

STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

In re: Blue Cross and Blue Shield of Vermont) GMCB-004-19rr
2020 Association Health Plan Rate Filing)
_____) SERFF No.: BCVT-131835495

DECISION AND ORDER

Introduction

Vermont law requires that health insurers submit major medical rate filings to the Green Mountain Care Board. 8 V.S.A. §§ 4062(a), 4515a, 4587, 5104. The Board must approve, modify, or disapprove rate filings, typically within 90 calendar days. 8 V.S.A. § 4062(a). On review, the Board must determine whether a proposed rate is affordable, promotes quality care, promotes access to health care, protects insurer solvency, and is not unjust, unfair, inequitable, misleading or contrary to Vermont law. *Id.* For the reasons set forth below, we disapprove without prejudice the 2020 Association Health Plan (AHP) Rating Program Filing submitted by Blue Cross Blue Shield of Vermont (BCBSVT or “the carrier”).

Procedural History

On February 21, 2019, BCBSVT submitted its 2020 AHP Rating Program Filing via the System for Electronic Rate and Form Filing (SERFF).¹ On February 28, 2019, the Office of the Health Care Advocate (HCA), a special project within Vermont Legal Aid representing the interests of Vermont health insurance consumers, entered an appearance as a party to the filing. On April 19, 2019, the Vermont Department of Financial Regulation (DFR) filed its analysis regarding the impact of the filing on the carrier’s solvency. On April 22, 2019, the Board’s contract actuary, Lewis & Ellis (L&E), submitted an actuarial memorandum evaluating the filing (“L&E Memo”).

The Board solicited written public comments on the filing through June 7, 2019; no member of the public provided comment. The parties waived a hearing and filed memoranda in lieu thereof. *See* GMCB Rule 2.000, § 2.309(a)(1). The Board extended the review period by thirty days under 8 V.S.A. § 4062(a)(2)(A) and GMCB Rule 2.000, § 2.301(a).

Findings of Fact

1. BCBSVT is a non-profit hospital and medical service corporation and provides individual coverage, small and large group coverage to employers, and Medicare Supplement coverage in Vermont. L&E Memo at 1.

2. A fully-insured AHP is a form of group health insurance offered through an association of employers, such as an industry trade group. *See* 8 V.S.A. §§ 4079-4079a; *see also New York v.*

¹ The contents of the SERFF filing and all documents referenced in this Decision and Order can be found at <https://ratereview.vermont.gov/BCVT-131835495>.

United States Dep't of Labor, 363 F.Supp.3d 109, 119 (D.D.C. 2019). In June 2018, the U.S. Department of Labor (DOL) adopted regulations (“the Final Rule”) that allowed small employers and sole proprietors to band together to purchase large group health insurance coverage through an AHP in a way that was previously not possible.

3. Prior to the Final Rule, coverage provided through an association to individuals and small employers was typically regulated under the same standards that governed coverage sold by insurance carriers directly to individuals and small employers. This was because the test for determining the type of coverage being offered focused on whether the coverage was offered to individuals or employers and, if the coverage was offered to employers, on the number of employees of the particular employer obtaining the coverage. In other words, individual and small group coverage obtained through an association was regulated under the standards that applied to the individual and small group markets, respectively. This approach was known as the “look-through doctrine.” *See* Definition of “Employer” Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 28912, 28912-13 (June 21, 2018).

4. Vermont has a merged individual and small group health insurance market, meaning individual premium amounts and small group premium amounts must be based on the combined experience of the individual and small group risk pools. 33 V.S.A. § 1811.

5. An exception to the “look-through doctrine” existed for ERISA-covered employee welfare benefit plans.² Under DOL’s longstanding sub-regulatory guidance, only “bona fide associations” could sponsor such plans. *See New York v. U.S. Dep’t of Labor*, 363 F.Supp.3d at 119. A bona fide association sponsoring an AHP was treated as a single employer and the number of total employees of all the association’s employer members were counted to determine what market rules applied. In this way, small groups could band together to purchase large group coverage.

