THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

E.S., by and through her parents, R.S. and J.S., and JODI STERNOFF, both on their own behalf, and on behalf of all similarly situated individuals,

Plaintiffs,

v.

REGENCE BLUESHIELD; and CAMBIA HEALTH SOLUTIONS, INC., f/k/a THE REGENCE GROUP,

Defendants.

No. 2:17-cv-01609-RAJ

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF DISMISSAL OF STATE LAW CLAIMS

I. INTRODUCTION

Plaintiffs' Motion for Reconsideration of Dismissal of State Law Claims or, in the Alternative, Certification of Question to the Washington Supreme Court (the "Motion," Dkt. 71) argues that the Court should reconsider its dismissal of Plaintiffs' claims for violation of the Washington Law Against Discrimination ("WLAD") and Washington Consumer Protection Act ("CPA") because (1) WAC 284-43-5642(12) requires insurers to comply with both RCW 48.43.0128 and Section 1557 of the Affordable Care Act ("ACA"), and (2) WAC 284-43-5642(1)(b)(vii) cannot override the plain language of RCW 48.43.0128's unambiguous language. Plaintiffs are wrong on both counts.

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First, WAC 284-43-5642(12) requires compliance with "current state law" and consistency with "federal rules and guidance" implementing the ACA, but Plaintiffs have not identified any state law or any federal authority requiring coverage for hearing loss. Nor has any state or federal court held that exclusion of such coverage is discriminatory. WAC 284-43-5642(12) is limited to existing guidance and does not require the Washington Office of the Insurance Commissioner ("OIC") to make its own determinations about the scope of the ACA's anti-discrimination clause. OIC has already determined that exclusion of coverage for hearing loss is not discriminatory under state law, and that determination is entitled to deference.

Second, Plaintiffs' discussion about the priority of unambiguous statutory language is irrelevant because no state or federal statute unambiguously requires coverage for hearing loss. WAC 284-43-5642 implements RCW 48.43.0128, and OIC's express allowance for exclusions of coverage for hearing loss is therefore a determination by OIC that the exclusion is not discriminatory.

For these reasons, defendants Regence BlueShield and Cambia Health Solutions, Inc. (collectively, "Regence") respectfully request that the Court deny Plaintiffs' Motion. In the alternative, the Court should rule on Regence's other arguments for dismissal of the state law claims, which the Court did not reach in its Order (Dkt. 68). Finally, this issue does not warrant certification to the Washington Supreme Court because it can be fully adjudicated based on existing precedent and does not involve important public policy implications, but if the Court does decide to certify the question, it should be accurately stated.

II. ARGUMENT

A. Plaintiffs Have Not Presented Grounds for Reconsideration.

"Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence." LCR 7(h)(1). Plaintiffs' Motion presents no new facts and no legal authority that

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was unavailable during briefing of Regence's Motion to Dismiss Plaintiffs' Third Amended Complaint. Plaintiffs' Motion is simply a second bite at the apple. Regardless, because it fails to demonstrate manifest error by the Court, it should be denied.

B. The Court Correctly Dismissed Plaintiffs' State Law Claims.

In its Order dated March 19, 2024, this Court properly dismissed Plaintiffs' WLAD and CPA claims on the grounds that the exclusion of coverage for hearing loss is expressly authorized by WAC 284-43-5642, which implements the anti-discrimination provision of the Washington Insurance Code. Plaintiffs' new arguments to the contrary are without merit.

1. WAC 284-43-5642(12) Does Not Require Coverage of Treatment for Hearing Loss.

The plain language of WAC 284-43-5642(1)(b)(vii) explicitly authorizes insurers to exclude coverage for hearing loss and hearing aids: "A health benefit plan . . . is not required to, include [coverage for] . . . [h]earing care, routine hearing examinations, programs or treatment for hearing loss including, but not limited to, externally worn or surgically implanted hearing aids," as part of its essential health benefits ("EHB") benchmark package. This Court correctly held that such "unequivocal direction" from OIC is entitled to deference and shows that Regence's exclusion cannot be discriminatory under state law. (Order, Dkt.68 at 10-11.)

