

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

**In the Matter of the Appeal Regarding Denial of Benefit
Coverage for Elective Services Provided by Out-of-Country**

Provider to Andréa Schall, by:

MICHAEL A. SCHALL, Respondent

Agency Case No. 2019-0941

OAH No. 2019120449

PROPOSED DECISION

Jessica Wall, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on October 4, 2022, from Sacramento, California.

Charles H. Glauberman, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Respondent Michael A. Schall represented himself.

Evidence was received, the record closed, and the matter submitted for decision on October 4, 2022.

ISSUE

Did Anthem Blue Cross (Anthem) erroneously deny PERSCare benefit coverage to respondent for a 2019 hip resurfacing procedure provided by Derek McMinn, M.D., in Birmingham, England, to Andréa Schall?

FACTUAL FINDINGS

Background and Jurisdiction

1. The CalPERS Health Program is governed by the Public Employees' Medical and Hospital Care Act, Government Code section 22750 et seq. (PEMHCA) and its implementing regulations, California Code of Regulations, title 2, section 599.500 et seq. PEMHCA requires CalPERS to provide health benefits for state employees, dependents, and annuitants, as well as for employees, dependents, and annuitants of contracting public agencies that elect to contract with CalPERS for health benefit coverage.

2. Respondent is a local miscellaneous member of CalPERS whose dependents are eligible for CalPERS health benefits under PEMHCA. Respondent is the authorized representative for his minor dependent, Andréa Schall (Andréa). At all relevant times, Andréa was enrolled in PERSCare, a preferred provider healthcare plan (PPO) offered by CalPERS under PEMHCA. CalPERS contracted with Anthem to administer PERSCare medical claims during the relevant period.

3. On August 29, 2018, respondent contacted Anthem to appeal the denial of benefit coverage for a hip resurfacing procedure for Andréa to be performed by Derek McMinn, M.D., in Birmingham, England. In his communication with Anthem,

respondent explained that Andréa needed the surgery to be rendered by Dr. McMinn because he was “the foremost expert in the world” and “the only provider who practices this procedure on children.” If Andréa had to wait for the surgery, respondent said, she would later need back surgery for spinal curvature. Respondent expected his appeal to be denied but hoped CalPERS would cover it “based on extenuating circumstances.”

4. On September 27, 2018, Anthem sent a Final Adverse Benefit Determination to respondent, denying coverage for Dr. McMinn to perform the surgery on Andréa. On April 26, 2019, Anthem issued an Amended Final Adverse Benefit Determination (Amended FABD) that superseded the prior letter. In the Amended FABD, Anthem explained that the Evidence of Coverage (EOC) outlined that PERSCare did not cover elective procedures for United States residents who are traveling in foreign countries.

5. Respondent requested that CalPERS perform an administrative review of the Amended FABD on May 8, 2019, and attached a document stating his grounds for appeal. On July 9, 2019, CalPERS sent respondent its determination. In the letter, Dennis De Vore, Manager of CalPERS’s Health Plan Administration Division, wrote that CalPERS had upheld Anthem’s denial to provide benefit coverage for the services performed by Dr. McMinn in Birmingham, England, based on the language in the 2019 PERSCare EOC.

6. Respondent filed a timely appeal of CalPERS’s determination. On November 21, 2019, Marta Green, in her official capacity as Chief of CalPERS’s Health Plan Research and Administration Division, filed a Statement of Issues for purposes of the appeal. This hearing followed.

PERSCare PPO Plan

7. The 2019 PERSCare EOC¹ provides the contractual details for member coverage. It details that members who select in-network providers, called "Preferred Providers," receive 90 percent payment coverage for services. California members may choose from over 44,990 physicians, 435 hospitals, and 310 ambulatory surgery centers that fall within the network's "Prudent Buyer Plan Network." Should California members need medical services in a different state, they can choose an in-network provider from another Blue Cross and Blue Shield plan, which includes another 550,000 physicians and 61,000 hospitals nationwide. If a member receives services from an out-of-network, or "Non-Preferred," provider within the United States, reimbursement for covered services drops to 60 percent unless there is no in-network provider within a 50-mile radius of the member's residence.

8. Members traveling outside the United States may receive care at a hospital that participates in the BlueCross BlueShield Global Core Program. Reimbursement for international medical treatment is limited, however, as follows:

Claims will be accepted for U.S. residents who are traveling in foreign countries for urgent or emergent care only.

Claims for elective procedures will not be reimbursed.

Members who permanently reside in foreign countries may

¹ The contractual details of the 2018 PERSCare EOC are substantially similar to those in the 2019 PERSCare EOC.

submit claims for routine, elective procedures, urgent and emergent care to Anthem Blue Cross.

