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Correspondence Memorandum

Date: October 20, 2023

To: Group Insurance Board

From: Peter Rank, Attorney
 Office of Legal Services

Subject: Appeals Refresher Training: ETF Appeals Process

This memo is for informational purposes only. No Board action is required.

I. Introduction

- a) Ch. ETF 11, Wis. Admin. Code, Ch. 40, Wis. Stats., and other ETF administrative rules.
- b) Generally, “appeal” means the review of a determination made by ETF conducted by a Board under s. 40.03 (1) (j), (6) (i), (7) (f), or (8) (f), Wis. Stats.
- c) “Direct Appeal” relates to an employer’s determination.
- d) Nature of appeal determines which Board hears the case - for Group Insurance Board, s. 40.03 (6) (i):
 - 1) “Shall accept timely appeals of determinations made by the department affecting any right or benefit under any group insurance plan provided for under this chapter.”
- e) ETF attempts to resolve disagreements, complaints, and appeals at the most appropriate level.

II. Independent Review Organizations (IRO)

- a) Not administered by ETF.
- b) Office of Commissioner of Insurance complaint system – “no wrong door” policy.
- c) Requested (or not) by the participant.
- d) What is an independent review through insurance contract?
- e) Types of disputes decided by IRO (some examples):
 - 1) Medically necessary.
 - 2) Experimental.
 - 3) Rescission of health policy.
- f) If the participant pursues an IRO, no option for ETF review or appeal.

Reviewed and approved by Diana Felsmann, General Counsel, Office of Legal Services
 Electronically Signed 11/03/2023

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III. Informal Review Process Conducted by ETF

- a) Concerns of participant often resolved without a formal appeal being filed:
 - 1) Daily customer service activities of staff.
 - 2) ETF Ombudsperson Services – including referral to IRO.
 - 3) Authority of supervisors and managers to resolve disputes.
 - 4) Office of Legal Services internal review.
 - i. Resolution and Settlement authority of the ETF Secretary:
 - (i) s. 40.03(2)(v)- settlement of dispute in an appeal- requires approval of the Board.
 - 1. “shall consider the cost of litigation, the likelihood of success on the merits, the cost of delay in resolving the dispute, the actuarial impact on the trust fund, and any other relevant factor the secretary considers appropriate.”
 - ii. s. 40.02(2)(w)- correction based on administrative error – reported quarterly to the Board.
- b) Participant and ETF discuss whether the appeal can be resolved informally.
- c) If informal resolution is not possible, appeal is referred to Division of Hearings and Appeals.

IV. ETF Appeals Process: The Hearing Examiner

- a) Determine the parties and the issues for each appeal.
- b) Conduct the pre-hearing conference and evidentiary hearing, receive relevant evidence at the hearing, rule on all objections and motions, issue the proposed decision.
- c) Wis. Admin. Code ETF 11.

V. ETF Appeals Process: The Prehearing Conference

- a) Identify the specific issues to be resolved and any factual and legal disputes.
- b) Identify witnesses, including any expert witnesses.
- c) Discuss reaching agreement on a Stipulation of Facts and relevant exhibits.
- d) Discuss authority of the Boards to hear and decide issues in the appeal.

VI. ETF Appeals Process: The Hearing

- a) Burden of proof rests with the appellant, who presents the appellant’s case first.
- b) Testimony of witnesses and receipt of other relevant evidence (exhibits, Stipulation of Facts).
- c) ALJ rulings made on evidence offered at the hearing: what is admissible, what is hearsay, when objections are sustained or overruled.
- d) Record of the hearing is developed:
 - i. Stipulation of Facts.

- ii. Exhibits admitted and not admitted into evidence.
- iii. Transcripts (electronic or paper).

VII. ETF Appeals Process: Briefs Filed Following the Hearing

- a) Parties have an opportunity to file briefs or letters:
 - i. Reference to the evidence offered at the hearing.
 - ii. Reference to the laws supporting arguments made by the parties.
 - iii. Cannot contain new evidence or documents not previously offered at the hearing.
- b) Briefs become part of the appeal record.

