

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

In the Matter of:

R.S.

OAH No. 06-0176-TRS

DECISION AND ORDER ON SUMMARY ADJUDICATION

I. Introduction

This case is R.S.'s appeal of the denial of her request for Alaska Care Retiree Health Plan (Plan) coverage for preauthorization to undergo a duodenal switch surgery for treatment of morbid obesity. The Division of Retirement and Benefits (Division) denied Ms. S.'s request for preauthorization of duodenal switch surgery on January 31, 2006. Ms. S.'s appeal of this denial was referred to Office of Administrative Hearings (OAH). Joan M. Wilkerson, Assistant Attorney General, represented the Division.

The Division filed a motion for summary adjudication. Ms. S. filed a response to the Division's motion. Summary adjudication is granted to the Division based on the undisputed facts in this case.

II. Facts

A. History

R.S. retired under the Teachers' Retirement System (TERS) on July 1, 1999. Ms. S. receives health insurance benefits through TERS. On Ms. S.'s request, her health provider requested preauthorization for duodenal switch surgery, surgical procedure for the treatment.¹ The Division denied her request.² The Division based its decision on the undisputed fact that this procedure is specifically excluded from coverage under the 2003 TERS Retiree Health Plan, which is currently in effect.³ The Division also denied

¹ Ex. C.

² Ex. D, F & H.

³ Ex. D.

coverage because the administrator of the TERS insurance at the time, Aetna, made a determination that duodenal switch surgery was "experimental or investigational."⁴

Ms. S. had provided the Division with documentation of the medical community's growing acceptance of duodenal switch surgery.⁵ In her letter to the Division dated May 9, 2005, Ms. S. explained that several major health insurance carriers including the Government Employee Health Association, had approved coverage for this procedure, and that in June of 2003, the American Society for Bariatric Surgery recognized that duodenal switch surgery was an appropriate and accepted treatment for obesity.⁶

In its motion, the Division argued that Ms. S. was not entitled an evidentiary hearing because there was no dispute that duodenal switch surgery is explicitly excluded from coverage. The Division also argued that even if coverage for duodenal switch surgery could have been granted if Aetna had found that duodenal switch surgery was no longer "experimental or investigational." Aetna's denial of coverage of a treatment based a finding that the treatment is "experimental or investigational" is not a finding that can be challenged in an administrative appeal. The Division argued Ms. S. could not, therefore, challenge Aetna's finding that duodenal switch surgery was "experimental or investigational" in her appeal before OAH.

Ms. S. argued that the Division had failed its responsibility in this case to review progress in medical treatments and timely update coverage limitations to add coverage for reasonable and necessary medical treatments that have progressed from the experimental or investigational stage to the point where the treatment has achieved general acceptance being as safe and effective. Ms. S. also provided documentation with her appeal showing that the federal government has determined that duodenal switch surgery is a reasonable and necessary procedure for Medicaid beneficiaries who need this treatment.

III. Discussion

A. Summary Adjudication

Summary adjudication may be granted if there is no genuine dispute as to any material fact, so that the case may be resolved as a matter of law.⁷ In this case, no material facts are in dispute. The parties agreed that the procedure Ms. S. requested coverage for is specifically excluded from coverage under the 2003 TERS Retiree Health Plan. For the purposes

⁴ Ex. B at 50.

⁵ Ex. 18-115.

⁶ Ex. 18.

⁷ *E.g., Smith v. Dep't of Revenue*, 790 P.2d 1352, 1353 (Alaska 1990).

of this motion, the Division is arguing that the Division's determination to deny coverage must be upheld, even if Aetna's determination that duodenal switch surgery was "experimental or investigational" is incorrect, and even if Ms. S. is correct in her assertion that duodenal switch surgery is an accepted, reasonable and necessary procedure, which should not be excluded from coverage.

B. Interpretation of TERS Retiree Health Plan

The 2003 TERS Retiree Health Plan should be interpreted in the same manner as any other insurance contract.⁸ Insurance contracts are interpreted by looking to the language of the disputed policy provisions, the language of other provisions of the policy, and to relevant extrinsic evidence. In addition, it is appropriate to consider case law interpreting similar provisions. An insurance contract is interpreted to provide the coverage that a lay person would reasonably expect, given a lay interpretation of the policy language, and ambiguities are resolved in favor of the insured.⁹ Provisions regarding coverage are interpreted broadly, and exclusions are interpreted narrowly.¹⁰ The written provisions of the 2003 TERS Retiree Insurance Information Booklet are relevant extrinsic evidence of the TERS Retiree Health Plan insurance contract.¹¹ Interpreting the meaning of the terms of the 2003 TERS Retiree Health Plan in light of the extrinsic evidence is a question of law.¹²

C. Procedure Explicitly Excluded

There is no ambiguity regarding whether the 2003 TERS Retiree Health Plan provides coverage for duodenal switch surgery. Duodenal switch surgery is explicitly excluded from coverage under 2003 TERS Retiree Health Plan at page 50. Page 50 is in the part of the booklet, which begins on page 17 that is titled "COVERED MEDICAL EXPENSES." The section of the booklet that excludes duodenal switch surgery from coverage begins on page 49 and is titled: "Medical Treatment of Obesity."

