BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	)	
	)	
N M	)	OAH No. 13-0219-PER
	)	Div. R&B No. 2013-0204

DECISION

I. Introduction

N M appeals from the administrator's decision denying her request to provide a credit of $4,825 for interest on retroactively-paid premiums for long term care insurance coverage for her late mother, F M.

The parties had entered into a settlement agreement that called for payment of interest on the premiums, and Ms. M has not established grounds for disregarding that settlement agreement. In addition, F M and K M were treated equally with respect to the payment of premiums: interest was paid by F M to the Division of Retirement and Benefits on her retroactive premiums, and interest was paid by the Division of Retirement and Benefits to K M on his reimbursed premiums.

Because Ms. M paid interest under a settlement agreement with the Division and Retirement and Benefits, no grounds for disregarding the agreement have been established, and the Ms were treated the same with respect to retroactive and reimbursed premiums, the appeal is denied.

II. Facts

K and F M, a married couple, applied on May 18, 1987, for long term care insurance through the Public Employees' Retirement System.[1] The application was not timely acted upon by the plan's third-party administrator at the time, Aetna. In 1999, the couple contacted the Division of Retirement and Benefits concerning their applications and were informed that they were no longer eligible.[2]

K and F M subsequently submitted new applications, in 2000.[3] F's was denied on May 26, 2000,[4] while K's remained under consideration. Counsel for the couple wrote to the Division on June 8, 2000, stating that because the couple met the eligibility standards in 1988, they

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1 *See* R. 83, 85, 91, 93-95.
2 *See* R. 71.
3 *See* R. 45.
4 R. 59.

anticipated approval.[5] On July 23, the couple wrote to the administrator, asking that the original applications be approved, retroactively to June 1, 1988, with Aetna, the Division, and the Ms each being responsible for one-third of the accumulated premiums, and reserving the right to appeal the denial of F M's 2000 application.[6] On July 25, K M's application was approved, effective August 1, with a monthly premium of $427.[7]

By letter dated July 28, 2000, the administrator offered the Ms retroactive coverage effective June 1, 1988, upon the Ms' payment of the full amount of the premiums for the period of retroactive coverage, with interest on those retroactive premiums.[8] Alternatively, Mr. M could simply continue the coverage under his most recent application, effective August 1. N M, the Ms' daughter (who holds their power of attorney)[9] notified the Division that the Ms wished to accept the Division's proposal for both F and K.[10] On September 18, N M clarified that Mr. M wished to continue coverage under the recent application, at his current premium, rather than to obtain retroactive coverage.[11] On September 21, payment from F in the amount of $11,870.82 having been received, F was enrolled in the Bronze program, effective May 1, 1988, and K was enrolled in the Silver program, effective August 1, 2000.[12]

On April 29, 2011, K M suffered a stroke and on May 6, 2011, he began to receive long term care at No Name.[13] On August 12, Mr. M left No Name and returned to his home, receiving regular home health care from certified nurse aides as independent service providers.[14] Beginning that fall, N M, under a power of attorney for her father, contacted Wells Fargo (then the third party administrator for the health care plan) and requested information regarding the payment of benefits under the long term care plan that he had purchased in 2000.[15] After several months, in January, 2012, Wells Fargo informed N M that the long term care plan was

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5 R. 51.
6 R. 44-45.
7 R. 42.
8 R. 38-40
9 R. 96-105.
10 R. 24, 36. According to the letter from the administrator, the total amount of K's obligation for premiums and interest was $19,792.90; the amount shown for K's payment in the listed options was the amount shown as F's obligation.
11 R. 32.
12 R. 27. It is unclear why the effective date was May 1, rather than the June 1 date stated in the administrator's letter. The M' applications were dated May 18, 1987. R. 93-95.
13 Resp. at 7.
14 Resp. 7.
15 Resp. at 7-8.

administered by Univita.[16] On January 21 and 27, 2012, N contacted Univita and requested the payment of benefits under the long term care plan.[17] On February 20, 2012, Univita notified N M that benefits would be paid for covered services effective August 4, 2011, and that, as provided in the plan, K M's payment of monthly premiums in the amount of $427 for the coverage would be waived effective September 1, 2011.[18] On February 23, Mr. M was paid benefits for expenses at No Name.[19]

Towards the end of February, N M submitted a claim for benefits for the home health care services that Mr. M had been receiving from an individual service provider after he left No Name.[20] On March 2 and 16, Univita wrote to Mr. M requesting additional information in order to process the claim for home health care services.[21] On March 30, Univita denied Mr. M's claim for benefits for home health care services.[22] Mr. M filed an appeal of the denial of that claim.[23]

On April 26, Mr. M contracted with No Name Care to provide him with home health care services.[24] On May 22, Univita approved No Name as a home health care provider and authorized payment of benefits for six months.[25] Notwithstanding that No Name had been approved, the Division of Retirement and Benefits continued to deduct monthly long term care premiums from K M's monthly retirement benefit checks.[26]

On October 9, 2012, Mr. M's appeal of the denial of benefits for home health care services by an individual service provider for the period from August, 2011-April 2012 was granted; he was paid benefits totaling $8,125 for those services.[27] In conjunction with that decision, the Division, consistent with the plan, reimbursed Mr. M for the premiums he had paid during the time he was receiving home health care services from an individual service provider,

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16 Resp. at 8.

