

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
OFFICE OF FINANCIAL AND INSURANCE REGULATION
Before the Commissioner of Financial and Insurance Regulation

In the matter of

XXXXX

Petitioner

File No. 116854-001

v

Blue Cross Blue Shield of Michigan
Respondent

Issued and entered
this 28th day of May 2011
by R. Kevin Clinton
Commissioner

ORDER

I
PROCEDURAL BACKGROUND

On September 3, 2010, 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, MCL 550.1901 *et seq.* The Commissioner reviewed the request and accepted it on September 13, 2010.

The Commissioner notified Blue Cross Blue Shield of Michigan (BCBSM) of the external review and requested the information used in making its adverse determination. The Commissioner received BCBSM's response on September 22, 2010.

The contract here is the BCBSM *Community Blue Group Benefits Certificate* (the certificate) and *Rider CBD \$3,000-NP*. Because medical issues were involved, the Commissioner assigned the case to an independent review organization which provided its analysis and recommendations to the Commissioner on October 18, 2010.

II FACTUAL BACKGROUND

The Petitioner was diagnosed with colon cancer and received treatment from XXXXX in Michigan and from Dr. XXXXX at the XXXXX Clinic in XXXXX. BCBSM provided coverage for some of the care received at the XXXXX Clinic but denied coverage for use of the drug sodium phenylbutyrate and for other billed items that BCBSM concluded either did not constitute medical services or were charges that were included in other approved claims.

The Petitioner appealed BCBSM's denial of coverage for the sodium phenylbutyrate and the amount paid for the other services. BCBSM held a managerial-level conference on July 12, 2010, and issued a final adverse determination on August 3, 2010, affirming its position.

III ISSUE

Were BCBSM's coverage decisions consistent with the provisions of the *Community Blue* certificate of coverage and *Rider CBD \$3,000-NP*?

IV ANALYSIS

Petitioner's Argument

In a letter of September 22, 2010, the Petitioner's authorized representative wrote:

Our appeal is for BCBSM to cover charges for medical treatment rendered to Mr. XXXXX by the XXXXX Clinic which, for all intent and purposes, have been denied by BCBSM. Below are the points we would like to bring forth for the purpose of review:

1. The inconsistency of payment rendered by BCBSM for the same drugs, services and treatments rendered in Michigan and at the XXXXX Clinic.
2. We have never received a clear and concise explanation from BCBSM for their denials and discrepancy in payment.
3. The treatment rendered by the XXXXX Clinic has been effective. Mr. XXXXX has now spent for than \$50,000 out of pocket to maintain his treatment and further denial on these claims will impact his ability to seek and continue further treatment.

The Petitioner's representative asserts that Petitioner has submitted to BCBSM claims

totaling \$47,718.83 which have been denied. The Petitioner's representative argues that this care should be covered and BCBSM should be required to pay for it.

BCBSM's Argument

With respect to the claims for sodium phenylbutyrate, BCBSM says that under the terms of the certificate of coverage experimental or investigational services are not covered. The certificate, in "Section 6: General Conditions of Your Contract," provides:

Experimental Treatment

Services That Are Not Payable

We do not pay for experimental treatment (including experimental drugs or devices) or services related to experimental treatment. . . .

In Section 7, the certificate defines experimental treatment as:

Treatment that has not been scientifically proven to be as safe and effective for treatment of the patient's conditions as conventional treatment. . . .

BCBSM says its medical director is responsible for determining whether any service is experimental or investigational based on medical criteria and guidelines. BCBSM's medical director determined that this type of drug treatment has not been proven to be a safe and effective treatment for colon cancer.

BCBSM notes the claim that the Petitioner was told that the drug sodium phenylbutyrate was payable and that he says he was told that BCBSM would reimburse all of his services that were rendered at the XXXXX Clinic. However, BCBSM could not find any documentation in its records indicating that all of the Petitioner's treatment for colon cancer would be payable.

Concerning the other services, BCBSM indicates that its contracts do not guarantee that charges will be paid in full. Rather, its payments for physician services are based on the lesser of the doctor's charge and BCBSM's maximum payment level.

In determining the payment level for each service, BCBSM utilizes the Resource Based Relative Value Screen (RBRVS). This is a nationally recognized reimbursement structure developed by physicians. The RBRVS reflects the resources required to perform each service,

including physician time, specialty training, malpractice premiums, and practice overhead. BCBSM regularly reviews the ranking of procedures to address the effects of changing technology, training and medical practice. In this instance, additional reviews were conducted by a BCBSM medical consultant, and it was determined that the Petitioner's claims were paid appropriately. BCBSM's consultants did not see extenuating circumstances that would warrant additional payment for the procedures performed.

