ;
- (9) where such expenses are for custodial care . . . ;
- (10) where such expenses are for cosmetic surgery or are incurred in connection therewith, except as required for the prompt repair of accidental injury or for improvement of the functioning of a malformed body member;
- (11) where such expenses constitute charges imposed by immediate relatives of such individual or members of his household;
- (12) 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;**
- (13) where such expenses are for –
- (A) the treatment of flat foot conditions and the prescription of supportive devices therefore,
 - (B) the treatment of subluxations of the foot, or
 - (C) routine foot care (including the cutting or removal of corns or calluses, the trimming of nails, and other routine hygienic care)

. . . .

42 U.S.C. § 1395y (emphasis added).

Statutory language should be interpreted in its context and by reference to the whole statutory scheme. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Auburn Housing Authority v. Martinez*, 277 F.3d 138, 144 (2d Cir. 2002) (“The meaning of a particular section in a statute can be understood in context with and by reference to the whole statutory scheme, by appreciating how sections relate to one another.”)

The context in the Medicare statute of the dental exclusion, 42 U.S.C. § 1395y(a)(12), placed in the midst of a list of health services that are routine – e.g., often required in the normal course of aging, without severe medical complications, and

relatively inexpensive – shows that this exclusion was also intended to apply to routine dental services.

Furthermore, within 42 U.S.C. § 1395y(a)(12) there is an exception directing Medicare to cover those unusual dental services that must be provided in a hospital. This exception to the exclusion reinforces the construction of the statute that limits the exclusion of Medicare coverage to the majority of dental services that are routine.

2. The Legislative history clearly shows that only routine dental services are excluded

The legislative history of 42 U.S.C. § 1395y(12) supports the construction of the statute as excluding coverage only of routine dental services. The Senate Report said:

Payments would not be made for routine physical examinations or for eyeglasses, hearing aids, or the fitting expenses or other costs incurred in connection with their purchase. The committee bill provides a specific exclusion of routine dental care to make clear that the services of dental surgeons covered under the bill are restricted to complex surgical procedures. Thus, . . . a routine annual or semiannual checkup would not be covered. . . . Similarly, too, routine dental treatment -- filling, removal, or replacement of teeth or treatment of structures directly supporting teeth – would not be covered.

S.Rep.No. 89-404 (1965), reprinted in 1965 U.S.C.C.A.N. 1943, 1989-90 (emphasis added.)

At the time the Medicare statute was enacted, in 1965, it made sense for Congress to exclude routine dental services from coverage of the new health insurance program for the elderly. Routine dental care was not only an ordinary occurrence in the lives of all people, but was relatively inexpensive and thus affordable. These rationales for excluding routine dental services from Medicare coverage do not apply to extraordinary dental procedures such as those caused by chemotherapy and radiation treatments for oral cancer.

This construction of the exclusionary section of the Medicare statute as applying only to routine services was endorsed by the federal district court in *Currier v. Thompson*, 369 F.Supp.2d 65 (D.Me, 2005), second appeal, 490 F.Supp.2d (D.Me. 2007) (aff'd on other grounds). The *Currier* case involved a video monitor needed by a Medicare beneficiary with macular degeneration. The Medicare Appeals Council upheld the ALJ's denial of coverage based on the theory, similar to that adopted by the QIO here, that the device fell within the statutory exclusion for eyeglasses. *Currier*, 369 F.Supp.2d at 67. The district court rejected this argument. It held that the text of the statute is ambiguous, but that the legislative history shows that it was intended to exclude only payment for routine eye examinations and eyeglasses or contact lenses. *Id.*, 71. The court went on to say, "Similarly, too, routine dental treatment – filling, removal, or replacement of teeth or treatment of structures directly supporting teeth – would not be covered." *Id.* (emphasis added.)

3. The Policy Manual Recognizes That Dental Services Are Covered in Non-Routine Situations

The Center For Medicare Services (CMS) agrees that coverage of some dental services in some situations is provided under the Medicare statute. The CMS policy manual gives a number of examples of situations in which dental services are to be covered or not covered.

a. General Rule

The overriding principle articulated in the CMS policy manual for determining coverage of dental services is whether they are "incident to and an integral part of" a covered medical service. *Medicare Benefits Policy Manual* ("MBPM") Ch. 15 – Covered Medical and Other Health Services, § 150, and Ch. 16 – General Exclusions

from Coverage, § 140. Medicare interprets this principle restrictively, requiring that covered services be performed at the same time and by the same provider as the dental services.

b. Examples in the MBPM of Covered Procedures

The reconstruction of a ridge performed at the same time and as the result of surgical removal of a tumor is covered by Medicare, unless the primary purpose of the construction of the ridge is to prepare the mouth for dentures when it is not covered. MBPM, Ch. 15, § 150, Ch. 16, § 140.

