



COMMONWEALTH of VIRGINIA

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The Honorable A.C. Cordoza
Member, Virginia House of Delegates
General Assembly Building
201 North 9th Street
Richmond, Virginia 23219

Dear Delegate Cordoza:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether an insurance company that otherwise provides coverage for radiation therapy for a particular type of cancer can deny a patient coverage for proton radiation therapy for that cancer, when the claimed proton radiation therapy meets the standard of clinical evidence used by the insurance company in making coverage determinations for other forms of cancer radiation therapy.

Background

As I understand it, your inquiry involves a scenario in which a health insurance carrier provides a patient coverage for cancer treatments that use particular forms of radiation therapy.¹ The coverage is available based on the patient's treatment plan meeting the standard of clinical evidence supporting that treatment modality for the patient's diagnosis; however, the insurance company denies coverage for treatment that involves proton radiation therapy. While your question does not state the reason the insurance company is denying coverage for proton radiation therapy, it implies that the denial is based on the insurance company utilizing a different or higher standard of clinical evidence than used for other forms of cancer radiation therapy, such as the treatment it has already authorized.

Applicable Law and Discussion

Your inquiry implicates Virginia Code § 38.2-3407.14:1, which is among Virginia's laws addressing accident and sickness insurance. The statute defines "proton radiation therapy" as "the advanced form of radiation therapy treatment that utilizes protons as an *alternative radiation delivery method* for the treatment of tumors."² Although § 38.2-3407.14:1 directs that it not be "construed to

¹ Your request does not specify any particular cancer, so I assume that the type is irrelevant to your question.

² VA. CODE ANN. § 38.2-3407.14:1(A) (2020) (emphasis added). "Radiation therapy treatment" refers to "a cancer treatment through which a dose of radiation to induce tumor cell death is delivered by means of proton

mandate the coverage of proton radiation therapy under any policy, contract, or plan issued or provided by a carrier[,]³ the statute does provide that

each policy, contract, or plan issued or provided by a carrier *that provides coverage* for cancer therapy shall not hold proton radiation therapy to a higher standard of clinical evidence for decisions regarding coverage under the policy, contract, or plan than is applied for decisions regarding coverage of other types of radiation therapy treatment.⁴

Virginia does not mandate coverage for cancer therapy, including proton radiation therapy.⁵ According to the plain language of § 38.2-3407.14:1, however, an insurance carrier, to the extent it otherwise chooses to provide coverage for cancer therapy, may not deny coverage for proton radiation therapy based on the application of a higher standard of clinical evidence for proton radiation therapy than the carrier uses for other types of radiation therapy.⁶ Ultimately, whether a particular claim is being denied in violation of § 38.2-3407.14:1 is a question of fact beyond the scope of an opinion of this Office⁷; nevertheless, if the insurance carrier in your scenario is in fact denying coverage for proton

radiation therapy, intensity modulated radiation therapy, brachytherapy, stereotactic body radiation therapy, three-dimensional conformal radiation therapy, or other forms of therapy using radiation.” *Id.* Proton radiation therapy, as generally understood, is a type of radiation therapy that directs a beam of radiation from an external machine through the skin and into cancerous tissue. It differs from other forms of radiation therapy in that protons, positively charged subatomic particles, rather than x-rays are used. Proton radiation therapy can be used in conjunction with other cancer treatments, including x-ray radiation, chemotherapy, immunotherapy, or surgery. *See, e.g.*, AMERICAN CANCER SOCIETY, *Getting External Beam Radiation Therapy*, <https://www.cancer.org/cancer/managing-cancer/treatment-types/radiation/external-beam-radiation-therapy.html> (last visited Dec. 8, 2023); AMERICAN SOCIETY OF CLINICAL ONCOLOGY, *Proton Therapy*, CANCER.NET (10/22), <https://www.cancer.net/navigating-cancer-care/how-cancer-treated/radiation-therapy/proton-therapy>; ENVIRONMENTAL PROTECTION AGENCY, *Radiation Therapy*, <https://www.epa.gov/radtown/radiation-therapy> (last updated Sept. 5, 2023).

