COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT
C.A. NO. 99-4613H

GERMAINE BEGER, Plaintiff,	)
v.	)
MARK REYNOLDS, ACTING COMMISSIONER, DIVISION OF MEDICAL ASSISTANCE, Defendant.	)

PLAINTIFF GERMAINE BEGER'S MEMORANDUM IN SUPPORT OF HER MOTION FOR PARTIAL SUMMARY JUDGMENT
WITH RESPECT TO COUNT I OF THE COMPLAINT

INTRODUCTION

This case involves the Medicaid denial of a request for breast reconstruction surgery made by Germaine Beger, a 49-year old woman.[1] The sole basis for the denial is that Ms. Beger is a transsexual woman. Although, a Division of Medical Assistance ("DMA") regulation precludes payment for sex-reassignment surgery, it is not applicable in this case. Ms. Beger is not seeking sex-reassignment surgery. She fully completed such surgery over 25 years ago. The Commonwealth of Massachusetts legally recognizes her as a woman and she has been living, legally and medically, as a woman since 1975.

[1] The Complaint filed contains three counts. Count I seeks judicial review of the DMA decision not to pre-authorize approval of the breast reconstruction. Count II is a claim for declaratory relief based on constitutional violations that arise as a result of the denial of the pre-authorization approval. Count III states a claim for violation of the federal Medicaid Act. Counts II and III have been stayed pending resolution of Count I. This motion addresses solely Count I of the Complaint.

There is no legal or medical reason to ignore the facts of this case and treat her any different than every other woman who submits a request for pre-authorization approval for a comparable medical service.

This action is for judicial review pursuant to G.L. c. 30A of a hearing officer's denial of an appeal taken by Ms. Beger of the DMA's decision not to authorize payment for breast reconstruction despite the uncontroverted evidence of medical necessity for the procedure. As demonstrated herein, the hearing officer's decision is based upon an error of law, see G.L. c. 30A, § 14(7), because it improperly relied on a regulation defining Nonreimbursable Circumstances, 130 CMR 433.404(B) which is inapplicable by its terms. Even if the DMA properly relied on 130 CMR 433.404(B), its application to all requests for breast reconstruction made by transsexual women -- but not to non-transsexual women -- violates constitutional provisions. Therefore, this Court should reverse the agency's decision.

STATEMENT OF UNDISPUTED FACTS

Plaintiff Germaine Beger incorporates herein her Statement of Undisputed Facts and Legal Elements in Support of Motion for Partial Summary Judgment as to Count I of Her Complaint.

ARGUMENT

I. INTERPRETING THE TERM "RELATED TO" IN 130 CMR 433.404(B) TO APPLY TO A MEDICALLY NECESSARY PROCEDURE 25 YEARS AFTER SEX-REASSIGNMENT SURGERY IS ERROR AS A MATTER OF LAW.

The DMA hearing officer denied pre-authorization approval of the requested breast reconstruction, relying on 130 CMR 433.404(B) ("433.404(B)" or "404(B)") which reads:

> The Division will not pay a physician for performing, administering, or dispensing any experimental, unproven, cosmetic or otherwise medically unnecessary procedure or treatment, specifically including, but not limited to, sex-reassignment surgery, thyroid cartilage reduction surgery, and any other related surgeries and treatments, including pre- and post-sex-reassignment surgery hormone therapy. Notwithstanding the preceding sentence, the Division will continue to pay for post-sex-reassignment surgery hormone therapy for which it had been paying immediately prior to May 15, 1993.

130 CMR 433.404(B) (emphasis supplied). The Division's interpretation of 404(B) is that it refers not only to sex-reassignment surgery and any attendant procedures but also to any other treatment or surgery at any time in life which would not be necessary "but for" the sex-reassignment surgery. Division's Memorandum, Record-Exhibit P at P-5 (request denied because it "arose only because she underwent sex-reassignment surgery. Were it not for the sex-reassignment surgery, she would not now be requesting" breast reconstruction). In other words, according to DMA, 404(B) reaches any condition to the end of Ms. Beger's life that arguably involves her being a woman. Because such an interpretation leads to absurdity and inconsistency, it should be rejected in this appeal as error as a matter of law.

