

STATE OF NORTH CAROLINA
COUNTY OF WATAUGA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 INS 00996

Jennifer Rose Koehn Petitioner, v. North Carolina State Health Plan Respondent.	FINAL DECISION
---	-----------------------

On March 17, 2022, Petitioner filed a contested case petition with the Office of Administrative Hearings. Petitioner appeals Respondent's February 9, 2022 denial of her exception request to retroactively receive the \$60 tobacco attestation premium credit for the 2022 plan year. On September 6, 2022, the Undersigned conducted an administrative hearing in this case via WebEx, based on the consent of the parties. On October 4, 2022, counsel for Respondent submitted a proposed Final Decision. Petitioner was given until October 18, 2022 to submit written exceptions to Respondent's proposed Final Decision. The record in the case is now closed.

APPEARANCES

For Petitioner: Jennifer rose Koehn, *pro se*
1457 Rocky Mountain Rd.
Boone, NC 28607

For Respondent: Tamara M. Van Pala Skrobacki
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

EXHIBITS

Respondent submitted the following Exhibits into evidence:

1. Highlighted Excerpt from the 2021 70/30 PPO Plan Benefits Booklet
2. Highlighted Excerpt from the 2022 70/30 PPO Plan Benefits Booklet
3. COBRA Rate Sheet
4. Highlighted Decision Guide

- 5. Highlighted Powerpoint
- 6. Redacted Exception Request

ISSUE

Did Respondent deny Petitioner of property, order her to pay a fine or civil penalty, or otherwise substantially prejudice her rights, and exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule when it denied Petitioner’s request to retroactively add the tobacco attestation premium credit to her COBRA 70/30 Plan after Open Enrollment for the 2022 Plan Year had closed and where Petitioner failed to take action during Open Enrollment?

RELEVANT STATUTES, REGULATIONS & LEGAL AUTHORITIES

N.C.G.S. Chapter 135; N.C.G.S. §§ 135-48.2(a); 135-48.42(e); 135-48.30; § 135-48.43(a);
N.C.G.S. Chapter 150B, Article 3; § 150B-23(a); 26 C.F.R. § 1.125-4;
20 NCAC 12 .0101(a); the State Health Plan Rule on Enrollment Exceptions and Appeals;
McCaskill v. Dep’t of State Treas., 204 N.C. App. 373 (2010).

WITNESSES

For the Petitioner: Petitioner
For the Respondent: Roberta Hamby, Senior Customer Experience Specialist, NC State Health Plan

FINDINGS OF FACT

1. The State Health Plan (“the Plan”) is a self-funded benefit program that provides health care benefits to eligible North Carolina teachers, state employees, retirees and their dependents in accordance with the applicable North Carolina General Statutes, the benefit booklet for Respondent’s preferred provider organization (“PPO”) plans, and Respondent’s health care policies. The Plan is a division of the North Carolina Department of State Treasurer, an agency of the State of North Carolina. In 2021, Petitioner was enrolled in the Plan under COBRA and is a covered person under the Plan.

2. The Plan held annual Open Enrollment from October 11, 2021 until October 29, 2021, during which time eligible employees, teachers, and retirees could enroll or make election changes in the Plan for the 2022 Plan Year. Annual Open Enrollment is common practice in the insurance industry and provides Plan members the ability to play an active role in their health care and select their plan choices. The Plan cannot complete Open Enrollment on behalf of individual members and relies on members to make their own choices. Open Enrollment is the only time during the year where Plan members can make changes to their health plan without a qualifying life event, as defined by federal law. Members can make their changes online through the eBenefits portal or by calling the Eligibility and Enrollment Support Center and enrolling telephonically. The online enrollment portal, eBenefits, opened at 12:00 a.m. on October 11, 2021 and was available until 12:00 a.m. October 29, 2021. The call center was open all day Monday-Friday, 8:00 a.m. to 10:00 p.m., and on Saturday, 8:00 a.m. to 5:00 p.m.

3. Petitioner is enrolled as a COBRA member of the Plan. Pursuant to N.C.G.S. §135-48.44, the Plan “is required to offer covered employees and covered family members the opportunity for a temporary extension of health coverage, called continuation coverage, at group rates when coverage under the Plan would otherwise end due to certain qualifying events.” COBRA members, such as Petitioner are directly billed for each month’s premium payments. COBRA Plan members were offered an 80/20 Plan and a 70/30 Plan for the 2022 Plan year. The 80/20 Plan costs the subscriber \$642.36 per month and the 70/30 Plan costs the subscriber \$617.36 per month. Plan members were offered the opportunity to reduce their monthly premium by \$60 by attesting they either were tobacco-free or would participate in a tobacco cessation program (“the tobacco premium credit”). With the tobacco premium credit, the 80/20 Plan for a COBRA member costs the subscriber \$582.36 per month and the 70/30 Plan costs the subscriber \$557.36 per month. Petitioner’s spouse is enrolled in the Plan as a retired member. Petitioner’s spouse is not covered under her plan. Because he is a retiree under the 70/30 Plan, Petitioner’s spouse was not required to complete the tobacco attestation because he is not assessed a tobacco surcharge under the 70/30 Plan.

