

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of:	)	
	)	
S L. S	)	OAH No. 12-0910-PER
	)	Agency No. 2012-1108

**DECISION**

**I. Introduction**

S S is a retired State of Alaska employee. He receives health care benefits through the Public Employees Retirement System (PERS). The PERS Administrator denied coverage for his prescription expenses for the drug Cialis (generic name of Tadalafil) because the Retiree Health Plan excludes treatment for sexual dysfunction from coverage. Mr. S requested a hearing.

Prior to the hearing, the Administrator moved for summary adjudication. Partial summary adjudication was granted, as discussed below, holding that the denial of coverage for Cialis as a treatment for sexual dysfunction did not have a gender disparate impact, *i.e.*, it did not impermissibly discriminate on the basis of gender. However, summary adjudication was partially denied because there was a factual issue: whether Mr. S was prescribed Cialis solely for the treatment of sexual dysfunction. This matter then proceeded to an evidentiary hearing on March 12, 2013.

The facts, as adduced at hearing, demonstrate that Mr. S was prescribed Cialis for the treatment of sexual dysfunction, specifically erectile dysfunction, which is excluded from coverage by the Retiree Health Plan. Consequently, the decision of the Administrator denying coverage for Mr. S’s prescription expenses for Cialis is upheld.

**II. Facts**

Mr. S is a member of the Retiree Health Plan, the self-insurance plan the State of Alaska offers to retired PERS employees. He had prostate surgery to treat his prostate cancer in June 2011.<sup>1</sup> On February 7, 2012, Mr. S’s physician submitted a prior authorization request for the prescription drug Cialis to the Retiree Health Plan. That request identified Mr. S’s diagnosis as “185 – prostate cancer/erectile dysfunction.” That request also contained the additional

---

<sup>1</sup> Record, p. 49.

justification: “receiving treatment for prostate cancer. Pt – with erectile dysfunction – requesting Cialis.”<sup>2</sup> On February 29, 2012, Mr. S’s physician submitted the following:

S S is a patient of mine who has undergone radical prostatectomy for prostate cancer. He is now undergoing postoperative radiation therapy. Mr. S is interested in improving and preserving his erectile function which was affected by his prostate surgery. Data show that PDE-5 inhibitors can improve erectile function that is reduced after surgery (also called penile rehabilitation) when used either on a regular basis . . . or an on demand basis . . . The mechanism of this improvement is thought to be secondary to improved blood flow to the penis. PDE-5 inhibitors are also helpful in reducing erectile dysfunction (ED) cause by radiation therapy (RT) since the mechanism of RT induced ED is vascular sclerosis and narrowing. Based on the above, I would urge you to cover the cost of PDE-5 inhibitor therapy for Mr. S.<sup>[3]</sup>

Cialis (generic name Tadalafil) is a phosphodiesterase (PDE-5) inhibitor approved by the federal Food and Drug Administration to treat erectile dysfunction and benign prostatic hyperplasia (enlarged prostate) symptoms.<sup>4</sup> It is also used to treat pulmonary arterial hypertension.<sup>5</sup>

The Retiree Health Plan explicitly excludes coverage for “drugs . . . for sexual dysfunctions or inadequacies.”<sup>6</sup> That exclusion has been in effect continuously since July 1, 1983.<sup>7</sup>

Mr. S’s request that the Retiree Health Care Plan pay for his Cialis prescription was denied. He appealed the denial through multiple administrative levels, which culminated in a denial from the Administrator on September 24, 2012.<sup>8</sup>

Dr. Hsi, who wrote the Cialis prescription for Mr. S, is an oncologist who has treated Mr. S. He prescribed Cialis for Mr. S, as he also does for other post-prostatectomy patients, as a preventative treatment to preserve existing erectile function.<sup>9</sup>

Dr. Malter is an internal medicine specialist, whose caseload includes post-prostatectomy patients. He reviewed the coverage denial of the Cialis prescription for the Retiree Health Plan

---

<sup>2</sup> Record, p. 48.

<sup>3</sup> Record, p. 46.

<sup>4</sup> Record, p. 59, 64.

<sup>5</sup> Record, p. 59.

<sup>6</sup> Record, p. 30.

<sup>7</sup> See PERS Motion for Summary Adjudication, Exhibit 3, pp. 10, 13, 18, 22, 26, 32, 37, 44. Prior to 1998, the exclusion is worded slightly differently. *Id.* Prior to 1983, the Plan contained an exclusion for “[c]harges for services or supplies related to . . . sexual misfunctions or inadequacies.” *Id.* at 5.

<sup>8</sup> Record, pp. 32 – 33, 35 – 38, 54.

