

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NESHA BUTTERFIELD,

Petitioner,

vs.

Case No. 15-5679

DEPARTMENT OF MANAGEMENT
SERVICES, DIVISION OF STATE
GROUP INSURANCE,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 22, 2016, by way of video teleconference with sites in Jacksonville and Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Nesha Butterfield, pro se
2545 Chesterbrook Court
Jacksonville, Florida 32224

For Respondent: Gavin D. Burgess, Esquire
Department of Management Services
Suite 160
4050 Esplanade Way
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's claim for medical treatment by Dr. Gutovitz should be paid under the terms of her state health insurance plan.

PRELIMINARY STATEMENT

By letter dated September 8, 2015, Respondent, Department of Management Services/Division of State Group Insurance (the "Department"), issued a letter to Petitioner, Nesha Butterfield, denying her appeal of a claim for payment for certain medical services. Petitioner timely filed a request for formal administrative hearing and the case was referred to the Division of Administrative Hearings. Pursuant to notice, a final hearing was scheduled on the date and time set forth above.

At the final hearing, Petitioner testified on her own behalf and also called one additional witness, her mother, Kim Stanley. Petitioner's exhibits 1 through 10 were admitted into evidence. The Department called two witnesses: Alexandra Kuykendall, doctor's office employee; and Kathy Flippo, nurse consultant for the Division of State Group Insurance. The Department's exhibits 1, 3, and 5 through 8 were admitted into evidence.

The parties advised that a transcript of the final hearing would not be ordered. The parties are allowed 10 days from the date of the final hearing to file proposed recommended orders

("PROs"). Each party timely submitted a Proposed Recommended Order and each was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner was, at all times relevant hereto, an employee of the State of Florida, receiving medical benefits under the State Employees' HMO Plan (the "Health Plan").

2. In January 2015, Petitioner contacted North Florida OBGYN Associates, P.A. (the "Doctor's Office"), to schedule a doctor's appointment. A computer screenshot provided by the Department indicates that the purpose of the appointment was to "discuss infertility/endometriosis." An appointment was scheduled for March 22, 2015.

3. Upon arrival at the Doctor's Office, Petitioner filled out an intake sheet. She stated the purpose of her visit was for the problems of "endo & checkup." She indicated that she was not currently using birth control. As part of her medical history, she indicated: migraine headaches, reflux/IBS/ulcer, endometriosis, and infertility.

4. Upon completion of his examination and treatment of Petitioner, Dr. Gutovitz dictated his "History & Physical Report" notes on the visit. He stated as follows:

The patient is a 29 year old female who presents for a preconceptual consultation. LMP date: (2/25/2015) The frequency of

cycles is monthly. The duration of menses is less than 3 days. The menstrual flow is moderate. The patient has never been able to conceive. The patient has been unable to conceive after 2 years of unprotected intercourse. Intercourse has been occurring twice per week. There has been associated abdominal pain, pain on intercourse, breast tenderness (only when she is on her period) and cramping (only in the morning and then will go away). Vitamin and mineral intake: currently on prenatal vitamins (taking Women's one a day, vitamin b-12, vitamin d, calcium). Nutrition: normal /adequate. Unknown. There is a medical history of endometriosis dx at the 20 by Dr. Samuel Christian).

Pt. presents to discuss conception. She and her partner have been trying to [get] pregnant for 2 years. She reports at age 21 she had a laparoscopy for pain and was diagnosed with severe endometriosis and advised to have a hysterectomy. She had no follow up treatment, was not put on OCP. She continue to pain with menses, with intercourse and sometimes throughout the cycle. She does have regular cycles about 28 days apart. The partner has never had any children. He did have an injury to his scrotum about 7 years ago (fell off a truck onto some sharp object that "ripped open my scrotum in an L shape"), had stitches, significant swelling.

Discussed components of conception -- ovulation, pathway and semen. Referral to the FIRM [Florida Institute of Reproductive Management] for SA [sperm analysis], and recommended consultation with Dr. Freeman. Suggest laparoscopy. CPT for the pelvic pain. If covered by insurance, encouraged patient to have surgery done with Dr. Freeman. However, if not covered (if considered fertility intervention), would be happy to perform this surgery.

