

JUDICIAL ARBITER GROUP, INC.

JAG Case No. 270779

JILL and STEPHEN TAPPERT,

Claimants,

v.

ANTHEM BLUE CROSS BLUE SHIELD,

Respondent.

ARBITRATION AWARD

This matter is before the Arbiter for issuance of the arbitration award. The Arbiter has considered the evidence, counsels' arguments and submissions and the applicable law.

At issue, is whether Anthem is required to cover the costs of ABA autism treatment for Abby Tappert (age 4) and whether Anthem committed bad faith in adjudicating and denying Claimants' application for benefits. The Arbiter answers the first question "yes" and second question, "no".

I. Is ABA treatment a benefit under the policy?

Respondent's justification for denial of ABA treatment as a benefit under the policy was based on two specific reasons:

1. The treatment was not medically necessary.
2. The services were not provided in a doctor's office and/or ABA therapy is not a covered benefit.

The Arbitrator will consider each in turn.

1. **Whether ABA treatment is medically necessary.**

In general, Anthem's PPO policy provides:

Anthem's Process to Determine if Services are covered

To determine if a health care service is a covered benefit, Anthem considers whether the service is medically necessary and whether the service is experimental/investigational, cosmetic or otherwise excluded under this coverage. Anthem uses numerous resources, including current peer-reviewed medical literature, Anthem's adopted medical policies and practice guidelines, guidelines obtained from recognized national organizations and professional associations, and consultations with physician specialists when determining if a particular service is covered. Anthem will assist the member by determining what services are covered under the member's chosen coverage and what services are excluded from the health coverage.

Medically Necessary Health Care Services – Anthem determines if services, procedures, supplies or visits are medically necessary. Only medically necessary services (except as otherwise provided in this certificate), procedures, supplies or visits are covered services. Anthem uses medical policy, medical practice guidelines, professional standards and outside medical peer review to determine medical necessity. Anthem's medical policy reflects current standards of practice and evaluates medical equipment, treatment and interventions according to an evidence-based review of scientific literature. Medical technology is constantly changing, and Anthem reserves the right to periodically review and update medical policies. Providers and members may go to our website to view a list of services considered medically necessary. The benefits, exclusions and limitations of a member's coverage take precedence over medical policy. (Anthem PPO Policy; Exhibit 18, p.7-8.),

In the definitional section of the policy, Anthem more particularly describes what medically necessary means:

"Medically necessary - an intervention that is or will be provided for the diagnosis, evaluation and treatment of a condition, illness, disease or injury and the Anthem solely determines to be:

- Medically appropriate for and consistent with the symptoms and proper diagnosis or treatment of the condition, illness, disease or injury.
- Obtained from a physician and/or licensed, certified or registered provider.
- Provided in accordance with applicable with applicable medical and/or professional standards.

- Known to be effective, as proven by scientific evidence, in materially improving health outcomes.
- The most appropriate supply, setting or level of service that can safely be provided to the member and which cannot be omitted, and is consistent with recognized professional standards of care (which, in the case of hospitalization, also means that safe and adequate care could not be obtained as an outpatient).
- Cost-effective compared to alternative interventions, including no intervention (cost-effective does not mean lowest cost).
 - Not experimental/investigational
 - Not primarily for the convenience of the member, the member's family or the provider.
 - Not otherwise subject to exclusion under this certificate.

The fact that a physician and/or provider may prescribe, order, recommend or approve care, treatment, services or supplies does not itself make such care, treatment, services or supplies medically necessary.”

(Anthem PPO Policy, Exhibit 18, p.71-72.)

Pursuant to this provision, Anthem promulgated a medical policy on autism. The policy was drafted by a non-physician, using medically accepted and scientifically reliable data bases. The policy was then reviewed by physicians before its adoption and utilization by Anthem. No evidence was presented that the physician reviewers had any experience in the diagnosis and treatment of autism. In fact, the doctors testifying for Anthem on the validity of the policy acknowledged that they had no experience treating autism. See for example, *Kunin v. Benefit Trust*, 910 F.3d 534 (9th Cir. 1990) (failure to consult with expert in autism was abuse of discretion when labeling autism a mental illness instead of an organic disorder).

