

“Bariatric Surgery” and revising the definition of “Morbid Obesity” to read as follows:

§ 199.2 Definitions.

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(b) * * *

Bariatric Surgery. Surgical procedures performed to treat co-morbid conditions associated with morbid obesity. Bariatric surgery is based on two principles:

(1) Divert food from the stomach to a lower part of the digestive tract where the normal mixing of digestive fluids and adsorption of nutrients cannot occur (i.e., Malabsorptive surgical procedures); or

(2) Restrict the size of the stomach and decrease intake (i.e., Restrictive surgical procedures).

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Morbid obesity. A body mass index (BMI) equal to or greater than 40 kilograms per meter squared (kg/m^2), or a BMI equal to or greater than 35 kg/m^2 in conjunction with high-risk co-morbidities, which is based on the guidelines established by the National Heart, Lung and Blood Institute Federal on the Identification and Management of Patients with Obesity.

Note: Body mass index is equal to weight in kilograms divided by height in meters squared.

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3. Section 199.4 is amended by revising paragraphs (e)(15) and (g)(28) to read as follows:

§ 199.4 Basic program benefits.

* * * *

(e) * * *

(15) *Morbid obesity.* The TRICARE morbid obesity benefit is limited to those bariatric surgical procedures for which the safety and efficacy has been proven comparable or superior to conventional therapies and is consistent with the generally accepted norms for medical practice in the United States medical community.

(i) *Conditions for coverage.* (A) Payment for bariatric surgical procedures are determined by the requirements specified in paragraph (g)(15) of this section, and as defined in § 199.2(b) of this part.

(B) Covered bariatric surgical procedures are payable only when the patient has completed growth (18 years of age or documentation of completion of bone growth) and has met one of the following selection criteria:

(1) The patient has a BMI that is equal to or exceeds 40 kg/m^2 and has previously been unsuccessful with medical treatment for obesity.

(2) The patient has a BMI of 35 to 39.9 kg/m^2 , has at least one high-risk co-morbid condition associated with morbid obesity, and has previously been unsuccessful with medical treatment for obesity.

Note: The Director, TMA, or a designee, shall issue guidelines for review or the specific high-risk co-morbid conditions, exacerbated or, caused by obesity.

(ii) *Treatment of complications.* (A) Payment may be extended for repeat bariatric surgery when medically necessary to correct or treat complications from the initial bariatric surgery (a takedown). For instance, the surgeon in many cases will do a gastric bypass or gastroplasty to help the patient avoid regaining the weight that was lost. In this situation, payment is authorized even though the patient's condition technically may not meet the definition of morbid obesity because of the weight that was already lost following the initial surgery.

(B) Payment is authorized for otherwise covered medical services and supplies directly related to complications of obesity when such services and supplies are an integral and necessary part of the course of treatment that was aggravated by the obesity.

(iii) *Exclusions.* CHAMPUS payment may not be extended for weight control services, weight control/loss programs, dietary regimens and supplements, appetite suppressants and other medications; food or food supplements, exercise and exercise programs, or other program and equipment that are primarily intended to control weight or for the purpose of weight reduction, regardless of the existence of co-morbid conditions.

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(g) * * *

(28) *Obesity, weight reduction.* Service and supplies related “solely” to obesity or weight reduction or weight control whether surgical or nonsurgical; wiring of the jaw or any procedure of similar purpose, regardless of the circumstances under which performed (except as provided in paragraph (e)(15) of this section).

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Dated: October 23, 2009.

Patricia L. Toppings,

*OSD Federal Register Liaison Officer,
Department of Defense.*

[FR Doc. E9-26042 Filed 10-28-09; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[DoD-2009-HA-0098]

RIN 0720-AB36

TRICARE: Non-Physician Referrals for Physical Therapy, Occupational Therapy, and Speech Therapy

AGENCY: Office of the Secretary, Department of Defense.

ACTION: Proposed rule.

SUMMARY: The Department of Defense is publishing this proposed rule to authorize certified physician assistants and certified nurse practitioners (non-physicians) to engage in referrals of beneficiaries to the managed care support system for physical therapy, occupational therapy, and speech therapy.

DATES: Comments received at the address indicated below by December 28, 2009 will be accepted.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by either of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, Room 3C843 Pentagon, 1160 Defense Pentagon, Washington, DC 20301-1160.

Instructions: All submissions received must include the agency name and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT:

Glenn Corn, Medical Benefits and Reimbursement Branch, TRICARE Management Activity, telephone (303) 676-3566.