The wiring of teeth is covered if it is done in connection with the reduction of a jaw fracture. *Id.*

The extraction of teeth to prepare the jaw for radiation treatment of neoplastic disease is covered, with an admission that this policy is an exception to the requirement that the procedure be “incident to and an integral part of a covered procedure or service.” It is an exception because the dentist is not the physician who administers the radiation treatment, e.g., a radiologist. *Id.*

c. Examples in the MBPM of Excluded Services

The manual provides that the preparation of the mouth for dentures is always an excluded service, and states that even a complex or difficult procedure (extraction of an impacted tooth, an alveoplasty – surgical improvement of the shape and condition of the alveolar process, or a frenectomy) is not covered if it is performed to prepare the mouth for dentures. *Id.* Similarly, dental splints can be covered to treat a “covered procedure”, e.g., a dislocated jaw, but not when they are used to treat a “non-covered procedure”, e.g., a dental condition. *Id.*

d. Effects of the Policy Manual Provisions

The restrictive MBPM provisions relating to Medicare coverage of dental treatments are not entitled to deference from adjudicators. Administrative agency interpretations of law set out in policy statements that have not been adopted through a formal process such as notice and comment rule-making do not warrant “Chevron-style deference.” *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001). *Public Citizen v. U.S. Dept. of Health and Human Services*, 332 F.3d 654, 660 (D.C. Cir. 2003).

A case involving a claim for Medicare coverage of dental services for an individual who had experienced damage to his gums following radiation treatments gave “considerable deference” to the CMS manuals. *Bick v. Sec’y of H.H.S.* No. CV 95-0312-ABC (RMC) 1996 WL 393656 (C.D.Cal. 1996). See also *Chipman v. Shalala*, 894 F.Supp. 392 (D.Kan. 1995) (bone augmentation covered, implants denied), *aff’d* 90 F.3d 421 (10th Cir. 1996). The court denied coverage based on its finding that the services were not “incident to or an integral part” of the radiation treatments. *Bick*, *2. The case is distinguished from Appellant’s situation in that Bick’s dental services had not been prescribed by his oncologist. *Bick*, *3.

Appellant’s case is more analogous to that of the successful plaintiff in *Maggio v. Shalala*, 40 F.Supp.2d 137 (W.D.N.Y. 1999). The beneficiary, like Appellant, needed dental care (crowns and a prosthesis) to address nutritional deficiencies affecting his treatment for leukemia and thrombocytopenia. The court upheld the decision of the ALJ, finding that the dental services at issue met the manual standard that they be “incident to and an integral part of “ his covered treatment. *Maggio*, 40 F.Supp.2d at 140-141. It also

noted that his dental services were provided at the direction of his primary oncologist. In a precedent providing for coverage of dental care resulting from radiation treatments, the court refused to interpret the “incident to and an integral part of “ language of the manual as limiting coverage to dental services provided at the same time and by the same provider as the underlying treatment. It upheld the ALJ’s ruling that “the . . . intent of the law would clearly have been to cover such a procedure.” *Id.*, at 142.

Agency policy manuals can be entitled to “respect,” but only to the extent that they have the power to persuade. *Christensen v. Harris County*, 529 U.S. 576. However, the MBPM provisions relating to dental treatments are inconsistent and contradictory. As noted above, the extraction of teeth to prepare the jaw for radiation treatment of neoplastic disease is covered in the MBPM, but this expressly contradicts the requirement that a dental procedure must be “incident to and an integral part of a covered procedure or service.” The manual prohibition on coverage of dental services that are related to a covered procedure unless they are also performed by the same provider and at the same time as the covered procedure is not entitled to deference or respect.

III CONCLUSION

The evidence is clear, and it is undisputed, that the dental services required by Appellant are directly related to the chemotherapy and radiation treatments that he received for his oral cancer. As such, they are not the sort of routine dental care that is excluded from coverage by the Medicare statute, taking into account both by the language and context of the statute, and its legislative history.

A requirement that dental services be provided “incident to and as an integral part of “ a covered medical service is set out in the informal Medicare policy manual, and

Appellant's services appear to meet this requirement. But if it is given a more restrictive interpretation, it would not be entitled to deference; and it is applied so inconsistently in the MBPM that it is not entitled to respect by this tribunal.

Because Appellant's dental needs are part and parcel of his covered cancer treatment, the decision by QIO to uphold the denial of Medicare coverage was in error and should be reversed.

Respectfully submitted,

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