

DEPARTMENT OF INSURANCE
OFFICE OF THE COMMISSIONER

Statutory Authority: 18 Delaware Code, Section 311 and 24 Delaware Code, Section 2621
(18 Del.C. §311 & 24 Del.C. §2621)

FINAL

REGULATORY IMPLEMENTING ORDER

1321 Compensation for Physical Therapy Services

I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

In the March 1, 2019 edition of the *Delaware Register of Regulations* at 22 **DE Reg.** 756 (March 1, 2019), the Commissioner of the Delaware Department of Insurance (Commissioner) published a proposal which included a notice of intent to codify proposed new Regulation 1321 relating to Compensation for Physical Therapy Services. The proposed new regulation would prohibit insurance carriers from including in any health insurance policy terms and conditions that unreasonably discriminate against the payment for physical therapy care or services, or that place numerical limits on physical therapy visits for the treatment of back pain. The proposed new regulation would also codify a mechanism by which the Department of Insurance (the Department) may enforce these prohibitions.

The Department received comments from four commenters, copies of which are on file with the Department. The Department did not hold a public hearing on the proposal.

One commenter wrote in support of the regulation as proposed.

One commenter suggested that adding the word “certificate” at proposed new subsections 5.1 and 5.2 indicates extraterritoriality for this regulation, which exceeds the Department’s statutory authority. The commenter goes on to explain that extraterritoriality would make this regulation apply to certificates issued to residents of Delaware but stemming from policies that were not issued in Delaware. The commenter also opines that the underlying statute at 24 **Del.C.** §2621 only applies to policies or group contracts that are issued in Delaware, and by extension, to only certificates that stem from those policies or contracts.

One commenter pointed out that 24 **Del.C.** Ch. 26 does not contain a definition of “physical therapy” as cross-referenced in the proposed definition of “physical therapy.” The commenter also posed a question regarding whether subsection 5.1.2 is meant to prohibit a blanket classification of *all* physical therapy services as maintenance care and/or not medically necessary and thus not subject to reimbursement.

Two commenters noted that, as proposed, the effective date would apply retroactively to policies issued before the effective date of the regulation, and one suggested an effective date of on or after July 1, 2019.

Another commenter questioned whether this regulation applies to physical therapy care provided under a workers compensation policy, arguing in favor of applying the regulation to care provided under a workers compensation policy.

II. FINDINGS OF FACTS

1. The Commissioner finds that it is appropriate to adopt 18 **DE Admin. Code** 1321 as proposed in the March 1, 2019 *Register of Regulations*, for the reasons set forth in the proposal.

2. While the Commissioner acknowledges that the term “certificate,” as used in proposed new subsections 5.1 and 5.2, could imply extraterritoriality for this regulation, there are instances where Delaware policies are issued with underlying Delaware certificates. The Commissioner also acknowledges that 24 **Del.C.** §2621 does not give the Commissioner extraterritorial jurisdiction and, therefore, on adoption, the term will be clarified to apply only to certificates issued under Delaware policies or contracts, to more closely conform the regulation to its underlying statute.

3. The Commissioner finds that it is more accurate to define “Physical therapy” to more precisely mean “the practice of physical therapy” as defined in 24 **Del.C.** §2602.” This is a non-substantive change in existing regulations to correct technical errors, pursuant to 29 **Del.C.** § 10113(b)(4).

4. The Commissioner further clarifies that subsection 5.1.2 is indeed meant to prohibit a blanket classification of *all* physical therapy services as maintenance care and/or not medically necessary and thus not subject to reimbursement.

5. Regarding the regulation’s effective date, the Commissioner notes that the effective date of Del. S.B. 225/S.A. 1/S.A.2, 149th Gen. Assem. §2621 (2018) was March 9, 2019, and both carriers and providers were on notice that its provisions were in effect as of that date by operation of the statute. The Commissioner expects all carrier’s policies issued on or after March 9, 2019 to be in compliance with 24 **Del.C.** §2621, notwithstanding the effective date of this regulation. That notwithstanding, 29 **Del.C.** § 10118 and 29 **DE Admin. Code** 101-5.1 state that the effective date of a regulation shall be ten (10) days from the date an adoption order is published in the *Delaware Register of Regulations*. Accordingly, the Commissioner adopts that date as the effective date of this regulation.