4. All active Plan members were automatically enrolled in the 70/30 PPO Plan for the 2022 plan year, and if a Plan member wanted to be enrolled in a different plan, or receive the tobacco premium credit, the member was required to take specific action to elect a different plan and save their plan selection during the Open Enrollment period. All active Plan members, even COBRA members such as Petitioner, are required to participate in Open Enrollment if they want to change their plan selections for 2022. The Plan’s Benefits Booklets, which contain the terms of Petitioner’s coverage with the Plan echo these requirements.

5. Prior to and during the Open Enrollment period, Respondent mailed enrollment materials to Plan members, including Petitioner, about the Open Enrollment process for the 2022 plan year that contained information regarding the various health plan offerings, how to enroll electronically and telephonically, how to complete the tobacco attestation in order to receive premium credits, as well as the contact information and hours of operation for the Eligibility and Enrollment Support Center. An instructional PowerPoint presentation was also featured on the Plan’s website. The Plan posted instructional videos, Open Enrollment decision guides, rate sheets, comparison charts, benefit booklets, and summary of coverage documents on its website. Members also had the option to sign up for Plan emails.

6. All Open Enrollment materials notified members of the Open Enrollment dates and that “all members” needed to take action if they wanted to change their elections for 2022. The Open Enrollment materials also informed members who chose to be enrolled in the 70/30 PPO Plan that they still needed to complete the tobacco attestation during the Open Enrollment period to reduce their premiums. The enrollment materials similarly informed members that even if they completed the tobacco attestation in years prior, they must do so again in order to get the premium credit for the next year. The enrollment materials informed members repeatedly that all members needed to complete the tobacco attestation, regardless of plan selection. The enrollment materials also provided Plan members with step-by-step instructions regarding how to complete Open Enrollment electronically, including prompts to complete the tobacco attestation. A work laptop, work email, or access to the BEACON/HR platform is not required and all members can access

eBenefits from any browser. The Plan publishes the link to eBenefits on the Plan's website and all Open Enrollment materials. The step-by-step instructions further directed Plan members to print a confirmation statement showing their elections for their records. The Open Enrollment materials provided the telephone number and hours of operation for the Eligibility and Enrollment Support Center available to Plan members. Members could call the Eligibility and Enrollment Support Center during its extended hours to enroll telephonically, ask questions, or confirm their elections.

7. eBenefits records all enrollment elections that are made and saved by the user. Based on a review of Petitioner's enrollment history, Petitioner did not complete 2022 Open Enrollment. Petitioner is currently enrolled in the 70/30 PPO Plan for the 2022 plan year and did not take action to elect the 80/20 Plan or complete the tobacco attestation. Petitioner did not call the Plan, the Eligibility and Enrollment Support Center, or Blue Cross North Carolina, the Plan's third party administrator for help during Open Enrollment.

8. Petitioner was a member of the Plan employed by Appalachian State University ("App State") from 1999 through 2021. She would have participated in Open Enrollment each year during her employment would have completed the tobacco attestation since 2014, which is when the Plan started the requirement that members have to re-attest and complete the tobacco attestation each year in order to receive the premium credit.

9. It is undisputed that Petitioner did not take action during 2022 Open Enrollment to complete the tobacco attestation. On February 9, 2022, Petitioner submitted an exception request after Open Enrollment had closed requesting a retroactive change to her health plan for the 2022 Plan Year and seeking to be awarded the tobacco premium credit, which was denied. The Plan typically does not grant exception requests in this situation because the Plan's fiduciary responsibility is to follow plan rules, the Benefits Booklet, and Plan statutes, which state that members can only make changes to elections during Open Enrollment.

10. Petitioner testified that she and her spouse visited the App State Benefits Fair because they are former employees of App State. Based on advice from an App State employee, Petitioner mistakenly believed that she did not need to take any action in order to receive the tobacco premium credit.

11. An employing unit is the state agency or school system that employs individuals covered by the Plan. Human resource professionals from employing units, such as App State are not Plan employees. A Health Benefits Representative ("HBR") is usually an employee within the human resources or personnel office of the employing unit that serves as an ambassador for the Plan. Although they are not Plan employees, their role as an HBR is to educate employees on benefits and the Open Enrollment process. The Eligibility and Enrollment Support Center as well as the Plan's billing vendor, iTEDIUM serves as the HBR for COBRA members, such as Petitioner.