The proper interpretation of a regulation, like that of a statute, is a question of law reviewed de novo. Protective Life Insurance v. Sullivan, 425 Mass. 615, 618 (1997) (insurance commissioner's interpretation of a statute subject to de novo review). Although the interpretation an administrative body gives its own regulation is ordinarily entitled to deference, where an agency interprets a regulation inconsistently, it is "entitled to no weight." Morin v. Commissioner of Public Welfare, 16 Mass. App. Ct. 20 (1983). See also Morales v. Commissioner of Public Welfare, 18 Mass. App. Ct. 239 (1984). Where an agency interpretation is subject to deference, the principle is "one of deference, not abdication," and courts have overruled an agency interpretation where it is contrary to the plain language and underlying purpose of the provision subject to review. Sullivan, 425 Mass. at 618.

The Division argues that the breast reconstruction sought here constitutes "other related surgeries and treatments" within 404(B) because the request "relates to" Ms. Beger's transition from male to female 25 years ago in the broadest conceivable meaning of "related to," i.e. the most attenuated "but for" connection. The Division's interpretation, however, cannot stand because it leads to inconsistent results, even as to Ms. Beger herself.

The fact that the Division approved the removal of Ms. Beger's breast implants, but not the reconstruction, proves that the Division cannot consistently apply the regulation in the manner suggested by the Division Consultant. Another way of thinking about the inconsistency is that because DMA approved the removal of the breast implants, it must have determined such removal is not "related to" sex-reassignment surgery. If the removal is not "related to," it must follow logically that the replacement is

not "related to" as well. Also, while it is true that Ms. Beger would not require general gynecological care "but for" the original sex-reassignment surgery, it is implausible that the Division would deny such care.

The Supreme Judicial Court has stated that "it is our duty to interpret the statute, if possible, so as to make it an effectual piece of legislation in harmony with common sense and sound reason." Mass. Comm'n Against Discrimination v. Liberty Mutual Insurance Co., 371 Mass. 186, 190 (1976) (quoting Atlas Distributing Co. v. Alcoholic Beverages Control Comm'n, 354 Mass. 408, 414 (1968); and Morrison v. Selectmen of Weymouth, 279 Mass. 486, 429 (1932)). In interpreting statutes "absurd results are to be avoided." United States v. Turkette, 452 U.S. 576, 581 (1981). The Division's interpretation of 404(B) confounds common sense and sound reason, cannot be consistently applied, and leads to absurd results; therefore it is error as a matter of law.

II. BY ITS TERMS, 404(B) PRECLUDES AUTHORIZATION FOR PROCEDURES TO TRANSITION FROM ONE SEX TO ANOTHER, ALL OF WHICH MS. BEGER COMPLETED OVER 25 YEARS AGO.

The logical interpretation of 433.404(B) is that it refers to sex-reassignment (meaning surgical genital reconstruction or reconfiguration) and any related ancillary procedures, i.e. treatments necessary for a person to medically transition from one sex to another (including, for example, thyroid cartilage reduction). It does not apply to medically necessary and professionally recommended treatments or procedures once a person has successfully transitioned from one sex to another. No reasonable construction of the statute can render a procedure "related to" sex-reassignment surgery for a person who fully completed sex-reassignment surgery over 25 years ago.

The Division does not and cannot maintain that breast reconstruction in this case is sex-reassignment surgery (e.g. surgical genital reconstruction and ancillary procedures or treatments). To do so would suggest that Germaine Beger is seeking services to transition from male to female, which she decidedly is not. Ms. Beger completed this transition over 25 years ago. (See Record-Exhibit D, Letter from Dr. Wesser). Her amended birth certificate is further evidence of the fact that Ms. Beger long ago underwent sex-reassignment surgery and is now, for all legal and medical purposes, a woman. See also, Record-Exhibit C, Certification of Birth for Germaine Beger.

As the Morin Court explained, the traditional rules of statutory and regulatory construction apply once a court determines that the agency interpretation is entitled to no weight. Morin v. Commissioner of Public Welfare,16 Mass. App. Ct. 20 (1983). See also Morales v. Commissioner of Public Welfare, 18 Mass. App. Ct. 239 (1984) (where agency interpretation of its own regulations is inconsistent with their terms, plaintiff's more plausible interpretation controlled).

