STATE OF MICHIGAN

DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH

OFFICE OF FINANCIAL AND INSURANCE REGULATION

Before the Commissioner of Financial and Insurance Regulation

In the matter of

XXXXX
Petitioner **File No. 101000-001**
v

Blue Cross Blue Shield of Michigan
Respondent
_____/

Issued and entered
this 17th day of February 2009
by Ken Ross
Commissioner

ORDER

I
PROCEDURAL BACKGROUND

On October 24, 2008, XXXXX, authorized representative of XXXXX (Petitioner), filed a request for external review with the Commissioner of Financial and Insurance Regulation under the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901 *et seq*. The Commissioner reviewed the request and accepted it on October 31, 2008.

The Petitioner is enrolled for health coverage through the Michigan Education Special Services Association (MESSA). The coverage is underwritten by Blue Cross Blue Shield of Michigan (BCBSM). The Commissioner notified BCBSM of the external review and requested the information used in making its adverse determination. The Commissioner received BCBSM's response on November 12, 2008.

The issue in this external review can be decided by a contractual analysis. The contract here is the MESSA *Super Care 1 2003 Revision Plan Coverage Booklet* (Super Care 1 booklet). The Commissioner reviews contractual issues pursuant to MCL 550.1911(7). This matter does not

require a medical opinion from an independent review organization.

II
FACTUAL BACKGROUND

The Petitioner received occupational therapy (CPT code 97113, aquatic therapy) provided by XXXXX, OTR, from November 20, 2007, through January 28, 2008. The charge for this care was $416.00. BCBSM denied coverage for this therapy because it believes it is not a covered benefit under the Petitioner's Super Care 1 booklet.

The Petitioner appealed BCBSM's decision to deny coverage. BCBSM held a managerial-level conference on October 7, 2008, and issued a final adverse determination dated October 8, 2008.

III
ISSUE

Is BCBSM required to cover the Petitioner's occupational therapy from November 20, 2007, through January 28, 2008?

IV
ANALYSIS

A

This case is the fourth one in a continuing dispute between the Petitioner's family and BCBSM about coverage for ongoing occupational therapy. XXXXX is the authorized representative in this case as well as in three earlier related cases.

In the order in the immediate prior case, *XXXXX* v *BCBSM* (91565, entered November 20, 2008), the Commissioner upheld BCBSM's denial of coverage for the occupational (aquatic) therapy on the basis that it was not a benefit under the terms of her MESSA health care coverage. The Petitioner concedes[1] that case 91565 "is substantively identical" to the instant case. The Commissioner agrees and thus repeats the rationale of the prior case here:

The Commissioner first finds that the Petitioner's health care benefits are defined in the

1 XXXXX to the Office of Financial and Insurance Regulation dated January 12, 2009.

MESSA *Super Care 1 2003 Revision Plan Coverage Booklet*. The Petitioner does not dispute this fact. Therefore, it is the terms and conditions of that Super Care 1 booklet that must guide the Commissioner's resolution of this case. Further, there is no dispute that the Petitioner received occupational therapy from Cynthia Newmeyer.

The Super Care 1 booklet does not include occupational therapy in the list of covered therapy benefits in Section 15 on pp. 17-18. Only these therapies are covered:

Physical therapy
Speech and Language Pathology Services
Chemotherapy
Radiation Therapy
Hemodialysis
Outpatient Psychotherapy
Outpatient Substance Abuse Therapy
Vision Therapy Services
Allergy Therapy Services

The Super Care 1 booklet only refers to occupational therapy as part of the home health care benefit and specifically requires home health care benefits to be provided by a home health care agency (see section 18.1 of the Super Care 1 booklet, page 20). No information was provided to show that the Petitioner's occupational therapy was provided by such an agency. On the contrary, the therapy was not provided at home but rather at the local YMCA. Therefore, the Petitioner's occupational therapy provided by XXXXX is not a covered benefit under the terms and conditions of the Super Care 1 booklet.