A person reading this exclusion would not expect coverage for duodenal switch surgery after reading this section. This section first describes the medical conditions related to obesity that are a prerequisite to coverage for medical supervision for weight reduction programs and for

⁸ See *State v. Arbuckle*, 941 P.2d 181, 184 (Alaska 1997) (interpreting insurance contract covering state employee): Insurance contracts are interpreted 'by looking to the language of the disputed policy provisions, the language of other provisions of the policy, and to relevant extrinsic evidence. In addition, we also refer to case law interpreting similar provisions.' [quoting *Cox v. Progressive Cas. Ins. Co.*, 869 P.2d 467,468 n. 1 (Alaska 1994)]

⁹ *Makarka v. Great American Insurance Co.*, 14 P.3d 964, 966 (Alaska 2000); *Starry v. Horace Mann Insurance Co.*, 649 P.2d 937, 939 (Alaska 1982).

¹⁰ *State v. Arbuckle*, 941 P.2d 181, 184 (Alaska 1997), footnote 3.

¹¹ *State v. Arbuckle* 941 P.2d 181, 184 (Alaska 1997) footnote 5.

Gastric Bypass surgery. The section then lists noncovered services, "which include but are not limited to... Duodenal switch operation..."¹³

D. Experimental or Investigational Determination Is a Separate Exclusion.

The Division's denial letter and its brief could be misread to imply that the Division's position is that the Experimental or Investigational exclusion provision found on page 55 of the 2003 TERS Retiree Health Booklet could allow coverage of a medical procedure that specifically is excluded elsewhere in the 2003 TERS Retiree Health Booklet if the Claims Administrator finds that the procedure is not Experimental or Investigational. The Experimental or Investigational exclusion on page 55 of the 2003 TERS Retiree Health Booklet is, however, a separate exclusion. It is found in the section of the Booklet titled "Medical Expenses Not Covered." The Experimental or Investigational provision first excludes coverage for services or supplies that the claims administrator determines are experimental or investigational, then sets out the types of services or supplies that will be determined to be experimental or investigational, and then provides an exception for terminally ill patients.

This Experimental or Investigational exclusion does not allow for coverage of explicitly excluded procedures. Rather, it excludes coverage for procedures that might otherwise be

¹² *State v. Arbuckle* 941 P.2d 181, 184 (Alaska 1997).

¹³ The relevant portions of pages 49-50 of the 2003 TERS Retiree Health Insurance Information Booklet provide:

Medical Treatment of Obesity

Medically necessary expenses for medical supervision of weight reduction programs will be covered as any other medical condition when:

- The patient is 60% or more than their ideal body weight, as determined by the claims administrator; or
- The patient is more than 30% over ideal body weight, as determined by the claims administrator, and has one or more of certain documented medical conditions.

These qualifying medical conditions include diabetes, cardiac disease, respiratory disease, hypertension, and hypothyroidism. Diagnoses not acceptable for coverage include, but are not limited to, fasting, hyperglycemia, dyspnea on exertion, lower back pain, and hiatal hernia. If determined to be medically necessary, covered services for medical supervision of weight reduction may include history and complete physical exam, diagnostic tests, physician office visits, and anorectic (weight control) prescription drugs, and/or surgery.

Gastric bypass surgery and vertical banded gastroplasty surgery are considered medically necessary and appropriate when the following criteria are met

- The patient is twice or 100 pounds over ideal body weight, as determined by the claims administrator;
- There is a documented history of recent (past 6 to 12 months) attempts to lose weight through physician-supervised, nonsurgical means; and
- there are no contraindications to surgery

Noncovered services include, but are not limited to, intestinal bypass surgery, loop gastric bypass, gastroplasty (stomach stapling), **duodenal switch operation**, biliopancreatic bypass, mini-gastric bypass, gastric bubble balloon surgery, special diet supplements, vitamin injections, hospital confinement for weight reduction programs, exercise, exercise equipment, gym fees, whole body calorimeter studies and psychiatric treatment/counseling including behavior modification, biofeedback and hypnosis. (Emphasis added.)

covered but are determined to be experimental or investigational for the treatment of the patient's medical condition. For example, if a physician were to prescribe gastric bypass surgery for treatment of a rare auto-immune disorder based on research that indicated this procedure could provide relief for patients with that disorder, but this treatment for this disorder had not been substantiated to be safe and effective through clinical trials, the gastric bypass surgery would be excluded from coverage, even though this same procedure would be covered for treatment of obesity.

