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

In the Matter of :

B.D.

OAH No. 06-0J 96-TRS
Div. R&B No. 06-001

**ORDER GRANTING MOTION TO DISMISS**

**I. Introduction**

B.D. appeals decisions made by the administrator to deny 22 claims for massage or physical therapy. After some preliminary proceedings, the administrator paid the claims and moved for dismissal of the case. Ms. D. opposes the administrator's motion to dismiss.

**II. Facts**

Ms. D. received chiropractic and massage or physical therapy services on a number of occasions between September, 2002, and March, 2005. Aetna, the insurer, paid a number of different claims, but it also denied some. Ms. D. appealed the denied claims to the administrator, who referred the matter for a medical review by an independent medical review organization. The independent reviewer found that denial of the chiropractic claims was in error, and it recommended that the claims be approved. The reviewer was unable to obtain information it felt was necessary to review the physical therapy claims, and made no recommendation for those claims.[1] On February 3, 2006, the administrator paid the claims for chiropractic services, but denied the claims for physical therapy based on a lack of information.[2] On February 28, 2006, Ms. D. appealed the denial of coverage for 22 specific claims for physical therapy that had been denied between September 27, 2002, and March 8, 2005, totaling $1,600.[3] On August 30, 2006, the administrator directed AETNA to send Ms. D. a check for $1,625 in payment of all 22 claims. AETNA sent the check, and the administrator filed a motion to dismiss the case.

Ms. D. opposed the administrator's motion to dismiss. She asserts that in addition to the 22 claims that were originally denied, there are also five other claims from 2005 totaling $363 that have neither been approved nor denied. Ms. D. argues that this case should be expanded to include a determination of whether "the state has wrongfully denied those claims by

[1] Administrator's Exhibit AC.
[2] AD, AE.
[3] AF, pp. 5-6.

refusing to even act on them, and whether it is obligated by its previous coverage determinations to pay them." Ms. D. argues that "the State" is estopped from denying claims because in the past it has covered claims for similar treatment. Ms. D. argues that she is entitled to a prospective order requiring the administrator to approve similar claims in the future. Finally, Ms. D. argues that she is entitled to present evidence that "the State" has acted in bad faith, and that she should be permitted to claim expenses and attorney fees.

**III. Discussion**

The administrator has the power and duty to approve or disapprove claims for retirement benefits.[4] A member may appeal a decision of the administrator to the Office of Administrative Hearings.[5]

The administrator argues that this case is now moot, because it has reversed its decision and paid the 22 claims that Ms. D. appealed. Most of the administrator's brief addressed the public interest exception to the mootness doctrine that it anticipated Ms. D. would rely on. Ms. D. does not dispute that a moot case should be dismissed nor does she rely on the public interest exception. Rather, she argues that the case is not moot.

Ms. D. first argues that the five pending claims should be considered a part of this case. The administrator has not made a decision regarding these claims, which date back to April 12, 2005. Ms. D. argues that the administrator has made a decision by refusing to act on the claims.

Administrative convenience and economy can be served in some instances by joining appeals that have similar facts and issues, but there is no rule that requires joinder of similar cases. It appears that Ms. D. receives various kinds of treatments on at least a weekly basis. Continuing to add claims to an existing case creates the potential prospect of a case that might never come to a conclusion, as pending claims continue to arise. A more important reason to decline Ms. D.'s invitation to consider the pending claims as ripe appeals that should be joined to this case is that the issues are different. Whether a claim that has not been acted upon by the administrator represents a "decision" of the administrator that may be appealed to the Office of Administrative Hearings is not at issue in this case. This case is an appeal of 22 specific decisions the administrator made to deny individual claims. Those claims have now been paid.

[4] AS 14.25.004(a)(3).
[5] AS 14.25.006.

Ms. D. argues that the administrator is bound by principles of equitable estoppel to pay the claims at issue in this case in accordance with a decision it made to pay earlier claims. Regardless of the possible merits of this argument, the administrator has paid the claims. Ms. D. has received the relief she is requesting. Whether the administrator is estopped from denying coverage cannot be considered a live issue when the administrator already has reversed its decision to deny coverage and has paid the claims in question.

Ms. D. states that "there is also a live controversy with respect to the standards which govern Ms. D.'s coverage under her plan booklet." Ms. D. argues that the administrator has used selective and misleading quotes from the language of the plan to distort coverage available. Again, the administrator has apparently elected not to argue the point with Ms. D., and has paid the claims. There is no point to further inquiry on the matter.