17 Resp. at 8.

18 Resp. at 5 (monthly amount), 8. *See* Motion, Exhibit B, p. 5 ("Once the claims administrator begins to make benefit payments under this LTC Plan, you will not need to pay LTC premiums for that person during the benefit period…. Premium payments will resume on the first of the month following the end of that benefit period.").

19 Resp. at 8.

20 Resp. at 8. The claim was limited to one week's services.

21 Resp. at 9.

22 Resp. at 9.

23 *See* Resp. at 11.

24 Resp. at 10.

25 Resp. at 10-11.

26 Resp. at 5-6; *see* note 18, *supra*. It is not clear why the Division continued to deduct premiums after No Name was approved as a home health care provider in May, 2012.

27 Resp. at 11.

as well for the premiums he had paid after No Name had been approved as a home health care provider, and deductions from his monthly retirement benefit check were terminated effective October 1, 2012.[28]

The Division's premium reimbursement payments did not include interest. N M was extremely frustrated by the lengthy, opaque and convoluted claims process. Recalling that her mother had paid interest on retroactive premiums she had paid to the Division in 2000, N M was also upset that the Division had not paid interest on the premiums reimbursed to her father (and that it had continued to deduct premiums after No Name was approved as his provider), and she brought the discrepancy in the treatment of interest to the attention of the Division.[29] Brian Schmidt reviewed the matter and responded that "[t]here are no provisions of this plan that allow for payment of interest in the reimbursement of LTC premiums" and (incorrectly) that "no interest was paid when [F] was reimbursed LTC premiums."[30] N M responded, noting that in fact F had paid interest on the retroactive premiums she had paid to the Division, and requesting that the interest she paid be refunded to her.[31] In response, the Division paid interest on the premiums it had reimbursed to Mr. M.[32] On January 13, 2013, the administrator denied N M's request that the Division refund to F the interest that she had paid on retroactive premiums.[33]

III. Analysis

The administrator has filed a motion for summary adjudication. Summary adjudication may be granted when the undisputed evidence establishes that one party or the other is entitled to a decision in its favor as a matter of law.

In this case, it is undisputed that the parties entered into a settlement agreement calling for the Division to provide long term health care coverage for F M retroactively, and for F to pay the accrued premiums, plus interest, for the period of retroactive coverage. The Division's motion argues that the settlement agreement is consistent with law and public policy and should be enforced according to its terms. Settlement agreements are favored and should not lightly be set aside.[34] However, they may be rescinded if induced by mistake, fraud or duress.[35]

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28 Resp. 22.

29 R. 21.

30 R. 21. The latter statement was incorrect: (1) F did not receive reimbursed premiums; she paid retroactive premiums; (2) F did pay interest on the retroactive premiums.

31 R. 20.

32 R. 20.

33 R. 10-11.

34 *See, e.g.*, DeSalvo v. Bryant, 42 P.3d 525, 528 (Alaska 2002); Interior Credit Bureau, Inc. v. Bussing, 559 P.2d 104, 106 (Alaska 1977).

The Ms argue that the provision of the settlement agreement calling for payment of interest on the retroactive premiums should be disregarded, for two reasons. First, "the State should be held to the same standards as its insured", and if Division is not obligated to pay interest on reimbursed premiums, then neither was F obligated to pay interest on retroactive premiums.[36] Second, the Division is estopped to retain the interest, because it represented that F M was obligated to pay interest, the Ms relied on that representation, and "[a]llowing the division to charge interest inconsistently and without written authorization is prejudicial to plan members."[37]

With respect to the Ms' arguments, the fact is that the Division has provided exactly the same treatment for interest on reimbursed premiums as it has for interest on retroactive premiums: it paid interest on K M's reimbursed premiums, just as F M paid interest on her retroactive premiums. The basis of the Ms' objection is not what the Division has done, but rather what it has said: that payment of interest on retroactive premiums is required and payment of interest on reimbursed premiums is voluntary. The Ms' argument comes down to this: if (1) the Division was not required to pay interest on reimbursed premiums, then (2) neither was F required to pay interest on retroactive payments, and, because (3) the Division did not tell F that was so, (4) her assent to the agreement was obtained by mistake (or fraud) and (5) that provision of the settlement agreement should be set aside.

Let us examine each step of that argument. First, is it true that the Division is not required to pay interest on reimbursed premiums? The Division has said that is so, but it has offered no authority for the proposition: it has merely noted that nothing in the long term care plan requires that it do so. But neither does anything in the plan require that an insured pay interest on retroactive premiums. Payment of interest on retroactive premiums is necessary, according to the Division, not because a statute, regulation or contract requires it, but because the Division has an obligation to protect the plan from the loss resulting from an insured's nonpayment of interest on retroactive premiums. But the Division has not suggested any reason why it does not owe an equal obligation to protect an insured against loss resulting from the plan's failure to pay interest on reimbursed premiums. In the absence of any authority for the proposition that the Division has an obligation to protect the plan against loss, but no

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35 Watega v. Watega, 143 P.3d 658, 666 (Alaska 2006).
36 *See* Response at 2-4.
37 *See* Response at 4-5.

corresponding obligation to protect an insured against loss, one might reasonably question whether the first premise of the Ms' argument is valid. It may well be that, notwithstanding the Division's opinion, the Division has just as great an obligation to pay interest on reimbursed premiums as it does to obtain interest on retroactive premiums.

