



MAURA HEALY
GOVERNOR

KIM DRISCOLL
LIEUTENANT GOVERNOR

COMMONWEALTH OF MASSACHUSETTS
Office of Consumer Affairs and Business Regulation
DIVISION OF INSURANCE

1000 Washington Street • Suite 810 • Boston, MA 02118-6200
(617) 521-7794 • FAX (617) 521-7475
<http://www.mass.gov/doi>

GARY D. ANDERSON
COMMISSIONER OF
INSURANCE

**An-Louise Johnson, M.D, et al. and the Massachusetts
Society of Oral and Maxillofacial Surgeons, Petitioners**
v.
Blue Cross Blue Shield of Massachusetts. Inc., Respondent

Docket No. B2022-01

**Order on Petitioners' Motion for Reconsideration and
Respondent's Motion for Summary Decision**

I. Introduction

On January 28, 2022, the Massachusetts Society of Oral and Maxillofacial Surgeons (“MSOMS”) petitioned the Commissioner of Insurance (“Commissioner”) for a hearing before a Board of Review (“Board”) convened pursuant to M.G. L. c. 176B, §12 (“§12” or “Section 12”). MSOMS submitted its petition on behalf of its members who are participating providers for Blue Cross Blue Shield of Massachusetts (“BCBSMA”) medical insurance plans. The dispute or controversy that is the subject of the petition arose from BCBSMA’s decision to eliminate coverage for a particular procedure that had been provided to members of some of its medical plans (the “Coverage Change”). It specifically arose in October 2020 when BCBSMA, in a “NEWSALERT” issued to its provider network, notified “[o]ral surgeons and dentists caring for our members” that beginning January 2021 it would phase out from some of its medical plans coverage for the “removal of fully or partially impacted teeth” and the “removal of multiple erupted teeth.”¹

Section 12 provides, in pertinent part, that “[a]ny dispute or controversy arising between a medical service corporation and any participating physician, participating chiropractor, or any other participating provider of health services licensed under the laws of the commonwealth . . . may within thirty days after such dispute or controversy arises be submitted by any person aggrieved to a board serving in the division of insurance . . . for its decision with respect thereto.” On February 9, 2022 the Chair of the Board advised MSOMS that §12 explicitly applies to licensed participating providers and pointed out that because MSOMS, a professional

¹ BCBSMA dental insurance plans continue to include impacted teeth coverage.

association, is not a licensed participating provider of health services, it does not have statutory authority to seek administrative review under §12. For that reason, the Chair declined to hold a hearing on the MSOMS petition.

On February 23, 2022 MSOMS moved for reconsideration of the Chair's February 9 decision. Concurrently, it submitted an amended petition that retained MSOMS as a named petitioner but added four individual MSOMS members, each of whom was identified as a BCBSMA participating provider under an HMO plan (the "Amended Petition"). The added petitioners are: An-Louise Johnson, DMD, MD; Robert Memory, DMD, MD; David Beanland, DMD, MD; and Hussam Batal, DMD. Dr. Johnson was identified as president of MSOMS, Dr. Memory as its vice-president and incoming president, and Dr. Beanland as the incoming vice-president. Dr. Batal was not identified as an MSOMS officer. Each Petitioner was further described as being a recipient of the Coverage Change notice. The Amended Petition was assigned docket number B2022-01.

On June 2, 2022, the Petitioners and BCBSMA (the "Parties") were notified that a Board had been convened consisting of Jean Farrington, Esq., designee of the Commissioner and Chair; Samuel Leadholm, Esq., designee of the Board of Registration in Medicine; and Lisa Gaulin, Esq., designee of the Attorney General. The June 2, 2022 notice also asked Petitioners to submit additional information to the record; the Board received their responses on June 23, 2022.

On July 14, 2022 BCBSMA moved for summary decision, accompanied by a supporting memorandum with exhibits. Petitioners submitted their opposition to the BCBSMA motion on August 4. On October 17, 2022 the Board scheduled a hearing, to be held by virtual means, for November 1, 2022 to hear argument from the parties. That hearing was subsequently continued to December 13, 2022. Derek Domian, Esq. represented the Petitioners and Rebecca Zeidel, Esq. represented BCBSMA.

II. Motion for Reconsideration

The Petitioners' June 23, 2022 submission presented their arguments for granting MSOMS petitioner status under §12. They contend that M.G.L. c. 176B establishes a comprehensive scheme for the public supervision of medical service corporations and that, because BCBSMA's Coverage Change is, in effect, "eliminating coverage for medical treatment that is essential to oral and overall patient health," such oversight is necessary and available through a Board convened pursuant to §12. They point out that §12 allows "any person aggrieved" by an alleged dispute to petition the Board, asserting that MSOMS, as a representative of BCBSMA providers, is aggrieved on their behalf. They further note that an association such as MSOMS has standing to file civil suits in its name on behalf of its members without a need to add individuals. Finally, Petitioners argue that an earlier Board case provides precedent for allowing MSOMS to petition the Board.

