BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE DEPARTMENT OF ADMINISTRATION

In the Matter of P.A.	)	
	)	OAH No. 06-0254-PER
	)	Div. R&B No. 06-004

ORDER ON SUMMARY ADJUDICATION

I. Introduction

P.A. appeals a notice from the administrator regarding coverage for past massage therapy treatments and for possible treatment administered after February 9, 2006. Mr. A. and the administrator each moved for summary adjudication. Mr. A. asserts that he is entitled to ongoing coverage as a matter of law, and he seeks prospective relief. The administrator asserts that all claims for services up to the date of the appeal have been paid, and that Mr. A. is not entitled to a guarantee of future coverage based on a decision to cover previous claims. The administrative law judge finds that all previous claims have been paid and that there are therefore no issues currently ripe for appeal, and that there have been no previous acts of the administrator that would mandate future coverage of claims without review.

Because there are no issues in dispute that can be reviewed, summary adjudication is granted and this case is dismissed.

II. Facts

Mr. A. began working for the State of Alaska in 1974 and he retired in 1999.[1] From December 19, 2002, until March 13, 2003, Mr. A. received massage therapy six times.[2] On February 27, 2003, Aetna notified Mr. A. that it would not provide coverage for the treatment. On March 14, 2003, Mr. A. appealed the decision to Aetna and asked that the six claims be paid.[3] That appeal was denied on April 3, 2003;[4] Mr. A. submitted a second appeal to Aetna on June 9, 2003;[5] Aetna denied the second appeal on October 21, 2003.[6]

Mr. A. appealed Aetna's denial to the Division of Retirement and Benefits on November 4, 2003, again asking that the six therapy sessions be paid for, and that Aetna

[1] Mr. A.'s letter of May 19, 2006; *accord,* Administrator's Response to Appellant's Motion for Summary Adjudication and Administrator's Cross Motion for Summary Adjudication.
[2] *Id.*
[3] Administrator's Decision Record, page 18.
[4] Administrator's Decision Record, page 28.
[5] Administrator's Decision Record, pages 30-36.
[6] Administrator's Decision Record, page 56.

reimburse his future therapy services.[7] The division referred the matter to its independent medical review consultant, MAXIMUS Center for Health Dispute Resolution (MAXIMUS CHDR). The consultant determined that the massage therapy was not medically necessary for Mr. A.'s particular diagnoses.[8]

In spite of the fact that the independent consultant found the treatment not to be medically necessary, on April 8, 2004, former Benefits Supervisor Brenda Menge approved payment of the six massage therapy treatments in a phone call to Aetna. The only record of this decision is an electronic phone log note that reads,

> LETS GO AHEAD AND PAY THE CLAIMS IN THE APPEAL. THE DATES OF SERVICE ARE 12/19/02 01/02/03 01/16/03 02/13/03 02/27/03 03/13/03 I SENT MY RECORDS TO THE EXTERNAL REVIEWER. I GOT THE DATES ABOVE OFF HIS ORIGINAL APPEAL. I REMEMBER THE AMOUNT WAS $210.00 AND THAT IS THE AMOUNT CONNECTED TO THE CLAIMS ABOVE. THANKS BRENDA[9]

Mr. A. continued to receive massage therapy after this time, including about thirty separate treatments from March 24, 2004 through February 15, 2005. Aetna paid claims for all of these treatments.[10]

On February 13, 2006, a new benefits manager again took action on the same appeal for the six treatments in 2002 and 2003. The benefits manager sent a memo to the director recommending a curious action in which the denial of benefits would be upheld, but all services provided before February 9, 2006, would be paid anyway. On February 16, 2006, then-director Melanie Millhorn initialed the memo and checked a box stating that it was her decision to "uphold the denial of physical therapy services from February 9, 2006 forward."[11] At the time, of course, there had been no services administered or claims to deny after February 9, 2006.

