UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

MARLENA MILLS, DAVID G. MILLS, AND JULIA MILLS,	)	
Plaintiffs,	)	
v.	)	**No. 3:15-cv-00552**
	)	**Judge Reeves**
BLUECROSS BLUESHIELD OF TENNESSEE, INC.,	)	**Magistrate Judge Guyton**
Defendant.	)	

DEFENDANT BLUECROSS BLUESHIELD OF TENNESSEE, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO RECONSIDER PART IV.A. OF THE COURT'S JANUARY 9, 2017 ORDER (DOC. 34)

I. INTRODUCTION

Defendant BlueCross BlueShield of Tennessee, Inc. ("BCBST") has moved under Rules 59(e) and 60(b)(1) of the Federal Rules of Civil Procedure to reconsider Part IV.A of the Court's January 9, 2017 Memorandum Opinion and Order (Doc. 34), respectfully asking the Court to reconsider its ruling on Plaintiffs' admitted failure to satisfy contractual conditions for filing suit, to grant BCBST's Motion for Judgment on the Pleadings (Doc. 19) in its entirety, and to dismiss this action.

Plaintiff Marlena Mills, an adult BCBST insured, and her parents brought this action alleging state-law contract claims and a violation of the federal Affordable Care Act (ACA), 124 Stat. 119, and the Mental Health Parity and Addition Act (MHPAEA), 29 U.S.C. § 1185a. BCBST moved the Court for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, asserting that Plaintiffs failed to exhaust their contractual and statutory

remedies as set out in the Policy[1] upon which they sue, which are mandatory under both federal and state law, and otherwise failed to state a claim upon which relief could be granted. The Court dismissed all claims save one: Plaintiffs' claim for breach of contract. This claim survived, in part, because the Court found Plaintiffs' action is not barred by their failure to file a claim and to exhaust contractual remedies under the Policy. With respect and deference, BCBST believes that the prior order failed to give effect to certain provisions of the Policy and thus erred in reaching that conclusion. Thus, BCBST respectfully requests the Court to reconsider that determination, grant BCBST's Motion for Judgment on the Pleadings (Doc. 19) in its entirety, and dismiss this action.

II. STANDARD OF REVIEW

While the Federal Rules of Civil Procedure do not expressly authorize motions to reconsider, courts commonly treat them as either a Rule 59(e) or a Rule 60(b) motion. *Lincoln Mem'l Univ. Duncan Sch. of Law v. The Am. Bar Ass'n*, 3:11-CV-608, 2012 WL 1108125, at *1 (E.D. Tenn. Apr. 2, 2012) (citation omitted). When brought within the timeframe set forth in Rule 59(e)—twenty-eight days—courts treat motions to reconsider under that Rule. *Id.*

Rule 59(e) "(e)mpowers district courts to rectify their own mistakes immediately following the entry of judgment." *Am. Accessories Int'l, LLC v. Conopco, Inc.*, No. 3:15-CV-49-TAV-HBG, 2017 WL 52606, at *3 (E.D. Tenn. Jan. 4. 2017) (citation omitted). "A district court may grant a Rule 59(e) motion to alter or amend judgment only if there is: '(1) clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *Henderson v. Walled Lake Consol. Schs.*, 469 F.3d 479, 496 (6th Cir. 2006) (citation omitted). And "[t]he grant or denial of a Rule 59(e) motion is within the

[1] All capitalized terms herein are defined in the Policy or BCBST's brief in support of its motion for judgment on the pleadings (Docs. 15-1 and 20).

informed discretion of the district court." *Constr. Helicopters, Inc. v. Heli-Dyne Sys., Inc.*, Nos. 88-1166, 88-1192, 1989 WL 54111, at *4 (6th Cir. 1989) (citations omitted).

Rule 60(b)(1) similarly provides the Court with discretion to relieve a party from "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). The Sixth Circuit has identified two grounds where relief may be warranted: "(1) when a party has made an excusable mistake or an attorney has acted without authority, or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order." *United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002).

Regardless, it is well established that "(d)istrict courts have inherent power to reconsider interlocutory orders and reopen any part of a case before entry of a final judgment." *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 118 F. App'x 942, 945–46 (6th Cir. 2004) (citations omitted).