A. 404(B) Should Be Read Narrowly Because It Creates an Exception to Coverage for Medically Necessary Procedures By Administrative Fiat.

Regulation 404(B) is an anomaly. In a health care system governed by medical necessity it abandons that rule in very specific circumstances and declares that a certain procedure, i.e. sex-reassignment surgery, is medically unnecessary regardless of what medical science says. In short, 404(B) declares black to be white and vice-versa. Even

assuming the State has the power to adopt 404(B),[2] there is every reason to read it narrowly. Regulation 130 CMR 433.404(B) deems sex-reassignment surgery, thyroid cartilage reduction (Adam's apple shaving) surgery, and any other related surgeries and treatments to be medically unnecessary and unreimbursable, despite the possibility of evidence from a treating physician to the contrary.

Determination of medical necessity is generally made by one's treating physician. See Jewish Memorial Hospital v. Commonwealth, 416 Mass. 132, 135 (1993); see also Beal v. Doe, 432 U.S. 438 (1977). It is "plainly intended that the physician of each aid recipient's choice shall be a major factor" in determining the medical care and treatment received. Mass. General Hospital v. Comm'r of Public Welfare, 350 Mass. 712, 718 (1966). "The physician is to be the key figure in determining utilization of health resources . . . it is a physician who is to decide upon . . . treatments." S.Rep. No. 404, 89 Cong., 1st Sess. reprinted in 1965 USCCAN 1943, 1986.

Therefore, 404(B) should be construed to accomplish its apparent purpose of deeming sex-reassignment surgery to be medically unnecessary while preserving the statutory scheme of reliance on physicians' judgment in determining what is medically necessary. Read in this light, 404(B) is meant to address the treatments or procedures necessary to transition from one sex to another. In this case Ms. Beger underwent those treatments and procedures over 25 years ago to fully complete her sex-reassignment surgery.

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[2] Ms. Beger maintains that regardless of whether 130 CMR 433.404(B), properly construed, precludes authorization in her case, the regulation facially and as applied violates her federal and state rights under the federal Medicaid statute, 42 U.S.C. § 1396 et seq. and the Massachusetts and United States Constitutions (equal protection and sex discrimination) and secured by 42 U.S.C. § 1983 and relevant state laws. See Plaintiff's Complaint, Counts II and III.

By its language, the regulation deems medically unnecessary sex reassignment surgery and certain ancillary treatments and procedures, like thyroid cartilage reduction and unspecified "other related surgeries and treatments" which are part of the process of transitioning from one sex to another. It would not include all treatments and procedures that anyone would ever require that would not have arisen but for the initial sex reassignment. Nor would it make sense to interpret it to apply to <u>any</u> treatments or procedures once a person has transitioned in law, medicine, and fact, from one sex to another. In particular, 404(B) would not reach breast reconstruction after removal of an implant for a person who underwent sex-reassignment 25 years ago.

The general rule is that a state Medicaid plan will cover necessary medical treatments. People receiving Medicaid are supposed to be cared for "in accordance with the standards of good medical treatment applicable generally to the public . . . ." <u>Mass. General Hospital v. Comm'r of Public Welfare</u>, 350 Mass. 712, 718 (1966). Although there is no substantive requirement that a state provide all "medically necessary" services as determined by a physician, serious questions arise if a state Medicaid plan excludes necessary medical treatment for coverage. <u>Beal v. Doe</u>, 432 U.S. 438, 444 (1977); <u>Preterm, Inc. v. Dukakis</u>, 591 F.2d 121, 125 (1st Cir. 1979).

Under Massachusetts law, a general rule of statutory construction is that exceptions to the general law should be narrowly construed. <u>See</u> <u>Vittands v. Sudduth</u>, 41 Mass. App. Ct. 515, 518 (1996) (quoting <u>Commonwealth v. Yee</u>, 361 Mass. 533, 537 (1972)). Therefore, the natural reading of 404(B) is that it pertains by its terms, solely to sex reassignment and ancillary treatments and procedures, and not to every treatment or

procedure that would not have become necessary but for the initial process of undergoing sex reassignment.