III. Discussion

The administrator has the power and duty to approve or disapprove claims for retirement benefits.[12] A member may appeal a decision of the administrator to the Office of Administrative Hearings.[13]

[7] Administrator's Decision Record, page 12-16.
[8] Administrator's Decision Record, pages 8-11.
[9] Administrator's Response to Appellant's Motion for Summary Adjudication and Administrator's Cross Motion for Summary Adjudication, Exhibit A.
[10] Mr. A .'s letter of May 19, 2006, page 4.
[11] Decision record at 7.
[12] AS 39.35.004(a)(3).
[13] AS 39.35.006.

The confounding twist in this case arises from the administrator's recent "decision" that purports to both deny and pay all claims from December 19, 2002 through February 9, 2006. Confusion arises from the obvious fact that a claim cannot be both paid and denied. Although the administrator purports to be denying the claims, in fact no action has been taken on previous claims that have already been paid in accordance with a previous decision. Mr. A. appeals the new "decision" to the extent it denies his previous claims. Such an appeal is difficult to maintain when the "denied" claims have in fact been paid and the plan seeks no reimbursement. It is unclear what relief could be granted. There is a great deal of discussion and argument as to the reasons and bases for denying or granting the claims, but this discussion is academic and has no relevance as the case stands. Mr. A. wants the claims paid, and the administrator has paid them. There is no dispute as to any actual claims.

The real dispute in this case appears to be over payment of possible future claims. In the letter of February 16, 2006, the director at least implied that claims made after February 9, 2006, would be denied. Mr. A. argues that the administrator is bound by the previous decision to grant the original claims to also grant future claims. Both parties are incorrect. The administrator has the statutory duty to "approve or disapprove claims for retirement benefits."[14] These decisions may then be appealed to the Office of Administrative Hearings.[15] Claims that have not been submitted cannot be approved or disapproved. When a claim has been filed and paid, there is nothing to appeal. Until a claim has been made and the administrator has made a decision not to pay it, there is no basis for an appeal.

To the extent it purported to make decisions regarding future claims, the administrator has now changed its position and admitted that it may not do so:

> If all Mr. A. is asking is that future claims be considered under the provision of the retiree health benefit plan, there is no argument remaining and this appeal can be dismissed. The division has been doing that, and is prepared to continue to do so. If Mr. A. is insisting that all his future claims for massage therapy be granted without review then this appeal should be dismissed for failure to state a claim upon which relief can be granted. All claims are subject to review for eligibility and medical necessity....[16]

The division is not entirely correct to assert that it has been considering claims as they arise, because the director's letter suggested that it would be denying future claims that have not yet

[14] AS 39.35.004(a)(3).
[15] AS 39.35.006.
[16] *Administrator's Response to Appellant's Motion for Summary Adjudication and Administrator's Cross Motion for Summary Adjudication* at 5.

been subject to review. The administrator could have simply notified Mr. A. that it intended to perform a review of future claims for therapy, and much confusion may have been avoided. But the administrator has no authority to deny claims that have yet to arise, just as Mr. A. cannot be certain that all future claims will be covered.

The administrator is correct that all claims are subject to review. It is obvious that a patient's medical condition may change over time. Treatments that were not necessary in the past might be necessary now, or vice versa. In this case, the treatments that were originally in question were administered four years ago. Evidence of medical necessity gathered at that time will have limited relevance to treatments to be administered now and in the future. Mr. A. might need treatment now that he did not need then; he might not need any treatment in the future; or he may require newer and better treatments that have become available since 2002 and 2003.