Discussed fertile time in cycle, timing and frequency of intercourse. Brief review of fertility interventions. Pt happy with this

information, will proceed to AS and schedule consultation with Dr. Freeman. Also discussed patient's weight. Discussed healthy diet and exercise. Pt considering gastric sleeve procedure. Discussed some of the pros and cons of this being performed before or after fertility intervention. Pt likely to postpone surgery at this point.

5. Dr. Gutovitz listed "Infertility, Female" as the diagnosis. The plan of treatment called for the patient to "Follow up with reproductive endocrinologist." There is no mention of treatment for endometriosis.

6. It is clear from Dr. Gutovitz's notes that the purpose of the visit was to discuss infertility. Although endometriosis was mentioned, it was merely in a medical historical context.

7. Following her visit to the Doctor's Office, Petitioner made an appointment with Dr. Freeman (as advised by Dr. Gutovitz during the March 22 visit). She visited Dr. Freeman's office on April 15, 2015. Dr. Freeman's intake sheet on the patient indicates the chief complaint as "Primary infertility, endometriosis/pelvic pain." Dr. Freeman discussed the infertility issue, but noted "[Ppetitioner] is interested in further evaluation and treatment but most interested in control of her pelvic pain." Nonetheless, he noted that Petitioner's husband would undergo a semen analysis to determine his fertility potential.

8. About a week later, Petitioner presented again to Dr. Freeman for a follow-up visit. The doctor again addressed and discussed her pelvic pain and how it might be treated. He noted, "[Patient] is completely self-pay for fertility treatment and wishes to defer on HSG currently to see if tubal patency exists." He concludes his notes on that visit with:

At this point in time, [Petitioner] will forward results of her primary care physician's lab work over to our office. Once this occurs, we will meet for reconsultation and likely undergo several cycles of empiric ovulation induction as a first step. If she does not become pregnant with that, then we will likely perform HSG to evaluate for tubal patency and consider the possibility of surgery. At the conclusion of the visit, they were understanding of the above, in agreement with the plan and rationale and had no additional questions or concerns.

9. Empiric ovulation induction is a fertility treatment that induces ovulation. An HSG procedure uses dye to assess whether the fallopian tubes are blocked, i.e., whether there is tubal patency.

10. Again, the doctor's notes and comments address Petitioner's endometriosis and pelvic pain, but his primary focus is on the infertility issue.

11. Petitioner contends the two physicians simply misunderstood her needs or made a mistake when coding her office visits. The preponderance of evidence does not support her

contention. Petitioner's testimony concerning her claim was not persuasive.

12. The Health Plan under which Petitioner was insured contains an exclusion of payment for infertility treatments. Section VI, Limitations and Exclusions, of the State Employees' HMO Plan specifically excludes payment for "infertility treatment and supplies," including testing, diagnostic procedures, and treatment.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes. Unless specifically stated otherwise herein, all references to Florida Statutes will be to the 2015 version.

14. Petitioner has the burden of proof in this matter as she is asserting the affirmative of the issue. Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977). Nonetheless, at final hearing the Department was asked to present its case in chief first. This change in order of proof did not alter the burden of proof. The standard of proof is by a preponderance, or greater weight, of the evidence. See Osborne Stern & Co. v. Dep't of Banking and Fin., 670 So. 2d 932 (Fla. 1996).

15. In this case, Petitioner did not meet her burden; the evidence presented at final hearing simply does not support her position in this matter.

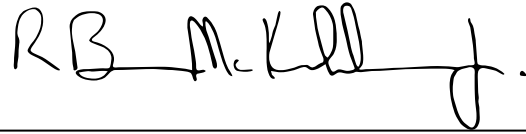
16. In these cases, if a petitioner meets his or her burden, the burden would then shift to the state agency to prove that the requested relief was not covered due to a policy exclusion. See Young v. Dep't of Cmty. Aff., 625 So. 2d 831 (Fla. 1993). As Petitioner did not meet her initial burden, there is no shifting of the burden to the Department. Even if it had, there is a clear exclusion for payment of infertility services in the Health Plan.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Department of Management Services denying Petitioner's claim for reimbursement of payments relating to her medical treatments by Dr. Gutovitz.

DONE AND ENTERED this 7th day of March, 2016, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of March, 2016.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.