



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

██████████  
██████████  
████████████████████

**DECISION**  
Case #: HMO - 208074

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**PRELIMINARY RECITALS**

Pursuant to a petition filed on March 22, 2023, under Wis. Stat., §49.45(5)(a), to review a decision by the Division of Medicaid Services (DMS) regarding Medical Assistance (MA), a hearing was held on June 7, 2023, by telephone. A hearing set for May 9, 2023 was rescheduled at the petitioner's request.

The issue for determination is whether the Division of Hearings and Appeals can overturn a determination that a medical procedure is experimental.

**PARTIES IN INTEREST:**

Petitioner:

██████████  
████████████████  
████████████████████

Petitioner's Representative:

██████████  
████████████████████  
████████████████████  
████████████████

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, WI 53703

By: Written submission of Steven Tyska, MD  
Division of Medicaid Services  
PO Box 309  
Madison, WI 53701-0309

**ADMINISTRATIVE LAW JUDGE:**

Brian C. Schneider  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Pierce County who is eligible for MA, with Group Health Cooperative – Eau Claire as his HMO.

2. On December 20, 2022, Mayo Clinic requested authorization to perform an intraosseous ablation of the basivertebral nerve using the Intracept spinal procedure, to alleviate petitioner's back pain. The HMO denied the request by a letter dated December 27, 2022 as the procedure was deemed to be experimental. A grievance was filed, but the committee upheld the denial on February 27, 2023.
3. Petitioner filed this appeal. The DMS sent the appeal literature to its evaluation service, and the service determined that the literature was insufficient to reverse the conclusion that the procedure was experimental.

### **DISCUSSION**

Under the discretion allowed by Wis. Stat., §49.45(9), the Department now requires MA recipients to participate in HMOs. Wis. Admin. Code, §DHS 104.05(2)(a). MA recipients enrolled in HMOs must receive medical services from the HMOs' providers, except for referrals or emergencies. Admin. Code, §DHS 104.05(3).

The criteria for approval by a managed care program contracted with the DHCAA are the same as the general MA criteria. See Admin. Code, §DHS 104.05(3), which states that HMO enrollees shall obtain services "paid for by MA" from the HMO's providers. The department must contract with the HMO concerning the specifics of the plan and coverage. Admin. Code, §DHS 104.05(1).

If the enrollee disagrees with any aspect of service delivery provided or arranged by the HMO, the recipient must file a grievance with the HMO. If the HMO denies the grievance, the recipient can appeal the HMO's denial within 90 days. Wis. Stat., §49.45(5)(ag); see also the Department's *HMO and PIHP* [Prepaid Inpatient Health Plan] *Member Grievances and Appeals Guide*, dated May 20, 2020, sec. 4.1.

Under Wis. Admin. Code, §DHS 107.035, certain services are excluded from MA coverage if, after a departmental review, they are determined to be experimental. Wis. Admin. Code, §DHS 107.03(4), provides that services considered experimental are not covered services. In this case the department has concluded that the Intracept procedure is experimental. See the Forward Health Physician Handbook, Topic 567: "A service is considered experimental when Wisconsin Medicaid determines that the procedure or service is not an effective or proven treatment for the condition for which it is intended."

I find no authority for the Division of Hearings and Appeals to reverse the department's conclusion that a service is experimental. Nothing in §DHS 107.035 suggests that the department's determination that a procedure is experimental is appealable to the Division of Hearings and Appeals. Since the Division of Hearings and Appeals is required to follow Department policy unless it clearly is contradicted by federal or state law, I must follow the Department's policy. The code makes clear that if a service is determined to be experimental, it is not covered by MA. Thus the issue before me is whether this requested service is one that has been deemed to be experimental. The answer is that it is such a service, and thus I must conclude that it is not covered by MA unless and until the Department deems the service to be covered.

### **CONCLUSIONS OF LAW**

The HMO and DMS correctly denied the requested medical procedure because it is not covered by the MA program.

**THEREFORE, it is**

**ORDERED**

That the petition for review is hereby dismissed.

## REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5<sup>th</sup> Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

## APPEAL TO COURT

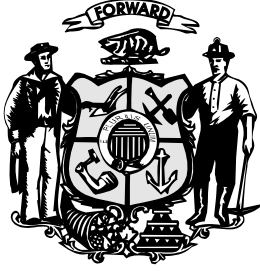
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 12th day of June, 2023



\s \_\_\_\_\_  
Brian C. Schneider  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin \DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on June 12, 2023.

Division of Medicaid Services

