

The Plan denied the insurance claim, providing as an explanation that “immunizations are not covered by the plan.”⁵ Mr. J submitted a first level appeal, which was denied with the following explanation:

[T]he decision is to uphold the denial for these services as they are not covered under the terms of your plan. Please refer to pages 51-57 from your benefit booklet. The benefit booklet indicates the following:

**Medical Expenses Not Covered
Limitations and Exclusions**

- Services or supplies not specifically listed as a covered benefit under the Medical Plan.⁶

Mr. J then submitted a second level appeal, which was denied with the following explanation:

[T]he shingles vaccination is not covered under the terms of your plan. Please refer to the employee benefit booklet on page 37. The booklet indicates routine immunizations are not covered... :

Please refer to your benefit booklet starting on page 51. The benefit booklet indicates the following:

**Medical Expenses Not Covered
Limitations and Exclusions**

- Services or supplies not specifically listed as a covered benefit under the Medical Plan.⁷

Mr. J then submitted a third level appeal, in which he argued that the shingles vaccination is “covered under Prescription Drugs in the benefit booklet,” and that it is “not a routine immunization like a flue [*sic*] shot but a prescription medication and was given only after a personal review of my age and medical history by my doctor.”⁸

Both the first level and second level appeals had been denied by letters from HealthSmart, a contractor that acts as a claims administrator for the Plan. The third level appeal was denied by a manager within the Division of Retirement and Benefits (“Division”), acting as the Plan Administrator. He wrote:

Your physician prescribed the vaccination to you and referenced diagnosis code V05.8 on the claim form. According to the American Medical Association, diagnosis code V05.8 indicates a prophylactic vaccination and inoculation against a single, otherwise specified disease.

⁵ R. 37.

⁶ R. 33.

⁷ R. 24.

⁸ R. 15.

The Retiree insurance Information Booklet ... states on page 32, “The Plan pays for prescription drugs for the treatment of an illness, disease, or injury if dispensed upon prescription of a provider... .” ... Your provider clearly indicated on the claim form that the vaccination prescribed was prophylactic in nature, and therefore it was not prescribed for the treatment of an illness. Therefore I must uphold the claims administrator’s determination... .⁹

Mr. J then submitted an email in which he stated that he was appealing the third level denial.¹⁰ At about the same time, however, his physician submitted the “corrected claim” mentioned above, in which the physician listed the additional diagnostic code V13.89. Mr. J notified the Division regarding the submission of the corrected claim form, and the Division acknowledged this notification, advising him that, “[u]pon receipt of the outcome of the corrected claim,” he should let them know whether he intended to continue with his “OAH level appeal.”¹¹ Subsequently, the Administrator issued a second denial of the third level appeal, after apparently taking into account the corrected claim.¹² This denial document, however, does not appear in the agency record.

In any event, Mr. J then followed up with his formal appeal to this office. During a case planning conference, the parties agreed that there were no facts in dispute and the matter could be decided without a hearing. They submitted their written summary adjudication filings, and the record of this matter was closed.

III. Analysis

In his letter attached to his notice of appeal to this office, Mr. J noted the Administrator’s position that “the shingles medication given was prophylactic in nature and therefore not covered,” and he quotes the Plan language that it “pays for prescription drugs for the treatment of an illness, disease, or injury... .”¹³ He then argues that the vaccination was “treatment for my chicken pox affliction [that] conforms to this provision of the Plan.”¹⁴ Mr. J restates this argument in slightly different language in his summary adjudication response, arguing that “shingles and chicken pox are medically bonded through a common virus”; that his physician’s corrected claim accounted for that linkage with the

⁹ R. 12.
¹⁰ R. 10.
¹¹ R. 9.
¹² See R. 3.
¹³ R. 3.
¹⁴ *Id.*

diagnostic code V13.89; that he was already infected with the virus when he received the injection; and that the vaccination thus was a treatment for a virus that he already had. He argues, in essence, that chickenpox and shingles are just different manifestations or symptoms of the same disease. He distinguishes the shingles injection from a flu shot vaccination, which he argues is “rightfully described as prophylactic because it blocks a virus from infecting” a person. Mr. J concludes that the shingles vaccination “offers a method of ‘treatment’ for controlling and containing an existing virus” that had already infected his body.