III. ARGUMENT

A. Securing Prior Authorization is Not Impossible When a Retroactive Prior Authorization is Available to Plaintiffs.

In the Memorandum Opinion and Order of January 9, 2017, the Court concluded that Ms. Mills did not need to secure a Prior Authorization because it was too late to do so once she entered residential treatment at Pasadena Villa; that she did not need to submit a written claim because she could not receive "maximum reimbursement" once she failed to get Prior Authorization; and that she did not have to comply with the Grievance Procedure because it was merely "a method" of resolving Disputes, not a mandatory one. BCBST respectfully submits that each of these findings is contrary to the language of the Policy and should be reconsidered.

With respect to Prior Authorization, as the Court recognized, the Policy plainly requires it for all in-patient treatment, including the out-of-network, in-patient residential treatment sought

here. As explained in prior filings, Mr. Mills could not get Prior Authorization for his adult daughter because he was not the subject of a personal representative designation on file at the time as required by the Policy and the HIPAA privacy rule. Doc. 15-1, PageID #: 199-200; 45 C.F.R. §§164.502(a)(1)(iv) & 164.508(a). As set out in the Policy, if an insured fails to obtain Prior Authorization for out of network treatment, "payments ***may*** be reduced or services denied." Doc. 15-1, PageID #: 186 (emphasis added). "May," of course, does not indicate that she will automatically suffer a Penalty. And, as explained to the Mills in writing on more than one occasion, it is still possible to secure Prior Authorization retroactively. Doc. 29, 29-1, PageID #: 393-401. Rather than make a request, however, they have chosen to attempt an end-run around the Policy and to rely on the Court to sort out the details in the first instance. Under the Policy language and the undisputed practices of BCBST, there is no automatic Penalty and a retroactive Prior Authorization is still available to the Mills, when and if they choose to follow the Policy. *Id*. Thus, the first basis for the Court's ruling in Part IV.A is ripe for reconsideration.

B. Plaintiffs Have Not Demonstrated Futility So as to Excuse Submission of a Claim.

As the January 9 order acknowledges, the Policy prohibits any suit prior to filing a claim ("proof of loss"). Doc. 15-1, PageID #: 184. As for the futility of submitting a claim, the Policy demonstrates that a claim is an absolute prerequisite to any reimbursement. Doc. 15-1, PageID #: 192 ("If You receive Covered Services from an Out-of-Network Provider, either You or the Provider must submit a claim form to the Plan."). The fact that Plaintiffs may have taken steps that might limit their reimbursement does not excuse them from compliance with the most fundamental requirement of insurance coverage--to submit written notice of a covered event. *See Westfield Ins. Co. v. Appleton,* 132 Fed. Appx. 567 (6th Cir. 2005) (property loss, applying Michigan law); *Strickland Transp. Co. v. Federated Dept. Stores, Inc*., 451 S.W.2d 677 (Tenn.

1970) (shipping loss). Neither of the futility cases cited by the Court excuse compliance merely because the claimant may not receive "maximum reimbursement" due to his own failures. Rather, futility is an exception to the exhaustion of remedies requirement when pursuing the prescribed remedies would be entirely pointless. *See, e.g., Evans v. Laborers' Dist. Council*, 602 Fed.Appx. 608 (6th Cir. Feb. 3, 2015). As explained by the Sixth Circuit, "futility means that it is certain that the plaintiff's claim, after proceeding through the provided administrative remedies, would be denied." *Smith v. Local No. 25 Iron Workers' Pension Plan*, 99 F. App'x 695, 698 (6th Cir. 2004). Here, we cannot determine whether Marlena Mills will receive "maximum reimbursement" or something less because she has never submitted a written claim or any medical or treatment records in support of a claim. Doc. 15-1, PageID #: 192-93; Doc. 29, 29-1. The Policy itself provides, "If you receive Covered Services from an Out-of-Network Provider, either You or the Provider ***must*** submit a claim form to the Plan." *Id*. (emphasis added). BCBST has consistently urged her to do so to allow BCBST to review the information, process the claim as required by the Policy, and pay whatever Policy benefits are available (up to 50% of the Maximum Allowable Charge after deductible, as determined by the out-of-network MAC schedule provided to the Mills in discovery). Doc. 29, 29-1; Doc. 15-2, PageID#: 254. Her failure to make any efforts may demonstrate the practical futility of her current (and frankly inexplicable) position but it does not constitute legal futility that would excuse compliance with the plain language of the Policy.

