

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MORRIS SHELKOFISKY,)
)
 Petitioner,)
)
 vs.) Case No. 01-0024
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF STATE)
 GROUP INSURANCE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in Tallahassee, Florida, on March 1, 2001, before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Morris Shelkofsky, Esquire
3721 Crawfordville Road, No. 17
Tallahassee, Florida 32310-7074

For Respondent: Julia Forrester, Esquire
Department of Management Services
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to receive a refund of insurance premiums paid to Respondent.

PRELIMINARY STATEMENT

Petitioner paid \$517.96 to the Division of State Group Insurance, Department of Management Services(Division), in July 2000, and again in August 2000. These payments were health insurance premiums remitted to the Division in return for coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 which, inter alia, provides for the continuation of health insurance for terminated employees, in certain circumstances. This program is applicable to state employees and is referred to as COBRA.

Subsequently, on or about August 24, 2000, Petitioner telephonically requested a refund of the premiums paid. The telephone call was followed by a faxed written request which was also dated August 24, 2000. This request was formally denied in a letter dated September 29, 2000, which was signed by Ria Brown, a benefits administrator with the Division. In a letter dated September 29, 2000, Petitioner demanded a formal hearing.

At the hearing, Petitioner called four witnesses and testified in his own behalf. Petitioner offered four exhibits which were admitted into evidence. Respondent called one witness. Both parties timely submitted Proposed Recommended Orders which were considered in the preparation of this Recommended Order.

References to Florida Statutes are to Florida Statutes (1999) unless stated otherwise.

FINDINGS OF FACT

1. The Division administers health plans, including COBRA, for the benefit of employees of the State of Florida.

2. Petitioner was an employee of the State of Florida from 1991 until February 11, 2000, which was his last day on the payroll of the Office of the Attorney General.

3. On May 27, 1998, Petitioner was placed on the Temporary Disability Retired List by the U. S. Air Force. He was presented an identification card reflecting his rank as colonel. His identification card reflects that he was eligible for medical insurance.

4. As a retired military person Petitioner was eligible for treatment at a military medical facility or through TRICARE. TRICARE is a comprehensive health insurance program for military personnel. TRICARE may be a primary provider or a secondary provider of health benefits. During his active employment with the state, however, the TRICARE coverage was secondary. This means that the state paid any claims to the extent of its policy limits and the remaining amount of any claim would be processed and paid in accordance with TRICARE coverage.

5. Petitioner was aware that placement on the Temporary Disability Retired List was, as the name implied, a temporary

situation. It was his expectation that subsequent to being placed on the list, the U. S. Air Force would determine either that he was disabled to the extent that he would receive disability retirement, and thus continue to be eligible for TRICARE, or that he would be denied disability retirement and would have to arrange for other medical insurance, or do without.

6. During Petitioner's employment with the Florida Department of Legal Affairs, he was covered by the State Group Health Self Insurance Plan. On February 11, 2000, when Petitioner terminated his employment with the Florida Department of Legal Affairs, he was seeking to have the State of Florida declare him disabled.

7. Pursuant to law, Petitioner's entitlement to the benefits of the State Group Health Self Insurance Plan continued until March 31, 2001. Without taking action to secure health insurance, Petitioner would have only TRICARE as an insurer. However, if the state determined him to have become disabled while employed by the state, he would be covered by the State Group Health Self Insurance Plan, retroactively.

8. On May 11, 2000, the Florida Division of Retirement denied Petitioner's application for in-line-of-duty disability retirement benefits. The effect of this determination was to terminate the possibility of coverage under the State Group

Health Self Insurance Plan with the reduced premiums available to a person on disability retirement.

9. The Florida Department of Legal Affairs failed to immediately notify the Division that Petitioner had terminated his employment. As a result, the Division did not send Petitioner a Notice of Continuation Coverage Eligibility until immediately after to May 11, 2000.

10. The notice informed Petitioner of his right to have family continuation coverage in return for a premium of \$517.96. It further informed him that he had until July 11, 2000, to elect coverage which would be retroactive to April 1, 2000.