Conceding that he lacks legal training, Mr. A. argues that principles of *res judicata* prohibit the administrator from reversing an earlier decision to grant the six claims in question. According to the Supreme Court,

> *Res judicata,* or claim preclusion,...is not always applied as rigidly in administrative proceedings as it is injudicial proceedings. When applicable, *res judicata* precludes a subsequent suit "between the same parties asserting the same claim for relief when the matter raised was or could have been decided in the first suit." It requires that "(1) the prior judgment was a final judgment on the merits, (2) a court of competent jurisdiction rendered the prior judgment, and (3) the same cause of action and same parties or their privies were involved in both suits."[17]

If the administrator were in fact attempting to reverse a decision to pay claims after a previous administrative review, Mr. A.'s argument would be correct. As noted above, the administrator is not actually reversing the previous decision regarding the six claims in 2002 and 2003. Future claims will depend on future decisions to be made by Mr. A.'s physicians and other medical providers, and may give rise to a new basis for appeal. To the extent the question of Mr. A.'s eligibility hinged on such issues as which version of the medical plan applied or whether there may have been an unconstitutional diminution of benefits, those issues were not decided on the merits. The evidence available only shows that the administrator decided "let's go ahead and pay the claims in the appeal." As to those claims, the case has been decided, but

[17] *Robertson v. American Mechanical, Inc.,* 54 P.3d 777 (Alaska 2002)(cites omitted).

none of the legal issues Mr. A. asserts were litigated. As the administrator now points out, the decision was likely made just to settle the case and close the appeal on those claims.

The administrator has also briefed the subject equitable estoppel. If the administrator had decided, after two years, to actually reverse the previous decision in Mr. A.'s favor and seek reimbursement for previously paid claims, legitimate equitable arguments against the new decision might very well be made. But because no sense can be made of a decision that purports to both deny and pay claims, and the administrator has taken no action to actually reverse the earlier decision to pay the claims in question, there is no action to which an equitable argument can be applied. The administrator has taken no new action, and there is nothing that can be appealed and no relief that can be granted at this point.

While the above discussion concludes the decision in this case, it should be noted that Mr. A.'s vigorous argument that denial of his claims for massage therapy is a constitutionally prohibited diminishment of his benefits under the Supreme Court's decision in the *Duncan* case has not been ignored.[18] In *Duncan,* the court found that health insurance should be considered on a group basis and not individually, and that termination of one element of coverage is not a prohibited diminishment if other offsetting coverage is added. The court did find that in special circumstances of serious hardship to an individual this general rule should not apply:

> Where there is an individual showing that a change results in a serious hardship that is not offset by comparable advantages, the affected individual should be allowed to retain existing coverage. This is suggested by a distinction between *Hoffbeck* and the present case. In *Hoffbeck* the detrimental change resulted in clear and specific "serious hardship" to certain individuals. By contrast, the examples that have been offered in the present case amount to detriments of at most several hundred dollars a year, without consideration of benefits. We believe that if there were an individual showing that substantial detriments were not offset by comparable advantages and that this resulted in a serious hardship, the affected individual should be protected from the change by article XII, section 7.[19]

If there were any unpaid claims at issue, Mr. A. might be entitled to a hearing on the factual issue of whether denial of the claims resulted in "a serious hardship" in his individual case, although as the quoted language above shows it would probably be necessary to show hardship that amounted to more than several hundred dollars per year in out-of-pocket costs. But

[18] *Duncan v. Retired Public Employees of Alaska,* 71 P.3d 882 (Alaska 2003).
[19] *Id.* (cites omitted).

a hearing on the matter cannot be justified when all claims have been paid, and the circumstances of potential future claims can only be speculated about.

IV. Conclusion

There are no disputed issues of fact or law in this case. Because all of the claims that have arisen have been paid, there is no further relief that could be granted to Mr. A. Any possible future claims are not ripe for consideration. Summary adjudication should be granted, and this case should be dismissed.

V. Order

IT IS HEREBY ORDERED that summary adjudication be granted, and that this case be DISMISSED.

DATED this 15th day of March, 2007.

By: DALE WHITNEY
Administrative LAw Judge

Adoption

This Order is issued under the authority of AS 39.35.006. The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 10th day of April, 2007.

By: DALE WHITNEY
Administrative Law Judge

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Case Parties
4/10/07