

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WEST VIRGINIA

IN RE: CHRISTINE O. STENGER,
Complainant,

v.

06-AP-024

CARELINK HEALTH PLANS, INC.,
Respondent.

RECOMMENDED DECISION
OF HEARING EXAMINER

This matter came on for hearing on August 10, 2006, at the offices of the Insurance Commissioner, there then being present the Complainant, Christine O. Stenger; I. Franklin Hartman, III, Esquire, Consumer Advocate, appearing on behalf of the Complainant; and Jonathan D. Weinberg, Esquire, appearing on behalf of Carelink Health Plans, Inc., Respondent, and Coventry Health Care, Inc., Respondent's corporate parent. Also appearing on behalf of Respondent was Grant P.H. Shuman, Esquire.

Statement of the Case

This matter involves the consumer complaint of Christine O. Stenger, a member of Respondent's Health Maintenance Organization ("HMO") product. She complains about the denial of her request for precertification for certain procedures as well as the handling of her request and subsequent internal

appeal, also denied. Both parties agree that one issue is whether or not the requested services were covered under the Evidence of Coverage ("EOC"). (T., pp. 9-13) Also in issue is whether or not Respondent's conduct in handling the matter violates a required standard.

Findings of Fact

The following are made as findings of fact:

1. The Complainant, Christine O. Stenger, is a member of the HMO plan offered by Respondent, Carelink Health Plans, Inc. ("Carelink"). This coverage is provided as a benefit of employment through Complainant's husband's employer.
2. The Complainant has suffered sleep problems for approximately 10 years. (T., p. 23) Following several sleep studies and various modes of treatment she was eventually referred to Dr. Bernard Costello for surgical procedures. (T., pp. 24-25) Dr. Costello concurred with the need for surgery and assigned a member of his staff, Patricia Conrad, the task of obtaining pre-certification of the proposed procedures from Carelink. (T., pp. 24-25; Ex. C-5) Ms. Conrad contacted Carelink by telephone during the period of May 4-6, 2005. (T., pp. 47) Ms. Conrad was verbally notified on May 9, 2005, that the procedures were denied. (Ex. R-2) On May 10, 2005, Carelink wrote to Complainant and Dr. Costello and formally denied the procedures, described as "Lefort Graft/Septum," as being excluded under the EOC in part 7.1.67 as being a "charge for oral surgery which is part of an orthodontic treatment program..."

(Ex. C-2)

3. On May 16, 2005, Dr. Costello wrote Carelink a letter indicating that he had diagnosed obstructive sleep apnea, mandibular hypoplasia, deviated septum and hypertrophied trbinates. He enclosed clinical information to support his determination that the required procedures were medically necessary for treatment of obstructive sleep apnea and not related to orthodontic treatment. The procedures he requested were as follows: "1. LeFort I osteotomy with advancement... 2. Bilateral sagittal split osteotomy with advancement and rigid internal fixation... 3. Segmental osteotomy of the mandible with genioglossus advancement... 4. Septoplasty... [and] 5. Bilateral inferior turbinate reductions..." (Ex. C-1) No response was received from Carelink and follow-up phone contact was attempted by Ms. Conrad. On June 6, 2005, Ms. Conrad again sent the May 16 letter with supporting materials to Carelink, this time by overnight UPS. (T., pp. 48-49) Still no response was received from Carelink even in the circumstance of multiple unanswered phone messages. (Ex. C-5) Ms. Conrad again sent the May 16 letter with supporting materials via fax on July 13, 2005. (T., p. 49; Ex. C-5) Carelink still did not respond despite multiple unanswered phone messages. (T., p. 49; Ex. C-5) The Complainant was not inactive during this period but also made numerous calls to Carelink and on July 28, 2005, faxed a request that Carelink consider her appeal. Complainant's fax request did not include the May 16 letter and material from Dr. Costello as she did not have a copy of those documents. (T.,

pp. 39–40, 61–65)

4. On July 29, 2005, Carelink's Medical Director, Dr. Rodney D. McKinney, considered Complainant's appeal of Carelink's denial of the requested procedures. Dr. McKinney stated that the appeal was expedited because the member claimed an earlier appeal request had been misplaced by Carelink. (T., p. 132) It is apparent that Carelink treated Complainant's faxed request of July 28, 2005, as the sole request. In expediting the appeal consideration Complainant was not given the opportunity to participate and no contact was made with Dr. Costello. (T., p. 147–148) In conducting his review upon appeal Dr. McKinney did not consider the May 16 letter and supporting material from Dr. Costello as it was not provided to him by Carelink staff. (T., p. 139) Carelink claims to have never received the May 16 letter and material until well after the appeal was considered on July 29, 2005. This is just not credible. Two of the three transmissions are fully documented. (Exs. C–3 and C–6)

