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VIA FACSIMILE

Department of Health and Human Services
Medicare Appeals Council, MS 6127
Medicare Operations and Appellate Division
330 Independence Ave., SW
Cohen Building, Room G-644
Washington, D.C., 20201
F: 202-565-0227

Re: United Healthcare's Request for Review of ALJ Case No. 1-2978123060

Medicare Appeals Council:

I am an attorney and representative of Ms. Charlene Lauderdale, a Medicare Advantage plan enrollee who prevailed in a hearing before an Administrative Law Judge. It is my understanding that the Plan administrator, United Healthcare ("United"), filed a request for review on May 26, 2015. I sent a letter to the Council on June 8 requesting that it wait until at least June 12 to decide whether to review this case and further stated that I would be sending a letter explaining why this case should not be reviewed. This is that letter.

As set forth in greater detail below, the Council should decline to review Judge Booker's decision. Contrary to United's representations in its May 26 letter to the Council, there was no error of law in Judge Booker's decision and, further, there is absolutely no legal or medical basis that supports denying care to Ms. Lauderdale.

I. SUMMARY OF EVENTS PRECEDING THIS LETTER

A. Background on Ms. Lauderdale

Ms. Lauderdale is a 55 year-old transsexual woman. Ms. Lauderdale has been diagnosed with gender dysphoria, a condition which entails a psychological disconnect between the sex one is assigned at birth and one's gender identity.

Ms. Lauderdale has lived full time as female since 2006, has been on exogenous hormone therapy for nearly a decade, and has undergone multiple operations including removal of the gonads and breast reconstruction surgery (a/k/a breast augmentation surgery). Though much of the dysphoria Ms. Lauderdale experiences has been ameliorated by her treatment thus far, both Ms. Lauderdale and her physicians attest that significant dysphoria attributable to her natal genitals remains. Both Ms. Lauderdale and her physicians believe that it is medically necessary for Ms. Lauderdale to undergo genital reconstruction surgery so that the remaining dysphoria is alleviated.

Ms. Lauderdale is a decorated, disabled veteran of the United States Air Force. Ms. Lauderdale has been diagnosed with combat related PTSD and other related, comorbid conditions. Ms. Lauderdale is presently under the care of a collaborative, multidisciplinary health team at the Michael E. DeBakey VA Medical Center in Houston, Texas. During the course of her treatment for PTSD and other comorbid conditions, Ms. Lauderdale has been hospitalized involuntarily and voluntarily on a few occasions. All of Ms. Lauderdale's physicians attest that, despite Ms. Lauderdale's history of hospitalizations, she was in November 2014, and remains today, ready and able to undergo genital surgery.

Over the last year, Ms. Lauderdale has consulted with two surgeons who specialize in male-to-female genital surgery, Dr. Marci Bowers and Dr. Loren Schechter. Dr. Bowers and Dr. Schechter are renowned sexual reassignment surgeons. Both adhere to the World Professional Association for Transgender Health's *Standards of Care*, a peer reviewed best practices article now in its 7th edition. (The *Standards of Care* is the leading best practices guide for treating gender dysphoria.) **Indeed, Dr. Loren Schechter is a co-author of the 7th edition of the *Standards of Care*.** Both Dr. Bowers and Dr. Schechter have deemed Ms. Lauderdale fit for surgery. Ms. Lauderdale has a clean track record of absolute compliance with medical care. For example, Ms. Lauderdale attends all scheduled psychiatric, psychological, medical, and other appointments without fail. Additionally, Ms. Lauderdale regularly attends alcohol abuse support groups outside of the VA and is, as of the date of this filing, 329 days clean and sober.