6. DOL’s sub-regulatory guidance set forth a stringent three-part test to determine whether a plan was sponsored by a bona fide association (Pathway 1). The Final Rule modified this test, making it easier for small employers (and, for the first time, sole proprietors) to offer an ERISA-covered employee welfare benefit plan subject to regulation as a large group plan (Pathway 2).

7. In response to these changes at the federal level, DFR adopted rules governing fully-insured and self-insured AHPs. Under these rules, an association may not offer a fully-insured AHP in Vermont unless it has been licensed by DFR. DFR Rule I-2018-01, § 5. The plan year for fully-insured AHPs is the same as the calendar year. *Id.* at § 7.

8. In 2019, BCBSVT began providing AHP coverage to two licensed associations under Pathway 2. This filing would establish the formula, manual rate, and accompanying factors used for AHP renewals. The filing includes support for key assumptions, such as trend, benefit relativities, administrative costs, aggregate stop loss, and large claim factors. L&E Memo at 1.

9. The experience BCBSVT used to develop the manual rate reflected in the filing comes from claims incurred between October 2017 and September 2018 by BCBSVT small groups who

² The Employee Retirement Income Security Act of 1974 (“ERISA”) governs employee benefit plans arising from employment relationships.

do not have their entire enrollment on a platinum plan. BCSVT selected this population because, at the time of the filing, it believed it would be analogous to the health and demographic characteristics of associations in 2020. L&E Memo at 2.

10. On March 28, 2019, the U.S. District Court for the District of Columbia invalidated major portions of the Final Rule. *New York v. United States Dep't of Labor*, 363 F.Supp.3d at 141. DOL appealed the district court's ruling on April 26, 2019 but did not request a stay of the decision. See DFR Insurance Bulletin No. 205, *Vermont Association Health Plans* (June 13, 2019).³

11. Since filing its appeal, DOL has issued guidance on the current status of AHPs. The guidance clarifies that at the end of the plan year, an issuer will only be able to renew coverage for an employer member of an AHP formed pursuant to the Final Rule (i.e., a Pathway 2 AHP) if the coverage complies with the relevant market requirements for that employer's size. U.S. Department of Labor Statement Relating to the U.S. District Court Ruling in *State of New York v. United States Department of Labor* (April 29, 2019).⁴

12. On June 17, 2019, H.524 (Act 63) was signed into law in Vermont. Section 7 of this bill amends state law to provide that 1) to the extent permitted by federal law, an AHP that provided coverage for the 2019 plan year may be renewed for coverage of existing association employer members for subsequent plan years, and 2) new AHPs may not be offered or issued for coverage in Vermont for plan years 2020 and thereafter.

13. DFR recently issued guidance addressing the status of AHPs in Vermont in light of the recent activity described above. The guidance clarifies that DFR cannot approve Pathway 2 AHPs to operate beyond plan year 2019 and requires Pathway 2 AHPs currently operating in Vermont to post a notice on their websites stating that new groups cannot be accepted and that current plan members will have to seek alternative coverage during open enrollment for plan year 2020. The guidance also clarifies that Pathway 1 AHPs will be allowed to operate in Vermont in plan year 2019 and beyond.⁵ DFR Insurance Bulletin No. 205, *Vermont Association Health Plans* (June 13, 2019).

14. A review of SERFF filings shows that there are no contract or policy forms currently under review by DFR for a Pathway 1 AHP.

15. In its memorandum in lieu of hearing, the HCA asserted that the Board should not, and cannot, approve the filing because it is for an illegal product. The HCA argued that the filing is for an illegal product because it covers AHPs created under the now-vacated Final Rule and the groups covered by the filing are not rated according to their employer size. The HCA argued that, in essence, the filing treats these groups as large groups for rating purposes even though it is no longer legally permissible to do so.

³ <https://dfv.vermont.gov/reg-bul-ord/vermont-association-health-plans>.

⁴ <https://www.dol.gov/newsroom/releases/ebsa/ebsa20190429>.

⁵ DFR states that the guidance is in line with a reading of H.524 (Act 63) that reasonably construes the statutory language so as to apply only to Pathway 2 AHPs, thus avoiding a conflict with federal law.