5. On July 29, 2005, Carelink denied Complainant's appeal, upon this occasion giving a different reason, being that the requested procedures were excluded under part 7.1.35 of the EOC as being "Orthognathic surgery, except as covered in a rider purchased by an Eligible Employer." During the hearing Dr. McKinney agreed that the Complainant suffers from sleep apnea and mandibular hypoplasia. (T., p 121) He acknowledged that obstructive sleep apnea is a syndrome of airway obstruction and that if untreated eventually leads to cardiac problems like cardiac dysrhythmia and congestive heart failure.

(T., pp 121, 143) Dr. McKinney indicated that Carelink's procedure was to first consider whether coverage is present and only if present do they consider whether or not medical necessity exists. (T., p. 125) No determination has ever been made as to medical necessity. (T., p. 141)

6. Dr. McKinney, upon consideration of the appeal, denied it because the request involved what he believes is an excluded orthognathic surgery. During the hearing he acknowledged that requests 4 and 5 as contained in Dr. Costello's May 16, 2005, correspondence would be covered and are not orthognathic, although noting that he did not have the benefit of this correspondence during his July 29, 2005, consideration and also noting that medical necessity has yet to be determined. (T., p. 162) He maintains that no decision has been made as to such requests 4 and 5 in the May 16 letter. (T., p. 158) Dr. McKinney believes the original denial of the request (Ex. C-2) was wrong because the requested procedures are not orthodontic. (T., pp. 133, 140) Dr. McKinney believes that the requested Lefort ostcotomy involves breaking the mandible and moving it forward to create a new alignment for purposes of cosmetics, orthodontia or sleep apnea. (T., p. 125) He acknowledges that when done to treat sleep apnea the nature of the procedure is different and that the reason for the procedure plays in to whether properly exlcuded. (T., p. 141) He believes that any procedure performed on the lower jaw is orthognathic, even wiring a fractured jaw. (T., 163) He maintains that the first three procedure requests contained in Dr. Costello's May 16 letter are

orthognathic and thereby excluded under the EOC. (T., 158)

Conclusions of Law

The following are made as conclusions of law:

1. There should first be considered Complainant's request for the imposition of civil penalties against Carelink under various provisions of the West Virginia Code. It must first be concluded that the Unfair Trade Practices Act ("UTPA") (§§ 33-11-1 et seq.) and the Legislative Rules promulgated thereunder (114CSR 14) do not here apply. This is so because §§ 33-25A-1 and 33-25A-24(a) specifically exclude HMOs from such provisions and such provisions are not specifically made applicable under the provisions of § 33-25A-24(d) of the Code. Additionally, the decision in Tri-State Mach., Inc. v. Nationwide Life Ins. Co., 33F. 3rd 309 (CA4, 1994), cert. denied 513 U.S. 1183, 115 S. Ct. 1175, 130 L. Ed. 1128 (1995) determined that in employer provided benefit plans, such as here, the UTPA has been preempted by the provisions of the federal Employee Retirement Income Security Act ("ERISA"). The remedy for an ERISA violation is an action in federal court. The sole remaining possibility of administrative penalty is contained in § 33-25A-23(1) of the Code, the provisions of which requires notice of intent to levy such a penalty, not here accomplished. Because of this lack of notice of intent to levy a penalty, none may be levied under § 33-25A-23(1).

