

STATE OF WASHINGTON

MIKE KREIDLER
STATE INSURANCE COMMISSIONER



OFFICE OF
INSURANCE COMMISSIONER

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FILED

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Hearings Unit, DIC
Patricia D. Petersen
Chief Hearing Officer

In the Matter of)	
)	No. G2003-02
REGENCE BLUESHIELD,)	
)	
Authorized Health Care Service Contractor.)	
)	FINAL FINDINGS OF FACTS,
)	CONCLUSIONS OF LAW
)	AND ORDER ON HEARING

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COPY TO: Timothy J. Parker, Attorney at Law
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AND TO: Mike Kreidler, Insurance Commissioner
Michael G. Watson, Chief Deputy Insurance Commissioner
Carol Sureau, Deputy Commissioner, Legal Affairs
Charles D. Brown, Staff Attorney
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Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this Order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service (date of mailing) of this Order. Further, the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this Order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this Order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence

or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General in the United States mail. If a party chooses to file a petition in the Superior Court, he or she may, but is not required to, first file a request for reconsideration. For further information or to obtain copies of the applicable statutes, the parties may contact the administrative assistant to the undersigned.

NATURE OF PROCEEDING

On January 9, 2003, Regence BlueShield (hereinafter "Regence") filed its Request for Hearing in this matter to contest the Insurance Commissioner's (hereinafter "OIC") disapproval of the method in which Regence proposes to cover diabetic equipment and supplies in its health care service contracts. Specifically, by letter dated November 25, 2002, the OIC disapproved Regence's filing of Rider RBS-56, which was proposed to be attached to large and small group contracts RBS-46, -47 and -48 based upon its view that said Rider was in violation of RCW 48.44.315. (Subsequent to Regence's original January 9, 2003 request for hearing and by agreement of the parties, various other Regence filings listed in its letter of February 28, 2003, to the extent that they provide coverage for diabetic equipment and supplies, are also included in this proceeding. (See Ex. 4.)

Pursuant to Regence's Request for Hearing, an administrative hearing was held in this matter before an Administrative Law Judge with the Office of Administrative Hearings on May 15, 2003, and an Initial Decision and Order (hereinafter "Initial Decision") was entered on August 13, 2003. Said Initial Decision was transmitted to the undersigned Review Judge for review, consideration and entry of Final Findings of Facts, Conclusions of Law and Order on Hearing. Subsequently, as permitted by RCW 34.05.461(8)(a), the undersigned did waive the statutory deadline for entry of the Final Findings of Facts, Conclusions of Law and Order, for good cause shown, specifically, for an extended lack of sufficient administrative support.

REVIEW JUDGE'S CONSIDERATION

1. Review. This matter has properly come before the undersigned Review Judge to review the Initial Decision entered by the Office of Administrative Proceedings on August 13, 2003.
2. Record of Proceeding. The entire record of this proceeding was presented to the undersigned Review Judge for her review and entry of Final Findings of Facts, Conclusions of Law and Order.
3. The Insurance Commissioner's Petition for Review. In addition to the automatic

review given to all initial decisions entered relative to appeals to the OIC, by letter dated August 15, 2003 the OIC requested that the undersigned establish a briefing schedule and afford the parties the opportunity to present additional briefing concerning the initial decision in this matter, prior to review and entry of the final order. Said Order Establishing Briefing Schedule was entered by the undersigned on September 5, 2003, and the parties filed briefs pursuant to that Order. Specifically, on September 5, 2003, the Commissioner filed his OIC Staff's Brief in Response to Initial Decision and Order and on September 19, 2003 Regence filed its Regence BlueShield's Memorandum in Opposition to OIC Staff's Brief in Response to Initial Decision and Order. Finally, as documented in the aforementioned Order Establishing Briefing Schedule, Regence requested, and was granted, the opportunity to present oral argument in person in this matter; accordingly, the parties presented oral argument in person before the undersigned on October 15, 2003.

In its aforementioned brief and oral argument, the OIC argues that the Initial Decision is clearly erroneous and that the OIC's initial decision disapproving Regence's annual \$2,000 pharmacy cap rider should be affirmed. Specifically, the OIC argues 1) that the Initial Decision recites, but then ignores, the legislative intent behind the Diabetes Cost Reduction Act of 1997, which is found in RCW 48.44.315 (hereinafter "DCRA"); 2) that the Initial Decision recites, but then ignores, the deference due the OIC's interpretation of Insurance Code provisions, 3) that the Initial Decision recites, but then ignores, the OIC's discretion in approving and disapproving health care service contractor and health maintenance organization benefit contracts; 4) that the Initial Decision mischaracterizes and misunderstands the OIC's reasoning in disapproving Regence's subject rider and the OIC's argument; and 5) that the Initial Decision relies upon conclusions of law that are unsupported findings of fact directly contrary to the legislative findings upon which the DCRA is based; and therefore that the Initial Decision should not be affirmed.