16. BCBSVT submitted its memorandum in lieu of hearing before H.524 (Act 63) was signed into law and before DFR issued the guidance described above. BCBSVT recognized the possibility that the new AHP market would be definitively prohibited by law for 2020. However, it stated that the failure to have an AHP rating mechanism established timely in the event the market is permitted to continue to exist is unduly burdensome. BCBSVT also argued that, even if the Final Rule remains invalid, the Board should approve this formula and factor filing because it would still apply to bona fide AHPs under prior DOL guidance (i.e., Pathway 1 AHPs). BCBSVT emphasized that the bulk of the work has already been done with respect to this filing and to require that it be redone would be unduly burdensome.

Standard of Review

The Board reviews rate filings to ensure that a proposed rate is “affordable, promotes quality care, promotes access to health care, protects insurer solvency, and is not unjust, unfair inequitable, misleading, or contrary to the laws of this State” and is not “excessive, inadequate, or unfairly discriminatory.” 8 V.S.A. § 4062(a)(3); GMCB Rule 2.000, § 2.301(b).

Conclusions of Law

Pathway 2 AHPs will not be allowed to operate in Vermont in 2020. Findings of Fact (Findings) ¶ 13. We understand that the AHPs currently offered by BCBSVT to Vermont associations are Pathway 2 AHPs. *See id.* Thus, coverage for the individuals and small employers in these associations will be subject to the rules that apply to the individual and small group markets. Findings ¶ 11. The rates in this filing would be contrary to state law if applied to these Pathway 2 AHPs because they are not based on the combined experience of the small group and individual risk pools. *See Findings ¶¶ 4, 9.*

BCBSVT is correct that Pathway 1 AHPs will be allowed for 2020. *See Findings ¶¶ 13, 16.* However, major medical rate filings submitted to the Board are tied to health insurance policies, as detailed in contracts or forms. Those contracts or forms must be approved by DFR. *See 8 V.S.A. §§ 4587 and 4515a* (providing that nonprofit hospital and medical service corporations such as BCBSVT may not issue a health insurance policy or a certificate under a policy until the contract or certificate form has been approved by DFR and the rates to be charged therefore have been approved by the GMCB). There are no forms under review by DFR for a Pathway 1 AHP. Findings ¶ 14. We decline to approve a rate filing where there is no accompanying form filing at DFR to which the rate would apply.

For certain products, DFR is responsible for approving rates *and* forms. In such cases, DFR advises insurers that “[r]ate filings may not be submitted until after the form filing has been approved. The reason for this requirement is that changes necessary to bring a form into compliance with Vermont law may necessitate a change in the corresponding rates . . . Rate filings submitted prior to form filing approval may be disapproved-final [sic].” DFR, *Recurring Issues: Supplemental Health Insurance* (June 12, 2019).⁶ While the Board does accept rate filings prior to DFR’s approval of the forms, we agree with the logic of DFR’s position.

⁶ <https://dfr.vermont.gov/document/recurring-issues-supplemental-health>.

If BCBSVT does files forms with DFR for Pathway 1 AHPs and if it is appropriate to apply the rates in this filing to those products, BCBSVT may resubmit this rate filing to the Board and we will attempt to expedite our review. We recognize that a significant amount of work has been done to date by BCBSVT, DFR, the HCA, and the Board with respect to this filing and, to the greatest extent possible, we would seek to avoid duplicating that work if this filing were to come before us again.

Order

For the reasons discussed above, we disapprove the 2020 Association Health Plan (AHP) Rating Program Filing submitted by BCBSVT without prejudice.

SO ORDERED.

Dated: June 24, 2019 at Montpelier, Vermont

s/ Kevin Mullin, Chair)
)
s/ Jessica Holmes) GREEN MOUNTAIN
) CARE BOARD
s/ Robin Lunge) OF VERMONT
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s/ Maureen Usifer)
)
s/ Tom Pelham)

Filed: June 24, 2019

Attest: s/ Jean Stetter, Administrative Services Director
Green Mountain Care Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Board (by e-mail, telephone, or in writing) of any apparent errors, so that any necessary corrections may be made. (Email address: Christina.McLaughlin@vermont.gov). Appeal of this decision to the Supreme Court of Vermont must be filed with the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration, if any, must be filed with the Board within ten days of the date of this decision and order.