Second, assuming that the Division has no obligation to pay interest on reimbursed premiums, does this necessarily mean that an insured has no obligation to pay interest on retroactive payments? In terms of a legal or contractual obligation, it does not, since the legal and contractual obligations of the parties are determined according to the law and their contract, and it isn't unusual for parties to have different legal or contractual obligations. In terms of fairness, of course, the Ms have a point. But the fairness argument cuts both ways: that is, since F paid interest on retroactive program, then it is fair that the Division should pay as well, and it did. Fairness lies in treating the payment of interest by Division and the Ms to the other the same, to the extent the law and their contract allow.

Turning to the third part of the argument, which concerns what the Division communicated to F, the Division's letter to her stated:

> [T]o protect the interests of other retirees paying premiums for this coverage, we must enroll you retroactively to the date you would have been approved, June 1, 1988. To do this we must collect premiums and interest due back to that date.[38]

The quoted language says that the Division "must" collect retroactive premiums and interest in order "to protect the interests of other retirees paying premiums." But the dispute between the Division and F M was not about paying retroactive premiums and interest, it was about obtaining long term care insurance coverage. The Division's position was that it did not need to provide retroactive coverage at all. The Division's letter simply communicates that the Division would insist on the payment of premiums and interest as a condition of granting retroactive coverage. The Division said nothing about the existence or non-existence of a legal or contractual obligation to pay interest as to either the Division or F, and F accepted the Division's offer in the form it was made.

Fourth, was F's consent obtained by mistake or fraud? No. There is no evidence that she had any opinion, at the time, about whether the Division would, or was required to, pay interest on reimbursed premiums. Thus, F was not mistaken about whether or not the Division was required to pay interest on reimbursed payments; rather, she was

[38] R. 39.

uninformed. Nor did the Division act with any sort of fraudulent intent. The Division's position, so far as the evidence indicates, has consistently been that it in order to protect the plan against loss, it must collect interest when accepting retroactive premium payments, but that it has no legal or contractual obligation to pay interest when reimbursing premium payments. At the time of the settlement agreement, neither of the parties anticipated a dispute regarding reimbursement of premiums, and thus the Division had no obligation to disclose, nor reason to conceal, its opinion that it would not be required to pay interest in the event it eventually had to reimburse premium payments to either K or F.

Fifth, even if one were to conclude that the F was mistaken, or that Division fraudulently concealed that, in its opinion, the Division is not required to pay interest on reimbursed premiums, what is the appropriate solution? Certainly, it would not be appropriate to undo the settlement in its entirety, as that would require the Ms to repay all of the benefits received on behalf F over the years, followed by litigation over whether the Division actually was required to provide retroactive coverage. A modification of the agreement, at most, would be appropriate. But what modification should that be: to require the Division to refund the interest payments it received from F, or to require the Division to pay interest on K's reimbursed premiums? Surely, the latter: interest is appropriately paid by <u>both</u> parties, because payment of interest is necessary in order to compensate the other party for the loss of use of the money during the period it was not paid. That the Ms paid more in interest than did the Division simply reflects the fact that F's retroactive premiums were substantially larger, and covered a longer period of time, than K's reimbursed premiums.

For the foregoing reasons, the Ms have not provided evidence from which it might reasonably be concluded that the settlement agreement should be modified in the manner they suggest. In fact, the Ms' response to the Division's motion does not so much suggest that the settlement agreement was induced by mistake or fraud as it does raise their objections to the manner in which the Division and its agents (the third party administrators) handled their participation in long term care program, both with respect to their initial application and, more recently, with respect to K M's claim for coverage beginning in 2011. The former issue was resolved by the settlement agreement, and notwithstanding the lengthy and often confusing process the Ms were subjected to, Mr. M ultimately received the coverage he requested. The Ms

also object that the Division's policy with respect to the payment of interest on retroactive and reimbursed premium payments should be clearly established and applied equally to all parties. However, this appeal is limited to the manner in which interest was treated with respect to F and K M. In the end, the Division treated them equally.

III. Conclusion

The Ms agreed to accept retroactive coverage for F M conditioned on the payment of retroactive premiums and interest. They have shown no reason why they should be relieved from that agreement. Their appeal is denied.

DATED June 10, 2013.

Signed
Andrew M. Hemenway
Administrative Law Judge

Adoption

The order is issued under authority of AS 39.35.006. The undersigned, in accordance with AS 44.64.060(e)(1), adopts this Decision 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 11th day of July, 2013.

By: *Signed*
Andrew M. Hemenway
Administrative Law Judge

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