

APPEAL COMMITTEE OF THE COUNCIL FOR MEDICAL SCHEMES

In the matter between:

SELMED MEDICAL SCHEME

Appellant

and

REGISTRAR OF MEDICAL SCHEMES

Respondent

RULING

Introduction

- 1 This is an appeal against a decision of the Office of the Registrar of Medical Schemes ("the Registrar") refusing to register a rule in the form in which it was submitted by the scheme.

- 2 The rule in question (rule 14.4.1), as the rubric under which it appears attests, deals with "foreign claims". It reads as follows:

"No benefits for Claims originating outside the borders of South Africa, with the exception of claims originating in Namibia, which

will be dealt with in accordance with the corresponding Benefits and tariff structures as described in this annexure for local claims and subject to the maximums, where applicable.” [sic]

3 There is something amiss in the grammar, but the essence of the rule is unmistakably to exclude claims arising from injuries or conditions sustained and treated beyond South Africa’s borders. Those originating from Namibia will be paid, however. The grammatical lapse comes in the form of a missing verb or phrase. The rule says “No benefits for Claims originating outside the borders of South Africa ...”. But what of such claims? Surely the intention is to say no benefits for claims originating extra-territorially “shall be paid” or “shall be eligible for payment”. But, this grammatical *faux pas* needs not detain us unduly because we get the drift of what is intended.

4 At the tail-end of the rule, the Registrar added the words, “**Subject to PMB’s**” and then affixed a stamp dated 1 October 2008 indicating that this is the formulation of the rule that he had registered on that date.

5 In her written submissions on behalf of the Registrar, Ms Steinberg says the Registrar “suggested to the appellant that the rule be worded” so as to include the following last sentence to the rule:

“Members will however be entitled to PMBs in respect of medical emergencies originating outside the borders of South Africa.”

6 We are requested by the scheme to set aside the Registrar’s decision, and to direct him to register the rule without variation.

7 We are also requested to direct the Registrar to approve and register the scheme's "benefit options". But this aspect of the appeal was not canvassed sufficiently on the papers and no argument was advanced by either party thereon at the hearing of the matter. Indeed, argument by both counsel, not only in their written submissions but also at the hearing, focussed on registration of rule 14.4.1.

8 The standard that has to be met for purposes of the registration of a rule are different from that required for the approval or withdrawal of a benefit option. The former requires consistency with the Medical Schemes Act, 131 of 1998 ("the Act") and fairness to members; the latter requires financial soundness of the benefit option. We have not been addressed on the latter issue and so are not in any position to make a finding thereon.

The Registrar's Case

9 Ms Steinberg for the Registrar seeks to justify the inclusion of medical emergencies (but not PMB conditions as listed in annexure A to the regulations) within the compass of the rule by pointing out that regulation 8(3) of the Act requires that PMB services be covered in full by the scheme

9.1 where that service is not available from a designated service provider ("DSP") in South Africa, or where no DSP can offer that service in South Africa; or

9.2 where the member's condition requires immediate medical or surgical treatment.

10 Ms Steinberg also submits that on a proper construction of section 29(1)(p) of the Act, where a member receives medical treatment outside South Africa, the scheme would only be liable to cover a FMB service to the extent that it would have done so had the member obtained that service in a South African public hospital. She seems to suggest that the member would have to make a co-payment in respect of the difference between what the foreign hospital or service provider charges, on the one hand, and that which the scheme pays in accordance with the applicable local tariffs on the other.

11 She then concludes that the Registrar's purpose is to ensure that the rule is formulated in a manner that accurately reflects the benefits available to the scheme's members in the event of them receiving medical treatment outside South Africa.

The Scheme's Case

12 Leaving aside the discursive academic treatise on possible meanings of section 29(1)(p) of the Act, and a brief discourse on the law as relates to prescribed minimum benefits, the over-arching submission advanced by Mr Fagan on behalf of the scheme seems to be this: the Registrar's truncated definition of PMBs for the sole purpose of his variation of this rule (focusing cover only on medical emergencies) will serve only to mislead and sow confusion in the

minds of the scheme's members as regards the extent of benefits to which they are entitled under the PMB regime. In this regard, he makes the following submissions in elucidation:

- 12.1 On a proper analysis of the legislative scheme relating to PMBs, cover is not available to members for PMB conditions sustained outside South Africa (except, expressly, those sustained in Namibia because Namibia is a member of the Board of Healthcare Funders);
- 12.2 The reason for this is that the Legislature could not have intended that medical schemes should be liable for costs of PMBs irrespective of wherever in the world those costs are incurred because that would bankrupt schemes.
- 12.3 The Registrar effectively recognises this by seeking to limit cover of PMBs sustained abroad only to medical emergencies.
- 12.4 But the Registrar does not have the power, *in ultram legis*, to alter the statutory definition of "prescribed minimum benefits" as contained in regulation 7.
- 12.5 Since the Registrar does not have this power, members of the scheme would be entitled (on the Registrar's variation of the rule) to claim full benefits for an elective treatment of a PMB condition performed at a

foreign hospital even if the same procedure could have been performed in South Africa at lower cost.

