

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

ORDER OF MEDICARE APPEALS COUNCIL
REMANDING CASE TO ADMINISTRATIVE LAW JUDGE
DOCKET NUMBER: M-11-63

In the case of

Claim for

E.D.

Prescription Drug Benefits
(Part D)

(Appellant)

(Enrollee)

(HIC Number)

Kaiser Foundation Health
Plan/Kaiser Permanente Senior
Advantage Individual Plan

(Part D Sponsor/Part D Plan)

(ALJ Appeal Number)

The Administrative Law Judge (ALJ) issued a decision dated August 3, 2010, which concerned the drug Thalomid dispensed on November 5, 2009. The ALJ determined that Kaiser Permanente Senior Advantage Individual Plan, the Part D Plan (Plan), in which the appellant is enrolled, was not legally and financially responsible for covering the cost of the drug. The appellant has asked the Medicare Appeals Council to review this action.

The Council reviews the ALJ's decision *de novo*. 42 C.F.R. § 423.2108(a). The Council will limit its review of the ALJ's action to the exceptions raised by the enrollee in the request for review, unless the enrollee is unrepresented. 42 C.F.R. § 423.2112(c).

The Council hereby vacates the hearing decision and remands this case to an ALJ for further proceedings, including a new decision. See 42 C.F.R. §§ 423.2108(a), 423.2128(a).

LEGAL PRINCIPLES

A Part D Plan must disclose information about cost-sharing to enrollees. 42 C.F.R. § 423.128(b). In general, the amount of

the enrollee's cost-sharing depends on which coverage phases apply. 42 C.F.R. § 423.104(d).

The initial coverage period is the first phase. This is the period before an enrollee's total drug expenses have reached \$2,700, including amounts the enrollee paid and what the Plan paid.¹ Exh. 1, Evidence of Coverage (EOC) at pages 62 and 112-113. The \$2,700 limit is also called the initial coverage limit. During this phase, the Plan pays part of the costs and that enrollee is responsible for a coinsurance or copayment according to the schedule in the EOC. The enrollee pays \$45 for brand-name drugs and 25 percent coinsurance for specialty-tier drugs.

The coverage gap is the second phase. After total drug costs reach the initial coverage limit of \$2,700, the enrollee is responsible for the full cost of a brand-name or specialty tier drug, until total out-of-pocket costs reach \$4,350. *Id.* at 114.

Catastrophic coverage is available in the third phase. After the enrollee has spent \$4,350 out-of-pocket, the enrollee is responsible for a \$12 payment for each non-generic drug. The Plan pays the rest. *Id.*

DISCUSSION

The total cost for the Thalomid dispensed on November 5, 2009, was \$5,172.95. The Plan has informed the enrollee that his net cost share is \$4175, and that the Plan paid \$997.95. Exh. 2. The enrollee disputes his liability, in part, because the dispensing pharmacy only charged a \$15 co-payment.

This is an unusual case because the cost of the drug caused the enrollee to cross the initial coverage limit of \$2,700 and the coverage gap limit of \$4,350. Catastrophic coverage was then available for out-of-pocket costs above \$4,350. The ALJ held that the Plan was not responsible for the cost of the drug, and that the enrollee was responsible for the full price of the drug. This is not an accurate statement of the law. Under the terms of the EOC, the Plan is responsible for paying at least a portion of the cost during the initial coverage period and under catastrophic coverage.

¹ The threshold for each phase may adjust annually. The specific amounts listed apply to plan year 2009.

However, the Plan has not provided a breakout of how it computed the enrollee's cost-sharing, including the specific amount due under each phase. The exact amount of the enrollee's cost-sharing and the Plan's responsibility cannot be determined on the present record, because of conflicts and gaps in the record.

First, the Plan submitted a copy of a letter dated December 3, 2009, to the ALJ after the hearing. That letter indicates that the Plan previously processed the claim for the Thalomid at issue under another Kaiser Permanente benefit plan. There is no information about the other benefit plan in the record, such as whether it was primary or secondary during any overlapping periods of coverage, or the effect of this reprocessing on the enrollee's Part D cost-sharing liability.

Second, the Plan's payment records in Exh. 3 indicate that the enrollee had been charged \$10.50 for generic prednisone prescriptions and \$15 for brand name Thalomid. These amounts do not correspond with any of the cost-sharing amounts listed in the Evidence of Coverage. Exh. 1 EOC at 113.

Third, the enrollee's out-of-pocket costs listed in the Plan's account printout in Exhibit 3 (\$176.50) during the initial coverage period are different than the same costs listed in the Explanation of Benefits dated January 22, 2010 in Exhibit 2 (\$493.95). There is no explanation in the record for this discrepancy.

Finally, the ALJ found that there was no dispute that Thalomid was a brand name or specialty tier drug, but the ALJ did not determine which category applies. Dec. at 2. Under the terms of the EOC, the enrollee pays \$45 for brand-name drugs and 25 percent coinsurance for specialty-tier drugs during the initial coverage period. This is a substantial difference for a drug costing \$5,172.95. The Formulary is not in the record to establish which category applies.

The Council therefore remands for further proceedings. The ALJ shall develop the record to obtain: 1) a copy of the Formulary; 2) the enrollee's and Plan's payments during the initial coverage period; 3) the calculation of the out-of-pocket costs during the coverage gap; and 4) an explanation of the specific cost-sharing the Plan imposed in each coverage phase, including the effect of coverage available under another Kaiser benefit

plan. The ALJ shall offer the opportunity for a supplemental hearing to the enrollee and the Plan.

The ALJ may take further action not inconsistent with this order.

MEDICARE APPEALS COUNCIL

/s/ Clausen J. Krzywicki
Administrative Appeals Judge

/s/Constance B. Tobias,Chair
Departmental Appeals Board

Date: March 4, 2011