The Administrator, on the other hand, argues in its summary adjudication motion that the Plan only covers prescription drugs for “treatment of an illness [or] disease”; that medical literature establishes that shingles “is a very different illness” than chickenpox; that it is undisputed that Mr. J did not have symptoms of shingles when he received the injection; and that the shingles vaccination is a preventative, prophylactic vaccination rather than a “treatment” of an illness or disease.¹⁵ In constructing this argument, the Administrator cites the diagnostic code V05.8 used by Mr. J’s physician in connection with the insurance claim, which it paraphrases as a “prophylactic vaccination and inoculation against a single, otherwise specified disease.” Therefore, the Administrator asserts that the vaccination is not covered under the terms of the Plan.

Under the specific facts of this case, Mr. J has the better argument. In examining this question, one must start by recognizing that the Plan is an insurance contract between Mr. J and PERS. Under Alaska law, any ambiguity in such a contract must be construed in a manner that gives effect to “a policyholder’s reasonable expectations of coverage.”¹⁶ Although Alaska does not appear to have applied this principle to a dispute about health

¹⁵ The Administrator also raises an argument in its summary adjudication motion that was never mentioned in the three appeal decisions below: that the Plan excludes coverage for “[a]ny drug entirely consumed at the time and place it is prescribed.” Administrator Motion at 2. This assertion, however, is not further developed or supported by any factual assertions in the brief to establish that the shingles vaccination falls within its terms. Mr. J notes this omission in his response, and he proceeds to successfully rebut the argument on its merits. J Response at 3.

¹⁶ *INA Life Ins. Co. v. Brundin*, 533 P.2d 236, 242 (Alaska 1975) (construing accidental death and dismemberment policy); *see also U.S. Fire Ins. Co. v. Colver*, 600 P.2d 1, 3 (Alaska 1979) (construing construction company’s general liability policy); *Serradell v. Hartford Acc. and Indem. Co.*, 843 P.2d 639 (Alaska 1992) (construing group accident insurance policy and commenting that “insurance contracts are to be construed so as to provide that coverage which a layperson would have reasonably expected from a lay interpretation of the policy terms”).

insurance coverage, other jurisdictions have done so.¹⁷ In any event, there would appear to be no compelling reason to treat health insurance any differently than other insurance policies.

Next, one must examine the pertinent policy language and determine if an ambiguity exists regarding the question of whether the Plan covers Mr. J's shingles shot. There is no dispute the Plan contains no express language excluding from coverage either shingles vaccinations specifically, or "prophylactic" injections or inoculations generally. The Plan's only relevant language is the provision excluding from coverage "[s]ervices or supplies not specifically listed as a covered benefit," and the provision stating that the Plan covers prescription drugs for "treatment of an illness [or] disease." Taken together, these two provisions would exclude the shingles vaccination from coverage if it were deemed to not constitute a treatment of an illness or disease.

Whether a shingles vaccination constitutes a treatment of an illness or disease is ambiguous. This is because if a person previously contracted chickenpox, he or she is permanently infected with the virus, which is known as "varicella-zoster virus." Thus the vaccination can just as easily be characterized as a treatment for the already-present virus, as it can be characterized as a preventative, prophylactic measure. The Administrator attempts to avoid this ambiguity by citing medical literature (a *New York Times* article authored by a physician at the National Institute of Allergy and Infectious Diseases) to the effect that shingles "is a very different illness" than chickenpox.¹⁸ Under the Administrator's theory, an individual who previously had chickenpox receives the vaccination in order to prevent the onset of the entirely distinct illness of shingles.

