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OPINION OF TRUSTEES

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In Re

Complainant: Pensioner  
Respondent: Employer  
ROD Case No: 02-001

Trustees: A. Frank Dunham, Michael H. Holland, Marty D. Hudson and  
Elliot A. Segal.

The Trustees have reviewed the facts and circumstances of this dispute concerning the provision of benefits under the terms of the Employer Benefit Plan.

Background Facts

Effective January 1, 2002, the Respondent implemented a mail service pharmacy program for maintenance prescription drugs—drugs that are used on a long-term basis to treat chronic conditions such as high blood pressure, diabetes, asthma and high cholesterol.

In general, under the Employer Benefit Plan, a beneficiary pays a \$5.00 co-payment per prescription if purchased from a pharmacy on the Employer's Participating Provider Lists (PPL), and a \$10.00 co-payment if purchased from a non-PPL provider. If purchased by mail-order, no co-payment is applied.

Under the Respondent's program, if a beneficiary purchases a maintenance drug through the mail order program, the \$5.00 co-payment is waived. If a beneficiary purchases a maintenance drug at a retail pharmacy, the beneficiary pays the \$5.00 co-payment plus a \$10.00 surcharge. However, the \$10.00 surcharge is waived if the beneficiary can document for reasons of medical necessity that the beneficiary is unable to use the mail order program. For example, the \$10.00 surcharge is waived for beneficiaries who reside in nursing homes. Furthermore, the \$10.00 surcharge is not applied to drugs prescribed for a short-term basis (such as antibiotics to treat strep throat) that are purchased from a retail pharmacy.

The Respondent's program was communicated to beneficiaries by mail in August 2001 and September 2001. In addition, 136 meetings were held to discuss the program with beneficiaries, and two new positions were created to help assist beneficiaries with their prescription issues.

The Complainants state that the \$10.00 surcharge applied for purchasing maintenance drugs through a retail pharmacy is in violation of the Employer Benefit Plan.

Dispute

Is the Respondent's mail order maintenance drug program in violation of the Employer Benefit Plan?

Positions of the Parties

Position of the Complainants: The Respondent's mail order maintenance drug program is in violation of the Employer Benefit Plan by requiring an additional surcharge of \$10.00 for maintenance drugs purchased at the retail pharmacy.

Position of the Respondent: The Respondent's mail order maintenance drug program is not in violation of the Employer Benefit Plan for the following reasons: 1) The program has not eliminated or reduced any benefits under the Employer Benefit Plan: only the method of delivery for benefits has changed; 2) The program is consistent with the Plan Administrator's authority provided under Article XX of the National Bituminous Coal Wage Agreement (Wage Agreement) and Articles III and IV of the Employer Benefit Plan to implement cost containment rules which do not result in a reduction of benefits or additional costs. Rules are mandatory, not voluntary; 3) In waiving the \$5.00 co-payment, the program does not impose increased cost or surcharge for covered services; 4) The program provides an appeal process for identifying medically necessary situations that require alternatives to the mail order program; 5) As an incentive to encourage compliance with the program, the \$10.00 surcharge is derived from a retail administrative and dispensing fee of \$3.75 plus \$6.25 which is the difference between the average cost of ingredients at retail and the average cost under the mail order plan; and 6) ROD 93-079 supports the Respondent's position.

In addition, the Respondent states that ROD CA-066 is not pertinent for the following reasons: 1) the "Coal Act has no applicability to any aspect of any health benefit program negotiated under the 2002 NBCWA[Wage Agreement]"; and 2) ROD CA-066 relied on precedent RODs decided under the 1988 Employer Benefit Plan which did not contain a provision comparable to Article IV of the 2002 Employer Benefit Plan and which did not address whether a benefit could be obtained by retail or mail order. The Respondent contends that ROD 93-109 supports this position.

Pertinent Provisions

Article XX (12) of the 1988 and 2002 Wage Agreement provides in pertinent part:

(12) Health Care Cost Containment:

The Union and the Employers recognize that rapidly escalating health care costs, including the costs of medically unnecessary services and inappropriate treatment, have a detrimental impact on the health benefit program. The Union and the Employers agree that a solution to this mutual problem requires the cooperation of both parties, at all levels, to control costs and to work with the health care community to provide quality health care at reasonable costs. The Union and the Employers are, therefore, committed to fully support appropriate programs designed to accomplish this objective. This statement of purpose in no way implies a reduction of benefits or additional costs for covered services provided miners, pensioners and their families.

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Article III A. (4) (a) of the Employer Benefit Plan states:

Drug Fee Schedule  
(Prescription Drugs)

(4) Prescription Drugs

(a) Benefits Provided

Benefits are provided for insulin and prescription drugs (only those drugs which by Federal or State law require a prescription) dispensed by a licensed pharmacist and prescribed by a (i) physician for treatment or control of an illness or a nonoccupational) accident or (ii) licensed dentist for treatment following the performance of those oral surgical services set forth in (3)(e).