At the hearing, Petitioners argued that although many of their concerns about MSOMS's standing to request a §12 Board hearing were obviated by joining the four individual petitioners, MSOMS still sought standing for the reasons expressed in the June 23 submission. It contended that, as an organization whose members are participating providers in BCBSMA medical service plans, it is positioned to express those members' concerns about the potential effect on their

patients of changes to their health plan benefits. That role, it argued, parallels what it may provide in civil litigation. MSOMS also reiterated its position that a prior Board proceeding held under a statute analogous to §12 allowed an association to petition for a Board review.

In response, BCBSMA argued that the motion for reconsideration should be denied because the explicit language of §12 requires that petitioners be participating providers of health services. It noted that MSOMS is not a provider and, further, incurred no damages as a result of the Coverage Change.

Discussion

The Board does not find persuasive MSOMS's arguments that it is eligible to petition for a Board hearing under §12. Section 12 specifically refers to disputes or controversies between a medical service corporation and the participating providers with whom it contracts to deliver health care to members of medical service plans operated by the corporation. It is undisputed that MSOMS is not a participating provider. Further, MSOMS offers no legal support for any authority it might have to petition the Board under §12, either to represent an asserted public interest in dictating the benefits required in medical service plans or to represent the collective interests of MSOMS members in receiving reimbursement for performing procedures associated with those benefits. MSOMS's argument that a prior proceeding before the Board established a precedent for allowing its petition incorrectly reports the outcome of that proceeding, which was held before a Board convened under M.G.L. c.176E, §12, a statutory analogue to c. 176B §12.² In that case the respondent, Dental Service Corporation, d/b/a Delta Dental of Massachusetts, opposed a petition by the Massachusetts Dental Society ("MDS") on the grounds that MDS did not meet the jurisdictional requirements for a Board hearing. Both parties fully briefed and argued the issue of standing but MDS withdrew the petition before the Board issued a decision. No ruling in the case addressed the jurisdictional issue of MDS standing.

Finally, we note that even if MSOMS were deemed an appropriate petitioner, it would not alter the events that gave rise to the petition or affect the reasons for the Board's decision articulated in Section III.

We have revised the caption in this proceeding to lead with the individual participating providers.

III. The Motion for Summary Decision

BCBSMA bases its Motion for Summary Decision on the familiar grounds that there are no genuine issues of material fact and that, as a matter of law, it is entitled to prevail. The record in this matter consists of each Party's documentary submissions, listed below.³ No Party

² Chapter 176E, §12 offers dental providers a forum in which to resolve disputes with a dental service corporation.

³ The Petitioners submitted the Amended Petition for a Board Review; a reply to the Board's June 2, 2022 Order; and an Opposition to Respondents' Motion for Summary Decision (the "Opposition"). Five exhibits were attached to the Amended Petition: 1) NEWSALERT dated October 1, 2020 from bcbsma.com/providers advising of the Coverage Change as of January 1, 2021; 2) November 10, 2020 letter from MSOMS to the BCBSMA Director of Dental Network Management; 3) November 20, 2020 letter from BCBSMA's Medical Director for Clinical Programs to MSOMS; 4) December 1, 2020 letter from MSOMS to the Commissioner of Insurance; and 5) January 28, 2021 letter from MSOMS counsel.

contested the inclusion of these documents in the record or objected to the Board's consideration of them. We conclude that neither BCBSMA nor the Petitioners contest the facts that gave rise to this dispute.

The Board has reviewed the Parties' documents and considered their oral arguments. BCBSMA contends that it is entitled to prevail as a matter of law on multiple grounds and seeks dismissal of the Amended Petition. The Petitioners dispute each of BCBSMA's arguments. For the following reasons, the Board finds that the Amended Petition does not comply with the statutory requirements for obtaining Board review and that Petitioners have presented no persuasive reasons to set aside those requirements.

A. Timeliness

BCBSMA argues that because § 12 requires a petition to be submitted to the Board within 30 days after a dispute or controversy arises, the Amended Petition is untimely. It points out that the initial petition was submitted to the Board on January 28, 2022, well over a year after the Coverage Change notice, dated October 1, 2020, was sent to oral surgeons and dentists. Dr. Johnson and Dr. Memory, MSOMS president and vice-president, responded to the NEWSALERT on November 10, 2020.

Petitioners oppose BCBSMA's argument that the Amended Petition is untimely, contending that the matter is ongoing and is not limited to a particular event. They assert that a dispute "arises each and every time a claim for medical coverage for the removal of impacted teeth is denied by BCBSMA." They further observe that Petitioners sought and obtained meetings with BCBSMA soon after receiving the NEWSALERT and continued to meet throughout 2021. They argue that the initial petition was filed only after those meetings had not produced the result they sought, *i.e.*, a reversal of the Coverage Change. Petitioners argue that requiring adherence to the time limits in § 12 discourages negotiations to resolve disputes between medical service corporations and providers.