6. The Commissioner further clarifies that the language utilized in the statute appears to limit its applicability to health

insurance contracts ("For purposes of disability insurance, standard health and accident, sickness and all other such insurance plans"). This limited applicability is supported by the Department's definition of "carrier" in the regulations. Moreover, workers' compensation coverage is not "health insurance." Rather, it is a type of casualty insurance as set forth in Chapter 9 of the Insurance Code. Therefore, applying the requirements of 24 **Del.C.** §2621 to workers' compensation plans would appear to exceed the scope of the plain language in those sections.

III. DECISION TO ADOPT THE NEW REGULATION

For the foregoing reasons, the Commissioner concludes that it is appropriate to adopt 18 **DE Admin. Code** 1321 as proposed, with amendments that conform the regulation to its underlying statutory authority as described in the findings of fact of this order and with non-substantive changes in existing regulations to correct technical errors, pursuant to 29 **Del.C.** §10113(b)(4).

IV. EFFECTIVE DATE OF ORDER

The actions hereinabove referred to were taken by the Commissioner pursuant to 18 **Del.C.** §311 and the amendments to 24 **Del.C.** Ch. 26, which added new section 2621 entitled "Physical therapists eligible for compensation from insurance." See Del. S.B. 225/S.A. 1/S.A.2, 149th Gen. Assem. §2621 (2018), with an effective date of March 9, 2019.

This Order shall be effective on the date signed. The effective date of the Regulation shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*, pursuant to 29 **Del.C.** §10118 and 29 **DE Admin. Code** 101-5.1.

IT IS SO ORDERED.

The 13th day of May, 2019.

Trinidad Navarro
Commissioner
Delaware Department of Insurance

1321 Compensation for Physical Therapy Services

1.0 Authority

This regulation is adopted pursuant to 18 **Del.C.** §311 and 24 **Del.C.** §2621 and promulgated in accordance with the Delaware Administrative Procedures Act, 29 **Del.C.** Ch. 101.

2.0 Purpose

The purpose of this regulation is to implement 24 **Del.C.** §2621.

3.0 Scope

3.1 This regulation shall apply to all carriers and to all third party administrators as defined herein.

3.2 This regulation shall not apply to personal injury protection automobile insurance that is required under 21 **Del.C.** Ch. 21.

4.0 Definitions

The following words and terms, when used in this regulation, should have the following meaning unless the context clearly indicates otherwise:

"Administrator" or "third party administrator" or "TPA" means "Administrator" or "third party administrator" or "TPA" as those terms are defined at 18 **DE Admin. Code** 1406-2.1.

"Carrier" means any entity that provides health insurance in this State. For the purposes of this regulation, carrier includes a health insurance company, health service corporation, health maintenance organization and any other entity providing a plan of health insurance or health benefits subject to state insurance regulation. "Carrier" also includes any third-party administrator or other entity that adjusts, administers or settles claims in connection with health benefit plans.

"Commissioner" means the Commissioner of the Delaware Department of Insurance.

"Medically necessary" means the providing of health care services or products that a prudent physician would provide to a patient for the purpose of diagnosing or treating an illness, injury, disease or its symptoms in a manner that is:

- A. In accordance with generally accepted standards of medical practice;
- B. Consistent with the symptoms or treatment of the condition; and

C. Not solely for anyone's convenience.

"Physical Therapist" means a person who is licensed to administer physical therapy care or services pursuant to 24 Del.C. Ch. 26 and 24 DE Admin. Code 2600.

"Physical therapy" means "[practice of] physical therapy" as defined in [24 DE Admin. Code 2600 24 Del.C. §2602].

"Physical therapy care or services" means those practices that a licensed Physical Therapist is licensed to provide pursuant to 24 Del.C. Ch. 26 and 24 DE Admin. Code 2600.

