

STATE OF NORTH CAROLINA
COUNTY OF PITT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 INS 03891

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| <p>Donna Thomas Tedder Petitioner,</p> <p>v.</p> <p>North Carolina State Health Care Plan Respondent.</p> | <p>FINAL DECISION</p> |
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THIS MATTER comes for consideration of Cross-Motions for Summary Judgment filed by the North Carolina State Health Plan for Teachers and State Employees (“Respondent” or “the Plan”) and Donna Thomas Tedder (“Petitioner” or “Tedder”) pursuant to N.C.G.S. § 1A-1, Rule 56, N.C.G.S. § 150B-34(e), and 26 NCAC 03 .0101(a) and .0115. At issue is whether Petitioner’s cochlear Baha® auditory implantable hearing aid repair surgery is covered under the terms of her health benefits plan. Petitioner claims that it is, and Respondent asserts that it is not. Both Parties contend that there are no disputed facts and they are entitled to judgment as a matter of law.

APPEARANCES

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ISSUE

Whether the policy coverage and exclusion terms of the 2019 State Health Plan with respect to the coverage of implantable bone-anchored hearing aids (“BAHA hearing aids”) are ambiguous?

PROCEDURAL BACKGROUND

The State Health Plan (the “Plan”), a division of the Department of State Treasurer, is a self-funded benefits program that provides health care benefits to eligible North Carolina teachers, State employees, retirees, and their dependents (“members”). Petitioner is a member of the Plan and was enrolled in Respondent’s 2019 80/20 PPO Plan (the 2019 Plan”) during the time period relevant to this dispute.

On July 8, 2019, Petitioner filed a Petition for a Contested Case Hearing for contesting the denial of health care coverage for her BAHA repair surgery. As ordered, on September 9, 2019, Petitioner and Respondent filed their Prehearing Statements. Neither Party sought discovery. Both parties filed motions for summary judgment asserting that there were no genuine issues of material fact. This matter is now ripe for adjudication.

STANDARD OF REVIEW

An administrative law judge is authorized to grant summary judgment, pursuant to N.C.G.S. § 1A-1, Rule 56. *See* N.C.G.S. § 150B-34(c). Summary judgment is proper when “the pleadings . . . together with the affidavits, if any, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c). “Summary judgment is appropriate when the movant proves that an essential element of a claim is nonexistent or that the opposing party cannot produce evidence to support an essential element of his claim.” *Holloway v. Wachovia Bank & Trust Co.*, 339 N.C. 338, 452 S.E.2d 233, 240 (1994). A non-movant “must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party’s case.” *Graham v. Hardee’s Food Sys., Inc.*, 121 N.C. App. 382, 386, 465 S.E. 2d 558, 560 (1996). “A fact is material only if it constitutes a legal defense to a charge, or would affect the result of the action, or its resolution would prevent the party against whom it is asserted from prevailing on the point at issue.” *Hilliard v. N.C. Dept. of Corr.*, 173 N.C. App. 594, 598, 620 S.E.2d 14, 18 (2005).

The entry of findings of fact is not necessary when granting a motion for summary judgment, *Hyde Ins. Agency, Inc. v. Dixie Leading Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975), and decisions issued by the OAH granting such motions need not include such findings. N.C. Gen. Stat. § 150B-34(e). The Undersigned nonetheless summarizes the following undisputed facts to provide context for her ruling. *See e.g., Hyde Ins. Agency, Inc.*, 26 N.C. App. at 142, 215 S.E.2d at 165 (“[I]t is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment.”). If the findings of fact are actually the trial court’s summation of the undisputed facts which support the judgment, findings of fact and conclusions of law do not render a summary judgment void or voidable. *Noel Williams Masonry, Inc. v. Vision Contractors*, 103 N.C. App. 597, 406 S.E.2d 605 (1991).

THE UNDISPUTED FACTS

1. Petitioner, Donna Thomas Tedder (“Tedder” or “Petitioner”) is 50 years old and employed by the Department of Psychiatry & Behavioral Medicine at ECU Brody School of Medicine. At all times relevant to these proceedings, Tedder has had health coverage under the 80/20 PPO State Health Plan for Teachers and State Employees (the “2019 Plan”).

2. The State Health Plan is a division of the Department of State Treasurer and is a self-funded benefits program that provides health care benefits to eligible North Carolina teachers, state employees, retirees, and their dependents. Tedder was an eligible member.

3. Tedder is contesting the denial of coverage for surgical repair of her BAHA hearing aids system. Her original BAHA hearing aids were implanted in 2014.