The cases cited in the January 9 Memorandum Opinion and Order do not suggest otherwise. In *Glover v. St. Louis-San Francisco Ry. Co*., 339 U.S. 324 (1969), the Supreme Court considered an action brought by African-American railroad workers against their union and the employer railroad, alleging that the two conspired to avoid promoting the plaintiffs to

higher-paid positions for which they were qualified. After the district court dismissed for failure to exhaust grievance procedures under the collective bargaining agreement and the Court of Appeal affirmed, the Supreme Court reversed. Writing for the majority, Justice Black explained that the federal Railroad Adjustment Board lacked authority to grant the relief sought, which rendered pursuit of that remedy futile. The Court also noted that claims of racial discrimination against the union constituted an exception to the exhaustion requirement, since pursuing those claims administratively before the discriminating union and co-conspirator employer would be "absolutely futile." *Id*. at 330-31. Here, Plaintiffs have shown nothing of the sort. Unlike the plaintiffs in *Glover*, they allege no prior unsuccessful efforts to redress their grievances and no reason to think that those efforts would be futile here. Quite the contrary, the Plaintiffs lack of any effort strongly undercuts any argument of futility.

Likewise, in *Chapman v. United Autoworkers Local 1005*, 670 F.3d 677 (6th Cir. 2012), the Sixth Circuit addressed a hybrid action alleging breach of the UAW's duty of fair representation to a member and breach of a collective bargaining agreement by his employer, General Motors. In an *en banc* decision, the Sixth Circuit reaffirmed the duty to exhaust internal union remedies, even when alleging a violation by the union of its duty of fair representation. *Id*. Finding that the plaintiff had not shown that the union officials were hostile to his claim nor that the internal appeal procedure could not afford him relief, the Court of Appeals affirmed the dismissal of the hybrid action. *Id*. at 685-86. Although decided in the statutory context of the Labor Management Relations Act, *Chapman* strongly supports enforcement of the contractual procedures at issue here, which have been agreed by the parties and are adequate to afford any relief to which Ms. Mills might be entitled. The public policy of allowing the parties to craft their own remedies to meet their needs is also equally applicable here.

Thus, the second foundation for section IV.A of the memorandum of January 9, 2017, is ripe for reconsideration.

C. The Grievance Procedure is Applicable to "Any and All Disputes," Which "Will" be Resolved under that Mandatory Procedure.

In determining that Plaintiffs were not required to proceed via the Grievance Procedure set forth in the Policy, the January 9 order analyzed the issue based solely on the following Policy language: "Our Grievance procedure (the 'Procedure') is intended to provide a fair, quick and inexpensive method of resolving any and all Disputes with Us." Doc. 15-1, PageID #: 195. In doing so, the Court said "(t)he issue here is whether *a method* means the *only* method[,]" and answered that question in the negative. Doc. 34, PageID #: 430. Of course, under Tennessee law, the meaning of a contract is to be determined from all of its language, read together to determine intent from common meaning. *Dick Broad. Co., Inc. v. Oak Ridge FM, Inc*., 395 S.W.3d 653, 659 (Tenn. 2013). The decisive weight the January 9 memorandum places on a single word in a single sentence--the indefinite article "a"--is too great in light of the clear language found in the Policy.

In fact, the Policy includes clear language that directly counters the Court's determination that the Grievance Procedure is "just one way to resolve disputes, not the only way." *Id.* at PageID #: 431. On its very first page, the Policy states the Grievance Procedure is the ***only*** way to initiate resolution of a dispute: "***Any*** Grievance related to Coverage under this Policy ***will*** be resolved in accordance with the 'Grievance Procedure' section of this Policy." Doc. 15-1, PageID #: 174 (emphasis added).[2] The language relied on by the Court describes the

[2] "The future tense is formed by using will with the verb's stem form {will walk} {will drink}. It refers to an expected act, state, or condition {the artist will design a wall mural} {the restaurant will open soon}." THE CHICAGO MANUAL OF STYLE § 5.125 (16th ed. 2010). Thus, as used in the Policy, "will" refers to an expected condition; that is, that any Dispute (defined as "any matters that cause [a member] to be dissatisfied with any aspect of [the member's] relationship with [BCBST]; any Adverse Benefits Determination concerning a claim; or any other claim, controversy, or potential cause of action [a member] may have against [BCBST]") will be resolved in

