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Boris O. Bergus, M.D., *et al.*

v.

Blue Cross Blue Shield of Massachusetts

Docket No. B2010-01

Order on Cross-Motions for Summary Decision

Introduction and Procedural History

On July 26, 2010, Boris O. Bergus, M.D. (“Dr. Bergus”) and Encompass Care Co., Inc. (“Encompass”) (collectively, the “Petitioners”), pursuant to G.L. c. 176B, §12, submitted to the Board of Review in the Division of Insurance a petition for review of a dispute arising between Petitioners and Blue Cross Blue Shield of Massachusetts (“BCBS”). A Board of Review was duly convened, and an initial order issued requiring Petitioners to file a statement providing additional information about the dispute and BCBS to respond to their statement.¹ Petitioners filed the required statement on September 9, 2010 (the “September 9 Statement”). BCBS filed, with its response, a motion to dismiss the petition; Petitioners timely filed objections to that motion. A prehearing conference took place on October 13, 2010.

At the conference the parties reiterated the arguments on the motion to dismiss that were set out in their written submissions. They agreed that no material facts were in dispute about the underlying controversy and that a decision on the merits could be rendered in accord with the principles governing motions for summary decision. The Board set a schedule for filing a

¹ Members of the Board are Jean F. Farrington, Esq., Counsel to the Commissioner of Insurance, Chair; Brenda Beaton, Esq., General Counsel to the Board of Registration in Medicine, and Sheila Calkins, Esq., Chief of Staff in the Attorney General’s Office.

statement of agreed-upon facts and submitting posthearing memoranda. On October 13, the Board denied BCBS's motion to dismiss. On November 5, Petitioners filed a motion to conduct discovery, arguing that after the prehearing conference they had decided that there were genuine issues about the reasonableness of the BCBS privileging policy. After reviewing the motion and BCBS's response, the Board denied the motion to conduct discovery and enlarged the dates for submitting the statement of agreed-upon facts and memoranda of law. The parties filed their joint statement of agreed-upon facts ("Joint Statement") on December 16, and their post-hearing memoranda on January 14.² On February 2, Petitioners filed a motion to strike BCBS's posthearing memorandum. BCBS submitted an opposition to that motion on February 8. On March 24, the Board denied the motion to strike. This decision is based on the documents submitted by the parties, the Joint Statement, and their posthearing memoranda.³

Background

Dr. Bergus, a physician licensed in Massachusetts and Rhode Island, has practiced in Massachusetts since 1991. He is the founder of Encompass and has performed endovenous laser thermoablation ("EVLT") procedures there for approximately six years. BCBS is a non-profit hospital and medical services corporation organized under M.G.L. c. 176A and c. 176B. On or about October 17, 2007, Petitioners entered into a Physician Agreement (the "Contract") with BCBS under which BCBS would compensate them for medical services provided to BCBS subscribers.⁴ BCBS thereafter reimbursed Petitioners for performing EVLT procedures on its members.

By bulletin dated December 15, 2008 (the "December 2008 Bulletin"), BCBS informed physicians who provided EVLT services, including Dr. Bergus, that as of April 15, 2009, it would compensate physicians for performing such procedures only if they were board certified in vascular surgery, radiology with interventional training, or in general surgery prior to the establishment of the vascular boards. To become or remain eligible to bill for such services,

² BCBS captions its motion as one for Judgment Based on the Stipulated Record. Petitioners style theirs as a Motion for Summary Judgment and Opposition to Blue Cross's Motion for Summary Judgment. Our decision refers to them as motions for summary decision.

³ The parties, in their agreed-upon statement, state that they do not contest the authenticity of correspondence and other business documents previously attached by either party as exhibits to documents filed with the Board of Review in this matter, except as indicated above, *i.e.*, in representations in the agreed-upon statement.