2. The Commissioner is given the authority under § 33-25A-23(4)(a) to issue cease and desist orders for violations of article 25A, chapter 33 of the

Code. The Complainant is vested with a variety of rights for pursuing a grievance through Carelink's internal grievance process both under Section 10 of the EOC (Ex. R-3, pp. 36-37) and § 33-25A-12 of the Code. Under the EOC, the May 16, 2005, letter from Dr. Costello would constitute request for formal appeal in the grievance procedure even if it did not use that precise language. Carelink has badly botched its obligations to provide an effective grievance procedure. First, the information provided by the May 16 letter and two subsequent transmissions was never made available to Dr. McKinney, the person making the decision. Second, neither the Complainant nor her representative (in this case, Dr. Costello) was allowed to present their position to the Appeal Committee as required by the EOC. Third, no offer was ever made to the Complainant to meet during the appeal process as required by § 33-25A-12(b)(8). It is arguable that Carelink failed to satisfy the sixty-day appeal completion requirement of § 33-25A-12(b)(6) but because it is just possible Carelink did not receive the May 16 letter when originally sent, such a failure is not here concluded. It is concluded, however, that the gross breakdown of Carelink's grievance procedure warrants the issuance by the Commissioner of a cease and desist order to preclude such shortcomings in the future.

3. One very troubling aspect of Carelink's procedure revealed in this proceeding is its practice of not addressing all issues necessary to decide to a finality whether or not a proposed procedure is covered. Carelink, quite

apparently, does not make a decision regarding medical necessity if it believes a proposed procedure is not otherwise covered or is excluded. This places a member in the position of possibly having to pursue multiple serial grievances and appeals. To place a member in this position violates both the spirit and letter of § 33-25A-12 of the Code. It is concluded that it is appropriate for the Commissioner to issue a cease and desist order to Carelink under the provisions of § 33-25A-23(4)(a) of the Code to require it to consider all aspects of a claim both upon initial consideration and upon internal appeal. Only in this manner can a member address all relevant issues during the internal appeal (grievance) process as well in any appeal to the Commissioner. Any question about medical necessity in this matter is concluded to have been waived by Carelink. It is equally important that Carelink not be permitted to abandon grounds for initial denial and substitute other grounds for denial upon internal appeal. The internal appeal process is for the benefit of the member, not an opportunity for Carelink to finally be thorough in its consideration. No waiver of Carelink's switch of grounds of initial denial is here concluded, however, because of the lack of detail in the record of information available to it during the initial consideration process; nevertheless, Carelink should be forewarned that it will be expected in future to acquire sufficient information for initial determination to be bound by grounds for denial asserted. Any lessening of this requirement violates both the spirit of the EOC and the spirit and letter of § 33-25A-12 of the Code.

4. There now needs to be examined the merit of Complainant's appeal to the Commissioner of Carelink's denial of the requested procedures. Carelink's Medial Director, Dr. McKinney, conceded that the fourth and fifth procedures requested by Dr. Costello in his May 16, 2005, letter, namely septoplasty and bilateral inferior turbinate reductions were covered procedures. So far as is discernible from the record, Carelink has still not certified these procedures to be covered. Consequently, it is concluded that these are covered procedures and Complainant's appeal in this regard should be sustained.

There must now be determined whether or not the first three procedures requested by Dr. Costello in his May 16, 2005, letter are properly excluded from coverage. Dr. McKinney maintains that they are excluded under the EOC under part 7.1.35 as being orthognathic surgery. Resort to dictionaries is required to determine the ordinary meaning which should be assigned to this exclusion. First, standard dictionaries are consulted, as follows:

- a. Webster's Third New International Dictionary, Unabridged, 1971, G & C Merriam Company, Springfield, Mass., contains no definition of "orthognathic" but does contain a definition of "orthognathous", which states: "having straight jaws: not having the lower part of the face protruding."
- b. The American Heritage Dictionary of the English Language, 1969, Houghton Mifflin Company, Boston, etc. also contains no definition of "orthognathic" but does contain a definition of "orthognathous," which states: "having the lower jaw aligned with the upper so that it does not protrude or recede."
- c. Webster's New World Dictionary, 1994, Macmillan, U.S.A., likewise contains no primary definition of

“orthognathic” but defines “orthognathous” as follows: “having the jaws in line, with the lower jaw neither projecting nor receding: also orthognathic.” (emphasis supplied)

Next, medical dictionaries are consulted:

- a. Mosby’s Medical, Nursing and Allied Health Dictionary, 1994, Mosby, St. Louis, etc. does not contain a definition for either “orthognathic” or orthognathous.”
- b. Tabor’s Cyclopedic Medical Dictionary, 1997, F.A. Davis Company, Philadelphia, has no definition for “orthognathic” or “orthognathous.”
- c. Dortland’s Illustrated Medical Dictionary, 30th Ed., 2000, W.B. Saunders Company, Philadelphia, contains the following definitions: “orthognathic: pertaining to orthognathia” and “orthognathia: the branch of oral medicine dealing with the cause and treatment of malposition of the bones of the jaw.”
- d. Stedman’s Medical Dictionary, 25th Ed., 1990, Williams and Wilkins, Baltimore, defines “orthognathic, orthognathous” as 1. Relating to orthognathia. 2. Having a face without projecting jaw, one with a gnathic index below 98.” It then defines “orthognathia” as follows: “The study of the causes and treatment of conditions related to malposition of the bones of the jaws.”