The "experimental or investigational" exclusion can only exclude coverage, not to create coverage that is otherwise excluded.¹⁴ Ms. S. may have read the Experimental or Investigational exclusion as creating coverage. She provided a great deal of information in an attempt to show that the claims administrator's determination that duodenal switch surgery is experimental or investigational was incorrect. She presented a very persuasive case that duodenal switch surgery has now receive wide acceptance as being a safe and effective treatment for obesity.

In response the Division argued that the claims administrator's determination regarding the experimental or investigational status of duodenal switch surgery in this case is not subject to review in an administrative appeal. The Division did not refute Ms. S.'s evidence which indicates that duodenal switch surgery is no longer experimental and that coverage for this procedure could reasonably be added to the TERS Retiree health insurance plan.

In its brief the Division correctly points out that the plan administrator's failure to provide Ms. S. with a written decision within 30 days after her appeal was received does

¹⁴ The relevant portions of pages 51 & 55 of the 2003 TERS Retiree Health Insurance Information Booklet provide:
MEDICAL EXPENSES NOT COVERED

Limitations and Exclusions

The following is a list of services and supplies that are **not covered** as are not included when determining benefits:

Services or supplies that are, as determined by the claims administrator, experimental or investigational. A drug, device, procedure, or treatment will be determined to be experimental or investigational if

- There is insufficient data available from controlled clinical trials published in peer-reviewed literature to substantiate its safety and effectiveness for the disease or injury involved;
- Approval, as required by the FDA, has not been granted for marketing;
- A recognized national medical or dental society or regulatory agency has determined, in writing, that it is experimental, investigational, or for research purposes; or
- The written protocols or informed consent used by the treating facility or any other facility studying substantially the same drug, device, procedure, or treatment states that it is experimental, investigational, or for research purposes.

not require the Division to provide coverage that is excluded under 2003 TERS Retiree Health Plan.¹⁵ It is not clear, however, that this is the argument that Ms. S. is attempting to make. Rather, Ms. S. asserting that the plan's exclusion of this procedure based on the procedure's historical status as experimental, combined with the failure to timely update the plan to take changes in this procedures' status into account has resulted in her not receiving coverage for an accepted, safe and effective treatment. It may be that as a result of cases like this one, specific exclusions that are based on the current status of the medical research on a specific procedure will be avoided in future plans because such exclusions make it difficult to keep up with the medical advances. Given the current practical limitations on updating plans,¹⁶ future plans may rely on more flexible general exclusions for the coverage of procedures that are experimental or investigational, such as the exclusion at page 55 of the current booklet. In the present case, however, Ms. S., cannot be granted coverage under 2003 TERS Retiree Health Plan for the specifically excluded duodenal switch surgery.

E. Explicit Exclusion Sufficient Basis to Grant Division's Motion

In order to decide this appeal it is not necessary to rule on the limitations of a TRS retiree's administrative appeal rights to challenge a denial of coverage based on the claims administrator's determination on the experimental or investigational status of the procedure. It is also not necessary to rule on the whether duodenal switch surgery has been shown to be a safe and effective method of treating obesity through clinical trials. Because duodenal switch surgery is explicitly excluded from coverage, the Division's decision to deny coverage must be affirmed, even if duodenal switch surgery would not have been excluded as experimental or investigational, based on current medical literature.

IV. Conclusion

The Division's January 31, 2006 determination on appeal, denying Ms. S.'s

¹⁵ This deadline is found in 2 A A C 39.520(c). The Division argument that its failure to meet the directory deadline in this regulation is not grounds for overturning the late determination is supported by the case law. *See In the Matter of Reinstatement of Weiderholt*, 24 P.3d 1219 (Alaska 2001).

¹⁶ Any changes in the medical insurance coverage provided by an Alaska state employees' retirement plan must be carefully balanced to ensure that no overall reduction of benefits has occurred because this coverage is a benefit protected by the Alaska Constitution under article XII, section 7. *See Duncan v. Retired Public Employees of Alaska*, 71 P.3d 882 (Alaska 2003).

request for coverage is affirmed.

DATED this 27th day of February, 2007.

By: Mark T. Handley
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 3rd day of April, 2007.

By: Mark T. Handley
Administrative Law Judge

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

Case Parties
4/3/07