4. On December 8, 2014, Tedder underwent Baha® Cochlear hearing aid implant surgery (the “original surgery”). The Baha® hearing aid system includes a sound processor, which is secured to the outside of the skull and an abutment, which connects to the sound processor to an implant inside the skull.

5. In 2014 Tedder had health coverage under the 80/20 PPO State Health Plan (“2014 Plan”). The 2014 Plan covered Tedder’s original surgery in 2014.

6. The 2014 Plan explained the coverage for “Hearing Aids” as follows:

Hearing Aids

Coverage includes all *medically necessary* hearing aids and services ordered by a physician or an audiologist. The following are covered:

- Initial hearing aids and replacement hearing aids
- New hearing aids with alterations to the existing hearing aid that does not adequately meet the *member’s* need.
- Services, including the initial hearing aid evaluation, fitting, and adjustments and supplies including ear molds.”

Coverage is limited to one hearing aid per hearing-impaired ear every 36 months for members under the age of 22. Reimbursement will be limited to the usual, customary, and reasonable (UCR) amount and you may be billed by the provider for charges greater than the UCR amount.

(Tedder Aff. Ex. A, p. 26) (emphasis in original)

7. The exclusion section of the 2014 Plan detailed which was not covered as follows:

WHAT IS NOT COVERED?

Exclusions that are specific to a type of service are stated along with the benefits description in “*Covered Services*.” Exclusions that apply to many services are listed in this section. To understand all of the exclusions that apply, read “*Covered Services*,” “Summary of Benefits” and “What is not Covered?” In addition, your health benefit plan does not cover services, supplies, drugs or charges that are:

- Not *medically necessary*.
- Hearing aids or examinations for the fitting of hearing aids except as specifically covered by your health benefit plan.
- Routine hearing examinations except as specifically covered by your health benefits plan.

(Tedder Aff. Ex. A, pp. 46-47) (emphasis in original)

8. The 2014 Plan did not specifically reference the BAHA hearing aids in either the covered services or exclusion sections, but the BAHA hearing aids were covered.

9. Blue Cross Blue Shield of North Carolina (“BCBSNC”) is the third-party administrator services for the State Health Plan. As Respondent’s third party administrator, BCBSNC processes State Health Plan members’ claims and administers internal appeal submitted by State Health Plan members.

10. Based on the terms in the policy, BCBSNC interpreted that the 2014 Plan covered Tedder’s original surgery for the BAHA hearing aids.

11. Respondent speculated that in 2014, BCBSNC was not administering the 2014 Plan benefit accurately and “may have” processed the original surgery in error. (Sweat Aff. p. 3, ¶ m).

12. On April 27, 2019, Tedder’s BAHA abutment came loose and fell out of her skull. On April 30, 2019, Tedder saw Dr. P. Bradley Brechtelsbauer, the surgeon who performed her original surgery in 2014. Dr. Brechtelsbauer determined that it was medically necessary for Tedder to have additional surgery to repair her Baha Cochlear implant (the “repair surgery”).

13. When Tedder sought coverage for the repair surgery, BCBSNC denied the claim on the grounds that Tedder’s health coverage, under the 2019 version of the 80/20 State Health Plan (the “2019 Plan”), did not cover the repair surgery.

14. Unlike the 2014 Plan, the 2019 Plan does reference implantable bone-anchored (BAHA) hearing aids in both the coverage and exclusion sections.

15. On page 32 of the 2019 Plan coverage for hearing aids is stated as:

Hearing Aids

Coverage includes all *medically necessary* hearing aids, including implantable bone-anchored hearing aids (BAHA) and services ordered by a provider or an audiologist. The following are covered:

- Initial hearing aids and replacement hearing aids.
- New hearing aids with alterations to the existing hearing aid that does not adequately meet the member's need.
- Services, including the initial hearing aid evaluation, fitting, and adjustments and supplies including ear molds.

Coverage is limited to one hearing aid per hearing-impaired ear every 36 months for members under the age of 22. Reimbursement will be limited to the usual, customary and reasonable (UCR) amount and you may be billed by the provider for charges greater than the allowed amount.

(Resp't Ex. A, page 32)

16. On page 48 of the 2019 Plan, the exclusion section states:

WHAT IS NOT COVERED?