⁴ Petitioners attached a copy of the agreement to their September 9 Statement; pages 33 through 36 were not included. A note on p. 32 suggests that these consisted, at least in part, of signature pages.

providers were required to submit privileging applications to demonstrate that they met that certification criterion.⁵ BCBS advised physicians to submit privileging applications by February 15, 2009 to ensure that reimbursements would continue after April 15, 2009. Dr. Bergus submitted a privileging application to BCBS in December 2008 that did not, in the section on medical specialties, identify board certification in vascular surgery or interventional radiology; the *curriculum vitae* (“cv”) attached to the application refers to board certifications in phlebology, emergency medicine and “registration” as a vascular specialist. By letter dated January 5, 2009, BCBS acknowledged receiving communications from Dr. Bergus about the criteria for the privileging program and advised him that the required board certification in one of the three specified areas had to be conferred by a board which is a member of the American Board of Medical Specialties (“ABMS”). By letter dated February 23, 2009, BCBS informed Dr. Bergus that it did not approve his privileging application for EVLT because he had not documented Board certification in one of the three accepted areas or described his training and provided a five-year history of procedure volume and complications. It stated that it would reconsider his application if he provided these supporting documents.

Dr. Bergus appealed the disapproval within BCBS, where it was reviewed by its medical directors. By letter dated March 6, 2008 [sic] BCBS informed Dr. Bergus that his appeal was not approved but that it would reconsider the matter when it received additional documentation relating to professional training and board certification.⁶ On June 23, 2009, the American Board of Laser Surgery (“ABLS”) certified Dr. Bergus in vascular surgery. On or about June 29, 2010, Dr. Bergus submitted a privileging application to BCBS, on which he described himself as a vascular specialist, but did not provide a board certification date. BCBS did not approve that application.

Dr. Bergus performed EVLT procedures on BCBS members after April 15, 2009 for which he submitted claims to BCBS. BCBS continued to reimburse him for performing these procedures until approximately June 16, 2010. BCBS contends that the reimbursements to Dr.

⁵ The December 2008 Bulletin also imposed accreditation requirements for the sites on which these procedures were performed, noting that claims for procedures performed at unaccredited sites would not be paid, regardless of the privileging status of the physician performing the procedure. The accredited status of Encompass is not disputed.

⁶ The parties agree that the date on the letter should be March 6, 2009. The record includes no other documents relating to Dr. Bergus’s appeal within BCBS.

Bergus for EVLT procedures performed after April 15, 2009 were made as a result of a computer error.⁷ Since June 16, 2010, it has not reimbursed Dr. Bergus for such procedures.

The Parties' Arguments

Dr. Bergus and Encompass

Petitioners argue that the issue in this matter is whether BCBS unreasonably refused to accept Dr. Bergus's certification from the ABLs as evidence of compliance with its privileging requirement for EVLT procedures. He asserts that his contract with BCBS contained an implied covenant of good faith and that BCBS, by distinguishing the ABLs certification from one granted by an ABMS Member Board violated that principle, was unsupported, arbitrary and capricious. Dr. Bergus argues that there is no rational basis for differentiating these certifications and that by doing so BCBS acted arbitrarily and unilaterally. He contends that the amount and level of training required by ABLs "rival, if not surpass" those of the ABMS Member Board.

In response to BCBS's position that it has the authority to amend the contract unilaterally, Petitioners assert that they had no expectation that it would fundamentally change the contract so as to exclude Dr. Bergus from receiving payment for established services. They argue that by compensating Dr. Bergus for performing EVLT procedures for many years, BCBS established a course of dealing that should be preserved. Further, Petitioners assert, Dr. Bergus has made considerable financial investments in Encompass on the basis of his understanding that he would continue to be reimbursed by BCBS for performing such procedures. They argue that, based on those factors, BCBS should either have "grandfathered" him or accepted the ABLs certification.