Though life has presented Ms. Lauderdale with myriad challenges, she is remarkably resilient. Once Ms. Lauderdale left the Air Force, she completed bachelors and masters degrees in aeronautical science at Embry-Riddle Aeronautical University. In the past, Ms. Lauderdale worked for several defense contractors on myriad aeronautical engineering projects for which she received awards and commendations. Though Ms. Lauderdale's health has required her to scale back her work outside the home, she continues to actively give back to her community. While juggling intensive medical and psychological care regimens, Ms. Lauderdale has become an avid volunteer in causes for both the transgender and disabled veterans communities. For example, earlier this year Ms. Lauderdale spent several days volunteering at Patriot Paws, an organization that trains service dogs for wounded veterans.

Ms. Lauderdale is blessed with a strong support network. Ms. Lauderdale is actively involved in the transgender community in the greater Houston area and enjoys the unequivocal support of her wife of 17 years, Ms. Connie Lauderdale. Ms. Lauderdale also has the full support of her medical team at the VA.

B. Ms. Lauderdale's Preauthorization Request

In late 2014, Ms. Lauderdale worked closely with her multidisciplinary medical team at the VA to pursue genital reassignment surgery. Ms. Lauderdale underwent psychiatric, cardiac, and other medical evaluations and was deemed by her VA team and Dr. Marci Bowers, to be a good candidate for genital reassignment surgery (a form of sex reassignment surgery). As testified to at the ALJ hearing, Ms. Lauderdale was evaluated by Dr. Bowers in or about late October or early November 2014 and Ms. Lauderdale's full mental health history was shared with Dr. Bowers at that time. Additionally, Ms. Lauderdale's primary VA psychiatrist, Dr. Loboprabhu, relayed Ms. Lauderdale's mental health history to Dr. Bowers via a letter (annexed hereto as Exhibit A). Sometime in early November, Dr. Bowers deemed genital surgery medically necessary for Ms. Lauderdale, and then submitted a request for pre-authorization to United. At the time, Dr. Bowers was a Medicare participating surgeon.

United denied Ms. Lauderdale's request for preauthorization citing a transgender services exclusion in the Plan that was rendered inoperable when NCD 140.3 was invalidated in May 2014. (The exact timing and means of communicating this denial were curious and subsequent attempts to deny Ms. Lauderdale the benefit of legal representation were more than problematic. For a complete discussion, please see Exhibit B at 2–6.). In a November 25, 2014 denial letter (annexed hereto as Exhibit C) United claimed that it need not cover Ms. Lauderdale's care because “[c]hange of genitals to the female form is not a benefit and not covered by your health plan.” United denied the claim again in a December 4, 2014 letter (annexed hereto as Exhibit D) (claiming “[y]our health plan benefits do not cover sex change surgery”). Neither the November 25 nor the December 4 letters indicated that United believed Ms. Lauderdale to be medically unstable or that Ms. Lauderdale could not demonstrate the medical necessity of genital reassignment surgery. After the last internal denial, the claim was referred to MAXIMUS.

On December 24, 2014 MAXIMUS issued a decision (annexed hereto as Exhibit E) ruling that United could not invoke a transgender services exclusion to deny care but that, curiously, genital reassignment surgery was not “medically reasonable” because Ms. Lauderdale suffered from comorbid conditions and had been recently voluntarily hospitalized. MAXIMUS did not cite peer review literature supporting this assessment. Nor did MAXIMUS purport to rely upon establish best practices memorialized in the *Standards of Care*. More alarming, it does not appear that MAXIMUS considered the averments of Ms. Lauderdale's treating medical team whom all attested to the propriety of care. Because Ms. Lauderdale was denied the benefit of

legal representation before MAXIMUS, MAXIMUS did not consider anything beyond the cherry-picked medical records supplied by United and United's other filings.

A request for ALJ hearing was filed on February 9, 2015. In my February 9 transmittal I included a lengthy letter (see Exhibit B) delineating the legal and medical errors in United's and MAXIMUS' decisions below. I also appended a January 5, 2015 letter from Ms. Lauderdale's VA medical team that further attested to Ms. Lauderdale's mental stability and her continued need for genital surgery (annexed hereto as Exhibit F).