Ms. D. argues that denial of the claims, which have now been paid, rises to an unconstitutional diminishment of her benefits. Without addressing the question of whether an executive branch hearing officer has the authority to examine a constitutional claim, Ms. D. argues,

> The question before the tribunal, squarely presented and still in controversy between these two parties, is whether the diminishment is unconstitutional under the court's holding in *D. v. RPEA*. The state notes that this issue has been more fully briefed in connection with the Memorandum on Dates of Service and Applicable Plan Coverage. For these purposes it is sufficient to note that there is dispute as to whether Ms. D. can establish "an individual showing that a change results in a serious hardship that is not offset by comparable advantages" so that she should "be allowed to retain existing coverage." She is entitled to argue and present evidence that the State has caused such a hardship and that her future massage therapy claims must be honored. (Footnotes omitted.)[6]

There is no question in controversy on this point, because the administrator has not made any decision regarding future claims. Until a decision has been made, there is nothing that may properly be appealed to the Office of Administrative Hearings under AS 14.25.006.

Ms. D. argues that she is entitled to an evidentiary hearing to show that "the State" has acted in bad faith, and that "she is entitled to persuade the OAH that those fees were incurred as a result of the State's bad faith handling of her benefit claims." In conducting any administrative hearing, the administrative law judge may

[6] Opposition to Motion to Dismiss at 6.

> exercise the powers authorized by law for exercise by that agency in the performance of its duties in connection with the hearing. An administrative law judge may...order a party, a party's attorney, or another authorized representative of a party to pay reasonable expenses, including attorney's fees, incurred by another party as a result of actions done in bad faith or as a result of tactics used frivolously or solely intended to cause unnecessary delay."[7]

Asserting that the state is a fiduciary and that it has "fallen far short of meeting its obligations under state or federal law governing its fiduciary responsibilities," Ms. D. states:

> The evidence of bad faith in this case is overwhelming. The evidence at the hearing will show that the claim process, as constructed by the State, presents the retiree with a moving target that she can never hit. Among other indicia of bad faith, Ms. D. will show:
>
> - Constantly changing coverage determinations.
> - Reversals of long-standing coverage determinations.
> - Deliberate misapplication or ignoring of relevant coverage criteria.
> - Inconsistent plan language being interpreted in the light least favorable to the retiree.
> - Shifting demands for information from providers to justify claims.
> - Failure to explain the reasons for coverage denials.
> - Refusal to provide complete documentation for the denial of claims.
> - Loss or misplacement of the retiree's medical records.
> - Repeated demands for medical records that had already been provided.
> - Financial coercion through delaying the decision to provide coverage until after the State knew that the retiree had incurred substantial legal fees.
>
> The question before the tribunal will be whether the State did those things, and if so, whether they amount to bad faith.[8]

The authority of an administrative law judge to order payment of expenses for bad faith must be read in context. AS 44.64.040(b) authorizes the ALJ to exercise powers "in conducting an administrative hearing." The instances of bad faith that Ms. D. alleges arose prior to the filing of her appeal with the Office of Administrative Hearings. They are based on "obligations under state or federal law" and have nothing to do with the conduct of the hearing.

In this case, the administrator's counsel has appeared promptly and been prepared at all prehearing conferences. She has made efforts at conferences to narrow the issues in dispute and to expedite the hearing. She has briefed procedural issues, communicated with opposing

[7] AS 44.64.040(b)(2).
[8] Opposition to Motion to Dismiss at 8.

counsel, and was accommodating of opposing counsel's previously scheduled three-month vacation. The administrator's attorney timely consulted with her client, and conveyed the decision to pay all of the disputed claims well before the scheduled hearing date. The administrator's attorney requested status conferences when the procedural standing of the case was unclear, and prompted the A L J to keep the case on track to avoid unnecessary effort by both parties.

Ms. D. has not alleged any instances of bad faith *in the conduct of the hearing.* None are apparent from the record. If Ms. D. has rights to redress arising under state or federal law, she may wish to seek a remedy in court. In her Opposition to Motion to Dismiss, Ms. D. states that "the resolution of those issues [she is contesting] will dictate Ms. D.'s future benefits; she has no way to receive a judicial determination unless this court is willing to review them."

The Office of Administrative Hearings is an executive branch agency with jurisdictional authority granted by AS 44.64.030. Paragraph (d) of that statute specifically states that "nothing in this chapter may be construed to create a right to a hearing or to require a hearing that is not required under other law." Other law, specifically AS 14.25.006, requires and allows the Office of Administrative Hearings to grant Ms. D. an opportunity to appeal decisions of the administrator. Ms. D. has appealed 22 decisions to deny coverage. The administrator has reversed each of the 22 decisions and granted the claims in each case. There have been no alleged or apparent acts of bad faith in the conduct of the hearing. There is nothing further for the O A H to decide in this matter.

**IV. Conclusion**

A11 of the disputed issues in this case are either moot or beyond the jurisdiction of the Office of Administrative Hearings. The administrator's motion to dismiss should be granted.

**V. Order**

IT IS HEREBY ORDERED that this case be DISMISSED.

DATED this 31st day of January, 2007.

By: DALE WHITNEY
Administrative Law Judge

## Adoption

This Order is issued under the authority of AS 14.25.006. 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 1st day of March, 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
3/1/07