Petitioners also argue that the December 2008 Bulletin about the new privileging requirements did not specify that the Board certification had to be from a member of the ABMS. Dr. Bergus states he does not recall receiving the BCBS January 5, 2009 letter which included that information. Petitioners characterize that requirement as a material change that should have been included in the original announcement. Its omission, they assert, renders the ABMS certification non-operational. Plaintiffs further argue that letters sent to Dr. Bergus targeted him alone, and that the same requirements were not imposed on other physicians.

⁷ The parties do not dispute that BCBS reimbursed Dr. Bergus for performing EVLT procedures after April 15, 2009, even though his privileging application had been rejected, and discontinued such reimbursements on or about June 16, 2010.

Petitioners contend that BCBS either waived the application of its privileging policy to Dr. Bergus or is estopped from implementing it because it continued to reimburse him for performing EVLT procedures from April 15, 2009 through June 16, 2010. During that period, they note, Dr. Bergus obtained certification from the ABLIS. They further contend that BCBS's assertion that the incorrect payments were the result of a computer system error is not a basis for attempting to recover them. Petitioners argue that BCBS had Dr. Bergus's credentialing information before June 2010 and should have known that he had obtained ABLIS certification in vascular surgery; nevertheless it did not enforce its policy not to reimburse physicians who did not meet the privileging requirements.

Finally, Petitioners oppose BCBS's summary decision motion on the ground that issues of material fact remain relating to the reasonableness of the BCBS privileging requirements. They assert that this issue did not arise until Petitioners became aware that BCBS had stopped payment for EVLT procedures because Dr. Bergus was not board-certified by an ABMS member Board.

Blue Cross Blue Shield

BCBS argues that the only issue in this proceeding is whether BCBS breached its contract with Dr. Bergus when it applied a privileging policy to him that required physicians to be certified in specific specialties by an ABMS member and discontinued reimbursing him for performing EVLT procedures because he failed to satisfy the privileging requirements. Pointing out that the Board declined to allow discovery on the reasonability of its privileging requirements, BCBS contends that this dispute does not involve a review of the privileging policy itself but is limited to its application to Dr. Bergus. It argues that the discontinuance of payments to Dr. Bergus based on his failure to comply with the BCBS privileging requirements cannot be a breach of contract, unless BCBS made a mistake of fact in applying the policy. The parties do not disagree on the fact underlying BCBS's failure to approve Dr. Bergus's 2010 privileging application: that the ABLIS is not a Member Board of the ABMS. Therefore, discontinuance of payment for that reason could not breach the contract.

BCBS argues that, contrary to allegations in the September 9 Statement, requiring applicants for EVLT privileging to have ABMS Member Board certification does not violate the Physician Agreement. The requirement, BCBS argues, ensures consistent, universally applicable and universally acceptable quality and safety standards. BCBS points out that, under

Massachusetts law, Dr. Bergus has a right to enter into a contract with it, but only so long as he is willing to meet the terms of that contract. The 2007 Contract provides that BCBS will promulgate administrative policies and practices and may change them unilaterally, and that Dr. Bergus must comply with those policies. The privileging requirements fall within the category of “policies, procedures and rules” necessary for the efficient administration of BCBS products that it may unilaterally develop under the Contract.

BCBS argues that it did not mislead Dr. Bergus or breach the Contract when it rejected his ABLs certification. It points out that the January 5, 2009 letter to Dr. Bergus advised him of the standard requiring certification by an ABMS Member Board. In response to Dr. Bergus’s statement that he does not remember receiving this letter, BCBS observes that even if he did not receive it in January 2009, he was given a copy in May 2009, before he obtained the ABLs certification. In any event, BCBS argues, Dr. Bergus was required to comply with BCBS policy. Further, BCBS asserts, the requirements for ABLs certification are not equivalent to those from an ABMS Member Board.