11. A second Notice of Continuation Coverage Eligibility, dated May 22, 2000, was sent to Petitioner. This notice similarly informed Petitioner of his right to have family continuation coverage in return for a premium of \$517.96 but informed him that he had until July 22, 2000, to elect coverage which would be retroactive to April 1, 2000.

12. The second page of the Notice of Continuation Coverage Eligibility informed Petitioner, inter alia, that coverage would be available for 18 months for voluntary or involuntary termination, 29 months for certain disabled qualified beneficiaries, and 36 months for all other qualifying events.

13. The second page also informed Petitioner that coverage might end on the occurrence of several events. The event

asserted to be pertinent to this case is the date the insured becomes covered by another group health plan which does not contain any limitation or exclusion with respect to a pre-existing condition.

14. Petitioner filed a "Continuation of Coverage Enrollment" form dated July 21, 2000. This form noted that the date of the event that precipitated eligibility for coverage was February 11, 2000. Petitioner wrote on the form in his own hand, "I am permanently and totally disabled; I and my dependents am covered under TRICARE at present."

15. At the bottom of the "Continuation of Coverage Enrollment" form, the Division authorized coverage dating back to April 1, 2000.

16. Petitioner sent the Division a check in the amount of \$517.96 to cover the initial premium. The date on the check was July 21, 2000. Sometime prior to August 24, 2000, he sent the Division another premium payment in the amount of \$517.96.

17. At the time Petitioner filed the "Continuation of Coverage Enrollment" form and submitted the premiums, he was covered by the regular military medical system, because he was considered to be retired by the U.S. Air Force. However, since the question of his disability with the U.S. Air Force had not been decided, he was aware of the possibility that his military health coverage could end at any time. By maintaining a COBRA

policy, he was insuring that he would not find himself in a posture where he had neither COBRA nor TRICARE.

18. On August 16, 2000, the U.S. Air Force determined that Petitioner was disabled and was entitled to the medical care provided by law for retired service persons, which includes TRICARE, presumably, for life.

19. It was at this point Petitioner demanded the return of the premium he paid. Petitioner's theory for the refund is that he was, under the law, ineligible for COBRA coverage during the two months that he paid a premium with respect to it.

20. On September 29, 2000, in a letter signed by Ria Brown, Benefits Administrator, the Division reiterated its refusal to refund the premiums and noted that Petitioner was covered under COBRA for the period April 1, 2000, through May 31, 2000. The letter informed Petitioner that, "Based on the information in your letter, you are eligible and entitled for TRICARE Standard coverage, but you did not indicate that you are actually enrolled."

21. Ms. Brown also advised the following:

Coverage at time of COBRA event: Section 4980(f)(2)(B)(iv) provides that a qualified beneficiary's right to COBRA continuation coverage may be terminated when the qualified beneficiary "first becomes," after the date of the COBRA election, covered under another group health plan (subject to certain additional conditions) or entitled to Medicare benefits.

The final regulations provide that an employer may cut off the right to COBRA continuation coverage based upon other group health plan coverage or entitlement to Medicare benefits only if the qualified beneficiary first becomes covered under the other group health plan coverage or entitled to the Medicare benefits after the date of the COBRA election.

22. Petitioner asserted in a reply, also dated September 29, 2000, that contrary to Ms. Brown's assertion, he was actually enrolled in TRICARE Standard during the operative period.

23. In a letter dated October 3, 2000, Merrill Moody, the Division Director, informed Petitioner that his claim for refund was being denied because he had a contractual relationship with the Division and that he got the product for which he paid-- health insurance coverage for April and May, 2000. Mr. Moody also pointed out that the Division was required under law to allow active employees and their covered dependents, to participate in COBRA, notwithstanding their participation in other programs.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter presented herein, pursuant to Section 120.57(1), Florida Statutes.

25. Petitioner has the burden of proving his entitlement to a refund by a preponderance of the evidence. Section 120.57(1)(j), Florida Statutes.

