

Aetna Clients Fight Bid To Nix ERISA Cancer Treatment Suit

By **Emily Brill**

Law360 (January 29, 2020, 4:41 PM EST) -- A couple is defending their proposed Employee Retirement Income Security Act class action challenging Aetna's alleged refusal to cover a cancer treatment called proton beam therapy, telling a Pennsylvania federal judge Aetna must answer for its alleged policy of categorically denying PBT claims.

Paul and Jacqueline Molloy argued in a Tuesday response to Aetna's motion to dismiss that benefit plan documents indicate the insurer actually does cover PBT, but it based its treatment denials on a clinical policy bulletin that it never circulated to the public.

Relying on a nonpublic CPB to make coverage decisions constitutes a breach of fiduciary duty, the Molloyes argued. Furthermore, the Aetna medical directors making decisions about PBT claim approval do not have the experience to make decisions about cancer treatment, the couple said.

"Aetna's unqualified medical directors, armed with Aetna's secret, undisclosed CPB, are denying medically necessary proton beam therapy for cancer patients like Paul and others on the grounds that it is experimental, investigational or unproven," the couple wrote in a memorandum in opposition to Aetna's dismissal motion.

Aetna denied the treatment "even though proton beam therapy is actually identified by the plan as treatment which is a 'covered expense,' even though proton beam therapy was [U.S. Food and Drug Administration]-approved in 1988, and notwithstanding the fact that Aetna covers the same PBT for its insureds younger than 19 years old and older than 65 years old," the couple argued.

The Molloyes filed their proposed class action in August and filed an amended complaint in December. The suit accuses Aetna Life Insurance Co. and Aetna Inc. of breaching their fiduciary duty under ERISA by refusing to pay for Paul Molloy's PBT treatment for a brain tumor.

The Molloyes are seeking to represent all 21-year-old to 65-year-old members of ERISA plans administered or insured by Aetna whose requests for PBT were denied within the statute of limitations period.

Counsel for the Molloyes said Wednesday that their clients brought the case "so that no other person need be improperly denied life saving medical care based upon these secret policies."

"There is no harm to Aetna in specifically and categorically advising Plan Participants, Members and Beneficiaries exactly what treatment is covered and what is not," said David S. Senoff of First Law Strategy Group LLC, speaking on behalf of a four-person legal team. "Plaintiffs brought this action to shine a light on Aetna's actions, and, hopefully, change them once and for all."

Counsel and representatives for Aetna did not immediately respond to requests for comment Wednesday.

The proposed class is represented by Hillary B. Weinstein and David S. Senoff of First Law Strategy Group and Richard Ochroch and Brett Benton of Richard M. Ochroch & Associates.

Aetna Life Insurance Co. and Aetna Inc. are represented by Mark J. Schwemler, Aimee L. Kumer and Gregory S. Voshell of Elliott Greenleaf PC and Mark C. Nielsen, Jon W. Breyfogle and Paul J. Rinefierd of Groom Law Group Chartered.

The case is Paul Molloy et al. v. Aetna Life Insurance Co. et al., case number 2:19-cv-03902, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Abbie Sarfo.