BCBS asserts that under the Contract it had a right to stop reimbursing Dr. Bergus for performing EVLT procedures when he did not meet its privileging requirement. Therefore, continuing to pay Dr. Bergus because of a computer system error and the subsequent discontinuance of such payments did not constitute a breach of contract. BCBS argues that Dr. Bergus received notice of the privileging policy in accord with the Contract but continued to provide EVLT services to BCBS members, even after he knew his privileging application had not been approved. His position that he relied on receiving payment under the Contract, BCBS argues, is unreasonable given his knowledge that BCBS had not approved his privileging application and the decision in litigation filed by Petitioners in the Worcester Superior Court in April 2009.

Finally, BCBS argues that Dr. Bergus’s claims under G. L. c. 93A (“c. 93A”) should be dismissed because the Board of Review has no authority to hear claims filed under that statute. Even if it had such authority, BCBS asserts, BCBS is not subject to c. 93A claims because it is not engaged in trade or commerce.

Analysis

Petitioners’ petition for a Board of Review hearing was triggered by BCBS’s June 2010 discontinuance of payments to Dr. Bergus for performing EVLT procedures for BCBS members.

Both in that petition and the September 9 Statement, Petitioners assert that BCBS breached the Contract and allege further that it took actions that violated c. 93A and G.L. c. 176D (“c. 176D”). They seek relief in the form of orders requiring BCBS to reimburse Dr. Bergus for performing past EVLT procedures for which payment was denied and prohibiting it from taking any action that would prevent payment for future procedures.

G.L. c. 176B, §12 authorizes submission to the Board of disputes or controversies between a medical service corporation (*i.e.*, BCBS) and a participating physician. The dispute in this proceeding concerns Dr. Bergus’s compliance with privileging requirements established by BCBS that affect his eligibility for reimbursement under the Contract. In addition to their breach of contract claims, the Petitioners allege numerous violations of c. 93A and c. 176D. As BCBS points out, c. 93A authorizes suit only in the Housing Court, District Court and Superior Court departments of the Massachusetts Trial Courts and applies only to entities that are engaged in trade or commerce.⁸ In response to questions from the Board at the October 13 prehearing conference, Petitioners failed to identify any statute or common law decision that would permit it to hear claims alleging violations of c. 93A and c. 176D.⁹ They have subsequently provided no citations to any authority that would confer jurisdiction on the Board to hear claims arising under those statutes. For that reason, we hereby dismiss for lack of jurisdiction those portions of the Petitioners’ submissions that assert claims under c. 93A and c. 176D.¹⁰

In the September 9 Statement, Petitioners allege that four actions by BCBS breached the Contract: 1) unreasonable refusal to accept his certification from the ABLs, even though the credentialing application and professional handbook “do not exclude certifications in vascular

⁸ In support of its position that it is not subject to claims under c. 93A, BCBS cites to several court decisions concluding that BCBS is not such an entity.

⁹ There is no private right of action for alleged violations of c. 176D. G.L. c. 176D authorizes the Commissioner of Insurance to initiate proceedings when he believes that a person subject to the statute has engaged or is engaging in unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. For purposes of the statute, BCBS is deemed to be engaged in the business of insurance. See G.L. c. 176D, §1(a).

¹⁰ Those claims, as set out in the September 9 Statement, allege that BCBS: 1) induced Dr. Bergus to obtain board certification in vascular surgery and then unfairly refused to accept his ABLs certification; 2) refused to accept the ABLs certification without first providing Dr. Bergus with a list of organizations authorized by it for certification; 3) establishing arbitrary and capricious credentialing requirements on physicians performing EVLT procedures; 4) unilaterally amending material contractual terms without providing consideration to Dr. Bergus; 5) materially altering its credentialing terms after inducing Dr. Bergus to rely on their contract and invest in Encompass Care’s EVLT practice; 6) failing to maintain a credentialing and recertification program that is consistent with industry standards; and 7) unlawfully restraining trade through unreasonably implementing high entry barriers into the market for vein-related surgery. Because claims alleging violations of c. 93A are outside the Board’s jurisdiction, none of the allegations that Petitioners characterize as violations of that statute will be addressed in this decision.