Leading up to the ALJ hearing both United and I submitted multiple letters to Judge Booker outlining our theories of the case and addressing other matters. For example, in a March 17, 2014 letter (annexed hereto as Exhibit G) I argued that United could not invoke the transgender services exclusion since NCD 140.3 had been invalidated, Ms. Lauderdale had demonstrated that genital surgery was medically necessary treatment for her gender dysphoria, and that MAXIMUS erred in denying care because its decision was unsupportable by prevailing medical expertise in the field, peer review medical literature, and, without explanation, directly contradicted the attestations of Ms. Lauderdale's treating physicians. On March 19, 2015 I notified Judge Booker (annexed hereto as Exhibit H) that United's agent had improperly contacted Ms. Lauderdale's wife via phone in what appeared to be an attempt to intimidate Ms. Lauderdale into dropping her appeal. On March 19, 2015 I also submitted a letter authored by Dr. Loboprabhu updating Judge Booker on Ms. Lauderdale's mental health status (Dr. Loboprabhu's letter is annexed hereto as Exhibit I). (United did not respond to my March 19 letter.) In a March 23, 2015 letter (annexed hereto as Exhibit J) United responded to my March 17 letter. Among other things, United argued it was not bound by the Department Appeals Board decision invalidating NCD 140.3, that even if bound United need not provide care because a provision of a *draft* LCD which does not cover Part C plans could be read as supporting denial of care, and that a misquoted passage from the *Standards of Care* could be read to support denial. I responded in a March 26, 2015 letter (annexed hereto as Exhibit K). In my response letter I pointed out that United had completely altered its basis for contesting coverage. Among other things, United had never represented that care had been denied for any reason save for the inoperable transgender services exclusion. I also thoroughly rebutted each and every alternative argument for denial of care. Unlike United, I supported my rebuttals with thorough citations to peer review medical literature, the *Standards of Care*, and Medicare law. I also drew Judge Booker's attention to additional letters of support from Ms. Lauderdale's medical team and recent events in her life that evidence her mental stability. United never responded to this letter.

On March 31, 2015 a lengthy hearing was conducted. (The hearing was approximately 2 hours in length). During the hearing, United conceded that it could not invoke a transgender services exclusion to deny care, and further conceded that it had not, prior to this hearing, expressly claimed that Ms. Lauderdale had failed to demonstrate that the care requested was either not medically necessary or not reasonable. Additionally, Ms. Lauderdale testified on her

own behalf and explained, in exacting detail, why she believed genital surgery was necessary and affirmed that she was sufficiently stable to undergo surgery. United did not present any expert witnesses supporting its position, nor did it introduce into evidence any peer reviewed medical literature that supported its rationale for denial.

On April 23, 2015 United's agent submitted an odd letter (annexed hereto as Exhibit L) to Judge Booker claiming that HPMS had issued guidance that purportedly absolved United of liability. Curiously, United's letter did not include an authenticated copy of the HPMS transmittal. On the morning of April 24, 2015 I submitted a response letter (annexed hereto as Exhibit M) objecting to the admission of United's letter, pointing out that despite diligent efforts I could not find a copy of the HPMS memo United referenced in its letter, and further argued that, even if an authenticated copy of the HPMS memo were admitted into evidence, Medicare law and equity demanded that Judge Booker reach a decision on the merits. United did not respond to this letter.

Sometime in April 2015, Ms. Lauderdale scheduled an in-person consult appointment with Dr. Schechter in Chicago, IL. (In the weeks leading up to this appointment, Ms. Lauderdale and her physicians at the VA transmitted copies of Ms. Lauderdale's pertinent medical records and expressly advised Dr. Schechter of Ms. Lauderdale's comorbid conditions.) The purpose of this appointment was for Ms. Lauderdale to be evaluated for genital surgery. It should be noted that, during the ALJ hearing, United's representative agreed that this remedy would be appropriate if the ALJ decided this matter in Ms. Lauderdale's favor.