Based on these Findings of Fact, the Tribunal makes the following:

CONCLUSIONS OF LAW

1. The North Carolina Office of Administrative Hearings has jurisdiction to hear this matter. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law.

2. Petitioner has the burden of proof by a preponderance of the evidence, regarding the issues presented in this contested case. N.C.G.S. § 150B-34(a) (2015).

3. “[T]o the degree that Petitioner’s request seeks equity relief, this Tribunal is without authority to grant equitable relief.” *Schauer v. N.C. State Health Plan*, No. 18 INS 02058 (OAH Aug. 20, 2018) (Bawtinheimer, ALJ) (quoting *Wojcik v. N.C. State Health Plan*, No. 09 INS 6649 (OAH Apr. 6, 2010) (Overby, ALJ)).

4. This Tribunal may grant Petitioner relief under N.C.G.S. § 150B-23 only where the agency has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner’s rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

N.C.G.S. § 150B-23(a).

5. Petitioner cannot meet her burden of proving by a preponderance of the evidence that the Plan violated N.C.G.S. § 150B-23(a). *See* N.C. Gen. Stat. § 150B-34(a). The Plan’s tobacco attestation is an appropriate exercise of the Treasurer’s authority. The Treasurer and the Executive Administrator of the Plan are authorized to administer and operate the Plan, pursuant to N.C.G.S. § 135-48.30. The Treasurer is authorized to set premium rates and offer wellness incentives, pursuant to N.C.G.S. § 135-48.30(a)(2) and (5). The Treasurer has the authority to offer the tobacco premium credit as a wellness incentive. N.C.G.S. § 135-48.30(a)(5). The tobacco premium credit is also included under the Treasurer’s authority to set premium rates. N.C.G.S. § 135-48.30(a)(2). The Treasurer and Executive Administrator of the Plan have the fiduciary duty to enforce the tobacco attestation requirement, pursuant to N.C.G.S. Section 135-48.2. Plan members may make election changes for the following plan year only during annual open enrollment. N.C.G.S. § 135-48.42(e); N.C.G.S. § 135-48.43(a)(3). Pursuant to state statute, Plan rule, and the Plan’s Benefits Booklet, a Plan member can make changes to her plan outside of annual open enrollment within 30 days of a qualifying life event. *See* N.C.G.S. § 135-48.42; 20 NCAC 12.0101(b). Otherwise, a member has to wait until annual open enrollment to make coverage changes. Therefore, as a matter of law, the Plan has not violated N.C.G.S. § 150B-23.

6. Petitioner did not take action during annual Open Enrollment. Petitioner has not experienced a qualifying life event that would allow for changes to her health benefit plan elections

outside the open enrollment period.

7. The only argument Petitioner raises in her defense is that she consulted with an HR professional at App State and as a result, mistakenly thought she did not need to take action during Open Enrollment. While Petitioner's situation is understandable and sympathetic, she did not consult with a Plan employee and the Plan did not lead her astray. Employing unit personnel and Health Benefits Representatives are not Plan employees and thus do not bind the Plan. Even if the employing unit or Health Benefit Representative gave the member bad advice, the Plan was not bound by that mistake. *See McCaskill v. Department of State Treas.*, 204 N.C. App. 373, 395-98 (2010).

8. No authority requires the Plan to correct Petitioner's mistake. The Plan presented evidence that the tobacco attestation and open enrollment requirements apply equally to everyone and that exception requests typically are not granted for cases like Petitioner's.

9. Petitioner has advanced no legal argument entitling her to relief. Having considered all matters of record, the Undersigned finds as fact and concludes as a matter of law that Petitioner has failed to meet her burden of proving by a preponderance of the evidence that Respondent erred when it denied Petitioner's exception request to retroactively award her the tobacco premium credit for the 2022 plan year. Accordingly, Petitioner's claim is dismissed.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned holds the Petitioner failed to carry her burden of proof by a preponderance of the evidence regarding the issues presented in this contested case and it is hereby ORDERED that this matter is DISMISSED and Respondent's decision to deny Petitioner's February 9, 2022 exception request is UPHeld.

NOTICE OF APPEAL

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

Under the provisions of North Carolina General Statute § 150B-45, 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 the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **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 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by 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 17th day of November, 2022.



David F Sutton
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

Jennifer Rose Koehn
Jennifer.koehn.905@gmail.com
Petitioner

Tamara Van Pala Skrobacki
NC Department of Justice
tskrobacki@ncdoj.gov
Attorney for Respondent

This the 17th day of November, 2022.



Viktoriya Tsuprenko
Paralegal
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850