B. The History of the Regulation Precluding Pre-Authorization Approval for Sex-Reassignment Surgery Suggests it Only Addresses Sex-Reassignment Surgery and Ancillary Treatments and Procedures to Transition from One Sex to Another.

The regulation's history confirms that 433.404(B) that denies pre-authorization approval only for sex-reassignment surgery and the ancillary treatments and procedures to transition from one sex to another. A regulation to expressly preclude pre-authorization approval for sex-reassignment surgery was first promulgated by the Division effective July 1, 1989. Prior to that date, there was no express preclusion of pre-authorization approval for sex-reassignment surgery or any other "related" treatments or procedures. In at least one reported case prior to 1989, a denial by the Department of Public Welfare for pre-authorization approval of sex-reassignment surgery was reversed by a hearing officer on appeal who determined that, based on substantial evidence, surgery was medically necessary. See, L.R. v. Comm'r of DMA, 97-P-304 (Mass. Ct. App. 1998) (affirming Superior Court decision requiring DMA, in 1998, to provide Medicaid coverage for sex-reassignment surgery that had been approved on administrative appeal in 1988) (attached).

It was only after July 1, 1989, that Department regulations specifically precluded pre-authorization approval for sex-reassignment surgery. Even after that date, however, the Superior Court construed 106 CMR 433.451(B)(2), an express preclusion of coverage for "sex-reassignment surgery and presurgery hormone therapy," not to include thyroid cartilage reduction. In Swan v. Canino-Siegriest, Sup. Ct. C.A. 90-1358 (Middlesex Sup.

Ct. 1992) (attached), the Superior Court held that the decision to deny approval, as medically unnecessary, experimental or unproven, for the thyroid cartilage reduction was without evidential support. The Court went on to state that thyroid cartilage reduction is not sex-reassignment surgery nor is it pre-surgery hormone therapy and the procedure therefore did not fall under the specific exclusion relied on by the Department.

In reversing the hearing officer's decision, the judge noted that thyroid cartilage reduction is an established procedure in the treatment of male-female transsexualism. That is, the proposed procedure was an ancillary treatment or procedure integral to the Plaintiff's plan for transitioning from male to female.

In 1993, the Department again amended the regulations, this time including the language precluding sex-reassignment, "thyroid cartilage reduction surgery and any other related surgeries and treatments." In light of the history of the regulations addressing sex-reassignment surgery and the reversal of the denial of authorization in Swan, the logical construction of the amendment is that it was only intended to capture ancillary treatments and procedures that are integral to the process of transitioning from one sex to another like, for example, thyroid cartilage reduction, in addition to sex-reassignment surgery which was already addressed.

Regulations, like statutes, should be construed to give effect to the intent of the promulgating body, "ascertained from all [their] words construed by the ordinary and approved usage of the language." Champigny v. Commonwealth, 422 Mass. 249, 251 (1996) (quoting Commonwealth v. Galvin, 388 Mass. 326, 328 (1983)); see also United States v. Holmquist, 36 F.3d 154, 159-160 (1st Cir. 1994) (stating statutes should be read in their "ordinary, contemporary, and common meaning . . . with due regard for its object,

purposes and underlying policy.”). It is illogical to assume that the 1993 amendment was intended to capture any conceivable treatments or procedures that arise at any time during the person’s life, including 25 years after transitioning from male to female. To the contrary, in light of the decision in Swan and the timeframe of the amendment to the sex-reassignment regulation, it is logical to construe the regulation to only address sex-reassignment surgery and other treatments and procedures that are part of the established procedures of transitioning from male to female.

III. REGULATION 130 CMR 433.404(B) IS INAPPLICABLE IN THE FACE OF UNCONTROVERTED EVIDENCE OF MEDICAL NECESSITY.

By its terms, 404(B) is not applicable because it refers to “experimental, unproven, cosmetic or otherwise medically unnecessary procedure or treatment.” 130 CMR 433.404(B) (emphasis added). Because the uncontroverted evidence in this case proves Ms. Beger’s breast reconstruction is medically necessary, relying on 433.404(B) as grounds for denying medically unnecessary procedures is unsupported by substantial evidence and error as a matter of law. In other words, DMA may not simply assert by fiat that 404(B) makes an otherwise medically necessary procedure medically unnecessary without any record evidence in support. Arthurs v. Board of Registration in Medicine, 383 Mass. 299 (1981) (in absence of substantial evidence in the record to support its finding, an agency may not simply assert its expertise as a substitute for evidence in the record).