We conclude that the Amended Petition is not timely and therefore does not comply with requirements for § 12 review. Section 12 sets a specific time limit for participating providers to petition for Board review: within 30 days of the date on which the dispute arose. The dispute at issue here arose from BCBSMA's decision to exclude coverage for a benefit that had been covered under some of its medical health plans. It is undisputed that: 1) on October 1, 2020 BCBSMA issued its NEWSALERT notifying providers that as of January 1, 2021 it was

The exhibits to the Reply to the June 2, 2022 Order duplicated two documents attached to the Amended Petition and added four charts showing the sources of payments to the individual petitioners for oral surgery after January 1, 2021. Exhibits to the Opposition included a recent BCBSMA Financial Statement, a March 5, 2021 letter from BCBSMA to Petitioners' counsel, and an August 3, 2022 letter from Petitioner Dr. Johnson to BCBSMA and the Division of Insurance. BCBSMA submitted a Motion for Summary Decision, a Statement responding to information in the Amended Petition, a Memorandum in Support of its Motion and three exhibits to that Memorandum: 1) its March 5, 2021 letter to Petitioners' counsel; 2) a list of Managed Care Medical Plans affected by the Coverage Change; and 3) a letter from the Board Chair responding to an inquiry about § 12 in connection with a case in the Boston Municipal Court between an HMO Blue member and her insurer, HMO Blue.

eliminating impacted teeth coverage from some medical plans; 2) Petitioners Dr. Johnson and Dr. Memory, MSOMS officers at that time, responded to BCBSMA on November 10, 2020; and 3) the Petitioners submitted four charts documenting that soon after January 1, 2021, BSBCMA had denied claims from each of them for treating impacted teeth. On this record, there can be no question that the Petitioners were all fully aware of this dispute well over a year before the Amended Petition was filed.

Petitioners' objections to applying the § 12 time limit to them are not persuasive. Their argument that this dispute arises every time BCBSMA denies a claim for impacted teeth would render the statutory deadline meaningless. Further, they offer no support for the premise that in disputes between providers and medical service corporations discussions about negotiated resolutions obviate or stay the need to comply with the statute.

B. Other issues

BCBSMA raises in support of its request for dismissal of the Amended Petition two additional arguments that it characterizes as jurisdictional. It first argues that the Board has no authority to hear a challenge to or decide the subject of this dispute, elimination of coverage for a particular procedure from a medical service plan. The Petitioners respond that § 12 allows "any dispute or controversy between a medical service corporation and any participating physician" be submitted for Board review and that the Division's responsibility for oversight of medical service plans does not limit the Board's authority to review matters involving such plans.

Section 12 establishes a forum for resolving disputes between health care providers participating in a medical service plan and the corporation offering that plan. The statutory language does not define the circumstances or the factors that must be at issue but permits "any dispute" between the parties to be presented to the Board. The Board reviews documents submitted and arguments made by both parties, both to ensure that petitioners meet the statutory requirements for submitting a petition and to consider the substantive merits of the dispute and the petitioner's requests for relief. We reject BCBSMA's argument that Board is without authority to hear and resolve disputes if, in BCBSMA's opinion, the petition is without merit.

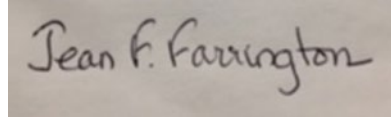
BCBSMA also contests the Board's authority to hear this matter, arguing that the four individuals named on the Amended Petition are ineligible to petition for a hearing under § 12. It asserts that they are participating providers to HMO Blue, a BCBSMA subsidiary formed and regulated as a health maintenance organization under M.G.L. c. 176G and, for that reason, are not participating providers to a medical service plan issued by a medical service corporation formed pursuant to c. 176B. The Petitioners contend that HMO Blue is a wholly controlled subsidiary of BCBSMA and does not thereby avoid oversight under §12.

Neither party provides a thorough analysis of its position supported with citations to statutes or judicial opinions that might support its arguments. BCBSMA proposes an interpretation of §12 that potentially could affect virtually every licensed provider of health services whose patients are subscribers to health plans that BCBSMA issues through a subsidiary. Because the Board has fully resolved BCBSMA's Motion for Summary Decision on independent grounds, it declines to address further a question of this magnitude.

IV. Conclusion

Because we find that the Amended Petition was untimely filed, we allow BCBSMA's Motion for Summary Decision.

Date: May 25, 2023



Jean F. Farrington, Esq.
Chair, Board of Review

:

Lisa Gaulin (jff)

Lisa Gaulin, Esq.
Board of Review

Samuel Leadholm (jff)

Samuel Leadholm, Esq.
Board of Review