

STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

In re: BlueCross and BlueShield of Vermont)	
3 rd Quarter 2018 Large Group Rating Program Filing)	GMCB-003-18rr
)	
In re: The Vermont Health Plan)	
3 rd Quarter 2018 Large Group Rating Program Filing)	GMCB-004-18rr

OPPOSITION TO BCBSVT AND TVHP MOTION FOR RECONSIDERATION

The Office of the Health Care Advocate (HCA) opposes the motion (Motion) of Blue Cross and Blue Shield of Vermont (BCBSVT) and The Vermont Health Plan, LLC (hereinafter referred to collectively as BCBSVT) for reconsideration of the Green Mountain Care Board’s (Board) decision. We respectfully request that the Board deny the Motion in full.

We oppose the Motion on three grounds. First, the Motion is defective because BCBSVT does not provide any legal grounds for the Motion. Second, BCBSVT’s sole means to appeal the Board’s decision is specified in Board Rule 2.404 and the Motion is, in all but name, an appeal of the Board’s decision. Third, BCBSVT is attempting to re-litigate this matter with the Motion. BCBSVT has failed to make any showing that the evidence it now proffers was not available prior to the Board’s decision or that, if the Board had considered the proffered evidence, that the Board would have reached a different conclusion.

Because BCBSVT’s Motion must fail for the three above-stated reasons, we will only briefly address the flaws in BCBSVT’s arguments as follows: First, BCBSVT alleges that actuarial factors and solvency concerns should dictate the Board’s review. As the Vermont Legislature, the Board Rules, and the Vermont Supreme Court make clear, the Board’s review must also consider whether the rates are affordable, promote quality care, promote access to care, and are not unjust, unfair, inequitable, or misleading. GMCB Rule 2.301(b); 8 V.S.A. §4062(a)(3); In re MVP Health Insurance Company, 155 A. 3d 1207 (Vt. 2016). Second, BCBSVT offers no evidence for its claim that its recent RBC trend is directly caused by Board regulation.¹ Reserve levels are influenced by a complicated set of factors. For example,

¹ BCBSVT’s choice of timeframe regarding RBC levels is also misleading. It is true that BCBSVT experienced a decline in RBC from 2014 to 2015. However, once a larger timeframe is considered, the decline is negligible. From 2013 to 2017, BCBSVT’s RBC level has only dropped 17 points.

BCBSVT's argument that it would be better off if the Board had approved higher rates does not account for healthy consumers leaving BCBSVT for lower priced alternatives as BCBSVT's prices increase. Third, BCBSVT's statements about its RBC trend fail to account for the manner in which cost sharing reduction (CSR) defunding is temporarily negatively impacting its reserves, the extent to which silver stacking in 2019 will correct this, and the potentially positive impact current litigation to recover 2018 CSR monies will have on its RBC level. Finally, BCBSVT will receive major windfalls as a result of the benefits provided for non-profit Blue Cross plans in the 2017 tax law, and BCBSVT's RBC ratio is likely to increase substantially as a result of those windfalls. In short, there is no justification for a 1.5% CTR, and there may well be support for a negative CTR factor.

Having briefly addressed some of the flawed factual contentions BCBSVT makes in the Motion, we now turn to the legal defects of the Motion itself.

1. The Motion Should be Denied because BCBSVT Provides no Legal Grounds for the Motion.

The Motion is defective because BCBSVT does not include any legal grounds for the Motion. Rule 7(b) of the Vermont Rules of Civil Procedure sets out the minimal standards for the form of a motion. Rule 7(b) requires that a motion "shall state with particularity the grounds therefor including a concise statement of the facts and law relied on..." V.R.C.P. 7(b). Although requirements for the form of motions are more liberally construed than other pleadings, BCBSVT fails to provide any legal grounds for the Motion.

The defective Motion violates the HCA's due process rights and even a permissive interpretation of the Vermont Rules of Civil Procedure. Therefore, we respectfully request that the Board deny the Motion.

2. The Motion Should Be Denied Because the Motion is Effectively an Appeal and Appeal Rights are Specified by Rule and Statute.

BCBSVT attempts to create a new administrative appeals process by creative motion practice. Board Rule 2.404 unambiguously states a party's appeal rights from a Board decision. Specifically, Board Rule 2.404 reads, "the decision of the Board shall constitute a final order, which may be appealed pursuant to 18 V.S.A. § 9381 and 8 V.S.A. § 4062(g)." Board Rule 2.404.

Although the title of the Motion is not an appeal, its substance makes clear that it is an appeal in all but name. Board Rule 2.404 and 18 V.S.A. § 9381 specifically state that upon exhaustion of administrative remedies, a party's sole means to appeal a final judgement of the Board is to appeal said judgement to the Vermont Supreme Court. Board Rule 2.404; 18 V.S.A. § 9381.