Claimant presented the testimony of Drs. Strain and Huckabee – both of which are well versed and practiced in autism treatment. Dr. Strain is world recognized for his autism research and publication having authored over 170 articles, 44 book chapters and having received \$45 million in grants to study autism and its treatment. In his criticism of the Anthem policy, Dr. Strain points out that Anthem erroneously equates ABA

therapy with Lovaas therapy – an approach which has received considerable justifiable scientific criticism. ABA therapy is based upon incidental teaching and pivotal response training, which Dr. Strain testified is the standard of care when dealing with autistic children. According to Dr. Strain, instead of being investigational and experimental, ABA therapy reduces problem behaviors 80 – 90% and studies have replicated these results repeatedly. Finally, Dr. Strain testified that the ABA therapy received by Abby was endorsed by the National Academy of Sciences – the recognized authority in the United States for resolving scientific disputes. Dr. Strain's opinions were echoed by Dr. Huckabee, Abby's treater for autism. Both Dr. Strain's and Huckabee's opinions are supported by the National Institute of Mental Health's publication on Autism Spectrum Disorders:

“Among the many methods available for treatment and education of people with autism, applied behavior analysis (ABA) has become widely accepted as an effective treatment. Mental Health: a Report of the Surgeon General states: “Thirty years of research demonstrated the efficiency of applied behavioral methods in reducing inappropriate behavior and in increasing social behavior.”

The Arbiter has reviewed the references submitted by Anthem. Most are critical of the Lovaas approach. ABA therapy is not Lovaas therapy. Many articles which do mention ABA therapy are positive. (For example, see meta-analysis, Exhibit O, p. 3) Anthem 00539: “Applied behavior analysis strategies have been demonstrated to be effective in young children with autism”) It appears both from the greater weight of the references and credible testimony that ABA therapy is the standard of care in treating autism,

While the scientific reliability of ABA therapy was contested, its ability to reduce harmful behaviors was not. Anthem's medical policy also provides:

Behavioral modification for management of behavioral symptoms related to Autism . . . is considered medically necessary when required for the management of behaviors where the potential for patients to harm themselves or others is present . . .

(Anthem PPO Policy, Exhibit 15.)

Mr. London testified that this language does not apply to ABA therapy. The Arbiter is unconvinced. ABA therapy uses behavior modification techniques to manage autistic behavioral symptoms such as self destructiveness and aggression. Abby's parents and Dr. Huckabee testified about Abby's self-destructive head banging and aggressiveness towards other children. It was uncontroverted that the ABA therapy has helped in the past and continues to help control Abby's self-destructive and outward aggressive behaviors. Similarly, it was undisputed that without such therapy, Abby would undoubtedly have suffered brain damage.

The Arbiter concludes, at a minimum, that Abby's ABA therapy was medically necessary because it controls Abby's self-destructive behaviors and outward aggressions directed toward others.

2. Whether ABA therapy is a covered benefit under the policy.

The insured has the initial burden to demonstrate a loss, injury or benefit covered under the policy. The insurer then must establish an exclusion that applies which is not subject to any other reasonable interpretation. *Leprino Foods v. Factory Mutual Ins. Co.*, 453 F.3d 1281, 1287 (10th cir 2006); *American Family Mutual Insurance v. Bentley*, 953 P.2d 1297, 1301 (Colo. App. 1998). If the insurer shows that an exclusion applies, the burden then shifts back to the insured to establish an exception to the exclusion. *Pubic Service v. Wallis*, 955 P.2d 564, 568 (Colo. App. 1997), reversed other grounds, 986 P.2d 924 (Colo. 1999); *Rodriguez v. Safeco Ins. Co.*, 821 P.2d 849 (Colo. App. 1991).

Claimants initially point to the policy's mental health provision to support their coverage position:

Biologically based mental illness conditions and autism are covered under the member's medical benefits and not subject to the limitations of the mental health benefit. They are covered the same as any other physical illness, and described in the appropriate section of the certificate depending upon the care type received. (Anthem's PPO Policy; Exhibit 18; p. 41)

Claimants cite two sections of medical benefits for coverage of the claimed treatment: Physician Office Services and Other Outpatient Therapy Services.