Plaintiffs contend that, despite this clear authorization, WAC 284-43-5642(12) overrides the regulation's express authorization of exclusions for coverage of treatment for hearing loss. (Motion at 1-4.) Subsection 12 provides as follows:

> Each category of essential health benefits must at a minimum cover services required by current state law and be consistent with federal rules and guidance implementing 42 U.S.C. 18116, Sec. 1557, including those codified at 81 Fed. Reg. 31375 et seq. (2016), that were in effect on January 1, 2017.

WAC 284-43-5642(12). Plaintiffs argue that this provision requires coverage of hearing aids because both state law and federal guidance require such coverage. Plaintiffs are wrong on both counts.

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a. Legal Standards.

When interpreting regulations, courts follow the same framework as when interpreting a statute:

> When interpreting an administrative regulation, we follow the general rules of statutory construction. Our primary goal is to determine and give effect to the agency's intent and the regulation's underlying policies. If the language of the regulation is clear, its plain meaning will reveal the agency's intent. As with statutes, a regulation is to be considered as a whole, giving meaning to all of its parts. Strained meanings and absurd results should be avoided. When interpreting statutes and regulations, courts are not required to abandon their common sense. If the language of the regulation is ambiguous in that it is subject to more than one reasonable interpretation, we may look to outside sources such as legislative history to determine the agency's intent.

Clark v. City of Kent, 136 Wash. App. 668, 672, 150 P.3d 161 (2007) (internal citations omitted).

b. The Plain Language of WAC 284-43-5642 Is Dispositive.

This Court does not need to proceed further than the regulation's plain language in order to determine OIC's intent. It expressly states that insurers are "not required" to provide coverage for hearing loss and hearing aids. WAC 284-43-5642(1)(b)(vii). Subsection 12 requires that each category of EHB must (1) "cover services required by current state law" and (2) "be consistent with federal rules and guidance implementing 42 U.S.C. 18116, Sec. 1557, including those codified at 81 Fed. Reg. 31375 et seq. (2016), that were in effect on January 1, 2017." Neither of these directives contradict the clear directive of subsection (1)(b)(vii).

First, Plaintiffs have not identified any state law that requires coverage of hearing loss and hearing aids. They argue that RCW 48.43.0128 is such a statute, but WAC 284-43-5642 *implements* RCW 48.43.0128. Therefore, the regulation constitutes a determination by OIC that exclusion of coverage for hearing loss is *not* discriminatory. Plaintiffs' argument to the contrary is circular. They rely on the same statute their claim seeks to interpret as grounds for ignoring clear contrary language in a regulation. OIC has already spoken on this issue, and its determination is entitled to deference.

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Second, Plaintiffs have not identified any "federal rules [or] guidance implementing 42 U.S.C. 18116, Sec. 1557" that require coverage of hearing loss and hearing aids. WAC 284-43-5642(12). Subsection (12) states that, if the U.S. Department of Health and Human Services issues a rule or other guidance stating that Section 1557 *does* require such coverage, the regulation will yield to that guidance, but OIC is not required to make its own determination as to the scope of federal anti-discrimination law. It has already determined that the exclusion of coverage for hearing loss is not discriminatory under state law, and absent any contrary federal guidance, subsection (12) does not change the plain language of subsection (1)(b)(vii).

c. The Concise Explanatory Statement Does Not Support Plaintiffs' Argument.

Even if the Court finds that the language of WAC 284-43-5642 is ambiguous, the OIC guidance cited by Plaintiffs does not support their position.

On January 16, 2020, OIC issued a Concise Explanatory Statement ("CES") related to the enactment of WSR 20-03-114, which, *inter alia*, amended WAC 284-43-5642. (*See* Motion, Dkt. 71, App. A.) One of the questions inquired about the addition of the new subsection (12). (*Id.* at 12 ¶ 5.) The question first wrongly states that subsection (12) applies to "treatment for hearing loss," and it then requests that OIC make "clear that the non-discrimination section applies to all categories of essential health benefits." (*Id.*) OIC responds that the questioner apparently "misread the EHB rule," clarifying that the rule's structure lists the EHB category, describes what the benchmark plan covers and excludes, and then "require[s] coverage of services that the benchmark plan (which was filed prior to the ACA) improperly excludes or limits." (*Id.*)