surgery from any particular organization; 2) unilaterally amending its requirements without providing consideration to Dr. Bergus; 3) withholding payments to him for performing EVLT procedures on BCBS members; and 4) failing to notify him that it intended to stop payments for performing EVLT procedures on June 16, 2010.¹¹

The Contract executed in October 2007 governs the professional relationship between Petitioners and BCBS. Section 4.16.3 requires Dr. Bergus to comply with BCBS policies and procedures including, but not limited to, those outlined in the Physician Administrative Manual. That section also permits BCBS, from time to time, to develop and distribute “such other policies, procedures and rules as may be necessary for the efficient administration of its...Products” and requires Dr. Bergus to comply with such additional policies, procedures and rules. Section 5.4 of the Contract allows BCBS to revise the Physician Administrative Manual; BCBS agrees to give participating physicians 60-day notice of changes to the Manual, including changes relating to medical management policies. Sections 6.7 and 6.8 address procedures for correcting improperly paid claims and recoupment or offset of amounts improperly paid from payments due participating providers.

The December 2008 Bulletin announcing the new privileging requirements for EVLT procedures changed BCBS policy on reimbursement for treatment of varicose veins.¹² The Contract anticipates that BCBS might need to develop and distribute additional policies and procedures as needed, and expressly obligates providers to comply with such additions. Petitioners do not contest BCBS’s authority to develop and implement policies and procedures but object to their application to Dr. Bergus. He contends that BCBS breached the contract because the December 2008 Bulletin did not provide adequate information about the certification standards.¹³ His argument is not persuasive. The December 2008 Bulletin outlined basic criteria and provided contact information for two people: a person who would answer questions about the application process and BCBS’s provider relations manager. It also included instructions for accessing BCBS’s medical policy on varicose vein treatments. Dr. Bergus availed himself of the

¹¹ Although Petitioners refer to BCBS’s credentialing requirements, the dispute actually addresses its privileging procedure with respect to performing EVLT procedures. Petitioners do not contend that there has been any change in BCBS policies on credentialing and recredentialing physicians under Section 3 of the Contract or in the application of those policies to Dr. Bergus.

¹² Page 2 of the bulletin refers to Medical Policy 045, *Sclerotherapy, Radiofrequency Ablation and Laser Ablation of Varicose Veins in Lower Extremities*.

¹³ Petitioners do not dispute that BCBS gave them the requisite 60-day notice of those new requirements.

opportunity to contact BCBS about the privileging process; the January 5, 2009 letter from BCBS to Dr. Bergus refers to his review of the privileging requirements and the concerns he expressed about the privileging initiatives. We find no merit to Petitioners' argument that the format of the December 2008 Bulletin supports a claim that BCBS breached the Contract.

Dr Bergus next contends that BCBS breached the contract by modifying it in a manner that would exclude him from receiving reimbursements for performing EVLT procedures. The December 2008 Bulletin required an applicant for EVLT privileges to be board certified in vascular surgery or interventional radiology. The application that Dr. Bergus submitted to BCBS in December 2008 did not identify, in the section on medical specialties, board certification in either of those areas.¹⁴ On February 23, 2009, BCBS informed Dr. Bergus in writing that his privileging application was not approved because he had not documented Board certification in one of the three accepted areas or described his training and provided a five-year history of procedure volume and complications, but noted that it would reconsider his application if he provided these supporting documents.¹⁵ Dr. Bergus's internal appeal of BCBS's disapproval was unsuccessful; by letter dated March 6, 2008 [sic] BCBS again declined to approve his application, but stated that it would reconsider the matter when it received additional documentation relating to professional training and board certification.¹⁶

BCBS stated, in the December 2008 Bulletin, that it established privileging requirements to ensure that its members received appropriate treatment from providers who met certain standards. Dr. Bergus's 2008 privileging application did not provide documentation relating to Board certification in one of the three required fields. That Dr. Bergus could not satisfy that requirement, without obtaining an additional qualification that would comply with BCBS standards, does not support a claim that the standard was improperly adopted in order to exclude him from receiving reimbursements for performing EVLT procedures. To the contrary, BCBS twice offered to reconsider his application if he provided appropriate documentation.