The initial amount dispensed shall not exceed a 30 day supply. Any original prescription may be refilled for up to six months as directed by the attending physician. The first such refill may be for an amount up to, but no more than, a 60 day supply. The second such refill may be for an amount up to, but no more than, a 90 day supply. Benefits for refills beyond the initial six months require a new prescription by the attending physician. Prescriptions filled by the Plan's mail order provider, if any, are not subject to the limits on quantity set forth

in this paragraph.

Reasonable charges for prescription drugs or insulin are covered benefits. Reasonable charges will consist of the lesser of:

- (1) The amount actually billed per prescription or refill;
- (2) The price of the applicable generic substitution drug, if AB or better-rated, approved by the federal Food and Drug Administration; or, in the event the prescribing physician determines that use of a brand name drug is medically necessary, the price of such brand name drug; or
- (3) The current price paid to participating pharmacies in any prescription drug program established by the Employer.

Article III A. (8) of the Employer Benefit Plan provides in pertinent part:

(8) Co-Payments and Deductibles

Effective January 1, 2002, the benefits provided in this Plan shall be subject to the co-payments and deductibles set forth below and such co-payments and deductibles shall be the responsibility of the Beneficiary. The Plan Administrator shall implement such procedures as deemed appropriate to achieve the intent of these co-payments and deductibles. . . .

\* \* \*

Co-payments for covered Health Benefits are established below. Co-payments for services or supplies subject to a deductible only apply after the deductible has been met in full for the year.

Participating Provider Lists (PPL's) implemented by the Employer pursuant to Article IV may include participating hospitals, physicians, pharmacies and other providers. The Plan payment for hospital and related benefits provided from a non-PPL source will be limited to 90% of the amount that would have been paid by the Plan if the benefit had been provided by a provider on a PPL (or actual charges, if less). . . .

\* \* \*

Prescription Drugs (Co-pays do not apply to out-of-pocket maximum):

In PPL: \$5.00 per prescription\*

Non-PPL: \$10.00 per prescription\*

Mail Order: No co-payment

Brand name where a generic equivalent is available:

In addition to the co-payment, the Beneficiary is responsible for the additional cost of the brand name drug over the cost of the generic substitute. A generic drug will not be considered "available" unless it has been approved by the federal Food and Drug Administration. In addition, if the prescribing physician determines that

use of a brand name drug is medically necessary, the generic drug will not be considered "available," and there will be no additional payment by the Beneficiary for the use of the brand name drug.

Deductibles for covered Health Benefits refer to the first portion of covered benefits that must be paid by a Beneficiary during a calendar year before any amounts will be paid by the Plan. The first \$750 of all covered medical expenses incurred by any covered family member will be counted toward satisfying the deductible. Vision care and prescription drug expenses are not subject to the deductible. . . .

\* \* \*

Article III A. (10) (b) of the Employer Benefit Plan provides in pertinent part:

(10) General Provisions

(b) Administration

The Plan Administrator is authorized to promulgate rules and regulations to implement and administer the Plan, and such rules and regulations shall be binding upon all persons dealing with the Beneficiaries claiming benefits under this Plan. . . .

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\*Note: For purposes of this co-payment provision, a prescription or refill shall be deemed to be each 30 days (or fraction thereof) supply.

Article IV A. provides the following:  
Article IV A. of the Employer Benefit Plan provides:

Article IV Managed Care, Cost Containment

A. (1) The Employer may adopt Participating Provider Lists (PPL's) of physicians, hospitals, pharmacies and other providers, subject to the requirements set forth in C., below.

(2) In addition, the Employer may implement certain other managed care and cost containment rules, which may apply to benefits provided both by PPL providers and by non-PPL sources, but which (except for the deductibles and co-payments specifically provided for in the Plan) will not result in a reduction of benefits or additional costs for covered services provided under the Plan.

Discussion

As stated in Article XX (12) of the 2002 Wage Agreement, the parties to the Agreement are committed to fully support appropriate programs designed to control costs and to provide quality health care at reasonable costs. Article IV B. of the Plan states that the "Employer may implement certain other managed care and cost containment rules which may apply to benefits provided by both PPL providers and by non-PPL sources, but which (except for the deductibles and co-payments specifically provided for in the Plan) will not result in a reduction of benefits or additional costs for covered services provided under the Plan."

Article III A. (10) (b) authorizes an Employer to promulgate rules and regulations to implement and administer the Plan. The Trustees have determined in prior RODs (see RODs 81-697 and 84-042) that such rules and regulations are binding if they are reasonable and have been effectively communicated to the Beneficiaries.

Based on the information submitted by the Respondent, the program appears to have been effectively communicated to its beneficiaries. Accordingly, what is at issue here is whether the Respondent's mail order pharmacy program results in a reduction of benefits or an increase in costs, and whether the program is reasonable.

Under the Respondent's program, if a beneficiary purchases a maintenance drug from a retail pharmacy, the beneficiary is required to pay the co-payment of \$5.00 or \$10.00 depending on whether it is a PPL or non-PPL pharmacy plus the \$10.00 surcharge. According to Article III A. (8) of the Plan, prescription drugs purchased from a PPL pharmacy require a \$5.00 co-payment and drugs purchased from a non-PPL pharmacy require a \$10.00 co-payment. Thus, in either case, under the Respondent's program the beneficiary will pay an additional \$10.00 per

prescription whether it is purchased from a PPL or non-PPL retail pharmacy.