The Administrator's filings in this matter, however, never address the additional code cited in the physician's corrected claim, code V13.89, which can be paraphrased as "personal history of other specified diseases." Presumably the Administrator's final, third level appeal decision addressed this diagnostic code, as it was apparently issued in response to the corrected claim; but as noted above, that decisional document does not appear in the record. Nor does the Administrator address the argument in its summary adjudication papers. Mr. J makes the

¹⁷ See *Sanchez v. TakeCare Ins. Co.*, 2010 WL 5148074 (D. Guam 2010) (noting that Ninth Circuit and California both treat insurance policies as adhesion contracts, to be interpreted according to the reasonable expectations of the insured, and therefore any exclusions must be conspicuous, plain, and clear); *Doble v. Mega Life & Health Ins. Co.*, 2010 WL 3702441 (N.D. Cal. 2010) (applying the same principle and construing coverage for "equipment and supplies" for diabetes treatment to include prosthetic leg and wheelchair for amputee).

¹⁸ See Exh. E, p. 1.

entirely plausible argument that by including the V13.89 code, his physician was indicating that “shingles and chicken pox are medically bonded through a common virus,”¹⁹ i.e., that they simply are separate symptoms of the same disease.²⁰ This is a compelling argument. The Administrator’s failure to address the additional diagnostic code is fatal to its position on this issue.²¹

Having concluded that the Plan is ambiguous regarding coverage of Mr. J’s shingles vaccination, one must construe the Plan in a manner that gives effect to his reasonable expectations of coverage as the policyholder. Is it reasonable for Mr. J to expect coverage here? In his view, he became infected with the virus when he got chickenpox during his childhood. The shingles vaccination was a “treatment” for the virus already in his body, given to him pursuant to his physician’s recommendation, at a time when he was not showing any symptoms of the disease.²² There is nothing unreasonable about this point of view. The Plan, therefore, must be construed as covering the cost of Mr. J’s shingles vaccination.

The Plan, however, includes a clear, explicit exclusion for “[t]he administration or injection of any drug.”²³ The \$39 cost of administering the vaccination, therefore, is not covered by the Plan.

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¹⁹ J Response at 1.

²⁰ See J Response at 2 (“they are only different symptoms of the same virus”).

²¹ If this case involved a dispute of a greater magnitude than the \$224 cost of Mr. J’s vaccination, an additional round of briefing or a hearing might be warranted to allow the Administrator another opportunity to respond to this issue. Such an opportunity might also allow consideration of the fact that both the Centers for Disease Control and National Institute of Health characterize chickenpox and shingles together as “VZV disease.” See, e.g., “Varicella (Chickenpox) and Herpes Zoster (Shingles): Overview of VZV Disease...” http://www.cdc.gov/vaccines/vpd-vac/shingles/downloads/VZV_clinical_slideset_Jul2010.pdf; “Guidelines for the Prevention and Treatment of Opportunistic Infections in HIV-Infected Adults and Adolescents, Non-CMV Herpes Varicella-Zoster Virus Disease,” <http://aidsinfo.nih.gov/guidelines/html/4/adult-and-adolescent-oi-prevention-and-treatment-guidelines/341/vzv>.

The CDC refers to chickenpox as the “primary infection” and shingles as the “recurrent infection” of this disease. See <http://www.cdc.gov/vaccines/pubs/pinkbook/varicella.html#zostervirus>.

Because resolution of this case turns on the additional diagnostic code provided by Mr. J’s physician, however, we need not reopen the record in this case to hold a 2 AAC 64.300(a) proceeding.

²² There is no dispute that the vaccination is not used to “treat” shingles once a person is experiencing the shingles symptoms (see Exh. C); but, this fact begs the question of whether the vaccination is properly characterized as a treatment or a preventative measure.

²³ Exh. F, p. 2.

IV. Conclusion

The Administrator’s decision denying coverage of Mr. J’s shingles vaccination is reversed as to the \$185 cost of the prescribed drug, and affirmed as to the \$39 cost of administering the injection.

Dated this 10th day of April, 2015.

Signed _____
Andrew M. Lebo
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 11th day of May, 2015.

By: *Signed* _____
Andrew M. Lebo
Administrative Law Judge

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