26. Title 10, U.S.C. Section 1074 provides for comprehensive medical coverage for persons retired from the military. Medical care may be obtained at a military medical facility or through the military insurance program called TRICARE. Because Petitioner was on the temporary disability retired list of the U.S. Air Force, Petitioner was covered by a comprehensive military health program from May 27, 1998, until the time his disability status was resolved.

27. Title 10, U.S.C. Section 1210 provides that service members on the temporary disability retired list must submit to periodic physical examinations. If it is determined that a disability is permanent, and is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs, then the member will be put on the permanent retired list. This determination was made in the case of Petitioner on August 16, 2000. Accordingly, Petitioner from that date onward is covered under TRICARE.

28. COBRA coverage is couched in terms which are directory toward the employer. It provides generally that an employer who provides a group health plan for the benefit of its employees, must continue to provide benefits identical to the plan, to employees no longer employed by the employer as the result of a "qualifying event." Title 29, U.S.C. Section 1161.

29. The employer is directed to provide coverage from the period beginning on the date of the qualifying event and ending not earlier than the maximum required period; the end of the employer's plan; the failure of a participant to pay a premium; or the participant's entitlement to group health plan coverage or Medicare entitlement, or termination of extended coverage for disability. Title 29, U.S.C. Section 1162.

30. Title 29, U.S.C. Section 1162(2), with regard to group health plan coverage, provides that coverage must extend for at least the period beginning on the date of the qualifying event and ending not earlier than the earliest of the following:

* * *

(D) Group health plan coverage or medicare entitlement

The date on which the qualified beneficiary first becomes, after the date of the election--

(i) covered under any other group health plan (as an employee or otherwise) which does not contain any exclusion or limitation with respect to any preexisting condition of such beneficiary (other than such an exclusion or limitation which does not apply to [or is satisfied by] such beneficiary by reason of chapter 100 of Title 26, part 7 of this subtitle, or title XXVII of the Public Health Service Act [42 U.S.C.A. § 300gg, et. seq.]), or

(ii) in the case of a qualified beneficiary other than a qualified beneficiary described in section 1167(3)(C) of this title, entitled to benefits under title XVIII of the Social Security Act [42 U.S.C.A. § 1395 et. seq.]

31. It is the aforementioned language which is summarized on the reverse of the "Continuation of Coverage Enrollment" form which stated that coverage might end on, ". . . the date the insured becomes covered by another group health plan which does not contain any limitation or exclusion with respect to a pre-existing condition." Petitioner concluded that this meant that he was ineligible ab initio for COBRA coverage because he was covered by TRICARE at the time of the qualifying event. However, during the COBRA coverage period, Petitioner could not "become covered" by TRICARE because he was already covered by TRICARE on the date of the qualifying event.

32. Continuation coverage of health insurance under COBRA is required to be provided to employees upon their termination of employment, even if at the time of termination they have other health insurance coverage. The employer may terminate COBRA coverage if the employee subsequently obtains health insurance from another employer. Geissal v. Moore Medical Laboratories, 524 U.S. 74; 118 L. Ed.2d 64(1998).

33. The State of Florida is required to offer COBRA coverage to military reservists. So long as servicemen elect COBRA continuation coverage, and pay appropriate premiums, they are entitled to it for the period allowed by law. A person covered under military health care is not ineligible to receive COBRA. Internal Revenue Service Notice 90-58, "Continuation of

Employer Health Coverage for Activated Reservists and Their Families" dated September 7, 1990.

34. Petitioner elected COBRA continuation coverage and paid premiums for two months. He did not become ineligible to receive COBRA during the period in question. He received that for which he paid, and therefore, is not entitled to a refund of \$1035.92.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That the Division of State Group Insurance enter a final order denying Petitioner's request for a refund of \$1035.92.

DONE AND ENTERED this 19th day of March, 2001, in Tallahassee, Leon County, Florida.

HARRY L. HOOPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of March, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.