The *Community Blue* certificate requires a deductible and copayment if a member receives care from a nonpanel provider. Because Dr. XXXXX is a nonpanel provider and does not participate with Blue Cross Blue Shield of XXXXX his services are subject to an out of network deductible. *Rider CBD \$3000-NP* sets the nonpanel deductible at \$3,000 for one member and \$6,000 for the family when two or more members are covered. The Petitioner was required to pay the deductible before any coverage would be provided.

BCBSM has also reviewed the apparent discrepancies the Petitioner submitted in the way services provided in XXXXX were handled as opposed to services provided in XXXXX. BCBSM indicated that the claims provided in XXXXX were initially rejected due to lack of information then reprocessed and applied towards the out of network deductible. Therefore, BCBSM believes they were processed in compliance with the certificate and rider language.

Commissioner's Review

The question of whether sodium phenylbutyrate is experimental or investigational in the treatment of Petitioner's condition was presented to an independent review organization (IRO) for analysis as required by Section 11(6) of Patient's Right to Independent Review Act. The IRO reviewer is board-certified in internal medicine and oncology, holds an academic appointment at a large academic medical center and has been in active practice for more than fifteen years. The IRO report includes the following comments:

[T]he [Petitioner's] treatment with Sodium Phenylbutyrate is based on the theory antineoplastons interfere with cancer cells and keep them from

growing. . . [T]here are no reports in the peer reviewed cancer journals that this form of treatment is effective. . . [T]he [Petitioner] is not being treated in a randomized trial. . . [T]he [Petitioner] is also receiving standard chemotherapy with Xeloda and Avastin. . . [T]he report that there has been a 1% reduction in the liver size does not demonstrate the efficacy of treatment with Sodium Phenylbutyrate.

The IRO reviewer concluded that sodium phenylbutyrate is investigational in the treatment of Petitioner's condition.

While the Commissioner is not required in all instances to accept the IRO's recommendation, it is afforded deference. In a decision to uphold or reverse an adverse determination, the Commissioner must cite "the principal reason or reasons why the Commissioner did not follow the assigned independent review organization's recommendation." MCL 550.1911(16) (b). The IRO reviewer's analysis is based on extensive expertise and professional judgment and the Commissioner can discern no reason why that judgment should be rejected in the present case.

The Commissioner accepts the conclusion of the IRO and finds that BCBSM's denial of coverage for sodium phenylbutyrate is consistent with the terms of the certificate.

The Petitioner also argued that BCBSM was inconsistent in its payments for his care. He cited instances where BCBSM paid for care provided in Michigan and did not pay for the same care provided in XXXXX. BCBSM pays the same amount (its "approved amount") whether a physician is a participating provider or not. However, actual payments may differ because of the existence of a different deductible or copayment. The most significant difference, in terms of the financial impact for a patient, may be the fact that nonparticipating providers can bill their patients for any portion of their charges that BCBSM does not pay. In contrast, participating providers have agreed to accept BCBSM's payment as full payment for the medical care provided.

Dr. XXXXX and the XXXXX Clinic are nonpanel providers (i.e., have not signed an agreement with BCBSM to provide services under the PPO program through which the Petitioner received benefits). Also, Dr. XXXXX and the XXXXX Clinic do not participate with Blue Cross Blue

Shield of XXXXX. Under these circumstances, it is to be expected that BCBSM's payments would differ between Michigan participating providers and XXXXX providers who do not participate with a Blue Cross Blue Shield organization.

Finally, the Commissioner notes the Petitioner's claim that he was led to understand that his sodium phenylbutyrate treatment would be fully covered. Under PRIRA, the Commissioner's role is limited to determining whether BCBSM has properly administered health care benefits under applicable statutes and the terms of the health plan's policy or certificate of coverage. Resolution of the factual dispute described by the Petitioner (what was said, or not said, about that treatment) cannot be the basis of this decision because the PRIRA process lacks the hearing procedures necessary to make findings of fact based on evidence such as oral statements.

The Commissioner finds that BCBSM established that it processed Petitioner's claims in compliance with the terms of the certificate and applicable riders.

**V
ORDER**

BCBSM's final adverse determination of August 3, 2010, is upheld. BCBSM is not required to pay any additional amount for the care provided the Petitioner at the XXXXX Clinic.

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.

R. Kevin Clinton
Commissioner