SUPPLEMENTARY INFORMATION: This proposed rule will permit services of an otherwise TRICARE-authorized individual paramedical provider, Physical Therapists (PT), Occupational Therapists (OT), and Speech Therapists (ST) to be paid on a fee-for-service basis if based on a referral from a certified physician assistant or certified nurse practitioner. This change will also align

TRICARE with Medicare's allowance of "non-physician providers" to provide, certify, or supervise therapy services. The language of 32 CFR 199.4(c)(3)(x) states that PT and OT may be cost shared when services are prescribed and monitored by a physician and 32 CFR 199.6(c)(3)(iii)(K) states that the services of PT, OT, and ST can be paid on a fee-for-service basis if the beneficiary is referred by a physician for the treatment of a medically diagnosed condition and a physician provides continuing oversight. In the Military Treatment Facility (MTF) setting, certified physician assistants work under the supervision of a physician. Until recently, the mechanical process of entering referrals into the electronic system allowed the MTF to reflect which physician was overseeing these referrals. However, with the implementation of the National Provider Identifier Standard as required by the Health Insurance Portability and Accountability Act, and the changes to the electronic system, the responsible physician is no longer allowed to be annotated on the referral. Additionally, a review of the processes used by Medicare found that Medicare no longer restricts the referral for PT, OT, and ST to only physicians, but now allows non-physician providers to make these referrals. After consideration, the Department of Defense has determined that this model should be proposed within the Military Health System so that a certified physician assistant or certified nurse practitioner may be allowed to issue such referrals.

Regulatory Procedures

Executive Order 12866, "Regulatory Planning and Review"

Section 801 of title 5, United States Code, and Executive Order (E.O.) 12866 require certain regulatory assessments and procedures for any major rule or significant regulatory action, defined as one that would result in an annual effect of \$100 million or more on the national economy or which would have other substantial impacts. It has been certified that this rule is not economically significant, and has been reviewed by the Office of Management and Budget as required under the provisions of E.O. 12866.

Public Law 104-4, Section 202, "Unfunded Mandates Reform Act"

Section 202 of Public Law 104-4, "Unfunded Mandates Reform Act," requires that an analysis be performed to determine whether any federal mandate may result in the expenditure by State, local and tribal governments,

in the aggregate, or by the private sector of \$100 million in any one year. It has been certified that this proposed rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year, and thus this proposed rule is not subject to this requirement.

Public Law 96-354, "Regulatory Flexibility Act" (RFA) (5 U.S.C. 601)

Public Law 96-354, "Regulatory Flexibility Act" (RFA) (5 U.S.C. 601), requires that each Federal agency prepare a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This proposed rule is not an economically significant regulatory action, and it has been certified that it will not have a significant impact on a substantial number of small entities. Therefore, this proposed rule is not subject to the requirements of the RFA.

Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

This rule does not contain a "collection of information" requirement, and will not impose additional information collection requirements on the public under Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35).

Executive Order 13132, "Federalism"

E.O. 13132, "Federalism," requires that an impact analysis be performed to determine whether the rule has federalism implications that would have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. It has been certified that this proposed rule does not have federalism implications, as set forth in E.O. 13132.

List of Subjects in 32 CFR Part 199

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, Military personnel.

Accordingly, 32 CFR part 199 is proposed to be amended as follows:

PART 199—[AMENDED]

1. The authority citation for part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. Chapter 55.

2. Section 199.4 is amended by revising paragraph (c)(3)(x)(A) to read as follows:

§ 199.4 Basic program benefits.

* * * * *

(c) * * *

(3) * * *

(x) * * *

(A) The services are prescribed and monitored by a physician, certified physician assistant or certified nurse practitioner.

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3. Section 199.6 is amended by revising paragraph (c)(3)(iii)(K) to read as follows:

§ 199.6 TRICARE-authorized providers.

* * * * *

(c) * * *

(3) * * *

(iii) * * *

(K) *Other individual paramedical providers.*

(1) The services of the following individual professional providers of care to be considered for benefits on a fee-for-service basis may be provided only if the beneficiary is referred by a physician for the treatment of a medically diagnosed condition and a physician must also provide continuing and ongoing oversight and supervision of the program or episode of treatment provided by these individual paramedical providers.

(i) Licensed registered nurses.

(ii) Audiologists.

(2) The services of the following individual professional providers of care to be considered for benefits on a fee-for-service basis may be provided only if the beneficiary is referred by a physician, a certified physician assistant or certified nurse practitioner and a physician, a certified physician assistant or certified nurse practitioner must also provide continuing and ongoing oversight and supervision of the program or episode of treatment provided by these individual paramedical providers.

(i) Licensed registered physical therapist and occupational therapist.

(ii) Licensed registered speech therapists (speech pathologists).

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Dated: October 23, 2009.

Patricia L. Toppings,

*OSD Federal Register Liaison Officer,
Department of Defense.*

[FR Doc. E9-26049 Filed 10-28-09; 8:45 am]

BILLING CODE 5001-06-P