5.0 Unreasonable and Discriminatory Access to Physical Therapy Care or Services Prohibited

5.1 No carrier shall include in any insurance ~~[policy, policy or]~~ contract [delivered or issued for delivery in Delaware] or [in any] certificate [issued under such a policy or contract] any provision that unreasonably discriminates against access to physical therapy care or services, including but not limited to:

5.1.1 A cost containment or managed care provision that denies or restricts access to physical therapy care or services in a manner that is more restrictive than a cost containment or managed care provision placed on a provider who is not licensed as a physical therapist but who is otherwise licensed to perform the same or substantially similar service, for the treatment of a patient with a condition that is within the scope of physical therapy practice;

5.1.2 A provision that classifies physical therapy care or services as "maintenance care" or "not medically necessary," solely for the purpose of denying access to physical therapy care or services;

5.1.3 A provision that requires a patient to pay a higher copay or deductible when being treated by a physical therapist than that patient would otherwise be required to pay for the same or substantially similar care or services had that care or services been rendered by a provider who is not licensed as a physical therapist but who is otherwise licensed to render that or a substantially similar care or service;

5.1.4 A provision that requires a patient to pay a copayment or coinsurance that is more than 25 percent of the fee due or to be paid to a physical therapist for physical therapy care or services;

5.1.5 A provision that contains a utilization or compensation restriction or practice for a physical therapist that is more restrictive than a utilization or compensation restriction or practice placed on a provider who is not licensed as a physical therapist but who is otherwise licensed to perform the same or substantially similar care or service for the treatment of patients with conditions within the scope of physical therapy care or services, including but not limited to:

5.1.5.1 Unreasonable or discriminatory restrictions on the number of compensated visits per condition, or per episode, year, or other period; or

5.1.5.2 Unreasonable or discriminatory precertification requirements and allowances for initial or subsequent visits, or for the determination of medical necessity; or

5.1.6 Including a provision that would unreasonably deny coverage for a physical therapy technique, method or diagnostic procedure if that physical therapy technique, method or diagnostic procedure is taught by an educational program described in 24 Del.C. §2606(a)(1), or has been approved by the Delaware Examining Board of Physical Therapists and Athletic Trainers.

5.2 No carrier shall include in any insurance ~~[policy, policy or]~~ contract [delivered or issued for delivery in Delaware] or [in any] certificate [issued under such a policy or contract] any provision that places any annual or lifetime numerical limits on physical therapy visits for the treatment of back pain.

6.0 Unreasonable and Discriminatory Compensation Prohibited

6.1 No carrier or TPA shall discriminate against or unreasonably deny a physical therapist compensation for a physical therapy service rendered by that physical therapist if the carrier would otherwise compensate a provider who is not licensed as a physical therapist but who is otherwise licensed to perform that same or substantially similar service.

6.2 Every carrier or TPA shall utilize nondiscriminatory cost containment and managed care payment strategies to provide payment for physical therapy care or services, regardless of whether the care or services were delivered by a licensed physical therapist or by a provider who is not licensed as a physical therapist but who is otherwise licensed to perform the same or substantially similar service.

7.0 Reasonable and Nondiscriminatory Provisions

Nothing in this regulation shall prohibit a carrier or a TPA from implementing reasonable and nondiscriminatory cost containment or managed care provisions as permitted by 24 Del.C. §2621(b).

8.0 Waiver not permitted

The provisions of this regulation may not be waived, voided, or nullified by contract.

9.0 Causes of Action

This regulation shall not create a private cause of action for any person or entity other than the Commissioner against a carrier or its representative based upon a violation of 24 Del.C. §2621 or any provision of this regulation.

10.0 Effective Date

This regulation shall be effective ~~for all policies issued on or renewed on or after the effective date of 24 Del.C. §2621~~ 10 days after the date of publication of the notice of adoption in the *Register of Regulations*].

22 DE Reg. 1021 (06/01/19) (Final)