Physician Office Services includes benefits which are for medical care, consultation and second opinions for the examination, diagnosis and treatment of an illness or injury, when received in a physician's or other professional provider's office. (Anthem PPO Policy, Exhibit 18, page 27.) A physician is defined as a doctor of medicine or osteopathy who is licensed to practice medicine under the laws of the state or jurisdiction where the services are provided. (Anthem PPO Policy, Exhibit 18; p. 73.) A "professional provider" is defined as:

Professional provider – a physician or other professional provider who is licensed or otherwise authorized by the state or jurisdiction where services are provided to perform designated health care services. For benefits to be payable, services must be within the scope of the authority granted by the license and covered by this certificate. Such services are subject to review by a medical authority appointed by Anthem. Other professional providers include, among others, certified nurse midwives, dentists, optometrists and certified registered nurse anesthetists. Services of such a provider must be among those covered by this certificate and are subject to review by a medical authority appointed by Anthem.

(Anthem's PPO Policy, Exhibit 18; p. 73.)

Claimant is requesting reimbursement for services that were provided at multiple locations including, the child's home, Emerge, P.C., the Aspen Center, the child's school, in the community and staffing phone conferences. Dr. Helena Huckabee, a licensed

clinical psychologist and pediatric neurophysiologist maintains offices at Emerge and at the Aspen Center. Services provided at both the Aspen Center and Emerge to Abby were within the scope and authority of Dr. Huckabee's license. The Aspen Center's executive director is a registered occupational therapist. The Aspen Center has apparently billed for Service for which Anthem has paid. (See Exhibit 34.)

The Respondent contends that the services must be provided in a physician's office. The Arbiter does not agree. While the first paragraph under Physician Office Services says that the services must be provided in a physician's office, the third paragraph clearly permits consultations to treat an illness or injury, when provided in a professional provider's office. (Anthem PPO Plan, Exhibit 18, p.27.)

At the very least, these two conflicting provisions create an ambiguity, or inconsistency in a policy of insurance and, therefore, the provision should be construed in favor of coverage. *Farmers Alliance Mutual Ins. v. Ho*, 68 P.3d 546 (Colo. App. 2002), *Tepe v. Rocky Mountain Hospital and Medical Services*, 893 P.2d 1323 (Colo. App. 1994).

The policy carries benefits for consultations and treatment when received in a professional provider's office. There does not appear to be any limitation on either the type or number of treatments as long as they are at the professional office within the scope and authority of the license. The services were provided by Dr. Huckabee and paraprofessionals which she trained and supervised. The Arbiter concludes that services provided at Emerge and the Aspen Center for Abby are a covered benefit.

Claimant also asserts that there is coverage for ABA therapy under the Other Outpatient Therapy Provisions. The Arbiter agrees. The relevant section provides as an exclusion to coverage:

Therapies for learning disorders, behavioral or personality disorders, developmental delays, stuttering, voice disorders or rhythm disorders.

(Anthem PPO Plan, Exhibit 18, p. 33.)

However, an exception to that exclusion, provides that, up until the member's 5th birthday, the "exclusion shall not apply to therapies for the care and treatment of congenital defects or birth abnormalities." (Anthem PPO Policy, Exhibit 18, p. 33.)

Respondent contends that this exception to the exclusion only provides the 20 outpatient visits for physical, speech and occupational therapy. The Arbiter is not persuaded. The exception does not express any limitation and the Arbiter will not rewrite the contract to engraft such a limitation on the exception. *Farmers Alliance, supra*, at 550 (when the insurer seeks to restrict coverage, the limitation must be clearly expressed.)

Respondent also contends that the language in exclusion: "therapies for self help programs not specifically identified above" limits any benefits for ABA therapy. The Arbiter does not agree. The policy specifically delineates therapies for care and treatment of congenital defects, as an exception to the exclusion and thus, it is a therapy enumerated above.

Respondent finally asserts that there is a no coverage because autism is not a congenital defect or birth abnormality¹. Anthem has taken contradictory positions

¹ Claimant initially responds that Respondent's assertion is untimely because it was raised for the first time at the hearing. See *Public Service v. Wallis*, 955 P.2d 564, 571 (Colo. App. 1997), reversed other grounds

regarding its interpretation of the cause of autism. In its medical policy, Anthem defines autism as a developmental disorder that affects parts of the brain that control social interaction and communication. Congenital defect is defined in the Anthem PPO Policy as a defect or anomaly existing before birth, such as cleft lip or club foot. (Anthem PPO Policy, Exhibit 18, p. 67.)