9. The Definitions section of the EOC defines "Emergency Care Services," as follows:

[T]hose services required for the alleviation of the sudden onset of severe pain, or Psychiatric Emergency Medical Condition, or the immediate diagnosis and treatment of an unforeseen illness or injury which could lead to further significant Disability or death, or which would so appear to a prudent layperson.

10. The Definitions section also defines "Urgent Care," as follows:

[S]ervices received for sudden and unexpected serious illness, injury or condition, other than one which is life threatening, which requires immediate care for the relief of severe pain or diagnosis and treatment of such condition.

Testimony by Sheri Alvarado

11. Sheri Alvarado has worked at CalPERS for 16 years and currently serves as a Research Data Specialist. In her position, Ms. Alvarado reviews members' appeals, complaints, and inquiries. She gathers relevant information from the health plan, including the EOC, which serves as a member's contract with the health plan. When Ms. Alvarado received respondent's appeal, she gathered documentation from PERSCare and respondent, and reviewed respondent's arguments.

12. First, Ms. Alvarado considered respondent and his daughter's permanent address, which was within the United States, and the location of the proposed surgery, which was in Birmingham, England. Based on the international nature of the medical treatment, she reviewed the proposed surgery to determine whether it qualified as urgent care or an emergency care service. She determined that the procedure was elective because it was a planned surgery for a foreseen injury or illness. CalPERS could not cover the procedure because it applies benefits equally to all its members, according to the terms of the EOC. Based on her findings, Ms. Alvarado concluded that CalPERS should uphold Anthem's denial of benefit coverage.

Respondent's Evidence

13. Respondent testified at hearing about Andréa's injury and his request for benefit coverage. Andréa first began to experience pain in her right hip in September 2015. She was hospitalized and found to be suffering from an infection. A physician drained her hip infection, surgically cleaned the site, provided her with intravenous antibiotics, and sent her home to recover.

14. On May 13, 2016,² Andréa's hip pain returned. She returned to the hospital, where she was diagnosed avascular necrosis (loss of bone tissue) in her right hip. Respondent moved Andréa to a different hospital and consulted five other children's hospitals with her medical information. A surgeon performed a varus osteotomy surgery, which moved the femoral head to a different weight-bearing

² In his testimony, respondent identified "May 13" as the date that Andréa's hip pain worsened, but he could not recall the year. His May 2019 documents, attached to his CalPERS appeal, clarifies that the date was May 13, 2016.

surface of the hip. Yet Andréa remained in pain following the surgery. Respondent had Andréa tested for metal allergies. The test determined she was extremely sensitive to nickel and moderately sensitive to titanium. The steel plate used in her surgery contained nickel, so a surgeon removed it. Andréa's pain decreased.

15. Following a magnetic resonance imaging (MRI) procedure, respondent learned that Andréa's femoral head was no longer round, and Andréa had lost cartilage at the new location. The pediatric surgeon recommended respondent seek an adult orthopedic surgeon for a hip replacement. Respondent elected to pursue hip resurfacing, rather than hip replacement,³ to preserve more of Andréa's remaining bone tissue and avoid other future surgeries. However, at that time, most hip resurfacing surgeons in the United States used metal appliances, which contained nickel. Respondent contacted the leading hip resurfacing specialists in the United States and determined Andréa would need a custom implant based on the size of her hip socket and metal sensitivities. In total, respondent contacted 10 to 12 surgeons in the United States.

16. Based on his research, respondent concluded that Dr. McMinn was the only surgeon that could provide Andréa with a custom implant that addressed her metal sensitivities. On May 15, 2018, Dr. McMinn examined Andréa in Birmingham, England, and agreed he could make her a custom implant. Respondent spoke with six to eight surgeons in the United States about whether they would install Dr. McMinn's

³ According to respondent, traditional hip replacement removes and replaces both the head of the thighbone and the damaged socket. A hip resurfacing procedure trims and caps the thighbone with a smooth metal covering and replaces the damaged bone and cartilage within the socket with a metal shell.

custom implant, but they all declined based on the implant's lack of Food and Drug Administration (FDA) approval. Respondent also felt Dr. McMinn was the best fit because of his pediatric surgery experience, experience treating women with avascular necrosis, and reputation for being one of the best hip surgeons in the world. Respondent decided none of the alternative options in the United States were credible and sought preapproval from Anthem to cover the procedure as in-network treatment.