The Trustees have previously reviewed RODs concerning the implementation of maintenance drug mail order programs. In RODs 88-613 and 88-322, employers had established mail order programs for long-term maintenance drugs as well as a network pharmacy system. Under the programs the co-payment was waived for a beneficiary who used the mail order system. A \$5.00 co-payment was charged if the beneficiary purchased a drug at the network pharmacy. If the beneficiary purchased a drug from a non-network pharmacy, the beneficiary would pay the cost of the drug and receive a reimbursement minus the co-payment. While the Trustees found that the general aims of the programs were reasonable, the Trustees noted that the cost-shifting to the beneficiary of the up-front charges when using non-network pharmacies was inconsistent with the co-payment provisions under the Employer Benefit Plan. In the present case, a beneficiary may avoid a \$10.00 surcharge by using the mail order program. However, when using the retail pharmacy system, a beneficiary will be required to pay more than the co-payment required pursuant to Article III A. (8) of the Plan. Therefore, the Respondent's program, which imposes a \$10.00 surcharge when drugs are purchased at a retail pharmacy, is inconsistent with the Employer Benefit Plan.

This conclusion is consistent with ROD CA-066 which contains identical facts. In ROD CA-066, the Trustees concluded that the \$10.00 surcharge applied under the Employer's program is "inconsistent with the prescription drug coverage and cost containment provisions of the Employer Benefit Plan. . . ."

The Respondent argues that ROD CA-066, a decision under the Coal Act Employer Benefit Plan, does not apply to the 2002 Employer Benefit Plan. This argument is, however, without merit because the language in Article IV B. of the Coal Act Employer Benefit Plan is identical to the language in Article IV A. (2) of the 2002 Employer Benefit Plan. More specifically, both provide that:

In addition, the Employer may implement certain other managed care and cost containment rules, which may apply to benefits provided both by PPL providers and non-PPL sources, but which (except for the deductibles and co-payments specifically provided for in the Plan) will not result in a reduction of benefits or additional costs for services provided under the Plan.

The Respondent also argues that ROD opinions under the 1988 Wage Agreement are non-precedential as to the 2002 Employer Benefit Plan. Article III A. (10) (b) of the Employer Benefit Plan states that "Precedent under the resolution of disputes mechanism previously in place shall remain in effect. . ." This language is also found in Article III A. (10) (b) of the 1993 and 1998 Employer Benefit Plans. Thus, the Employer Benefit Plan requires a consistent interpretation of provisions between each succeeding Plan. Therefore, the use of precedent opinions to clarify or support a point is upheld by the Plan.

Although the 1988 Employer Benefit Plan does not include the specific cost containment provision of Article IV of the 2002 Employer Benefit Plan, Article III A. (10) (g) 2. of the 1988 Employer Benefit Plan addresses cost containment initiatives. Article III A. (10) (g) 2. authorizes the Trustees to take steps to contain prescription drug costs and provides that Plan Administrators may “piggyback” the cost containment programs adopted by the Trustees. It also states, similar to Article IV of the 1993, 1998 and 2002 Employer Benefit Plans, that any cost containment program may not have the effect of causing a “loss or reduction of benefits to participants.” Article III. A. (10)(g) 2. further states that nothing contained in the cost containment section of the Plan shall diminish or alter any rights currently held by the Employer in the administration of this Plan.

Both the 1988 and the 2002 Wage Agreements contain identical language under Article (12), titled “Health Care Cost Containment,” by which the parties to the Agreement indicate their commitment to fully support appropriate programs designed to control costs and to provide quality health care at reasonable costs. The Trustees issued opinions under the 1988 Employer Benefit Plan that addressed cost containment programs implemented by Employers (see RODs 88-253, 88-322, 88-403, 88-571 and 88-613). Furthermore, although the Respondent states that its position is supported by the Trustees’ decision in ROD 93-079, the decision in that case is not relevant to the particular facts here. In that case, the issue addressed was whether an employer could impose a requirement that a beneficiary provide medical documentation to support the use of brand name drugs. That is not the issue in this ROD.

Finally, in further support of its position that opinions that address the 1988 Employer Benefit cannot be used as precedent, the Respondent cites to the Trustees’ discussion in ROD 93-109. In that discussion, the Trustees noted that the 1993 Employer Benefit Plan was amended to include new language not provided for in predecessor Employer Benefit Plans that addressed the period of health benefits coverage for a retiree. Based on that language, the Trustees found that the employer was required to provide coverage to a disabled employee. The 1988 Employer Benefit Plan and 1988 Wage Agreement along with the 2002 Employer Benefit Plan and 2002 Wage Agreement each address cost containment initiatives, thus the facts of ROD 93-109 are inapposite to the facts of the current ROD.

#### Opinion of the Trustees

The Respondent’s mail order maintenance drug program is inconsistent with the provisions of the prescription drug coverage and cost containment provisions of the Employer Benefit Plan.