Anthem's interpretation of its own policy and conduct evinces its belief that autism is a congenital defect and/or a birth abnormality. In its coverage denial letter of May 30, 2006, Anthem acknowledged that Abby was entitled to outpatient therapy for congenital defects and birth abnormalities to wit—her autism. (See Exhibit AJ). Even before the issuance of the second level appeal, Dr. Jones, Anthem's Medical Director, expressed the opinion: "autism meets the requirements for therapies up until age 5 – the therapies need be PT, OT, and ST provided by a licensed provider..." (Anthem Appeal Review Request, 02/12/06, Exhibit 14.) For autism to meet the requirement of the PT, OT, and ST therapies, the benefits must be solely for the treatment of congenital defects and/or birth abnormalities. (Exhibit 18, p. 33)

The initial opinion of Dr. Jones, that autism is not a developmental disorder which Respondent now claims was an accommodation to the autism lobby, is well supported by Dr. Strain and Dr. Huckabee. Additionally, Dr. MacHaffie, the President of the Colorado Chapter of the Americas Academy of Pediatrics noted, citing five recent peer reviewed articles, that autism is a neurological disorder that is present in some children at birth. Jill Tappert testified about Abby's birth abnormalities which were consistent with autism as a congenital defect or birth anomaly.

986 P.2d 924 (Colo. 1999). The Arbiter finds it unnecessary to make this determination, because of Anthem's conduct in construing its own policy.

Given Anthem's inconsistent interpretation of its own policy, the Arbiter must construe the policy to extend coverage. See State Farm Mutual v. Nissen, 851 P.2d 165 (Colo. 1993). The Arbiter concludes that autism is a congenital defect and/or birth abnormality. The Arbiter concludes that ABA treatment for autism is a covered benefit under the policy until Abby is five.

II. Did Anthem act in bad faith?

To prevail on their claim of bad faith the Claimant's must demonstrate that Anthem acted unreasonably with knowledge that its conduct was unreasonable or in reckless disregard that its conduct was unreasonable. American Family v. Allen, 102 P.3d 333, 342 (Colo. 2004). The *scienter* requirement for a bad faith action reflects the balance between the need for carriers to reject non-covered claims, yet, to investigate and pay covered claims. Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1275 (Colo. 1985),

Claimants assert Anthem acted in bad faith because:

1. In the first level appeal Dr. Jones did not consult a clinical peer nor did the denial letter accurately reflect Dr. Jones' decision.
2. The second level appeal two of the three members did not have appropriate expertise.
3. In the second level appeal, Dr. Pedowitz, the panel member with specialized autism knowledge abstained and Claimants were not so informed.
4. The second level appeal letter was not issued by the panel and failed to include the review panel's statement of their understanding of the covered person's request for review.

5. Anthem delayed the proceedings by failing to seasonably select an arbiter and insisting Morgan Stine Fitzsimmons, that the Claimants should pursue a third level external review.
6. Anthem's reliance on Medical Policy BEH0004 is unreasonable because the policy out of date and not in accord with the current standard of care.

Although a close question, Claimant's contentions individually and cumulatively do not constitute bad faith. It is undeniable that Anthem did not adhere to each rule governing the appellate procedure. However, the Arbiter finds that the non-compliance was not done in bad faith.

In the first level appeal, Dr. Jones needed to be a clinical peer or consult a clinical peer. Dr. Jones is a board certified surgeon with substantial policy and administrative education and experience. He does not recall whether he consulted with a clinical peer. He testified that his decision to deny coverage in the first appeal was based upon coverage... i.e. the policy did not provide the benefit the Tapperts were seeking. Thus, a clinical peer's input was unnecessary because this was not a utilization review involving issues of medical necessity. Part of the first level review letter was authored by Mr. Espo, the Anthem assigned Member Appeals Advocate. The Espo language somewhat tracks Dr. Jones' determination. (Compare Exhibit 12 and 14)

In the second level appeal, the panel members must consider all issues, regardless of whether they were raised in the first appeal. Amended Reg. 4-2-17 § 11(G) (4). The appeal panel must be comprised of health care professional with appropriate expertise to the case presented by the covered person. Amended Regulation 4-2-17 § 11(F). On the other hand, a third level review contemplates that the reviewers have expertise in the

treatment of the medical condition of the covered individual. § 10-16-113.5, C.R.S. (2007). The statute has no mandate for such specialized expertise for second level reviewers. The statute simply requires that the review be conducted by a health care professional who has appropriate expertise, who was not previously involved in the appeal and who does not have a financial or other interest in the case outcome. Appropriate expertise should not be equated with the more rigorous level of expertise directed towards the specific medical condition required for the covered individual. If the legislature had wanted such expertise, they could have used the same language. The neutral must construe statutes together to give meaning to all the terms, *People v. Lowe*, 967 P.2d 177 (Colo. App. 1998).