¹⁴ A copy of the application is attached to BCBS's response to the September 9 Statement. The cv attached to the application refers to board certifications in phlebology and emergency medicine by unidentified boards and "registration" as a vascular specialist.

¹⁵ The January 5, 2009 letter refers to communications from Dr. Bergus to BCBS about the criteria for the credentialing program. The record does not include documents relating to such communications.

¹⁶ The parties agree that the date on the letter should be March 6, 2009. The record includes no other documents relating to Dr. Bergus's internal appeal.

Dr. Bergus argues that BCBS should have exempted him from the new privileging requirements because he was providing EVLT services before they were implemented. He has identified no provision in the Contract or the December 2008 Bulletin that would exempt him from compliance with BCBS policies and procedures. BCBS was well aware of Dr. Bergus's experience; it acknowledged that experience in its January 5, 2009 letter. The February 23, 2009 letter from BCBS specifically refers to a requirement on the privileging application that the applicant document five years of procedure volume and complication rate.¹⁷ We find no merit to Dr. Bergus's argument that his experience alone should exempt him from the privileging requirement; his experience is relevant to evaluating his privileging application but does not exempt him from compliance with the other criteria. We conclude that, under the Contract, BCBS was authorized to establish a policy requiring special privileging for physicians performing EVLT procedures, that Dr. Bergus was required to comply with the privileging requirements, and that there is no basis for waiving those requirements.

Subsequent to the disapproval of his December 2008 privileging application, Dr. Bergus obtained certification in vascular surgery from the ABLS on June 23, 2009. Over a year later, on or about July 1, 2010, he submitted to BCBS a new privileging application dated June 29, 2010. He described himself on that application as a vascular specialist, but did not provide the name of the board or the certification date.¹⁸ In the Joint Statement, the parties agree that late in June or early in July 2010 BCBS informed Dr. Bergus that his ABLS certification did not meet the privileging requirements because the ABLS is not an ABMS Member Board; BCBS did not approve the June 29 application.¹⁹

Petitioners assert in the September 9 Statement that BCBS unreasonably refused to accept Dr. Bergus's ABLS certification and by so doing breached the Contract, arguing in their post-

¹⁷ No such documentation was provided with the copy of Dr. Bergus's December 2008 privileging application submitted by BCBS.

¹⁸ A copy of the application was attached to the September 9 Statement. In response to a request for information on the applicant's specialty and Board certification date, the term Vascular Surgery has been changed to Vascular Specialist. No Board certification date is listed. The attached cv lists certifications from organizations identified by acronyms, and describes Dr. Bergus as a member of, and Board certified, by the American College of Phlebology. There is no reference on the application itself to the ABLS, but a copy of a certificate stating that the American Board of Laser Surgery awarded Dr. Bergus a certificate in Laser Surgery and Medicine for Vascular Surgery on June 23, 2009 was apparently submitted with the application.

¹⁹ The documentary record contains no formal communication from BCBS about Dr. Bergus's June 2010 credentialing application. Attached to Petitioners' September 9 Statement is a copy of an undated letter from Paula Pineault on Americas Vein Centers letterhead, stating her understanding that there was a problem with that application and referring to a July 1, 2010 transmission to BCBS.

hearing memorandum that the training required by the ABLs rivals, if not surpasses, ABMS requirements. They further argue that, despite their statement that no material facts are in dispute and that a summary decision procedure is appropriate, the matter should be reopened to permit further inquiry into the BCBS privileging requirements. We decline to do so.