A review of the regulation's text and some of the changes implemented by WSR 20-03-114 makes clear what OIC meant by this response. Contrary to Plaintiffs' suggestion, subsection (12) is not intended to contradict express requirements or exclusions that appear elsewhere in the rule. Instead, the rule specifically identifies which EHB categories in the base benchmark plan

contain exclusions that are improper under the ACA. *See* WAC 284-43-5642(3)(c) (hospitalization category); WAC 284-43-5642(5)(c) (substance abuse disorder services category); WAC 284-43-5642(9)(c) (preventive services category); WAC 284-43-5642(10)(b) (pediatric services). In each of these, the rule specifically states that some of the exclusions conflict with federal law and clarifies that they must be covered. *See, e.g.*, WAC 284-43-5642(9)(c) ("The base-benchmark plan establishes specific limitations on services classified to the preventive services category that conflict with state or federal law as of January 1, 2017, and should not be included in essential health benefit plans."). This is what the CES means when it says the rule *already* states which benefits "are improperly excluded."

The hearing loss/hearing aid exclusion appears in the "ambulatory patient services" category, which does *not* include any language indicating that its exclusions conflict with federal law. WAC 284-43-5642(1). Plaintiffs therefore have it exactly backward. The CES does not mean that clear regulatory language can be ignored if someone thinks an exclusion is discriminatory; it means OIC has already determined which exclusions conflict with federal law and provided notice of those conflicts in the rule. In fact, WSR 20-03-114, which the CES was explaining, added this notice language to the "hospitalization" category in WAC 284-43-5642(3)(c). (Galloway Dec. ¶ 2, Ex. 1 at 5.) OIC was therefore still evaluating the effect of the ACA on the regulatory exclusions as recently as 2020 and did not change the provision allowing exclusion of coverage for hearing loss.

In sum, WAC 284-43-5642(1)(b)(vii) expressly and unambiguously allows the exclusion of coverage for hearing loss and hearing aids under state law. OIC has reviewed the rule for compliance with Section 1557 but has not updated the hearing loss exclusion to require coverage as it has with other exclusions. OIC's rule and determination are entitled to deference, and the Court was correct to dismiss Plaintiffs' state law claims on this basis.

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2. No Statute Expressly Requires Coverage of Treatment for Hearing Loss.

Plaintiffs next argue that the Court should not give deference to OIC's determination that exclusion of coverage for hearing loss is not discriminatory because OIC has no authority to contradict an unambiguous statute. (Motion, Dkt. 71 at 4-5 (citing *O.S.T. v. Regence BlueShield*, 181 Wn.2d 691, 700 n.9 (2014)).) This argument fails because RCW 48.43.0128 does not unambiguously require coverage of hearing loss. *O.S.T.* is inapposite because it involved OIC's approval of a policy that was contrary to the plain language of a statute. 181 Wn.2d 691, 700 n.9.[1] RCW 48.43.0128, however, does not contain plain language requiring coverage of treatment for hearing loss; it is a general prohibition on discrimination in insurance. Plaintiffs again seek to start at the end by assuming that their claim has merit, but the statute is not "unambiguous" as to its application to hearing loss, and OIC is authorized by law to enact implementing rules based on its expertise. RCW 48.02.060(1)(a).

The reasonableness of OIC's interpretation is highlighted by the fact that no state or federal agency has issued guidance stating that exclusion of coverage for hearing loss is discriminatory, nor has any court so held. When OIC enacted WAC 284-43-5642, it did not contradict the plain language of RCW 48.43.0128; it determined that the exclusions allowed in the regulation are not discriminatory, and that determination is entitled to deference.

C. The Court Should Decline Plaintiffs' Invitation to Certify the Question to the Washington Supreme Court.

The Court should not exercise its discretion to certify this question to the Washington Supreme Court because the issue is fully resolvable on existing precedent, and it does not have important public policy implications. If, however, the Court is considering certification, it

[1] The Court "assumed," for purposes of its opinion, that OIC approval of a policy form constituted an agency interpretation that would otherwise be entitled to deference. *O.S.T.*, 181 Wn.2d at 700 n.9. Here, the dispute turns on the meaning of an administrative rule, which is unquestionably entitled to deference as a general matter.

