

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 INS 3246

Chad Bryant,)
 Petitioner,)
))
 v.)
North Carolina State Health Plan,)
 Respondent.)

**FINAL DECISION
ORDER OF DISMISSAL
without Prejudice**

THIS MATTER is before the undersigned Administrative Law Judge, Augustus B. Elkins II, on Respondent’s oral motion presented at hearing. After reviewing the motion, briefs and memorandum filed by both parties, and all supporting documents; and, the entire record proper; and upon review of the applicable law in this case, the Undersigned hereby makes the following ruling.

FINDINGS OF FACT

1. The Petitioner is a member of Respondent’s PPO Standard Plan and the Petitioner’s son, Lukas Bryant, is also a covered member under the Plan. Lukas Bryant has a genetic condition called phenylketoria (PKU), which was diagnosed shortly after his birth. On November 18, 2010, Petitioner submitted a request for coverage of Phenex-2, for his son Lukas. Medco, the State Health Plan’s pharmacy benefit manager, denied the request for Phenex-2 as a non-covered product.
2. On January 20, 2011, Petitioner appealed Medco’s denial to the State Health Plan’s claims processor, BlueCross BlueShield of North Carolina (BCBSNC). In the letter attached to his appeal form, Petitioner stated that, “[u]p until now the state of North Carolina has provided this formula to all of its residents with PKU. Recent budget cuts mean, however, that Lukas and others with PKU in the state must find other means of obtaining the formula.”
3. On January 26, 2011, BCBSNC upheld the denial of coverage for Phenex-2. The basis for the decision by BCBSNC, as cited in its denial letter, stated that Petitioner’s PPO Plan did not cover “services, supplies, drugs or charges that are for vitamins, food supplements or replacements, nutritional or dietary supplements, formulas or special foods of any kind.”
4. On March 28, 2011, Petitioner filed a petition for a contested case hearing to appeal BCBSNC’s January 26, 2011 decision. In the letter attached to his Petition, Petitioner again

stated that “[u]p until now the state of North Carolina has provided this formula to all of its residents with PKU. Recent budget cuts mean, however, that Lukas and others with PKU in the state must find other means of obtaining the formula.” Petitioner stated that the amount in controversy was unknown in his Petition filed with the Office of Administrative Hearings.

5. The matter came on for hearing on September 22, 2011 at the Office of Administrative Hearings in Raleigh, North Carolina.

6. Petitioner testified during cross-examination that his son, Lukas Bryant, was receiving Phenex-2 from the State Metabolic Formula Program without charge at the time of his request for and denial of coverage on November 18, 2011. Petitioner also stated that his son received Phenex-2 from the State Metabolic Formula Program, without charge, at the time of his appeal to BCBSNC on January 20, 2011. Petitioner further testified that his son has continued to receive Phenex-2, without charge, from the State Metabolic Formula Program.

7. Respondent moved to dismiss at the close of Petitioner’s evidence. The parties were informed the matter may be viewed by the Undersigned as a motion for summary judgment, withheld ruling on any motion, and requested that the parties submit briefs on the issues.

8. In Petitioner’s memorandum in opposition to Respondent’s oral motion filed October 11, 2011, Petitioner argued for a “stay of these proceedings for a brief period” which would “allow Petitioner the opportunity to complete discovery on the implementation date for the new program, and provide the Court with a date by which Petitioner would require Respondent to cover medical food.” “On information and belief,” Petitioner thought that the Department of Health and Human Services would inform participants of the implementation of the new funding program in “approximately three to six months or sooner.”

9. The Undersigned has withheld final ruling in this matter up until this point. The North Carolina General Assembly has concluded its session for this year. No further evidence has been submitted to refute the testimony that Petitioner’s son receives Phenex-2, without charge, from the State.

10. In their memorandum and alternatively, Petitioner moved for a dismissal without prejudice “to Petitioner coming back to reopen the instant contested case as soon as the implementation date for the new funding program is known.”

CONCLUSION OF LAW

1. In accordance with *In re. Peoples*, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978), “whenever, during the course of litigation it develops that the relief sought has been granted or that the questions in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract

propositions of law.” Further, “if issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action. *Id.* Even where the issue has not been raised at the trial level or on appeal, the North Carolina Courts will dismiss an action *ex mero motu* whenever it appears that no genuine controversy exists between the parties. See *Messer v. Town of Chapel Hill*, 346 N.C. 259, 485 S.Ed.2d 269 (1997); *Stanley v. Department of Conservation & Dev.*, 284 N.C. 15, 199 S.Ed.2d 641 (1973).

2. Petitioner filed this contested case appealing the denial of coverage for Phenex-2 for his son. His son received Phenex-2 for free from a state program at the time of his appeal and all times relevant to this case. The evidence shows that Lukas Bryant was receiving Phenex-2, without charge, from the State Metabolic Formula Program at the time of Petitioner’s request for coverage and denial on November 18, 2010, at the time of Petitioner’s January 20, 2011 appeal to BCBSNC, and that he continues to receive Phenex-2 at the present time from a State program. As such, Petitioner has suffered no injury and the relief sought, i.e., payment by the State for Phenex-2 is not at issue. See *In re. Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978).

3. Moreover, the Respondent North Carolina State Health Plan is precluded from providing coverage for Phenex-2 to Petitioner pursuant the North Carolina General Statutes which is the basis for language in the benefit booklet that excludes coverage for benefits that are provided by any governmental unit, or are available free of charge. See former N.C.G.S. §135-45.8 (2009) (now repealed) and current N.C.G.S. §135-48.52. The State Health Plan is limited to only providing those benefits authorized by statute, and the medical policies adopted pursuant to such statutory authority. See *State of N.C. ex rel. Utilities Comm. v. Thurston Motors*, 240 N.C. 166, 81 S.E.2d 404 (1954)

FINAL DECISION

NOW, THEREFORE, based on the foregoing, the Undersigned hereby finds proper authoritative support of the Conclusions of Law noted above. It is hereby **ORDERED** that this contested case be **DISMISSED without prejudice**.

NOTICE

This is a Final Decision issued under the authority of N.C. GEN. STAT. § 150B-34.

UNDER the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the

Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 2nd day of August, 2012.

Augustus B. Elkins II
Administrative Law Judge