



**STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of the Inspector General
Board of Review**

**Jeffrey H. Coben, MD
Interim Cabinet Secretary**

**Sheila Lee
Interim Inspector General**

March 14, 2023

[REDACTED]

RE: [REDACTED] v. WVDHHR
ACTION NO.: 23-BOR-1094

Dear [REDACTED]:

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

You will find attached an explanation of possible actions you may take if you disagree with the decision reached in this matter.

Sincerely,

Todd Thornton
State Hearing Officer
Member, State Board of Review

Encl: Recourse to Hearing Decision
Form IG-BR-29

cc: Terry McGee, II, DHHR / Lori Tyson, DHHR

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW**

██████████,

Appellant,

v.

Action Number: 23-BOR-1094

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,**

Respondent.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for ██████████. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on February 28, 2023.

The matter before the Hearing Officer arises from the December 23, 2022 decision by the Respondent to deny Medicaid payment for requested surgical procedures.

At the hearing, the Respondent appeared by Anita Ferguson. Observers not participating as witnesses for the Respondent were Mary Taylor, Alva Page, and Tanya Cyrus. The Appellant appeared pro se. Observers not participating as witnesses for the Appellant were the Appellant's parents, ██████████. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 BMS Provider Manual, Chapter 519.24, Gender Affirmation Surgery
- D-2 Initial Authorization Request, dated December 20, 2022
- D-3 Notice dated December 23, 2022, from Aetna Better Health of West Virginia
- D-4 Aetna Better Health of West Virginia First Level Appeal Form (unclear date); Medical records regarding the Appellant

D-5 Notice dated January 17, 2023, from Aetna Better Health of West Virginia

Appellant's Exhibits:

- A-1 Memorandum Opinion and Order, U.S. District Court, Southern District of West Virginia, Huntington Division, entered August 2, 2022, by Judge Robert C. Chambers
- A-2 Prior authorization details for the Appellant
BMS Provider Manual, Chapter 519.24, Gender Affirmation Surgery
- A-3 International Journal of Transgender Health
Standards of Care for the Health of Transgender and Gender Diverse People
Version 8
- A-4 Printed communication excerpts between the Appellant and the Respondent or its
contracted Managed Care Organization (MCO)

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the Hearing Officer sets forth the following Findings of Fact.

FINDINGS OF FACT

- 1) The Appellant is a recipient of Medicaid.
- 2) The Appellant is diagnosed with gender dysphoria. (Exhibit D-4)
- 3) The Respondent contracts with various Managed Care Organizations (MCOs) to provide and administer Medicaid benefits.
- 4) On December 20, 2022, the Appellant requested a series of surgical procedures (Exhibit D-2), specifically: frontal cranioplasty, brow lift, hairline advancement, and orbital rim recontouring.
- 5) Aetna, as the MCO for the Appellant, provided a notice denying these procedures on December 23, 2022. (Exhibit D-3)
- 6) This notice (Exhibit D-3) provided the reason for denial as, "Your doctor did not say in the records that this is medically necessary for you. We see that you want this to make you look different."
- 7) The Appellant submitted a first-level appeal request with Aetna, including medical documentation. (Exhibit D-4)

- 8) Aetna issued a notice dated January 17, 2023 (Exhibit D-5), denying the Appellant's first-level appeal.
- 9) This notice (Exhibit D-5) read, in pertinent part, "Your appeal was decided on 1/17/2023. The Committee decided that the service your requested is not covered by Aetna Better Health of West Virginia. Current Procedural Terminology (CPT) codes 21139 Frontal cranioplasty, 67900 Brow lift, 14021 Hairline advancement, and 21172 Orbital rim recontouring are considered non-covered codes by the West Virginia Department of Health and Human Services Bureau for Medical Services Provider Manual Chapter 519.24 Gender Affirmation Surgery and the Aetna Better Health of West Virginia 2022-2023 Member Handbook, page 32, Services Not Covered. Therefore, your request remains denied as non-covered."
- 10) The International Journal of Transgender Health, Standards of Care for the Health of Transgender and Gender Diverse People, Version 8, Appendix E (Exhibit A-3) provides a list of gender-affirming surgical procedures, which includes: Brow lift and Hair line advancement.
- 11) [REDACTED] a physician for the Appellant, provided a statement of medical necessity (Exhibit D-4), dated January 9, 2023.
- 12) In this statement (Exhibit D-4), [REDACTED] wrote, "...gender-affirming facial surgery is considered part of standard treatment for gender dysphoria."
- 13) In this statement (Exhibit D-4), [REDACTED] wrote, "[Appellant] is scheduled for hairline advancement, frontal cranioplasty and brow lift this month. These procedures are medically necessary to treat [REDACTED] specific gender dysphoria."
- 14) [REDACTED] explained (Exhibit D-4) why the procedures requested are not cosmetic, noting, "...[Appellant's] forehead is over 6.5 cm in height (normal female forehead height is 4.5 cm) and has an M-shaped configuration with now stable male pattern temporal hairline recession. Her brows are prominent with fully pneumatized/airated frontal sinuses and prominent supraorbital rims consistent with male-type periorbital anatomy. These features cannot be hidden or masked with makeup or clothing and are a source of significant dysphoria for her. Specifically, these procedures will focus on feminizing her forehead and brow so that they affirm with her gender identity."
- 15) [REDACTED] attending psychologist for the Appellant, provided a January 4, 2023 letter (Exhibit D-4) to support the medical necessity of the Appellant's requested procedures.
- 16) [REDACTED] noted (Exhibit D-4, emphasis in original), "...it is my clinical opinion that [Appellant] meets the criteria for gender dysphoria, has met the requirements for the

WPATH *Standards of Care*, version 8, and it is at this time medically necessary for [Appellant] to undergo gender affirmation facial surgery.”