17. While appealing Anthem's denials to CalPERS, respondent flew Andréa to England, where the surgery was performed on June 1, 2019. He felt the need to have the surgery performed overseas, rather than wait for medical developments in the United States, because for years Andréa was bedridden, could not walk, and was in constant pain. Respondent paid for the surgery out-of-pocket and now seeks reimbursement for the surgery, all surgery-related fees, Andréa's hospital stay and related fees, the cost of her custom implant, and the cost of the FDA-approved appliance used in her surgery. He argues that CalPERS's fiduciary duty and ethics policy compels the reimbursement.

Analysis

18. There is no dispute that, during the relevant period, respondent and Andréa were United States residents. The medical care at issue took place abroad in Birmingham, England. Thus, to obtain reimbursement of costs, respondent must demonstrate that the surgery was an emergency or urgent service under the terms of 2019 PERSCare EOC. Yet respondent does not argue that Andréa's surgery met either definition. The ailment underling Andréa's hip condition arose in 2015 and worsened in 2016. By 2019, it was neither an "unforeseen illness or injury" nor a "sudden and unexpected serious illness, injury or condition."

19. Instead, respondent contends that Andréa required out-of-country medical treatment because no domestic physician was able to meet Andréa's unique needs as well as Dr. McMinn could. Understandably, respondent wanted his daughter to receive the best medical care and to alleviate her discomfort. Even with full knowledge that benefit coverage was denied, respondent chose to continue with the surgery he believed was in his daughter's best interest. He now seeks to revise the terms of the EOC to receive reimbursement for all the international medical costs he incurred. In doing so, respondent does not contend that the EOC's limitation on international claims was unclear or that the denial was unexpected. Rather, he argues that CalPERS has a fiduciary duty to act in the best interests of its members and to deny him reimbursement would violate CalPERS's ethics policy. These arguments are not persuasive.

20. "An insurance policy is but a contract, and, like all other contracts it must be construed from the language used; when the terms are plain and unambiguous, it is the duty of courts to enforce the agreement." (*Roug v. Ohio Security Ins. Co.* (1986) 182 Cal.App.3d 1030, 1035.) Here, the terms of the 2019 PERSCare EOC plainly, clearly, and conspicuously limit coverage on international medical claims to emergency and urgent services. As detailed above, Andréa's surgery was neither. The law allows an insurance company to "limit the coverage of a policy issued by it ... as long as such limitation conforms to the law, is not contrary to public policy, and does so in conspicuous, plain and clear language." (*Roug v. Ohio Security Ins. Co., supra*, 182 Cal.App.3d at pp. 1037–1038 ["when the terms of an insurance policy are plain and explicit, the court will indulge in no forced construction so as to cast unassumed liability on an insurance company."].)

21. Assuming respondent rested his argument on public policy grounds, he did not carry his burden. Respondent cited no law or state policy that requires health insurers to pay for international elective surgeries when their contracts state the opposite. His citation to CalPERS's fiduciary duty is unavailing because it supports CalPERS's argument that it must follow the EOC and treat its members equally. To do otherwise risks inequitable treatment of claims and could cause an increase in premium costs for all members.

22. In sum, when the record as a whole is considered, respondent did not establish that Anthem erroneously denied benefit coverage for Andréa's surgery, performed by Dr. McMinn in Birmingham, England. The planned surgery was for a foreseen illness or injury, and thus did not qualify as urgent or emergent care under the terms of the 2019 PERSCare EOC.

LEGAL CONCLUSIONS

1. The CalPERS Health Program is governed by PEMHCA and its implementing regulations. PEMHCA requires CalPERS to provide health benefits for state employees, dependents, annuitants, as well as for employees, dependents, and annuitants of contracting public agencies that elect to contract with CalPERS for health benefit coverage.

2. Under PEMHCA, "[a]n employee or annuitant who is dissatisfied with any action or failure to act in connection with his or her coverage or the coverage of his or her family members under this part shall have the right of appeal to the board and shall be accorded an opportunity for a fair hearing. The hearings shall be conducted,

insofar as practicable, pursuant to the provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3." (Gov. Code, § 22848.)

3. In this appeal, respondent had the burden of proving by a preponderance of the evidence that Anthem erroneously denied benefit coverage for the procedure at issue. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"]; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) A preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

4. Based on the Factual Findings as a whole, and specifically, Factual Findings 18 through 22, respondent did not establish that Anthem erroneously denied benefit coverage for Andréa's hip resurfacing procedure and related medical costs, incurred in England in June 2019.

ORDER

The appeal of respondent Michael A. Schall is DENIED.

DATE: October 21, 2022

Jessica Wall

[Jessica Wall \(Oct 21, 2022 16:08 PDT\)](#)

JESSICA WALL

Administrative Law Judge

Office of Administrative Hearings