OPINION OF TRUSTEES

In Re

Complainant: Pensioner
Respondent: Employer
ROD Case No: CA-056 – April 25, 2006

Trustees: Micheal W. Buckner, A. 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 Coal Industry Retiree Benefit Act of 1992 (Coal Act) Employer Benefit Plan maintained pursuant to section 9711 of the Internal Revenue Code.

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--$5.00; 2) Brand-name drug when a generic is available--$5.00 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 $5.00. 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--$5.00; 2) Brand-name non-formulary drug when no generic is available--$5.00 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 is composed of drugs put 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 $5.00 to $20.00 for certain drugs.

Dispute

Is the formulary drug program implemented by the Respondent consistent with the terms of the Coal Act 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 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 a beneficiary utilizes the prescription drug designated in the formulary program, it does not result in increased costs.
3) The appeals process allows a beneficiary to establish medical necessity and thus be exempt from the $15.00 surcharge. During a three-month period, 70% of appeals were approved.
4) The cost containment provisions under the Coal Act and the Coal Act Employer Benefit Plan authorize the implementation of a drug formulary.
5) The Respondent's formulary drug program is similar to the formulary drug program implemented by the Trustees of the 1992 Benefit Plan because both programs impose an additional charge when a beneficiary uses a non-formulary medication.
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

The Introduction to Article III of the Coal Act Employer Benefit Plan states:

> Subject to Article IV, the benefits provided under this Plan are set forth in this Article III. Benefit payments shall not exceed reasonable and customary charges for covered services and supplies. 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. . . . The benefits described in this Article are subject to any requirements implemented pursuant to Article IV. Covered services that are medically necessary will continue to be provided, and accordingly, while benefit payments may be subject to managed care and cost containment rules, this paragraph shall not be construed to detract from plan coverage or eligibility as described in this Article III.

Article III A. (4) (a) of the Coal Act 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.

Reasonable charges for prescription drugs or insulin are covered benefits. Subject to any cost containment rules and procedures adopted pursuant to Article IV, reasonable charges will consist of the lesser of:

(1) The amount actually billed per prescription or refill, or

(2) The average wholesale price plus 25%, to be not less than $2.50 above nor more than $10.00 above the average wholesale price per prescription or refill, or the Plan Administrator may determine average wholesale price from either the American Druggist Blue Book, the Drugtopics Redbook, or the Medi-Span Prescription Pricing Guide.

(3) For a pharmacist participating in a Trustee-established prescription drug program, the current price paid by the Funds and available to the Employer in a piggybacked program.

(4) 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;

(5) The rate for the drug listed on the formulary list of specific drugs along with payment rates adopted by the Plan Administrator and provided to Plan participants;

(6) The current price paid to participating pharmacies on a Participating Provider List (PPL) adopted by the Employer pursuant to Article IV. The Employer will notify Beneficiaries of the need to use PPL pharmacies. If a Beneficiary purchases a prescription drug or insulin from a pharmacy that is not on the Employer's PPL, the Employer will advise the Beneficiary by letter regarding the future consequence of using a non-PPL pharmacy. If the Beneficiary fails to use a PPL pharmacy a second time, the Employer will contact the Beneficiary in person or by telephone to counsel the Beneficiary on the consequences of using a non-PPL pharmacy. Following such counseling, the "Hold Harmless" protections of section (10)(g)3 will cease to apply to prescription drugs and insulin purchased for such Beneficiary or his eligible Dependents from any pharmacy that is not on the Employer's PPL.

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

(8) Co-Payments and Deductibles

Certain benefits provided in this Plan shall be subject to the co-payments set forth below and such co-payments 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. Beneficiaries and providers shall provide such information as the Plan Administrator may require to effectively administer these co-payments, or such Beneficiaries or providers shall not be eligible for benefits or payments under this Plan. Any overpayments made to a provider who overcharges the Plan in lieu of collecting the applicable co-payment from a participant or Beneficiary shall be repaid to the Plan Administrator by such provider.

Co-Payments for covered Health Benefits are established as follows:

Benefit	Co-Payment
(a) Physician services as an outpatient as set forth in section A(2) and physician visits in connection with the benefits set forth in section A(3), paragraph (c) but only for pre-and post-natal visits if the physician charges separately for such visits in addition to the charge for delivery, and paragraph (g) through (m), paragraph (n) except inpatient surgery, paragraph (o) and section A(7), paragraph (f).	$5 per visit up to a maximum of $100 per 12-month period per family.
(b) Prescription drugs and insulin, as set forth in section A(4) and take-home drugs following hospital confinement set forth in section (A)(1)(a)	$5 per prescription or refill up to $50 maximum per 12-month period per family. Note: For purposes of this co-payment provision, a prescription or refill shall be deemed to be each 30 days (or fraction thereof) supply.

The 12-month periods shall begin on March 27 of each year.

Additional Rule Regarding Brand Name Prescription Drugs where a generic equivalent is available:

In addition to the regular 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. **NOTE:** "Hold Harmless" protections of section (10)(g)3 do not apply to brand name prescription drugs where a generic equivalent is available.

Article III A. (10) (b) of the Coal Act Employer Benefit Plan states:

(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. The Trustees of the UMWA 1992 Benefit Plan will resolve any disputes, including excessive fee disputes, to assure consistent application of the Plan provisions which are identical to the benefit provisions of the 1992 Benefit Plan.

Article III A. (10) (g) 2. provides the following:

(g) Explanation of Benefits (EOB), Cost Containment and Hold Harmless

* * *

2. (i) Regarding health care cost containment, the Trustees of the UMWA 1992 Benefit Plan are authorized to establish managed care and cost containment rules and procedures pursuant to section 9712(c) of the Internal Revenue Code. Among other programs, the Trustees are authorized to take steps to contain prescription drug costs, including but not limited to, paying only the current average wholesale price, encouraging the use of generic drugs instead of brand name drugs where medically appropriate, and encouraging the use of mail order drug programs when advantageous.

(ii) The Trustees shall make available to the Plan Administrator any special cost containment arrangements that they make with outside vendors and/or providers. Further, the Plan Administrator may "piggyback" the cost containment programs adopted by the Trustees, and may utilize the managed care and cost containment rules and programs adopted by the Trustees.

(iii) Disputes shall be resolved in accordance with (l0)(b).

(iv) It is expressly understood that nothing contained in this

Section shall diminish or alter any rights currently held by the Employer in the administration of this Plan.

* * *

Article IV A. and B. of the Coal Act Employer Benefit Plan states:

Article IV Managed Care, Cost Containment

A. The Employer may adopt Participating Provider Lists (PPL's) of physicians, hospitals, pharmacies and other providers, provided that any such PPL has been approved for adoption under the Employer's benefit plan maintained pursuant to Article XX(c)(3)(i) of the National Bituminous Coal Wage Agreement of 1993 ("1993 NBCWA"). The Employer may also implement a formulary for prescription drugs; implement a mail-order procedure for prescription drugs, including appropriate limits on quantity and periodic physician review; and subject the prescription drug program to a rigorous review of appropriate use.

B. 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 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 Coal Act and the Coal

Act Employer Benefit Plan.