To be clear, we are not asserting that the Board cannot delineate an administrative appeals process. The Board can. Rather, absent a delineated process, BCBSVT may not create an administrative appeals process by filing motions in contravention of the Board's rules. As the appeal process is unambiguously delineated by Board Rule 2.404 and the Motion is an appeal in all but name, we respectfully ask the Board to deny the Motion.

3. The Motion Should Be Denied because it Neither Offers New Evidence that was not Available Prior to the Board Decision nor Does it Demonstrate that such New Evidence Would Change the Outcome of the Matter.

Assuming arguendo that the above defects are not fatal, BCBSVT failed to justify why the Board should revisit or modify its decision.

The Motion is most similar to a Rule 60(b) motion for relief from a judgement due to newly discovered evidence. V.R.C.P. 60(b). A Rule 60(b) motion is an extraordinary remedy that should be used sparingly with relief being granted only when the basis for relief is clearly established. John A. Russel Corp. v. Bohlig, 170 Vt. 12, 24 (1999); Pirdair v. Med Ctr. Hosp. of Vt., 173 Vt. 411, 415 (2002); Eaton v. Prior, 2015 WL 1759959 (Vt. Sup Ct. 2015). Further, such a motion is not meant to afford parties a second, better opportunity to litigate matters already decided. Id.; Venable v. Reed Elsevier, Inc., 2009 WL 2156844 (S.D. NY 2009)

In recognition of the extraordinary relief sought by a Rule 60(b) motion, the movant must meet a substantial burden to prevail. Specifically, the movant must (1) prove that the evidence offered could not have been reasonably obtained until after the final order and (2) that, had the new evidence been considered, the result of the final order would have been different. See Draken v. Mooney, 144 Vt. 561, 566 (1984); Pridair at 414; Stalb v. Stalb, 168 Vt. 235 (1998); Olde & Co. v. Boudreau, 150 Vt. 321 (1988) (mere failure to present evidence is not a basis for relief from judgement); V.R.C.P. 61.

a. The evidence offered in the Motion could have been offered before the Board's decision.

BCBSVT offers essentially no new evidence in its motion. For instance, BCBSVT offers historical risk based capital (RBC) levels. (BCBSVT Mot. Recons. at 2). This information is public today and it was public when BCBSVT made its filing. See e.g., (BCBSVT Mem. In Lieu Her'g at 5); (HCA Mem. In Lieu Her'g at 3); BCBSVT Annual Statement 2017.

BCBSVT also recites statements made by Lewis & Ellis (L&E) and the Department of Financial Regulations (DFR) in memoranda and letters. (BCBSVT Mot. Recons. at 2-3). All of this evidence was before the Board prior to the issuance of its decision.

Simply put, BCBSVT is attempting to relitigate this matter. BCBSVT does not argue that the evidence it proffers is new. Indeed, BCBSVT's reliance on public information from its Annual Statements and its recitation of L&E's and DFR's statements makes clear that the evidence BCBSVT now proffers is not new.

b. BCBSVT does not and cannot show that the new evidence, had it been considered, would have resulted in different judgement.

BCBSVT fails to show that, had the proffered evidence been considered by the Board, the decision would have been different. Even if BCBSVT attempted to make such an offer, it could not in the present case. As the evidence was in the record, the Board has already considered the evidence in reaching its decision.

Conclusion

As stated above, the Motion should be denied for three reasons. First, the Motion should be denied because BCBSVT provides no legal grounds for the Motion. Second, Board Rule 2.404 clearly specifies the process BCBSVT can use to appeal the Board's decision and a motion for reconsideration is not part of the allowed appeals process. Third, assuming *arguendo* that the Motion is valid despite the above-listed defects, a motion for reconsideration is an extraordinary remedy and BCBSVT failed show that the evidence it proffers was unavailable prior to the Board's decision or that the evidence, had it been considered prior to the decision, would have changed the outcome of the matter.

For the above-stated reasons, we respectfully ask the Board to deny the Motion in full.

Dated at Montpelier, Vermont, this 29th day of June, 2018.

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CERTIFICATE OF SERVICE

I, Kaili Kuiper, hereby certify that I have served the above Memorandum in Lieu of Hearing on Judith Henkin, Green Mountain Care Board General Counsel; Sebastian Arduengo, Green Mountain Care Board Staff Attorney; Agatha Kessler, Green Mountain Care Board Health Policy Director; and Jacqueline Hughes, Blue Cross Blue Shield of Vermont representative, by electronic mail, return receipt requested, this 29th day of June, 2018.

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