On April 24 Judge Booker issued a favorable decision for Ms. Lauderdale (annexed hereto as Exhibit N). Among other things, Judge Booker determined that Medicare law demands coverage of all care that is deemed medically necessary and reasonable (Exhibit N at 3), that NCD 140.3 had been invalidated and thus United's transgender services exclusion was inoperable as a matter of law (*id.* at 4), that Ms. Lauderdale's surgeon and psychiatrist had adequately attested to the medical necessity of genital surgery (*id.* at 5), and that Ms. Lauderdale both satisfied the requirements set forth in the *Standards of Care* and that "testimony presented and the documentary evidence reviewed" supported a favorable decision for Ms. Lauderdale (*id.*). As an aside, Judge Booker noted that Ms. Lauderdale met the criteria in United's own internal guidance for gender reassignment surgery "were she in a different Plan" (*id.*).

On May 26, 2015 United filed a request for review with this Council and further requested that the Council issue an unfavorable determination for Ms. Lauderdale.

Ms. Lauderdale was evaluated by Dr. Schechter on May 27, 2015. Shortly thereafter, Dr. Schechter deemed Ms. Lauderdale a candidate for surgery. *See* Exhibits O and P. Dr. Schechter estimates that the cost of Ms. Lauderdale's genital surgery will be approximately \$20,000.00. *See* Exhibit P. Ms. Lauderdale estimates that she will need an additional \$3,000.00 to cover the

costs of transportation, hotel fees, and medical equipment. (At the moment, there is no in-network, Medicare participating surgeon with experience performing male-to-female genital surgery located in Texas. It is my understanding that Dr. Schechter is the closest surgeon willing and able to perform male-to-female genital surgeries for Medicare patients.) As a disabled veteran, Ms. Lauderdale is unable to bear the risk of incurring these costs on her own. Thus, until this matter is firmly resolved in her favor, Ms. Lauderdale is left in the untenable position of waiting for either United or this Council to settle this matter.

In light of United's request for review of the ALJ decision, Ms. Lauderdale is unable to schedule her surgery during calendar year 2015. Given the delay attendant to resolution of this request for review and Dr. Schechter's lengthy waiting list, in all likelihood, the soonest date Ms. Lauderdale's surgery may be performed is sometime in February 2016.

II. ARGUMENTS

A. Ms. Lauderdale is Seeking Coverage for Surgery in Calendar Year 2016, Thus the Unproduced HPMS Memo Is Inapposite

United's reliance on the HPMS memo is inapposite. Due to United's unscrupulous denial of Ms. Lauderdale's claim in November 2014 and the passage of time, the original surgeon Ms. Lauderdale sought surgery with, Dr. Bowers, has opted out of Medicare participation. As a result, Ms. Lauderdale has sought the services of another in-network surgeon, Dr. Schechter (a remedy that United's representative agreed to at the March 31 hearing).

Though Dr. Schechter has approved Ms. Lauderdale for surgery, United's insistence on appealing this matter has sown further delay. Dr. Schechter has a long waiting list and, because United has filed a request for appeal to this Council rather than issuing a pre-authorization letter, it is now highly unlikely that Ms. Lauderdale can secure a 2015 surgery date with Dr. Schechter. Thus, even if the HPMS memo does exist, and even if it applies to a claim that should have been covered during calendar year 2014, the HPMS memo is irrelevant since services will not be performed in 2015. (For a more complete explanation of why the HPMS memo does not govern, see Exhibit M).

Moreover, Judge Booker's declination to exhaustively address each and every spurious argument United proffered, including a last minute letter requesting immediate dismissal due to an unproduced memorandum from HPMS, is not reversible error. As the Council has previously held, "[a]n ALJ is not required to 'cite, reference, or consider' every possible legal or policy source in issuing a decision that is already well-reasoned and complete." *In the Case of Spokane Washington Hospital*, Docket No. M-12-1005 at *6 (June 19, 2012), available at <http://www.hhs.gov/dab/divisions/medicareoperations/macdecisions/12-1005.pdf>.