Petitioners have identified no Contract provision that circumscribes BCBS's authority to develop and implement policies, procedures and rules necessary for the efficient administration of the Plan. Nevertheless, Dr. Bergus specifically challenges BCBS's decision to require Board certification from an ABMS member board, arguing that the issue should be addressed in this proceeding as it relates to his ABLs certification. We conclude, for the following reasons, that his effort is untimely. After receiving the December 2008 Bulletin, Dr. Bergus reviewed the new privileging requirements, communicated his concerns to BCBS, and ultimately submitted a privileging application. On January 5, 2009, BCBS wrote a letter to Dr. Bergus that referred to the specific sources for Board certification that it accepted, commenting that although it had heard Dr. Bergus's point of view it had no plans to change that criterion at that time. It further stated that it would consider his comments as it considered "developing an alternative privileging pathway."

BCBS rejected Dr. Bergus's December 2008 privileging application on February 23, 2009 for, among other things, his failure to document Board certification in vascular surgery or interventional radiology or Board-certified in general surgery prior to the establishment of the vascular Boards; two weeks later it denied his internal appeal of that decision for similar reasons. Neither decision references the content of the letter that BCBS wrote to Dr. Bergus on January 5, 2009, expressly stating that the required board certification in one of the three areas specified on the application had to be conferred by the American Board of Medical Specialties ("ABMS") and acknowledging BCBS's understanding that Dr. Bergus did not meet that element of the privileging criteria. In the Joint Statement, Dr. Bergus states that he has no recollection of receiving the January 5, 2009 letter and does not have a copy in his office records. However, Petitioners raised no issue about his receipt of the letter in their September 9 Statement; a copy of the letter is attached to that Statement as Exhibit C.²⁰ After rejection of his privileging

²⁰ No question of receipt was raised at the prehearing conference; both parties' counsel referred to notice in 2009 of the ABMS member board certification requirement. The September 9 Statement also refers to litigation that Petitioners initiated against BCBS in the Worcester Superior Court on or about April 29, 2009, challenging BCBS's

application, Dr. Bergus did not petition the Board for review of BCBS's decision within the statutory thirty-day time limit imposed by c. 176B, §12. Regardless of whether he had seen the January 5, 2009 letter, any dispute about the reasonableness of BCBS's new privileging requirements arose when BCBS applied them to Dr. Bergus's first application. His appeal of issues that were manifest when his application was rejected early in 2009 is untimely.²¹

Furthermore, Dr. Bergus obtained his ABLIS certification in June 2009, but chose not to submit a new application for EVLT privileges to BCBS immediately. He offers no explanation for his decision not to seek BCBS's reconsideration in 2009.²² Instead, he waited a year to file a new application, doing so only after BCBS had discontinued reimbursements for EVLT procedures. Submission of the privileging application dated June 29, 2010 appears to be an attempt to create a dispute relating to the reasonableness of BCBS's privileging policies within the otherwise determined time frame for filing a petition with this Board.²³

Petitioners finally argue that BCBS has waived its right to deny or is estopped from denying reimbursement to Dr. Bergus for performing EVLT procedures because it continued to pay him after April 15, 2009 although he had not satisfied its privileging requirement. BCBS is obligated under Section 6 of the Contract to pay for Covered Service; the multi-part definition of those services in Section 1 of Contract requires, in pertinent part, that they be provided by a "physician or provider credentialed and/or privileged as required by the applicable Plan." BCBS was therefore not required to reimburse Dr. Bergus for EVLT procedures unless he met its privileging requirements.²⁴ The parties do not dispute that he did not meet those requirements.

new credentialing requirements and seeking to enjoin their enforcement. It strains credibility to posit that Dr. Bergus would not have been fully apprised of those requirements before that suit was initiated. In any event, BCBS's response to the September 9 Statement includes its memorandum filed in the Worcester Superior Court in May 2009 opposing Petitioners' request for injunctive relief in that proceeding. The memorandum indicates that a copy of the January 5, 2009 letter was attached to it as an exhibit. Although Dr. Bergus asserts that he does not recall receiving the January 5, 2009 letter, he does not deny knowledge of its content. The letter itself refers to communications from Dr. Bergus about the privileging requirement that addressed acceptable sources for certification.