intent of the Grievance Procedure, not its scope or mandatory effect. *See* Doc. 15-1, PageID #: 195. A mandatory dispute resolution procedure may be a "fair, quick, and inexpensive method" of resolving disputes--but only a mandatory procedure "***will***" resolve "***any*** Grievance" as required by the Policy. The Court's reading eliminates the all-inclusive "***any***" and mandatory "***will***" language from the Policy, contrary to settled rules of construction. Because "any" is customarily read as synonymous with "all," and "will" as synonymous with "shall," the mandatory import of these terms read together is unavoidable. *Paradise Farms, S.A. v. Chiquita Frupac, Inc*., No. 1:02CV714, 2006 WL 640501, at *7 (S.D. Ohio Mar. 10, 2006) ("As defined in Black's Law Dictionary, 'will' is 'an auxiliary verb commonly having the mandatory sense of 'shall' or 'must.'" (citation omitted)); *Roddy Mfg. Co. v. Olsen*, 661 S.W.2d 868, 871 (Tenn. 1983) ("It is axiomatic that 'any' is synonymous with 'all.'").

This construction is also consistent with the remainder of the sentence analyzed by the Court, which provides that the Grievance Procedure will apply to "any and all Disputes." Doc. 15-1, PageID #: 195. It is further supported by the mandatory language found elsewhere in the Grievance Procedure, such as the requirement that "You must submit a written request asking Us to reconsider an Adverse Benefit Determination, or to take a requested action to resolve another type of Dispute (Your 'Grievance")." Doc. 15-1, PageID #: 196.

Moreover, the Court recognized that in *Davis v. Tennessee Rural Health Improvement Association*, No. 12C1403 (Davidson Cnty. Cr. Ct. Feb. 27, 2015), the court held that the plaintiff could not sue his insurer given the following language in his policy: "This Procedure is the exclusive method of resolving any dispute . . . ." The Court distinguished *Davis* from the Policy here, finding that "Marlena's policy contains no such language." (*Id.*). BCBST

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in accordance with the Grievance Procedure. Doc. 15-1, PageID #: 174.

respectfully disagrees and asserts that *Davis* is instructive here. The controlling language here is "Any Grievance related to Coverage under this Policy will be resolved in accordance with the 'Grievance Procedure' section of this Policy," found in bold in the first section of the first page of the Policy. Doc. 15-1, PageID #: 174. Likewise, the language stressed by the Court--"a method"--is also mandatory when that sentence is read in full to describe a method "of resolving ***any and all*** Disputes with Us." *Id*. at PageID #: 195 (emphasis added). A procedure applicable to "***any*** Grievance" and to "***any and all*** Disputes," and by which such Grievance or Dispute "***will*** be resolved," which is initiated by the written request that "***must***" be submitted, is not an optional one. This conclusion is further reinforced by the descriptions of other appeal steps that "must" be taken set out in the Policy. *Id*. at PageID # 196.

Thus, the third basis for the ruling in section IV.A of the Memorandum and Order of January 9, 2017, is also ripe for reconsideration. When read as a whole, the Policy requires Prior Authorization for residential treatment, which may (not must) incur a Penalty if omitted--but also allows for issuance of a retroactive Prior Authorization after the fact. Doc. 15-1; Doc. 29-1. The Policy plainly requires submission of a written claim form with medical records as a prerequisite to any reimbursement. Doc. 15-1, PageID #: 192. The fact that Plaintiffs may have refused to seek a Prior Authorization or submit a simple claim form does not constitute futility excusing them from any effort to follow the Policy's procedures. Finally, the Grievance Procedure applies to "any and all Disputes" and is the procedure by which "any Grievance" ***will*** be resolved. The plain language of the Policy requires that the remaining breach of contract cause of action be dismissed as premature and that the insured follow the simple and commonsense procedures set out in her Policy before any resort to litigation.

IV. CONCLUSION

For the foregoing reasons, Defendant BlueCross BlueShield of Tennessee, Inc. submits that the Court should reconsider its determination that the Policy does not prevent Plaintiffs from filing this suit prior to submission of a claim or compliance with the Grievance Procedure, grant its Motion for Judgment on the Pleadings (Doc. 19) in its entirety, and dismiss this action.

Respectfully submitted,

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Certificate of Service

I certify under Rule 5 of the Federal Rules of Civil Procedure that a true and exact copy of the foregoing Defendant BlueCross BlueShield of Tennessee, Inc.'s Memorandum in Support of Its Motion to Reconsider Part IV.A. of the Court's January 9, 2017 Order was served on the following counsel of record via operation of the Court's electronic filing system:

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This 25th day of January, 2017.

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