Replacing Germaine Beger's breast implants is medically necessary. The procedure meets the definition of medical necessity in 130 CMR 450.204,[3] and there is substantial evidence to support medical necessity. No contrary evidence suggests otherwise, and the Division does not contradict any evidence offered by Ms. Beger to establish medical necessity. The requested procedure is not experimental, unproven, or cosmetic. Multiple doctors have submitted letters attesting to the fact that having breasts is integral to Germaine's identity as a woman and that implant replacements is the only way to prevent pain and suffering as well as physical deformity.[4]

In a letter addressed to the Prior Approval Unit, Dr. Kristen Steuber, Ms. Beger's surgeon, stated that "there is no question that new implants are medically necessary." See Record-Exhibit F, Letter from Kristin Steuber, MD. Dr. Steuber continued that "replacement will thus alleviate, correct and cure Ms. Beger's suffering and pain, and it will also prevent a physical deformity which would result from the removal of implants were there not a corresponding replacement." Id. In her letter, Dr. Steuber concurred with the medical opinion of Ms. Beger's treating psychologists and therapist that breast implants are an integral part of Ms. Beger's identity, See also Record-Exhibit G, Letter

[3] "A provider may furnish or prescribe medical services to a recipient, or cause a recipient to be admitted to an inpatient facility, only when, and to the extent, medically necessary. A service is 'medically necessary' if: (1) it is reasonably calculated to prevent, diagnose, prevent the worsening of, alleviate, correct, or cure conditions in the recipient that endanger life, cause suffering or pain, cause physical deformity or malfunction, threaten to cause or to aggravate a handicap, or result in illness or infirmity; and (2) there is no comparable medical service or site of service available or suitable for the recipient requesting the service." 130 CMR 450.204.

[4] The second prong of medical necessity, 130 CMR 450.204, has never been at issue in this appeal. Nevertheless, Ms. Beger proffered evidence at the hearing that because Ms. Beger is intolerant of female hormones, there is no comparable medical service available to reconstruct her breasts that is more conservative or less costly. See Record-Exhibits J and K, Letters from Ms. Beger's endocrinologist Jeffrey M. Korff, MD. Even if Ms. Beger were not intolerant of female hormones, her taking of them would not be comparable to the breast reconstruction recommended to her by her surgeon, Kristin Steuber, MD.

from Drs. Harak, Woodard and therapist Meyer, further supporting a determination of medical necessity in this case.

In addition, at the June 25, 1999, hearing, Ms. Beger submitted letters from her primary care physician, see Record-Exhibit I, Letter from Dr. Kevin Epstein, MD, and an advanced practice nurse (Clinical Specialist in Psychiatric/Mental Health Nursing), see Record-Exhibit H, Letter from Bette E. Kisner, RN, MSN,CS. Dr. Epstein stated that as Ms. Beger's primary care physician, he determined that "loss of one or both breasts would have a profound effect on" Ms. Beger and that failure to complete Ms. Beger's breast reconstruction would result in a "long lasting psychological impact which would be devastating." See Record-Exhibit I, Letter from Dr. Kevin Epstein, MD. Bette Kisner agreed and stated that, based on her 20 years treating persons with cancer, she testified that "like a woman who loses a breast to mastectomy, Ms. Beger would experience depression, lowered self-esteem, a sense of bodily deformity, diminished feelings of attractiveness, and feelings of being viewed as less than feminine." See Record-Exhibit H, Letter from Bette E. Kisner, RN, MSN, CS.

At the June 25, 1999, hearing, Division Consultant Dr. Linda A. Clayton conceded that she had no knowledge with respect to the medical necessity of breast reconstruction for Germaine Beger. Tr. at 13-14.[5] In the face of uncontroverted evidence of medical necessity from no less than two medical doctors, two psychologists, one therapist, and one advanced practice nurse, the original stated grounds for the Division's denial, 130 CMR 450.204, clearly could not, and cannot, stand.

[5] Transcripts are to the record transcript attached to Plaintiff's Statement of Undisputed Facts.