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should first rule on Regence's other arguments for dismissal of the state claims. If the Court decides to certify, it should state the issue more accurately than Plaintiffs' proposed framing.

1. This Issue Does Not Warrant Certification.

The decision to certify a question to a state supreme court is within the discretion of the district court. *Louie v. United States*, 776 F.2d 819, 824 (9th Cir. 1985) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). "The certification procedure is reserved for state law questions that present significant issues, including those with important public policy ramifications, and that have not yet been resolved by the state courts." *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003). Based on these criteria, the Court should decline certification here.

First, this issue can be fully adjudicated based on existing precedent. Although no Washington court has resolved the specific question here—whether the general anti-discrimination provision in RCW 48.43.0128 overrides a specific determination by OIC that state law allows exclusion of coverage for hearing aids—the principles on which the decision turns are well established. Existing precedent covers the interpretation of administrative rules and the deference given to agency interpretations. Application of these principles in this case does not require the involvement of the Washington Supreme Court.

Second, this issue does not have important public policy ramifications because changes in state and federal law since this case was filed have dramatically improved access to hearing aids. As of October 17, 2022, the FDA has made over-the-counter hearing aids available, at a price that is often significantly cheaper than prescribed hearing aids. 21 C.F.R. § 800.30; Medical Devices; Ear, Nose, and Throat Devices; Establishing Over-the-Counter Hearing Aids, 87 Fed. Reg. 50,698 (Aug. 17, 2022). Furthermore, since the passage of House Bill 1222 in 2023, Washington law now requires coverage for hearing aids at the level of $3,000 per ear every three years. RCW 48.43.135; RCW 41.05.831. As a result, this case is now almost exclusively about damages rather than prospective coverage requirements.

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2. If the Court Does Not Deny Plaintiffs' Motion Outright, It Should Address Regence's Other Arguments Against the State Law Claims.

For the reasons above, the Court should deny Plaintiffs' Motion for Reconsideration, but if it decides not to deny the Motion outright, it should first rule on Plaintiffs' other arguments before deciding whether to certify the question to the Supreme Court. In the Order under reconsideration, the Court noted that Regence made three arguments against Plaintiffs' WLAD claim, but because the second argument was dispositive, it did "not reach the other arguments." (Order, Dkt. 68 at 10.) The Court also ruled on Plaintiffs' CPA claim on the grounds that it rose or fell with the WLAD claim. (*Id.* at 11.) To avoid a potentially unnecessary ruling from the Supreme Court, if this Court reconsiders its ruling regarding WAC 284-43-5642, it should address Regence's other arguments before denying Regence's Motion to Dismiss or certifying the question.

3. Alternatively, if the Court Does Certify, the Question Should Be Accurately Stated.

Plaintiffs frame the question to be certified as follows: "Does a health carrier's compliance with the essential health benefits benchmark design under WAC 284-43-5642(1)-(10) immunize it from liability under the Washington Law Against Discrimination and the Washington Consumer Protection Act?" (Motion, Dkt. 71 at 6-7.) This framing misstates the issue in two ways.

First, the issue here is not policy language that merely complies with EHB rules; it is language based on OIC's express authorization of a specific exclusion. The difference is between conduct that is merely consistent with regulatory authority and conduct that is specifically allowed by it. Second, Regence has never argued that it is "immune" from liability. Regence's position has consistently been that it has acted at all times in accordance with state law as stated in the regulations implementing RCW 48.43.0128.

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Regence does not agree that certification is warranted, but if the Court decides to certify the question, Regence suggests the following wording: "Can an insurance carrier be held liable for discrimination under the Washington Law Against Discrimination and the Washington Consumer Protection Act for issuing a policy containing an exclusion that is specifically allowed in WAC 284-43-5642(1)-(10)?"

III. CONCLUSION

For the reasons above, Regence respectfully requests that the Court deny Plaintiffs' Motion for Reconsideration.

I certify that this memorandum is less than 10 pages, in compliance with the Court's Minute Order dated April 29, 2024.

DATED: May 13, 2024.

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