VIII. ETF Appeals Process: The Proposed Decision by Hearing Examiner

- a) Findings of Fact, Conclusions of Law, Order.
- b) Parties may file objections to the proposed decision (become part of record).

IX. The Board functions in an appeal

- a) Quasi-judicial.
- b) Closed session deliberation—parties not present during the deliberation.
- c) Review on the record—Board does not take evidence or hear testimony.
- d) Provide oversight of the initial decision making process—either that of the Department, or, in direct appeals, the participant's employer.

X. Who are the parties?

- a) A person with a “substantial interest” in the issue to be decided.
- b) Except for direct appeals, the Department is a party, but may choose not to participate.
- c) In cases involving death benefits, the parties may include potential beneficiaries.
- d) In cases involving insurance benefits, the third-party administrator or health insurance program may be a party.

XI. The proposed decision.

- a) The hearing examiner issues a proposed decision, but the Board need not adopt it, either in part or in full. The proposed decision is not entitled to deference by the Board.
- b) The hearing examiner may issue a final decision in specific types of cases, primarily ones involving time-barred claims. The Board normally does not see these cases.

XII. The decision-making process.

- a) ETF's Appeals Coordinator provides the appeal record to each Board member.
- b) Prior to Board meeting: read the record, identify the specific issues to be resolved and any factual and legal disputes.
- c) At Board meeting: counsel provides summary of case and a recommendation for deciding the appeal
- d) Board discusses member's views of the facts and law at issue
- e) Problems of hearsay
 - i) what is hearsay?
 - ii) use in administrative proceedings
 - iii) substantial evidence standard
- f) Vote. Not all Board decisions are unanimous
- g) Board's powers to correct "unfairness" are very limited
- h) The Board's options do include remanding the appeal back to the hearing examiner to gather additional evidence that the Board finds is needed, or to consider a point of law that the parties did not address

XIII. What must the final decision include?

- a) Findings of fact and conclusions of law.
- b) Should include facts establishing the Board's jurisdiction, including the date on which the appeal was filed
- c) A statement of the disposition of the appeal:
 - (1) affirmed,
 - (2) reversed, or
 - (3) remanded for further proceedings
- d) Parties to the appeal

XIV. What are the losing party's options after the final decision issues?

- a) Petition for re-hearing
 - (1) Time to submit is 20 days from date of final decision
 - (2) Not required to seek judicial review in state court
 - (3) If petition for rehearing submitted, the Board Chair must determine whether
 - (1) to add the petition for rehearing to the agenda for the next board meeting
 - (2) to delegate final authority to decide the motion to the hearing examiner who presided over the appeal. (Wis. Admin. Code § ETF 11.14(4).)
 - (4) The timeframe for making this decision is 30 days from the date petition for rehearing was filed (Wis. Admin. Code § ETF 11.14(1)(c).)
 - (5) If no action is taken within the 30 days, the Petition for Rehearing is deemed to have been denied. (Wis. Admin. Code § ETF 11.14(1)(c).)
 - (6) Petition for rehearing may be granted only on the basis of one or more of the following:

- (a) A material error of law.
 - (b) A material error of fact.
 - (c) The discovery of new evidence no later than 20 days after notice of the final decision is mailed that is sufficiently strong reverse or modify the original decision, which could not have been previously discovered by due diligence. (Wis. Admin. Code § ETF 11.14(2).)
- b) Judicial review in circuit court – Wis Stat. § 40.08(12)
- (1) Time to appeal - within 30 days after the date on which notice of the action, decision or determination is mailed to that party
 - (2) Must be an action for certiorari
 - (3) can be brought by any party to the administrative proceeding, including the department,
 - (4) All appeals heard by a trial judge in Dane County
 - (5) Review is on the record—no additional gathering of evidence
 - (6) The Board's findings and conclusions of law are typically entitled to some level of deference
- c) Appeal beyond the circuit court

Staff will be at the Board meeting to answer any questions.