<sup>9</sup> Dr. Hsi testimony.

and concluded that coverage should be denied under the plan exclusions because the purpose of the prescription, whether prescribed to prevent erectile dysfunction or prescribed to treat erectile dysfunction, was for the treatment of sexual dysfunction.<sup>10</sup>

### **III. Discussion**

The coverage denial for Mr. S's Cialis prescription presents two issues. The first issue is whether Mr. S was prescribed Cialis for the treatment of a sexual dysfunction. The second issue is whether the Retiree Health Plan's coverage exclusion of treatments for sexual dysfunction constitutes gender based discrimination. This second issue was resolved by partial summary adjudication, as discussed further below.

#### *A. Purpose for the Cialis Prescription*

Mr. S's physician prescribed him Cialis. That drug is used to treat erectile dysfunction, enlarged prostate symptoms, and pulmonary arterial hypertension. The physician's February 8, 2012 prior authorization request and his February 29, 2012 letter of explanation are clear that the purpose for the prescription is for erectile dysfunction.

Dr. Hsi, Mr. S's treating physician, explained at hearing that he prescribes Cialis as a preventative measure to preserve erectile function, rather than as a treatment to restore it. However, the distinction between the preservation of erectile function and the treatment of erectile dysfunction is not persuasive. A treatment to preserve erectile function is a treatment to avert erectile dysfunction. Regardless of how the underlying purpose for the Cialis prescription is characterized, its purpose was for the treatment of erectile dysfunction. A treatment to prevent erectile dysfunction is a treatment. A treatment to preserve and improve erectile function is a treatment to avert erectile dysfunction. Erectile dysfunction unquestionably falls under the category of sexual dysfunction.

Prior decisions of this Office, both of which dealt with the identical Retiree Health Plan, held that the Retiree Health Plan's provisions exclude coverage for drugs for sexual dysfunctions, specifically Cialis<sup>11</sup> and Levitra.<sup>12</sup> The express coverage exclusion contained in the Retiree Health Plan, as discussed in this Office's prior decisions, compels an identical result in this case.

---

<sup>10</sup> Dr. Malter testimony.

<sup>11</sup> *In the Matter of S. E.*, OAH Case No. 08-214-TRS (Office of Administrative Hearings 2008) (<http://aws.state.ak.us/officeofadminhearings/Documents/TRS/TRS080214.pdf>).

<sup>12</sup> *In the Matter of R. P. G.*, OAH Case No. 10-0626-PER (Office of Administrative Hearings 2011) (<http://aws.state.ak.us/officeofadminhearings/Documents/PER/PER100626.pdf>).

*B. Gender-Based Discrimination*<sup>13</sup>

In his lower level appeal proceedings, Mr. S analogized his prescription for Cialis as being comparable to post-mastectomy breast reconstruction, and argued that the Retiree Health Plan's sexual dysfunction exclusion constitutes gender based discrimination. He implicitly raised this identical point in his appeal to this Office:

A variety of statistics demonstrate, in many respects, a striking resulting between breast cancer in women and prostate cancer in men. One respect in which the parallel does not hold: our plan covers reconstruction following mastectomy – in other words it covers restoration of bodily integrity following treatment. That fact that our plan fails to afford similar care for men following a prostatectomy or other treatment for prostate cancer is more than a bit incongruous.<sup>[14]</sup>

Mr. S reiterated this argument by reference, albeit minimally, in his Opposition to the PERS' Motion for Summary Adjudication: “[m]y point concerning the inconsistency of the plan's coverage when it comes to restoration of bodily integrity, to the extent possible, seems to me to stand.”<sup>15</sup>

However, the Retiree Health Plan's coverage exclusion for drugs that treat sexual dysfunction is gender neutral on its face. Mr. S's comparison of post-mastectomy breast reconstruction to erectile dysfunction drugs, as both being “restoration[s] of bodily integrity” is not apt. First, post-mastectomy breast reconstruction, which is equally available to men and women breast cancer survivors (breast cancer occurs in both sexes), is the rebuilding of a body part, which is not the function of Cialis.<sup>16</sup> Further, the plan does not appear to exclude male genital reconstructive surgery after, for example, excision of a penile tumor. Mr. S's gender discrimination argument is insufficient to defeat the gender neutral language contained in the Retiree Health Plan, which excludes coverage for drugs for treatment of sexual dysfunction.

---

<sup>13</sup> The applicable portion of the March 4, 2013 Partial Summary Adjudication Order is provided for the sake of completeness.

<sup>14</sup> Record, p. 4.

<sup>15</sup> S Opposition to Motion for Summary Adjudication, p. 4.

<sup>16</sup> As pointed out in Emily Cotter's January 14, 2013 Affidavit, paragraph 6, post-mastectomy reconstruction is available to both men and women. *Also see* Dr. Alex Malter's January 14, 2013 Affidavit, paragraph 10: “breast reconstruction is not a treatment for sexual dysfunction.”

**IV. Conclusion**

The Administrator's decision denying Mr. S's request for coverage for his Cialis prescription is upheld.

DATED this 28<sup>th</sup> day of March, 2013.

By: Signed  
Lawrence A. Pederson  
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 26<sup>th</sup> day of April, 2013.

By: Signed  
Lawrence A. Pederson  
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]