- 12.6 The Act does not envisage a situation where a member of the scheme incurs PMB costs outside South Africa. If that were the case, there would have been no need for members to take out travel health insurance when travelling outside South Africa. If the latter were to happen, and the member sustains a PMB injury abroad which is treated there, and the scheme refuses to pay for the treatment, the member would be mulcted in significant medical costs if the appeals committee and the appeal board uphold the basis for the scheme's refusal to pay.

The Appeal Ruling

- 13 It is true that this appeals committee has never before had to deal with the issue that is now before it, namely, whether or not PMB conditions sustained outside South Africa are covered by the PMB provisions in the Act. That is the issue before us and so previous rulings dealing with the meaning of the payment of PMB costs in full are not directly in point.
- 14 Mr Fagan is quite correct, with respect, when he says this committee does not by its rulings bind itself to a particular view on an issue. It does not set precedents for itself. Each matter is determined on its own terms. It is in this light that this ruling must be understood. This ruling does not set a precedent either for this committee when faced with claims for PMB conditions

sustained and treated extra-territorially in the future, or for other schemes which may or may not contain a similar rule.

- 15 The concept of “prescribed minimum benefits” is defined in regulation 7 as
- 15.1 any emergency medical condition, and
 - 15.2 the diagnosis and treatment pairs listed in annexure A of the regulations.
- 16 While the Registrar does not have the power to alter that definition, he does have the power, conferred on him by section 31(4) of the Act, to “order” a medical scheme
- 16.1 either to amend a rule in a manner indicated by him within 30 days of the order,
 - 16.2 or to apply a rule in a manner indicated by him
- whenever he is of the opinion that the rule in question is being applied in a manner that is inconsistent with the provisions of the Act.
- 17 It is clear from Mr Matshidze’s letter of 15 October 2008, addressed to the scheme’s principal officer, that the Registrar’s office has invoked the power conferred on the Registrar by section 31(4) of the Act (see para 2 of the letter

dated 15 October 2008 – annexure “D” to the scheme’s papers). But by then, the Registrar appears to have already registered the rule as varied by him two weeks previously – on 1 October 2008. This, the provision does not seem to countenance in our view.

18 The power that he does have is to express an opinion that the rule in question is inconsistent with the Act, or that it is being applied in a manner that is inconsistent with the Act, and order the scheme to amend it in a manner indicated by him or apply it in such manner. The Registrar’s concern is that the rule in its un-amended form is inconsistent with the PMB provisions in the Act. The question that then arises is whether or not the opinion is correct.

19 This enquiry has two parts to it in our view. The first is whether PMB conditions sustained and treated abroad are covered at all within the scheme of the Act. The second is whether they are covered in full.

20 The Act is silent in respect of both. The scheme seems to answer both questions in the negative, while the Registrar, through his counsel, seems to suggest that while PMBs sustained extra-territorially are also covered by the Act, they are only covered to the extent that the scheme would have been liable for costs of treatment in a South African public hospital. For this latter proposition, Ms Steinberg relies on an interpretation of section 29(1)(p) of the Act. It reads:

“No limitation shall apply to the re-imburement of any relevant health service obtained by a member from a public hospital where

this service complies with the general scope and level as contemplated in paragraph (o) and may not be different from the entitlement in terms of a service available to a public hospital patient."

21 Mr Fagan has taken us through an interesting analysis of what the provision may mean. We believe that in essence the provision seeks to protect members against two possible ills. The first is where a member is reimbursed by the scheme less than he actually paid the service provider for qualifying medical expenses. The second is where the member receives poorer health service than the level of minimum benefits to which he is entitled in terms of the rules. The standard for the level of minimum benefits is what patients receive at public hospitals. Thus, the scheme may not pay less for the treatment of any qualifying medical condition than would be sufficient to cover treatment of that condition at a public hospital. In the result, the phrase "different from" in the second part of the provision in truth connotes "less than", so that the meaning is that a scheme may not pay for health services that are less than those for which public hospitals provide in relation to the medical condition in question.

22 It is in this context that we understand Ms Steinberg's submission that "a member may be entitled to claim for a PMB service received in a foreign public hospital to the same extent that she would be entitled to claim for a PMB service received in a South African public hospital" and that "this construction of section 29(1)(p) does not expose the medical scheme to anything more than its liability to a member using a public hospital in South Africa".

