OPINION OF TRUSTEES

In Re

Complainant: Pensioner
Respondent: Employer
ROD Case No: 98-013 – April 25, 2006

Trustees: Micheal W. Buckner, Frank Dunham, Michael H. Holland, 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

The Respondent notified all Employees and Pensioners by letter dated March 20, 2000, that in coordination with the Respondent's prescription drug plan, the Respondent was implementing a formulary prescription drug program called RX Selections Formulary effective April 1, 2000. Subsequently, the Respondent notified beneficiaries that the program would begin May 1, 2000.

According to the literature submitted by the Respondent, for a supply of 30 days or less, a beneficiary will pay the following per prescription: 1) Generic drug--$4.50; 2) Brand-name drug when a generic is available--$4.50 co-payment plus the difference between the brand-name price and the generic price. If medical necessity for a brand-name drug is established, the charge is $4.50. It should be noted that this portion of the Respondent's prescription drug program is identical to the provision of benefits under Article III A. (8) of the Employer Benefit Plan.

In addition to the benefits provided above, the literature also indicates that for a supply of 30 days or less, a beneficiary will pay the following per prescription: 1) Brand-name formulary drug when no generic is available--$4.50; 2) Brand-name non-formulary drug when no generic is available--$4.50 co-payment plus a $15.00 surcharge. Under the formulary program, a beneficiary's physician may request a review to have a non-formulary drug designated as medically necessary. If medical necessity is established, the beneficiary does not pay the $15.00 surcharge.

In general, a "formulary" is a list of prescription drugs, grouped by therapeutic class, that a health plan prefers and in some cases may require doctors to prescribe. A therapeutic class puts drugs into groups according to the disease that the drug treats or the effect the drug has on the body.

A representative for the Complainant states that the Rx Selection Formulary program is not

consistent with the terms of the Employer Benefit Plan because it increases the Complainant's co-payment from $4.50 to $19.50.

Dispute

Is the formulary drug program implemented by the Respondent consistent with the terms of the Employer Benefit Plan?

Positions of the Parties

Position of the Complainant: The Respondent's formulary drug program is in violation of the terms of the Employer Benefit Plan because it increases the co-payment allowed for prescription drugs.

Position of the Respondent: The Respondent's formulary drug program is not in violation of the terms of the Employer Benefit Plan for the following reasons:
1) The formulary program does not reduce benefits because non-formulary drugs are not medically necessary. Formulary drugs provide equivalent therapeutic benefits to those provided by non-formulary drugs. However, a beneficiary still may choose to purchase a non-formulary drug as a more costly alternative.
2) When the beneficiary utilizes the prescription drug designated in the formulary program, the program does not result in increased costs.
3) The appeal process allows the beneficiary to establish medical necessity and thus be exempt from the $15.00 surcharge. During a two-month period, 68% of appeals were approved.
4) The cost containment provisions under the Wage Agreement and the Employer Benefit Plan authorize the implementation of a drug formulary.
5) The surcharge does not arbitrarily hinder or deny a beneficiary reasonable and timely access to required medications.
6) The Trustees' decision in ROD 93-079 supports the formulary drug program with respect to whether an employer may review for medical necessity to determine whether coverage will be provided for brand name prescription drugs.

Pertinent Provisions

Article XX (12) of the 1998 Wage Agreement states 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.

The Introduction to Article III of the 1998 Employer Benefit Plan states in pertinent part:

> . . . Covered services shall be limited to those services which are reasonable and necessary for the diagnosis or treatment of an illness or injury and which are given at the appropriate level of care, or are otherwise provided for in the Plan. The fact that a procedure or level of care is prescribed by a physician does not mean that it is medically reasonable or necessary or that it is covered under this Plan. . . .

Article III A. (4) (a) of the 1998 Employer Benefit Plan states:

> (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).
>
> * * *
>
> 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 the 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.

However, in no event will a Beneficiary be responsible to pay more for a single prescription than the appropriate co-payment set forth in this Plan, plus any difference between the price of the generic and the brand name drug, where applicable.

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

(8) Co-Payments and Deductibles

Effective January 1, 1997, 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. . . .

* * *

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

In PPL: $4.50 per prescription*[1]

Non-PPL: $9.00 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.

* * *

Article III A. (10) (b) of the 1998 Employer Benefit Plan state, in pertinent part:

---

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

(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. . . .

* * *

Article IV. A. (2) of the 1998 Employer Benefit Plan state, in pertinent part:

Article IV. Managed Care, Cost Containment

> A. (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

The Trustees deadlocked on this matter. Trustees Holland and Buckner found for the Complainant. Trustees Dunham and Segal found for the Respondent. Under the ROD procedures approved by the Trustees of the UMWA 1993 Benefit Plan, the matter was referred to a neutral interest arbitrator, Robert E. Nagle, for resolution. The arbitrator was directed to choose one of the two draft opinions proposed by the Trustees. The arbitrator's choice is printed below as the Opinion of the Trustees.

Opinion of the Trustees

The Employer’s imposition of a mandatory formulary drug program is inconsistent with the prescription drug coverage and cost containment provision of the Employer Benefit Plan, and therefore is not within the Employer’s authority to implement under the National Bituminous Coal Wage Agreement and the Employer Benefit Plan.