All of the definitions, both standard and medical, relate to whether or not the lower jaw aligns with the upper jaw or protrudes or recedes in comparison with the upper jaw. Complainant’s problem does not relate to such alignment but to mandibular hypoplasia. (T., p. 121; Ex. C-1) “Hypoplasia” means “underdevelopment or atrophy due to destruction of some of elements, not general reduction in size.”¹ Carelink has failed to demonstrate that Complainant’s condition has anything to do with alignment of her upper and

¹PDR Medical Dictionary, 2000, Lippincott, Williams & Wilkins, Baltimore.

lower jaws or any protrusion or recession of her lower jaw when compared with the upper. This is Carelink's burden to show. National Mutual Insurance Company v. McMahon & Sons, 177 W. Va. 734, 356 S.E. 2d 488 (1987). Consequently, it is concluded that the first three procedures requested by Dr. Costello in his May 16, 2005, letter, namely Lefort osteotomy with advancement, bilateral sagittal split osteotomy with advancement and rigid internal fixation, and segmental osteotomy of the mandible with genioglossus advancement, are not excluded under Carelink's EOC and that Complainant's appeal of Carelink's denial should be sustained. That these procedures may also be utilized to treat orthognathia just does not matter. Had Carelink wanted to exclude any surgical procedures related to the mandible it should have said so in its EOC.

Recommendation

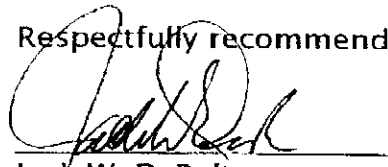
It is recommended as follows:

1. That Carelink be ordered to cease and desist from failing to follow its internal appeal or grievance procedure as contained in its EOC and § 33-25A-12 of the West Virginia Code;
2. That Carelink be ordered to cease and desist from considering all possible issues upon initial determination of a claim as well as upon consideration of a claim upon internal appeal or grievance;
3. That Carelink be ordered to cease and desist from relying upon grounds for denial upon internal appeal or grievance not stated as grounds for

denial upon initial consideration; and

4. That Carelink be ordered to cease and desist from failing to certify as covered procedures all five of the procedures requested in Dr. Costello's letter of May 16, 2005.

Respectfully recommended,



Jack W. DeBolt
Hearing Examiner

Date: November 29, 2006

Final order signed by
WA Insurance Commission
Joan Chene
Dec 14, 2006

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OF THE STATE OF WEST VIRGINIA

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CARELINK HEALTH PLANS, INC.,

Respondent,

FINAL ORDER NO. 06-AP-024

The undersigned, Insurance Commissioner of the State of West Virginia, does hereby adopt and approve the Recommended Decision of the Hearing Examiner, appended hereto, as well as the findings of fact and conclusions of law therein contained, except that recommendation Number 2 is interpreted to state, "That Carelink be ordered to cease and desist from not considering all possible issues upon initial determination of a claim as well as upon consideration of a claim upon internal appeal or grievance."

It is consequently ORDERED that Respondent, Carelink Health Plans, Inc., cease and desist from failing to follow its internal appeal or grievance procedure as required by its EOC and § 33-25A-12 of the West Virginia Code; that Respondent, Carelink Health Plans, Inc., cease and desist from not considering all possible issues upon initial determination of a claim as well as upon consideration of a claim upon internal appeal or grievance; that Respondent, Carelink Health Plans, Inc., cease and desist from relying upon



grounds for denial upon internal appeal or grievance not stated as grounds for denial upon initial consideration; and that Carelink Health Plans, Inc., cease and desist from failing to certify as covered procedures all five of the procedures requested in Dr. Costello's letter of May 16, 2005.

The objections of any party aggrieved by this Order and to the Recommended Decision herein adopted are preserved.

Entered this 14th day of December, 2006:



Jane L. Cline
Insurance Commissioner of the State
of West Virginia