In its aforementioned brief and oral argument, Regence asserts 1) that the OIC's interpretation of the DCRA is not entitled to deference; 2) that the interpretation of RCW 48.44.315 contained in the Initial Decision is consistent with the Insurance Code; and 3) that the Initial Decision is consistent with legislative intent; and therefore the Initial Decision should be affirmed.

I. FINDINGS OF FACTS

Having considered the evidence and arguments presented at the hearing, the documents on file herein, and the subsequent briefs and arguments of the parties before the undersigned, the undersigned duly appointed Review Judge makes the following findings of facts:

1. Finding of Fact No. 1 in the Initial Decision is adopted.
2. Finding of Fact No. 2 in the Initial Decision is adopted.
3. Finding of Fact No. 3 in the Initial Decision is adopted through the language "See Exhibit 2." The final two sentences in that Finding are not adopted, and are substituted by the following:

Thus, this Rider creates a benefit for diabetes supplies, including insulin and other supplies, of 50% coverage up to a maximum annual limit of \$2,000. Further, by its own wording, the Rider does not include diabetes supplies as prescription drugs. Rather, the Rider provides the definition of prescription drugs, and the coverage therefore, and then adds: *Other items covered under this Benefit and requiring a prescription include the following: insulin, insulin syringes, other diabetes supplies.* And, later in the Rider: *Pharmacy Benefits. Prescription Drugs and other covered items obtained at an approved pharmacy....* [Emphasis added.] Because Regence intends to cover diabetes supplies at the same level as prescription drug benefits, it appears simply to be the most simple method to include them at this point in the contract where that level of benefit is specified.

4. Finding of Fact No. 4 in the Initial Decision is adopted.
5. Finding of Fact No. 5 in the Initial Decision is adopted.
6. Finding of Fact No. 6 in the Initial Decision is adopted, except that the final sentence in that Finding is not adopted.
7. Finding of Fact No. 7 in the Initial Decision is not adopted, and is substituted by the following:

On February 21, 2003, OIC wrote to Regence to clarify the scope of its disapproval of the annual \$2,000 maximum benefit for diabetes equipment and supplies. OIC indicated its understanding that the pending hearing contesting disapproval of RBS-56 would also cover the various other Regence filings listed in its letter of February 28, 2003. [Ex. 4.]

8. Finding of Fact No. 8 in the Initial Decision is adopted.

II. CONCLUSIONS OF LAW

1. Conclusion of Law No. 1 in the Initial Decision is not adopted and is substituted by the following:

The Administrative Law Judge from the Office of Administrative Hearings had jurisdiction over the parties and subject matter herein and authority to enter the Initial Decision herein, pursuant to RCW 48.04.010(5) by discretionary grant of authority of the OIC, RCW 48.44.020, Chapter 34.05 RCW, and Chapter 34.12 RCW. Pursuant to RCW 48.04.010, RCW 48.44.020, Chapter 34.05 RCW and Chapter 34.12 RCW, and delegation of authority from the OIC, the undersigned Review Judge has jurisdiction over the parties and subject matter herein to review the entire hearing file and to enter the final decision herein.

2. Conclusion of Law No. 2 in the Initial Decision is adopted.
3. Conclusion of Law No. 3 in the Initial Decision is not adopted.
4. The first six sentences of Conclusion of Law No. 4 (through Footnote No. 4) in the Initial Decision are adopted. The final sentence, however, is not adopted and is substituted by the following:

At this point, however, the Commissioner must carry the burden of showing that its post-approval action disapproving RBS-56 is supported by the cause required by statute.

5. Conclusion of Law No. 5 is adopted, except that the final sentence therein not adopted and is substituted by the following:

As explained below, the DCRA affected the way that health care service contractors, health maintenance organizations (HMOs), disability insurers, and even state-purchased health care provide coverage for diabetes equipment and supplies.

6. The first sentence of Conclusion of Law No. 6 in the Initial Decision is not adopted and is substituted by the following:

The DCRA set out a minimum level of coverage for diabetes training, education, equipment and supplies which must be included in disability policies, health care service contracts (such as those Regence contracts at issue herein), health maintenance organization agreements and state-purchased health care, as follows:

The following three paragraphs of Conclusion of Law No. 6 in the Initial Decision are adopted, through Footnote No. 8.

The balance of Conclusion of Law No. 6 in the Initial Decision is not adopted,

and is substituted by the following:

Thus, the DCRA requires that all disability policies, health care service contracts, health maintenance organization agreements (and specified state-purchased health care) provide diabetics with diabetes training and education on self-care and appropriate nutrition. However, the DCRA does not require all plans to include coverage for pharmacy services: it simply requires that, as to those health plans which do provide coverage for pharmacy services, those plans must also provide coverage for medically necessary diabetes equipment and supplies.