BCBSM also said that it had reason to believe XXXXX is the Petitioner's sister-in-law. If true, any therapy from XXXXX would not be covered because care from an immediate relative (i.e., sister-in-law) is excluded under the terms of the Super Care 1 booklet (see the exclusion in Section 20 on page 25). However, BCBSM provided no information on which the Commissioner could base such a finding.

The Commissioner concludes and finds that BCBSM correctly applied the terms and conditions of the Super Care 1 booklet when it denied coverage for the Petitioner's occupational

therapy provided by XXXXX from November 20, 2007, through January 28, 2008, since it was not provided by a home health agency.

B

The Petitioner's chief argument in this case is that the doctrine of res judicata applies and that the Commissioner is therefore compelled to order BCBSM to cover the occupational therapy at issue here. The Commissioner disagrees.

The issue of coverage of occupational therapy for the XXXX family was reviewed under PRIRA by the Commissioner first in *XXXXX* v *BCBSM* (85560) and then in *XXXXX* v *BCBSM* (86389), both orders entered December 28, 2007. Those cases also involved occupational therapy provided by XXXXX. In those two orders, the Commissioner upheld BCBSM's denial of coverage for occupational therapy. The Commissioner's orders in 85560 and 86389 erroneously relied on language provided by BCBSM dealing with coverage for occupational therapy that was not in the Petitioner's Super Care 1 booklet.

The Petitioners appealed those orders to the 9th circuit court (*XXXXX v BCBSM*, A08-0003-AA, and *XXXXX v BCBSM*, A08-0079-AA). In both cases the circuit court ordered BCBSM to pay for the therapy at issue. Even if the circuit court relied on the same erroneous language as the basis for its decision, BCBSM had the opportunity to raise that issue in circuit court. The judgments in 85560 and 86389 are now final and the Commissioner is unaware of any effort by BCBSM to relitigate the claims in those cases.

The doctrine of res judicata bars relitigation of the same cause of action between the same parties where there is a prior judgment. The doctrine was explained in *Dart v Dart*, 460 Mich 573 (1999) at 586:

> Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id*. at 375-376.

What the Commissioner must address here is a new claim for benefits for a new period of service, i.e., a new transaction. The Commissioner is not revisiting claims that have been fully adjudicated. The essential facts in the instant claim are not identical to the prior adjudicated claims. Moreover, the circuit court's orders in the prior cases that were furnished to the Commissioner are conclusory in nature and do not explain the rationale for the decision reached. They make no fact-finding nor do they interpret the Petitioner's Super Care 1 booklet or any law. They provide no guidance to the Commissioner for applying the doctrine of res judicata.

The Petitioner asserts that the occupational therapy in this case (from November 20, 2007, through January 28, 2007) was provided under the same terms of coverage as the earlier cases, that her coverage has not changed and therefore BCBSM is required to pay for it. However, BCBSM has brought to the Commissioner's attention in this case the actual language in the Super Care 1 booklet that relates to the Petitioner's claims. The Commissioner, under PRIRA, must decide "whether the health care service that is the subject of the adverse determination or final adverse determination reasonably appears to be a covered service under the covered person's health benefit plan." MCL 550.1911(2)(b). The Commissioner has reviewed the terms and conditions of the Super Care 1 booklet and concluded that the Petitioner's occupational therapy is not a benefit under her health plan.

V
ORDER

BCBSM's final adverse determination of October 8, 2008, is upheld. BCBSM is not required to cover the Petitioner's occupational therapy from XXXXX from November 20, 2007, through January 28, 2008, because it was not provided by a home health agency and therefore is not a benefit under her coverage plan.

This is a final decision of an administrative agency. Under MCL 550.1915, any person aggrieved by this Order may seek judicial review no later than sixty days from the date of this Order

in the circuit court for the county where the covered person resides or in the circuit court of Ingham County. A copy of the petition for judicial review should be sent to the Commissioner of Financial and Insurance Regulation, Health Plans Division, Post Office Box 30220, Lansing, MI 48909-7720.