THE ROLE OF A MEDICAL PRACTITIONER IN A COMPLAINT BY A MEMBER CONCERNING ACCESS TO MEDICAL SCHEME BENEFITS

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Lodging a complaint with a medical scheme can be a traumatic process for a member especially where benefits may have been denied on technical grounds by a medical scheme and the benefits are desperately needed by the member in order to deal with a severe chronic condition such as any one of many cancers.

INTRODUCTION

Benefits may be denied for a number of reasons: benefits may be exhausted; the particular treatment or medicine may not form part of the medical scheme's protocols or formularies, respectively, or the medicine proposed by a medical practitioner may not be registered as a medicine in terms of South African legislation and unavailable to patients as a registered medicine.

When a member's claim for assistance from a medical scheme is denied, as previously discussed in our *Legalwerks* dated 3 December 2015, there are a number of courses of action available to a member in order to challenge the negative decision by the member's medical scheme. Whilst the challenge of a negative decision by a medical scheme to a particular claim by a member is driven primarily by the member, the member may usefully receive support from medical professionals and healthcare providers for purposes of motivating why the claim should be allowed. Such motivation is especially pertinent in circumstances where claims based on unregistered medicines or medicines not available in South Africa but readily in use in other jurisdictions is the reason for the medical scheme's negative decision. Medical practitioners are ideally placed to explain to funders why particular medicines are needed by the patient over and above others and the effects of both the use of the medicine by the member on the member's health and, in circumstances where the claim is denied, the health effects of the unavailability of the medicine to the member. Such motivations are commonly required in dealing with claims based on members with rare cancers and where medicines are uniquely available in particular jurisdictions but not in South Africa.

THE ROLE OF A MEDICAL PRACTITIONER

The particular role to be played by a medical practitioner or healthcare provider in a process of complaining about a medical scheme's negative decision by a member would typically amount to the following:

> during an internal dispute resolution process, a medical practitioner may accompany the member to the dispute hearing and, where necessary, comment on the member's claim and provide oral, or written, motivation as to why the member's claim should be allowed. An internal disputes resolution process is an informal process and no evidence per se is given – certainly not under oath – and the process is dictated by the members of the dispute resolution panel;

- where a complaint is lodged with the Registrar of Medical Schemes ("the Registrar") in terms of the provisions of the Medical Schemes Act No. 131 of 1998, as amended ("the MSA"), the role of the medical practitioner or healthcare provider may be more formal in so far as he or she may need to submit a full written report with the requisite motivation/s as to why the claim should be allowed. Care should be taken at this point to ensure that the report is as complete and comprehensive as possible as, should the complaint to the Registrar be appealed to an appeal committee in terms of the MSA, the medical practitioner or healthcare provider may be called as a witness and examined before the appeal committee based on the contents of his or her report. The aforementioned principle also applies in respect of appeals to the appeal tribunal in terms of the MSA with the exception that the medical practitioner or healthcare provider may not be called as a witness but the appeal tribunal may rely heavily on any report provided by the medical practitioner or healthcare provider.

Ideally, disputes with medical schemes should be avoided in the interests of achieving the best possible care and outcome for the member/patient. Therefore medical practitioners and healthcare providers should take care in providing advice in respect of certain treatment regimens that are financially unavailable to a member based on his or her medical scheme benefits. Alternatively, advise that certain treatment regimens are available to a member but may not be supported by the member's medical scheme but that notwithstanding the medical practitioner will support the member in achieving a possible payment by a medical scheme with the requisite support and written and, if needs be, oral motivation/s. It simply does not make any sense for a member/patient to be advised of a particular treatment regimen, which his or her medical scheme will not support based on its rules, and then, when faced with a negative decision, the medical practitioner or healthcare provider is simply unavailable to the member to motivate why such a treatment regimen or medicine was prescribed as being in the best interests of the member. Both funding and medical decisions should be made responsibly vis-à-vis member and his or her health and best interests. This principle is recognised in the MSA in the context of Regulation 8 of the General Regulations promulgated in terms of the MSA, which deals with prescribed minimum benefits. Regulation 8(3) deals with the exemptions to the imposition of the general principle of a member receiving treatment from a designated service provider:

"For the purposes of sub-regulation (2)(b), beneficiary will be deemed to have involuntarily obtained a service from a provider other than a designated service provider, if -

a. the service was not available from the designated service provider or would not be provided **without unreasonable delay**;

b. an immediate medical or surgical treatment for a prescribed minimum benefit conditional is required under circumstances or at locations which **reasonably precluded** the beneficiary from obtaining such treatment from a designated service provider; or

c. there was no designated service provider within **reasonable proximity** to the beneficiary's ordinary place of business or personal residence."

CONCLUSION

The words emphasised in the abovementioned quotation indicate an objective criteria being applied to what is or is not reasonable. Part of the criteria would arguably be a report from a medical practitioner or healthcare provider dealing with matters of what is or is not reasonable vis-à-vis the member/patient.

In addition to the particular provisions of the MSA, when dealing with advice provided to patients, medical practitioners and healthcare providers are reminded of their obligations in respect of achieving informed consent, which includes dealing with matters of cost, in terms of Chapter 2 of the National Health Act No. 61 of 2003, as well as the ethical obligations under the Ethical Rules published by the Health Professions Council of South Africa in Government Gazette GNR 717, dated 4 August 2006 as amended and Booklet 9 published by the Health Professions Council of South Africa in May 2008 entitled "*Seeking Patients' Informed Consent: the Ethical Considerations*".

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Neil Kirby is a director at Werksmans Attorneys and currently heads the firm's Healthcare & Life Sciences Law Practice. He also forms part of the Financial Services Regulation Practice.

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Neil is a member of the International Bar Association (IBA). He is currently Co-Vice-Chair of the Corporate Social Responsibility Committee of the IBA. He was Chair of the Healthcare and Life Sciences Law Committee of the IBA from 2008-2012, and Co-Chair of the same committee from 2012-2013. He is also co-patron of the South African Cystic Fibrosis Trust.

Neil is named as a leading lawyer in the categories of healthcare and regulatory by Best Lawyers International and in dispute resolution by Chambers Global: The World's Leading Lawyers for Business. He has published numerous articles on healthcare, environmental, administrative and constitutional law matters.

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