

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HARRY DAVIS; RITA-MARIE GEARY;)
PATTY POOLE; and ROBERTA)
WALLACH, on behalf of themselves)
and all others similarly situated,)

Plaintiffs,)

v.)

NIRAV SHAH, in his official capacity as)
Commissioner of the New York State)
Department of Health,)

Defendant.)

~~PROPOSED~~
ORDER GRANTING
CLASS CERTIFICATION

12-CV-6134-CJS-MWP

~~PROPOSED~~ ORDER

Plaintiffs Harry Davis, Rita-Marie Geary, Patty Poole, and Roberta Wallach have moved the Court for class certification. Having heard oral argument and considered all the pleadings, including Plaintiffs' Amended Class Action Complaint, the Court finds:

1. Plaintiffs have moved for class certification pursuant to Fed. R. Civ. P. 23(a)(1)-(4) and 23(b)(2).

2. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Generally, numerosity is presumed at a level of 40 class members. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Plaintiffs have presented evidence that, annually, thousands of Medicaid recipients' doctors identify prescription footwear or compression stockings as medically necessary for them and that the Defendant has implemented policies that deny requests for Medicaid coverage of prescription footwear and

compression stockings, with only certain limited exceptions. The Defendant has not contested numerosity. Plaintiffs meet the requirements of Rule 23(a)(1).

3. Rule 23(a)(2) requires that “there are questions of law or fact common to the class.” The commonality requirement is satisfied when the “issues involved are common to the class as a whole,” because they “turn on questions of law applicable in the same manner to each member of the class.” *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). This requirement can be satisfied by the existence of a single common question. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2556 (2011). Plaintiffs challenge Defendant’s policy denying coverage of medically necessary compression stockings and orthopedic footwear for categorically needy Medicaid beneficiaries. Common questions of law include:

- a. Whether Defendant’s policy violates his obligations under the federal Medicaid Act;
- b. Whether Defendant’s policy violates his obligations under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act to provide services in the most integrated setting; and
- c. Whether Defendant’s policy for notifying recipients of denials of compression stockings and orthopedic footwear violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the federal Medicaid Act.

In addition, each proposed class member suffers from a medical condition for which their doctor has found either orthopedic footwear or compression stockings to be medically necessary but has been or will be denied Medicaid coverage of these treatments by operation of the Defendant’s policies implementing New York Soc. Serv. Law 365-a(2)(g)(iii) and (iv). As set forth in their Amended Class Action Complaint, Plaintiffs seek uniform declaratory and injunctive relief for themselves and all class members that, if granted, will resolve Plaintiffs’ and Plaintiff class

members' claims "in one stroke," as Rule 23(a)(2) requires. *Wal-Mart Stores*, 131 U.S. at 2551. The Defendant has not contested commonality. The Court finds the requirements of commonality are met.

4. The typicality requirement of Fed. R. Civ. P. 23(a)(3) requires "the claims ... of the representative parties are typical of the claims ... of the class." This factor "requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Romano v. SLS Residential Ins.*, 246 F.R.D. 432, 445 (S.D. N.Y. 2007) (citation omitted). Here, the Amended Class Action Complaint alleges that the Defendant has failed to cover medically necessary orthopedic footwear and compression stockings in the same way for each of the named Plaintiffs and all proposed class members. The proposed remedy will benefit Plaintiffs and proposed class members alike in the same way. The Defendant does not contest typicality, and this factor is also met.

5. Under Fed. R. Civ. P. 23(a)(4), the moving party must establish that the "representative parties will fairly and adequately protect the interests of the class." Under this prerequisite, class actions can be maintained if class counsel is "qualified, experienced and generally able to conduct the litigation," and "there is no conflict of interest between the named plaintiffs and other members of the plaintiff class." *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (citation and quotations omitted). In addition, Fed. R. Civ. P. 23(g)(1) requires the Court to consider the following factors in appointing class counsel: the work counsel has done in identifying or investigating potential claims in the action, counsel's experience in handling class actions or similar types of claims, counsel's knowledge of the applicable law, and the resources counsel will commit to representing the class. Having considered these factors, the

Court finds that the proposed class counsel, Empire Justice Center and the National Health Law Program, are qualified to conduct this litigation. These counsel have diligently identified and investigated the claims in this action. The Court further finds that Empire Justice Center and the National Health Law Program are experienced in class action litigation in federal and state courts, including matters relating to Medicaid, the ADA, and Constitutional protections. Counsel has litigated numerous class action lawsuits involving public benefits, Medicaid, and the ADA, many in the Western District of New York. Finally, the Court finds that Empire Justice Center and the National Health Law Program will prosecute this action vigorously and competently. Moreover, the Court finds that the interests of the named Plaintiffs and the Plaintiff class members are coextensive. The legal claims of the named Plaintiffs arise from the same conduct of Defendant applicable to the entire class. The Defendant does not contest adequacy of representation. The Court finds the Plaintiffs meet the requirements of Rules 23(a)(4) and 23(g).

6. Fed. R. Civ. P. 23(b)(2) requires that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Here, Defendant’s alleged conduct is generally applicable to the class in that Defendant’s policies regarding coverage of orthopedic footwear and compression stockings are affecting class members in the same way. The declaratory and injunctive relief that the plaintiffs seek in their Amended Class Action Complaint will affect the class as a whole. Certification under Rule 23(b)(2) is thus necessary and appropriate in this case.

WHEREFORE, it is hereby

ORDERED that the following class is certified:

All current and future New York State Medicaid recipients for whom Defendant has directly or indirectly failed to provide coverage for medically necessary orthopedic footwear and compression stockings as a result of New York Soc. Serv. Law § 365-a(2)(g)(iii) and (iv) and regulations and policies promulgated thereto.

It is further ORDERED that the following are appointed as class counsel: Empire Justice Center, by Bryan D. Hetherington, Jonathan Feldman, and Geoffrey A. Hale, and the National Health Law Program, Inc. by Martha Jane Perkins and Sarah Jane Somers.

Finally, it is ORDERED that the class shall be notified of this Order using the attached notice. The Defendant shall post the attached class notice prominently on its website, and Plaintiffs' counsel shall post the notice on their program websites. The notice shall also be included in a special *Medicaid Update* to Medicaid providers and suppliers of durable medical equipment.

So ordered.

Dated: Rochester, N.Y.

JAN 7, 2013
December __, 2012


Charles J. Siragusa
United States District Court Judge