³ Section 38.2-3407.14:1(C). As used in the statute, a “carrier” is any “insurer proposing to issue individual or group accident and sickness insurance policies providing hospital, medical and surgical, or major medical coverage on an expense-incurred basis; a corporation providing individual or group accident and sickness subscription contracts; or a health maintenance organization providing a health care plan for health care services.” *Id.* at subsection (A).

⁴ Enacted in 2017, Code § 38.2-3407.14:1 applies only to “insurance policies, subscription contracts, and health care plans delivered, issued for delivery, reissued, or extended in the Commonwealth on and after January 1, 2018, or at any time thereafter when any term of the policy, contract, or plan is changed or any premium adjustment is made.” 2017 Va. Acts ch. 287 (enacting subsection D as part of the statute). It does not apply to Medicare or “any other similar coverage under state or federal governmental plans.” Section 38.2-3407.14:1(E). I note that the State of Illinois passed a substantially similar law earlier this year. *See* H.R. 2799, 103d Gen. Assemb. (Ill. 2023). *See also* OKLA. STAT. tit. 36, § 6060.9b.

⁵ *Cf.* Ch. 34, art. 2, of Title 38.2 of the Virginia Code, §§ 38.2-3408 to -3419.1 (“Mandated Benefits”). I note that a bill seeking to mandate coverage of hypofractionated proton therapy for breast and prostate cancer was introduced in 2018, but failed. *See* H.B. 434, 2018 Reg. Sess. (Va. 2018).

⁶ “When the language of a statute is unambiguous, we are bound by the plain meaning of that language.” *Manu v. GEICO Cas. Co.*, 293 Va. 371, 379 (2017) (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007)).

⁷ *See, e.g.*, 2006 Op. Va. Att’y Gen. 141, 144 (relaying that “this Office does not investigate the facts behind opinion requests and does not issue opinions regarding questions of fact”). As proton radiation therapy is not a mandated benefit in Virginia, I must note that there may be other bases upon which the insurance company may deny coverage to a particular patient.

radiation therapy based on a failure to meet a higher standard than is imposed on other radiation treatments that would be approved, the carrier is violating § 38.2-3407.14:1.⁸

Conclusion

Accordingly, it is my opinion that Code § 38.2-3407.14:1 prohibits an insurance carrier that provides coverage for cancer therapy from denying a patient coverage for proton radiation therapy when the coverage determination is based on the carrier's application of a higher standard of clinical evidence to such treatment than it uses for treatments it otherwise approves.

With kindest regards, I am,

Very truly yours,



Jason S. Miyares
Attorney General

⁸ Section 38.2-3407.14:1 does not include a definition of "standard of clinical evidence." I assume that this term refers to the amount of clinical evidence, such as case reports, cross-sectional studies, case-control studies, cohort studies, randomized controlled trials, critically appraised individual articles, and systemic reviews, typically considered sufficient to show that a particular treatment is reasonable, effective, and medically necessary for its proposed use. See Patricia B. Burns, Rod J. Rohrich & Kevin C. Chung, *The Levels of Evidence and Their Role in Evidence-Based Medicine*, 128(1) *PLASTIC & RECONSTRUCTIVE SURGERY* 305-310 (July 2011), available at https://journals.lww.com/plasreconsurg/fulltext/2011/07000/the_levels_of_evidence_and_their_role_in.46.aspx (last visited Dec. 8, 2023); NORTHERN VIRGINIA COMMUNITY COLLEGE, *Evidence-Based Practice for Health Professionals*, <https://libguides.nvcc.edu/evidence-based-practice/levelsofevidence> (last updated Dec. 4, 2023); ELSEVIER, *Levels of evidence in research*, <https://scientific-publishing.webshop.elsevier.com/research-process/levels-of-evidence-in-research/> (last visited Dec. 8, 2023). Regardless, § 38.2-3407.14:1 makes clear that proton radiation therapy cannot be held to a higher standard than other cancer therapies.