Exclusions for a specific type of service are stated along with the benefits description in "*Covered Services*." Exclusions that apply to many services are listed in this section, starting with general exclusions and then the remaining exclusions are listed in alphabetical order. To understand all of the exclusions that apply, read "*Covered Services*," "Summary of Benefits" and "What is not Covered?" The *Plan* does not cover services, supplies, medications or charges for:

- Anything specifically listed in this benefits booklet as not covered or excluded, regardless of *medically necessary*;

17. In a separate section on page 51, the 2019 Plan states:

H. In addition, the *Plan* does not cover the following services, supplies, medication or charges:

.....

- Routine hearing examinations and hearing aids or examination except as specifically covered by the *Plan*.

- Implantable bone-anchored **hearing aids** (BAHA), or examinations for the fitting of hearing aids for *members* over the age of 22.

(Resp't Ex. A, pp. 48 & 51) (emphasis and bold in original)

18. Although the 2014 Plan covered Tedder's original Baha® Cochlear implant surgery, the 2019 Plan denied coverage of the repair surgery as a non-covered service.

19. Tedder properly appealed the denial and received the final adverse benefit determination on June 28, 2019.

20. Tedder timely filed her contested case hearing in the Office of Administrative Hearings ("OAH") on July 8, 2019.

BASED UPON the foregoing undisputed findings of fact, affidavits, and exhibits, relevant laws, legal precedent and upon the applicable standard of review of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. In interpreting insurance policies, our courts have well-established canons of contract interpretation. *Meinck v. City of Gastonia*, 823 S.E.2d 459, 466 (N.C. Ct. App. 2019), *review denied*, 826 S.E.2d 720 (N.C. 2019). "Our courts have long followed the traditional rules of contract construction when interpreting insurance policies." *Dawes v. Nash Cty.*, 357 N.C. 442, 448, 584 S.E.2d 760, 764, *reh'g denied*, 357 N.C. 511, 587 S.E.2d 417-18 (2003). "When interpreting provisions of an insurance policy, provisions that extend coverage are to be construed liberally to 'provide coverage, whenever possible by reasonable construction.'" *Plum Properties, LLC v. N.C. Farm Bureau Mut. Ins. Co., Inc.*, 802 S.E.2d 173, 175-76 (N.C. App. 2017) (quoting *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986)). Where an insurance policy's language is clear and unambiguous, our courts will enforce the policy as written. *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C.App. 530, 532, 530 S.E.2d 93, 95 (2000).

2. As a general rule, "ambiguities in insurance policies are to be strictly construed against the drafter, the insurance company, and in favor of the insured and coverage since the insurance company prepared the policy and chose the language." *Meinck* at 463 (citing *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 11, 527 S.E.2d 328, 335 (2000)).

3. However, "[i]f the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein." *Meinck* at 463 (citing *Dawes*, 357 N.C. at 449, 584 S.E.2d at 764).

4. With these principles of insurance policy interpretation in mind, the Undersigned concludes that the 2019 Plan is ambiguous with respect to coverage of Petitioner’s repair surgery. The meaning of the coverage was not clear and had more than one reasonable interpretation.

5. In the coverage section, the 2019 Plan covers all “*medically necessary* hearing aids, including implantable bone-anchored hearing aids (BAHA) and services” with no age limitation. Then, the last clause in the coverage section reads that “[c]overage is limited to one hearing aid per hearing-impaired ear every 36 months for members under the age of 22.” Which can mean that members under the age of 22 have limited coverage per every 36 months and that members over the age of 22 do not have that same restriction. Because youth and young adults may be more irresponsible with their hearing aids, the clause could reasonably be interpreted that only their coverage was limited. Or, the term could mean that the 2019 Plan did not cover members over 22 years of age.

6. The same clause was in the 2014 Plan and ambiguous to the Plan’s administrator, BCBSNC, to the extent that BCBSNC covered Petitioner’s initial BAHA hearing aids surgery.

7. Respondent argues that the language in the 2019 Plan cannot be ambiguous because it tracks the same language as N.C.G.S. § 58-3-285 which unambiguously mandates coverage only for individuals under the age of 22.

8. According to N.C.G.S. § 58-3-285:

(a) Every health benefit plan, including the State Health Plan for Teachers and State Employees, shall provide coverage for one hearing aid per hearing-impaired ear up to two thousand five hundred dollars (\$2,500) per hearing aid every 36 months *for covered individuals under the age of 22 years* subject to subsection (b) of this section. The coverage shall include all medically necessary hearing aids and services that are ordered by a physician or an audiologist licensed in this State. Only those persons authorized by law to fit hearing aids, including individuals licensed under Chapter 93D of the General Statutes, are eligible to fit a hearing aid under this section. Coverage shall be as follows:

- (1) Initial hearing aids and replacement hearing aids not more frequently than every 36 months.
- (2) A new hearing aid when alterations to the existing hearing aid cannot adequately meet the needs of the covered individual.
- (3) Services, including the initial hearing aid evaluation, fitting, and adjustments, and supplies, including ear molds.