IV. SINGLING OUT TRANSSEXUAL WOMEN FOR DENIAL OF MEDICALLY NECESSARY TREATMENTS OR PROCEDURES IS IN VIOLATION OF CONSTITUTIONAL PROVISIONS.

The statutory construction the Division advocates here is in violation of state and federal constitutional provisions. Because the position of the Division concerning 404(B), if accepted as correct, denies Ms. Beger equal protection of the laws and constitutes sex discrimination violative of the 14th Amendment of the United States Constitution and Articles I and X of the Declaration of Rights of the Massachusetts Constitution, it must be reversed by this court. G.L. c. 30A, § 14(7)(a).

Under the Massachusetts Constitution, sex-based classifications must be subjected to strict judicial scrutiny. See Opinion of the Justices to the House of Representatives, 374 Mass. 836, 842 (1977) (finding an "absolute prohibition" of all female students from participation in certain activities "cannot survive the close scrutiny to which a statutory classification based solely on sex must be subjected"). Sex-based classifications "are permissible only if they further a demonstrably compelling interest and limit their impact as narrowly as possible consistent with their legitimate purpose." Commonwealth v. King, 374 Mass. 5, 21 (1977). For federal equal protection challenges based on gender, courts have applied an "intermediate" level of scrutiny: to be constitutional, a gender-based classification must bear a substantial relation to an important government purpose. See Craig v. Boren, 429 U.S. 190, 197 (1976).

There is and can be no dispute in this case that Ms. Beger is a woman. By its interpretation of the regulation, DMA will not cover breast reconstruction for transsexual women, i.e. women who are born genetically male. The Division does cover breast reconstruction surgery for non-transsexual women, i.e. women who are born genetically

female. Since the Department provides no justification -- medical or otherwise -- for distinguishing between the medical needs of women born genetically female (non-transsexual women) and women born genetically male (transsexual women), the only conclusion to be drawn is that the grounds for denying breast reconstruction to transsexual women is that they were born genetically male. In effect, DMA has conditioned access to benefits on being born genetically female. DMA may not deny benefits to the Plaintiff because she was born male or because of her genetic "maleness" unless this gender-based classification bears a substantial relation to an important government purpose. The Division in this case simply cannot meet its burden thereby violating Ms. Beger's state and federal constitutional rights to equal protection under the law.

Even if this court does not accept Ms. Beger's argument that denial of medically necessary treatment for her constitutes impermissible sex discrimination, the DMA's interpretation of its law remains subject to rational basis scrutiny under both Massachusetts and federal law. To survive rational basis scrutiny, DMA's interpretation of 404B must be rationally related to a valid state interest. See Murphy v. Comm'r of Dept. of Indus. Accidents, 415 Mass. 218, 229 (1993) (declaring that a rule imposing filing fees on litigants with counsel, as opposed to litigants without counsel, was not rationally related to the legitimate state interests of reducing administrative proceeding costs and eliminating frivolous lawsuits). See also English v. New England Medical Ctr., 405 Mass. 423, 428 (1989) (rational basis scrutiny requires valid state interest); Dickerson v. Attorney Gen., 396 Mass. 740, 743 (1986) (same).

DMA's interpretation of 404B denying Ms. Beger's medically necessary treatment is not rationally related to a valid state interest. According to Dr. Clayton's testimony at the June 25, 1999, hearing, the Division pre-authorizes approval of breast reconstruction for women who lose a breast due to accident, injury, illness, congenital deformity or defect. Singling out transsexual women for denial of breast reconstruction when they lose a breast due to any of the same reasons for which non-transsexual women would obtain pre-authorization approval is impermissible and cannot be supported by any legitimate governmental purpose. Such an interpretation violates Ms. Beger's state and federal constitutional rights secured by law.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff Germaine Beger's Motion for Partial Summary Judgment as to Count I of the Complaint.

Respectfully submitted,

GERMAINE BEGER

By her attorney,

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CERTIFICATE OF SERVICE

I, Jennifer L. Levi, hereby certify that on this date I served the above document on Jean C. Sullivan, Esq., counsel for the defendant Mark Reynolds, by first class mail.

_________________________ ___________________________

Dated Jennifer L. Levi