Drs. Burgess and Sbarbaro had appropriate expertise to review issues of medical necessity and coverage. Dr. Pedowitz abstained in the decision because the other two reviewers had voted to deny coverage on the basis of contract interpretation. The fact that the decision was written by Anthem, while technically not in compliance with the regulations, is of no moment because the un-rebutted testimony was that the decision accurately reflected the view of the majority of the panel. The non-disclosure of Dr. Pedowitz abstention and the failure of the panel to delineate their understanding of Claimant's position does not constitute bad faith.

Exhibits 20-27 reflect Claimants efforts to move the case into arbitration. Mr. Fitzsimmons insistence that Claimants pursue a third level appeal was undoubtedly frustrating. However, Anthem's PPO Plan gave Claimants the absolute right to pursue arbitration at any time after the first appeal. Any delay would have been truncated by the

Claimants through filing with Anthem a demand for arbitration and later selecting an arbiter.

Claimant finally contends that:

“Most importantly, Anthem’s reliance upon Medical Policy BEH00004 is done in bad faith, Anthem’s Medical Policy BEH00004 is fundamentally flawed and not representative of the current standard of care for autism therapy. Anthem has an ethical and contractual obligation to institute medical policies that are accurate, fair and based upon appropriate scientific standards.”

The Arbiter has reviewed the articles and research supporting Anthem’s medical policy. Several of the articles seem dated, having been authorized in 1993 (Exhibit S); 1999 (Exhibit T & U) and 2000 (Exhibit N); others are quite current, authored in 2004 (Exhibit M) and 2005 (Exhibits L & R).

The definitions of autism range from a “developmental abnormality”, to an “endpoint of several organic etiologies”, to a “neurobehavioral disorder”, to a “disorder of brain development with a strong genetic base”. The Anthem policy impugns the efficacy of ABA treatment because of its association with Lovaas therapy. While it appears that ABA therapy grew out of the research that Lovaas did, they appear to be significantly different approaches with widely disparate results. The Arbiter based his decision on medical necessity on a very narrow ground – self harm and harm to others. The Arbiter will not dictate to Anthem what its medical policy should be and, thus, its contractual obligations on ABA and treatment for autism. Multiple other carriers do not cover ABA therapy. (Exhibits G-K). Anthem’s policy on medical necessity does not constitute bad faith.

III Conclusions

During the hearing, Claimants submitted bills for \$110,490.02 that should be

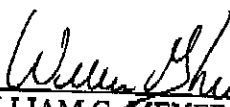
reimbursed and/or paid. (Exhibit 35) Anthem's counsel properly raised the issues of out-of-pocket annual maximum payments and annual deductibles. The parties have not had the opportunity to fully address these issues. In addition, the provider at issue here are apparently out-of-network and, thus, Anthem asserts certain caps may apply. The Claimants argue that pursuant to § 10-6-704 (2) (a), that in cases where the benefit is not available in-network, Anthem must provide the benefits to the member at the same cost as if there was an in-network provider. The record has not been fully developed on this issue.

IV Award

The Arbiter issues the following awards:

1. For the Claimants Jill and Stephen Tappert, as parents of Abigail Roberta Tappert on their claim that ABA therapy is a covered benefit under the Anthem PPO Policy.
2. For Respondent Anthem Blue Cross and Blue Shield on Claimant's bad faith claim.
3. For Claimants for their reasonable costs in pursuing and prosecuting the arbitration.
4. Counsel shall meet within 20 day to determine if they can resolve the remaining issues. If the parties cannot agree on a resolution of the remaining issues, they will submit to the Arbiter a joint statement of remaining issues by 12/28/07. The matter shall be set for a continued arbitration hearing to resolve the outstanding issues before January 31, 2008. The Arbiter will issue a ruling at the conclusion of the hearing.

Issued this 20th day of November, 2007, in Denver, Colorado.


WILLIAM G. MEYER, Arbiter
JUDICIAL ARBITER GROUP, INC.

CERTIFICATE OF MAILING AND FACSIMILE

I hereby certify that on this 20th day of November, 2007, I faxed by facsimile transmission and deposited in the United States mail, postage prepaid, a true and correct copy of the foregoing Arbitration Award to the following:

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