7. Conclusion of Law No. 7 in the Initial Decision is adopted.
8. Conclusion of Law No. 8 in the Initial Decision is adopted, excepted that the final sentence is not adopted.
9. Conclusion of Law No. 9 in the Initial Decision is not adopted, and is substituted by the following:

Annual maximum benefit limits are specifically authorized under some sections of Washington's Insurance Code. The DCRA provides only, however, that *Coverage required under this section may be subject to customary cost-sharing provisions established for all other similar services or supplies within a policy.*¹

10. Conclusion of Law No. 10 in the Initial Decision is adopted.
11. Conclusion of law No. 11 in the Initial Decision is not adopted.
12. Conclusion of Law No. 12 in the Initial Decision is not adopted, and is substituted by the following:

Both RCW 48.43.005(13) and WAC 284-43-130(8) provide that "*Enrollee point-of-service cost-sharing*" or "*cost-sharing*" means amounts paid to health carriers directly providing services, health care providers, or health care facilities by enrollees and may include copayments, coinsurance, or deductibles.

These three examples of cost-sharing cover the three typical, distinctly different, examples recognize the three widely recognized types of cost-sharing provided for in health plans: 1) With copayments, the plan member is responsible to pay a portion (normally expressed as a fixed amount) of the

¹ RCW 48.44.315(3)

allowable charges for the specified health care services needed. 2) With coinsurance, the plan member is responsible to pay a portion (normally expressed as a percentage) of the allowable charges for the specified health care services needed. 3) With deductibles, the plan member incurs all of the initial costs of health care services needed, and only after reaching a threshold level does the carrier become responsible for all or part of the costs over and above the level of the deductible.

13. Conclusion of Law No. 13 in the Initial Decision is not adopted.
14. Conclusion of Law No. 14 in the Initial Decision is not adopted.
15. Conclusion of Law No. 15 in the Initial Decision is not adopted, and is substituted by the following:

An internal maximum benefit limit is not similar to any of the three traditional methods of cost-sharing. Primarily, with all three methods of cost-sharing provided for in the above cited regulation and statute, the plan member is responsible for a definite, finite, fairly foreseeable amount of the costs of the necessary health care services which he or she can know at the outset, when he or she decides to purchase a particular health plan. (This is even more so when one recognizes that caps on out-of-pocket costs are normally provided for in most health plans). After the specified deductible has been met, the plan member is never 100% responsible for an unlimited amount of costs of necessary health care services, as is the case with internal maximum benefit levels such as the one at issue herein.

Further, it cannot be reasonably concluded that internal maximums are the mirror image of deductibles. Finally, it is persuasive that, when the Legislature enacted this diabetes mandate in 1997, it could have allowed for internal maximums just as it had previously done in 1984 when it amended the home health and hospice care mandate² to add a specific allowance for "internal maximums" to its then current statute which provided that coverage may include reasonable deductibles and coinsurance provisions.

16. Conclusion of Law No. 16 of the Initial Decision is not adopted.
17. Conclusion of Law No. 17 of the Initial Decision is not adopted.
18. Conclusion of Law No. 18 of the Initial Decision is not adopted.
19. Conclusion of Law No. 19 of the Initial Decision is not adopted.

² "RCW 48.44 320(2)(a), amended 1984 to add to subsec. (2)(a) ", and internal maximums."

20. Conclusion of Law No. 20 of the Initial Decision is not adopted, and is substituted by the following:

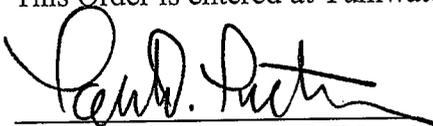
Health care service contractors may choose whether or not to offer a pharmacy benefit in their health care service contracts. However, as to those contracts which do offer pharmacy benefits, they must also offer benefits for diabetes equipment and supplies. While RCW 48.44.315(3) provides that these benefits for diabetes equipment and supplies may be subject to customary cost-sharing provisions, annual benefit limits are not an acceptable cost-sharing provision as contemplated by RCW 48.44.315(3) for implementation of the benefits required under RCW 48.44.315(2).

21. Based upon the above Findings of Facts and Conclusions of Law, Regence's imposition of internal maximums in its coverage of diabetes supplies and equipment in Rider RBS-56 and other specified riders, is in violation of RCW 48.44.315. Therefore, the OIC's disapproval of these riders should be upheld.

ORDER

IT IS HEREBY ORDERED that the Insurance Commissioner's disapproval of Regence's Rider Form RBS-56 and other similar riders specified and included herein, to the extent that they provide coverage for diabetes equipment and supplies and impose an internal maximum benefit limit thereon, is UPHELD.

This Order is entered at Tumwater, Washington, this 6th day of April, 2004.



PATRICIA D. PETERSEN
Review Judge