- 23 If that is the case, we are puzzled as regards why PMB cover should be confined only to emergency cases. Surely the same could apply with equal force in relation to PMB conditions generally, so that Mr Fagan's extreme example of a member who travels, electively, to the United States for a bone marrow transplant in the treatment of acute leukaemia loses its traction.
- 24 On our understanding of the import of section 29(1)(p) as articulated above, bearing in mind that no rule that is inconsistent with the Act has validity, it would ordinarily seem to us unnecessary for the Registrar to impose a condition that members are entitled to PMB cover in respect of injuries sustained and treated outside South Africa. But because the scheme has advanced an argument that PMBs sustained offshore are not covered by the Act, we believe that the Registrar is well within his powers (conferred on him by section 31(4)) to order the scheme to amend the rule or apply it in a manner that is consistent with the Act if he is of the opinion that it is not. Clearly he believes that the exclusion of PMBs from cover is inconsistent with the provisions of the Act. We believe he is correct in so believing.
- 25 The Act does not seem to distinguish between PMB conditions sustained abroad on the one hand and those sustained locally on the other. The submissions advanced by Mr Fagan for the proposition that the Act was never intended to cover injuries of a PMB type sustained abroad do not, in our respectful view, seem to surpass the standard set by section 29(1)(p) as we understand it. If the standard is as set by section 29(1)(p), namely, health

service standard that is no less than that provided by public hospitals in South Africa, then we do not believe that the scheme would be pushed precipitously on a bankruptcy path by PMB claims originating anywhere in the world any readily than would be the case if such claims originated from Namibia. In other words, whether the claim originates in Namibia or in Jamaica, the scheme's liability will be limited to the equivalent of the cost of treating that condition in a South African public hospital. This appears to be the Registrar's understanding (see par 18 of written submissions filed on behalf of the Registrar).

26 The only limit to the scheme's liability to pay for PMBs is contained in regulation 8(2)(b) and that is where the member obtains PMB treatment voluntarily from a non-DSP. Even then, it is not the entire payment that is withheld but only part of it as prescribed in the rules for that particular condition. The suggestion by the scheme that it is not liable for any payment whatsoever in relation to any PMB condition sustained abroad clearly offends against the scheme of the Act which (in section 29(1)(o) read together with regulations 7 and 8) requires that rules make provision for the scope and level of prescribed minimum benefits.

27 There is no provision anywhere in the Act that PMBs sustained abroad are not covered at all. If a member of the scheme, while visiting family in Jamaica for two weeks, happens to discover on his third day that he has contracted cholera (code 338S), and there is no DSP anywhere in Jamaica, it would be unreasonable of the scheme to expect the member to fly back to South Africa

for the "medical management" prescribed as treatment for that condition with a local DSP. If there should be a shortfall between the minimum benefit to which the member is entitled on the one hand, and the fee charged by the Jamaican service provider on the other, then the balance should be covered by the member's travel health insurance if he has taken one, or a co-payment from his own pocket if he has not. Even though the service is involuntary, that does not mean that the scheme is liable for whatever fee the service provider decides to charge. Section 29(1)(p) sets the minimum standard as the cost that a South African public hospital would have charged. On that understanding, the difficulties to which Mr Fagan points disappear.

- 28 We are thus satisfied that the Registrar's concern is justified and that the scheme ought to amend the rule in the manner indicated by the Registrar, subject to what we say below as regards the Registrar's formulation of the rule.

The Registrar's Formulation

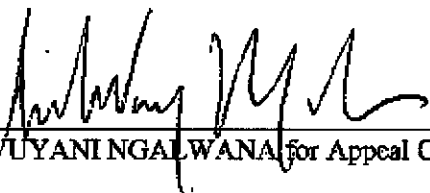
- 29 As already pointed out, there appears to be no justification in our view for limiting application of the rule only to medical emergencies and exclude the other part of the definition of PMBs. It thus seems to us that a better formulation may be one that includes both parts of the definition of prescribed minimum benefits. In this regard, Mr Fagan was quite correct in submitting that the Registrar does not have the power to alter the statutory definition of prescribed minimum benefits. We would thus suggest the following wording of the last sentence of the rule:

“This exclusion shall not apply to prescribed minimum benefit claims originating outside the borders of South Africa”

30 This is really a belt and braces job because the Act expressly provides that PMBs cannot be excluded. It makes no distinction between PMBs originating in South Africa on the one hand, and those originating elsewhere on the other. But because the scheme in this case proposes that PMBs originating outside South Africa are in its view excluded from cover, it is necessary to include this last sentence so as to make it clear that they are not.

Finding

31 In the result, the scheme is ordered to amend the rule in line with the Registrar’s direction, subject to the wording provided above.


 VUYANI NGALWANA for Appeal Committee

For the Appellant: Mr E Fagan
Instructed by: Webber Wentzel Inc

For the Registrar: Ms C Steinberg
Instructed by:

Date of hearing: 11 August 2009
Date of Ruling: 18 September 2009