N.C.G.S. § 58-3-285(a) (emphasis added).

9. The Undersigned disagrees with Respondent’s conclusion that the 2019 Plan tracks the statute. While the same language may be in both the 2019 Plan and the statute, based on the location of the minimum coverage term, there can be different interpretations.

10. Unlike the terms of the 2019 Plan, the statute, in the first paragraph, alerts the reader that the benefit is limited to a “covered individual under the age of 22 years.”

11. The 2019 Plan, on the other hand, states in the first paragraph that “coverage includes all medically necessary hearing aids ...”. In the last paragraph, the number of hearing aids for members under the age of 22 is later limited to one every 36 months. This could be interpreted that only members under the age of 22 years had coverage limitation.

12. The 2019 Plan could have simply stated at the beginning of the hearing aid section that “only members under the age of 22 are eligible for coverage for hearings aids or BAHA, ” or that “members over 22 years of age are not covered.” As written, however, the language in the hearing aid coverage section of the 2019 Plan was not clear and could be interpreted in different ways; therefore, the language must be construed in favor of coverage for Petitioner.

13. Respondent next argues that the exclusion clause found later on pages 48 and 51 explicitly states that hearing aids for members over the age of 22 are not covered. So if Petitioner was confused about the coverage on page 32, then the exclusion should have clarified the coverage terms.

14. According to the exclusion clause on page 48: [e]xclusions for a specific type of service are stated along with the benefits description in “*Covered Services.*” (Resp’t Ex. A p. 48) The exclusion refers back to the ambiguous coverage terms. Exclusions from coverage in insurance policies are disfavored under North Carolina law, and are narrowly construed. *Meinck* at 463 (citing *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 114, 314 S.E.2d 775, 779 (1984)).

15. Later, in a separate section on page 51, the exclusion states that BAHA hearing aids are not covered for members over the age of 22. (Resp’t Ex. A, p. 51). The first section of this sentence purports to exclude coverage for “Implantable bone-anchored hearing aids (BAHA)” -- despite the fact that the “Covered Services” section appears to include coverage for BAHA hearing aids. “When the coverage provisions of a policy include a particular activity, but that activity is later excluded, the policy is ambiguous, and the apparent conflict between coverage and exclusion must be resolved in favor of the insured.” *Southeast Airmotive Corp. v. United States Fire Ins. Co.*, 78 N.C. App. 418, 420, 337 S.E.2d 167, 169 (1985). “If the language in an exclusionary clause contained in a policy is *ambiguous*, the clause is ‘*to be strictly construed in favor of coverage.*’” *Meinck* at 463 (quoting *Daniel v. City of Morganton*, 125 N.C. App. 47, 53, 479 S.E.2d 263, 267 (1997)) (emphasis supplied). The provisions of the policy related to BAHA hearing aids are ambiguous and create a conflict between coverage and exclusion that must be resolved in favor of Petitioner.

16. Finally, Respondent cites *John Lacy Kelly v. Dep’t of State Treasurer, N.C. State Health Plan*, OAH case file number 17 INS 07195, 2018 WL 1897652 (OAH Feb. 2, 2018) (Ward, ALJ), an OAH decision denying coverage for BAHA hearing aids to a member over 22. This case is distinguishable. Mr. Kelly was a *pro se* litigant and did not question the ambiguity of the BAHA hearing aid coverage. Moreover, the *Kelly* decision is not binding on the Undersigned.

17. Petitioner also argued that as a matter of equity, she should be entitled to coverage. Petitioner's equity argument is disregarded as a matter of law because this Tribunal only adjudicates agency's decisions and is not a court of equity. *See* N.C.G.S. § 150B-1.

18. The Undersigned concludes that the 2019 Plan's coverage terms for Petitioner's BAHA repair surgery are ambiguous and, as a result, the coverage terms must be construed in Petitioner's favor. Respondent's denial of BAHA repair surgery claim was erroneous.

FINAL DECISION

BASED ON THE FOREGOING, the Undersigned hereby finds proper authoritative support of the conclusions of law noted above and it is hereby ordered, adjudged, and decreed that there are no genuine issues of material fact that the 2019 Plan coverage for BAHA hearing aids was ambiguous and that summary judgment is **GRANTED** for Petitioner.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 13th day of January, 2020.



Stacey Bice Bawtinheimer
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 13th day of January, 2020.



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