APPLICABLE POLICY

West Virginia Department of Health and Human Resources, Bureau for Medical Services, Provider Manual, Chapter 519.24, addresses Gender Affirmation Surgery.

At §519.24.3, this policy addresses non-covered items, and reads, in pertinent part, “Coverage is not available for surgeries or procedures that are cosmetic, such as services that change a beneficiary’s appearance but not medically necessary to treat the patients [*sic*] underlying gender dysphoria.”

At §519.24.3, this policy also provides a list of non-covered items, which includes Brow lift. The list does not include Frontal cranioplasty, Hairline advancement, or Orbital rim recontouring.

DISCUSSION

The Appellant has appealed the decision of the Respondent, through its contracted MCO, Aetna, to deny surgical procedures to the Appellant. The Respondent must show, by a preponderance of the evidence, that it correctly denied these procedures.

The Appellant is a Medicaid recipient who requested payment for surgical procedures to address her gender dysphoria. The Appellant researched to determine if these procedures could be paid for in communication with the Respondent and Aetna (Exhibit A-4), and obtained approval for imaging services that were only necessary as precursors to the surgical procedures ultimately denied. When the four procedures requested were denied by the Respondent’s MCO Aetna, the Appellant followed Aetna’s internal appeal process and obtained a second denial. The initial denial notice indicated the denial was due to undocumented medical necessity and a determination that the procedures were cosmetic in nature. The second denial simply stated the procedures were non-covered codes by the Respondent and Aetna. The policy of the Respondent does not support this conclusion.

BMS Policy provided a list of non-covered codes, and Brow lift was clearly shown as a non-covered item. This list in policy is headed, “Cosmetic Procedures not covered include, but are not limited to,” but does not provide any basis for expanding the non-covered services, other than the previous policy bullet, which reads (emphasis added), “Coverage is not available for surgeries or procedures that are cosmetic, such as services that change a beneficiary’s appearance **but not medically necessary to treat the patients [*sic*] underlying gender dysphoria.**” The evidence in the record shows that the Appellant did establish the medical necessity of the remaining three surgical procedures, as part of her treatment for gender dysphoria.

The physician and attending psychologist provided statements indicating the medical necessity of the requested procedures. These letters were ignored in the letter from Aetna regarding the

Appellant's first level internal appeal. The Appellant's physician explained how the changes, specifically with regard to forehead size, do not address a cosmetic outcome, but rather a change in secondary sex characteristics intended to match the Appellant's gender identity. The International Journal of Transgender Health provided a list of gender-affirming surgical procedures which included both Brow lift and Hair line advancement, further suggesting these are not procedures requested for cosmetic purposes, but are rather intended for gender-affirming outcomes.

The decision of the Respondent, through its MCO Aetna, to deny Brow lift is affirmed. This procedure is listed explicitly as a non-covered item, and although Respondent policy clearly contradicts the guidance from an expert journal, the non-covered status is policy which cannot be altered at hearing.

The decision to deny the Appellant the remaining requested surgical procedures cannot be affirmed. The Respondent appeared to rely on the notion that because there is a cosmetic element to a procedure, medical necessity must not be present. Because the Appellant did provide documentation that the procedures were medically necessary, any cosmetic element to the procedures are irrelevant. Policy denies procedures that have a cosmetic element but fail to have the element of medical necessity. The Respondent did not explain at hearing why they believed the documentation of the Appellant did not establish medical necessity, and the letter from its contracted MCO, Aetna, appeared to ignore the letters from the Appellant's attending medical professionals in its internal appeal denial (Exhibit D-5). Because the Appellant established medical necessity, the remaining three procedures cannot be denied as merely cosmetic procedures.

CONCLUSIONS OF LAW

- 1) Because the surgical procedure Brow lift is specifically identified as a non-covered cosmetic procedure, the Respondent must deny this procedure.
- 2) Because the Appellant established the medical necessity of the surgical procedures Frontal cranioplasty, Hairline advancement, and Orbital rim recontouring to treat her gender dysphoria, the Respondent may not deny coverage for these procedures as cosmetic.

DECISION

It is the decision of the State Hearing Officer to **REVERSE** the Respondent's determination, through its contracted Managed Care Organization, to deny the following surgical procedures: Frontal cranioplasty, Hairline advancement, and Orbital rim recontouring. The Respondent's decision regarding the procedure Brow lift, is affirmed.

ENTERED this ____ day of March, 2023.

Todd Thornton
State Hearing Officer