²¹ Petitioners continue to argue that the reasonableness of BCBS's privileging policies should be addressed in this proceeding even though they unsuccessfully raised that question in the form of a motion to conduct discovery. The Board, by order dated November 29, 2010, denied that motion for the reasons reiterated in this decision.

²² His decision is particularly puzzling in light of BCBS's repeated offers to reconsider his application with appropriate supporting documents. If Dr. Bergus thought that by acquiring ABLIS certification he had satisfied the BCBS requirement, he had every reason to submit an updated application.

²³ The triggering event, as noted above, was the denial of reimbursements for performing EVLT procedures.

²⁴ Contracted providers also agree not to bill the Plan for services that are not Covered Services. Section 6.1.

The Contract also gives BCBS a right to readjudicate claims in order to correct improperly paid claims.

The facts do not support the theories of waiver or estoppel that Petitioners now espouse as grounds for obligating BCBS to reimburse Dr. Bergus for non-Covered Services.²⁵ To support an argument that, by continuing to reimburse Dr. Bergus after April 15, 2009, BCBS waived its right to discontinue such payments, Petitioners must prove that BCBS actually intended to relinquish its right to pay only for Covered Services, or engaged in conduct that would warrant an inference of intent to relinquish that right. *Rotondi v. Arbella Mutual Insurance Company*, 54 Mass. App. 906, 907 (2002). That BCBS stopped reimbursing Dr. Bergus when it discovered that it had made payments for non-Covered Services amply demonstrates that it had not relinquished its right to pay only for Covered Services. The existence of a programming error in the BCBS computer-based payment system is insufficient to warrant an inference that BCBS, by its conduct, intended to relinquish that right. Petitioners' conclusory contentions that in an organization as large as BCBS a systems error could not possibly have occurred unintentionally or remained undiscovered for an extended time period are not persuasive.²⁶

Petitioners argument on estoppel fares no better. Estoppel must be based on findings that a person made a representation intended to induce a course of action by the person to whom the representation is made and a resulting detriment to the person relying on the representation and taking the action. *Rotondi v. Arbella Mutual Insurance Company, supra*, 906. Petitioners do not allege that BCBS represented to Dr. Bergus that it would continue to reimburse him for providing EVLT procedures even though he had not met its privileging requirements. No documentation supports Petitioners' argument that BCBS had information about Dr. Bergus's ABLIS certification before June 2010 but did not enforce its privileging policy. The documents show that Dr. Bergus informed BCBS of that June 2009 certification only at the end of June or

²⁵ Petitioners' did not raise any question of waiver or estoppel in their July 2010 petition to the Board or their September 9 Statement.

²⁶ Dr. Bergus questions BCBS's characterization of the reason for the continued payments as an "error," but offers no argument that it resulted from anything other than operation of the computer system.

early in July 2010, two weeks after it had stopped reimbursing him for performing EVLT procedures.²⁷

IV. Conclusion

We conclude that no material facts relevant to this matter are in dispute, and that, in accordance with the parties' representations, it may be resolved on motions for summary decision. For the reasons set forth above, the motion of Blue Cross Blue Shield of Massachusetts for Judgment Based on the Stipulated Record is **ALLOWED** and Petitioners' Motion for Summary Judgment is **DENIED**.

Issued this 31st day of May, 2011.

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

Brenda Beaton, Esq.
Member, Board of Review

Sheila Calkins, Esq/
Member, Board of Review

This decision may be appealed pursuant to M.G.L. c. 176B, §12.

²⁷ Even if he had done so, because that certification did not comply with BCBS's privileging standards, it did not qualify Dr. Bergus to be reimbursed for EVLT procedures performed on BCBS members.