



COLORADO

Department of
Regulatory Agencies

Division of Insurance

VIA EMAIL

December 18, 2023

Deputy Administrator and Director Ellen Montz
Center for Consumer Information and Insurance Oversight
Centers for Medicare and Medicaid Services
Department of Health and Human Services
Washington, D.C.

Re: Coverage of prosthetic devices for recreational activities

Dear Director Montz:

In 2023, the Colorado State legislature passed HB23-1136 concerning coverage for prosthetic devices deemed necessary to enable the covered person to engage in physical and recreational activities. The legislation requires the Division of Insurance ("Division") to determine whether this benefit would be subject to state defrayal and submit its determination to the Department of Health & Human Services ("HHS"). For the reasons set forth below, the Division has determined that the requirement in HB23-1136 is not a new mandate requiring state defrayal under the Affordable Care Act. HB23-1136 is a clarification of the coverage requirements and is required to comply with federal antidiscrimination laws. Further, as required by HB23-1136, the Division requests that HHS confirm the Division's determination within sixty (60) days after receiving this submission.

Prior to January 1, 2012, Colorado law mandated the coverage of prosthetic devices, and HB23-1136 is a clarification of this mandate. Section 10-16-104(14), C.R.S., requires coverage for prosthetic devices to adequately meet the medical needs of the patient. Specifically, Section 10-16-104(14)(a), C.R.S., requires coverage for benefits for prosthetic devices that equal those benefits provided for under federal laws for health insurance for the aged and persons with disabilities. Furthermore, the coverage required by Section 10-16-104(14), C.R.S., prior to HB23-1136, *did not exclude or limit* coverage for prosthetic devices necessary to enable a covered person to engage in physical and recreational activities.

The only two statutory limitations on replacement devices in Section 10-16-104(14), both prior to and after the enactment of HB 23-1136, are that the replacement device is: (i) subject to copayments and deductibles, and (ii) replacement cannot be necessitated by misuse or loss. Prior to the enactment of HB 23-1136, there was no limitation or exclusion on the types of



prosthetic devices, for example those that are deemed necessary to enable the covered person to engage in physical and recreational activities, in the law. As a result, HB 23-1136 simply clarifies that those prosthetic devices used for that purpose have always been covered by Section 10-16-104(14).

Further, “[r]epairs *and replacements* of prosthetic devices are also covered, subject to copayments and deductibles, *unless necessitated by misuse or loss.*” C.R.S. § 10-16-104(14)(e) (emphasis added). Requiring individuals that need prosthetic devices to use a standard prosthetic while engaging in physical or recreational activities could be considered misuse of that prosthetic device resulting in the inability of that individual to secure a replacement. However, a prosthetic device that enables a covered person to engage in physical or recreational activities may, in fact, prevent misuse of other prosthetic devices.

Similarly, federal law requires coverage of replacements when a physician has determined a replacement device is necessary because of a change in the physiological condition of the patient. See 42 U.S.C. § 1395m(h)(1)(G)(i)(I). Therefore, prosthetic devices to enable a covered person to engage in physical and recreational activities may be interpreted under Section 10-16-104(14), C.R.S. as “replacement devices,” a coverage requirement in Colorado that existed prior to January 1, 2012. Accordingly, the Division considers HB23-1136 to be a clarification of the coverage requirements under Section 10-16-104(14), C.R.S., rather than a new mandate requiring state defrayal.

Additionally, many federal laws prohibit discrimination based on disability. These laws include Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and Section 1557 of the Affordable Care Act (“ACA”). Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, age, disability or sex in covered health programs or activities. See 42 U.S.C. § 18116. Specifically, subsection (a) states in relevant part that “an individual shall not...be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity” receiving federal funding, “including...contracts of insurance.” Additionally, the ACA provides that “[i]n defining the essential health benefits,” the agency must “take into account the health care needs of diverse segments of the population, including...persons with disabilities,” and “not make coverage decisions...or design benefits in ways that discriminate against individuals because of their...disability.” See 42 U.S.C. § 18022(b)(4)(B)-(C).

Proposed federal rules released in 2022 related to Section 1557 highlighted the impacts of discrimination against people with disabilities and the health equity implications, and cited a recent survey of physicians' perceptions of individuals with disabilities and the inherent bias. In the study, 82.4% of respondents reported that individuals with significant disabilities have worse quality of life than those without disabilities and only 40.7% were confident about their ability to provide the same quality of care to patients with disabilities.¹ When doctors do not feel confident

¹<https://www.federalregister.gov/documents/2022/08/04/2022-16217/nondiscrimination-in-health-programs-and-activities#citation-174-p47836>



in their ability to treat patients effectively to meet their health care needs, disability patients' quality of life will continue to diminish and lead to worse health outcomes. The federal rules acknowledge that people with disabilities are more likely to have unmet medical, dental and prescription medication needs.² In fact, adults with disabilities are “three times more likely to have heart disease, stroke, diabetes or cancer than adults without disabilities.”³

In the CMS framework for Health Equity, released in 2021, CMS defines health equity “as the attainment of the highest level of health for all people, where everyone has a fair and just opportunity to attain their optimal health regardless of... disability...”⁴ Since individuals with disabilities are frequently not provided adequate care from their physicians, it is important to provide these individuals with all the tools necessary to achieve better health outcomes. According to the CDC, physical activity is integral to good health. Studies have shown that being active can “improve brain health, help manage weight, reduce the risk of disease, [and] strengthen bones and muscles.”⁵ Despite the health implications of physical activity, “nearly half of all adults with disabilities get no leisure-time aerobic physical activity.”⁶

If all people deserve the opportunity to attain optimal health, and the health benefits of recreational activities are proven to increase quality of life and overall health, then providing coverage for prosthetic devices that allow individuals to engage in physical activities will result in better health outcomes and lower health premiums for all individuals. This benefit will also help individuals with disabilities to overcome the bias and discrimination that currently exists in the healthcare industry.

For these reasons, HB23-1136 does not create a new state mandate requiring defrayal of additional premium costs, if any.

Please let us know if you have any questions or would like to discuss this matter further with the Division.

Sincerely,

Kate Harris
Chief Deputy Commissioner

Cc: Rebecca Bucchieri, CMS

² Id.

³ <https://www.cdc.gov/ncbddd/disabilityandhealth/pa.html>

⁴ <https://www.cms.gov/files/document/cms-framework-health-equity.pdf>

⁵ <https://www.cdc.gov/physicalactivity/basics/pa-health/index.htm#:~:text=Being%20physically%20active%20can%20improve,ability%20to%20do%20everyday%20activities.>

⁶ <https://www.cdc.gov/ncbddd/disabilityandhealth/pa.html>