B. Judge Booker's Medical Necessity Decision is Fully Supportable by Governing Law

Contrary to United's representations, Judge Booker's medical necessity decision did not rely upon the "same information" submitted to MAXIMUS. Among other things, Judge Booker was presented with two additional letters of support from Ms. Lauderdale's medical team attesting to her stability in January 2015 (see Exhibit F) and March 2015 (see Exhibit I), copies of guidance documents promulgated by United and Novartis (both submitted by United and which were entered into evidence during the March 31 hearing), and lengthy letters I authored which included thorough discussion and citation to peer reviewed literature supporting a finding of medical necessity in this case (see Exhibits G and K). Additionally, Judge Booker took sworn testimony from Ms. Lauderdale during the hearing, personally questioning her about her mental stability as well as other issues that directly bore on the suitability of surgery.

Moreover, contrary to United's representations, Judge Booker *did* explain why he departed from MAXIMUS' decision. For instance, Judge Booker claimed that MAXIMUS ruled that Ms. Lauderdale should not have surgery because she was psychiatrically unstable (see Exhibit N at 1), but that he was determining that care was medically necessary because, as attested to by Dr. Bowers and Dr. Loboprabhu, Ms. Lauderdale satisfied the *Standards of Care* and is "beyond the point of returning to the original gender" (Exhibit N at 5). In sum, Judge Booker's decision was firmly grounded on new materials, evidence, and testimony that were not before MAXIMUS.

C. Judge Booker Did Not Inappropriately Rely Upon Commercial Plan Coverage Criteria

Curiously, United claims that Judge Booker inappropriately relied upon commercial plan coverage criteria and that this inappropriate reliance is grounds for reversal. Not so. Judge Booker did not rely upon United's commercial coverage criteria but merely noted that, if those criteria were applicable to this case, Ms. Lauderdale had satisfied them. *See* Exhibit N at 5 ("Acknowledging that the guidance in Exhibit 9 does not apply to this specific Plan, I do find it informative and note that with regard to United Healthcare coverage criteria for gender reassignment surgery, the Appellant would have satisfied the coverage criteria set forth by United Healthcare were she in a different Plan."). There is no legal precedent that supports the notion that a passing comment, referencing a hypothetical that is not used as a grounds of decision, is a legitimate grounds for reversal.

CONCLUSION

If you require any further information please do not hesitate to reach out. I am available via phone at 949-291-3185, fax at 917-398-1849, and email at ezraiyoung@gmail.com.

Sincerely,



Ezra Young, Esq.
NY Bar No. 5283114

cc:

Ms. Vivian Hermiz
Senior Consultant
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Encl.

Exhibit A: Ltr from Dr. Loboprabhu to Dr. Bowers (Nov. 11, 2014)
Exhibit B: Ltr from Ezra Young to MAXIMUS (Feb. 9, 2014)
Exhibit C: United Denial Letter (Nov. 25, 2014)
Exhibit D: United Denial Letter (Dec. 4, 2015)
Exhibit E: MAXIMUS Decision (Dec. 24, 2014)
Exhibit F: Ltr from Dr. Loboprabhu (Jan. 5, 2015)
Exhibit G: Ltr from Ezra Young to Judge Booker (Mar. 17, 2015)
Exhibit H: Ltr from Ezra Young to Judge Booker (Mar. 19, 2015)
Exhibit I: Ltr from Dr. Loboprabhu (Mar. 19, 2015)
Exhibit J: United Letter (Mar. 23, 2015)
Exhibit K: Ltr from Ezra Young to Judge Booker (Mar. 26, 2015)
Exhibit L: United Letter (Apr. 23, 2015)
Exhibit M: Ltr from Ezra Young to Judge Booker (Apr. 24, 2015)
Exhibit N: ALJ Decision (Apr. 24, 2015)
Exhibit O: Ltr from Dr. Loren Schechter (June 1, 2015)
Exhibit P: Ltr from Dr. Loren Schechter (June 2, 2015)