

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 Services Provided by Out-of-Country Provider**

to:

DAGMAR H. WATERS, Respondent

Agency Case No. 2021-0533

OAH Case No. 2021100145

PROPOSED DECISION

Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on March 8, 2022, from Sacramento, California.

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

Respondent Dagmar H. Waters (Ms. Waters) appeared at hearing with her husband and authorized representative, Anthony E. Waters (Mr. Waters).

Evidence was received, the record closed, and the matter submitted for decision on March 8, 2022.

ISSUE

Did Blue Shield of California (BSC) erroneously deny benefit coverage for services provided by Bangkok Hospital Chiang Mai (Bangkok Hospital) to Ms. Waters from January 29, 2020, through February 6, 2020?

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. Mr. Waters established membership with CalPERS through his employment with the State of California. By virtue of his employment, Mr. Waters and his dependents, including Ms. Waters, are eligible for CalPERS health benefits under PEMHCA and its implementing regulations. At all relevant times, Mr. Waters and Ms. Waters were enrolled in BSC's Access+ HMO Basic Plan (Blue Shield Access+), a health maintenance organization plan offered by CalPERS.

3. On January 29, 2020, Ms. Waters underwent a right hip replacement surgery at Bangkok Hospital and remained inpatient until discharged on February 6,

2020. Bangkok Hospital is a Non-Preferred Provider and an Out-of-Country Provider; it does not participate in BSC's Preferred Provider network for Blue Shield Access+.

4. On or about February 22, 2020, BSC received Ms. Waters' International Claim Form dated February 7, 2020, which sought reimbursement of her surgery and hospitalization expenses at Bangkok Hospital. In early March 2020, BSC denied Ms. Waters' claim for a total of \$19,612.93.¹

5. Ms. Waters pursued a timely grievance regarding that denial with BSC.² Around June 26, 2020, BSC denied the grievance. It explained that a BSC Medical Director had determined that Ms. Waters' treatment at Bangkok Hospital was not a covered benefit, because it was an unauthorized elective procedure. It also did not qualify as a covered emergency or urgent service under the terms of the plan.

6. On September 26, 2020, Ms. Waters signed and subsequently submitted an Independent Medical Review (IMR) Application/Complaint Form to the California Department of Managed Health Care (DMHC). The DMHC referred Ms. Waters' complaint to MAXIMUS Federal Services, Inc. (MAXIMUS) for an IMR. After conducting

¹ Ms. Waters' claim was administratively processed as two separate claims for reimbursement of costs related to professional medical services (Claim No. 201086980400 in the amount of \$4,748.11) and inpatient services (Claim No. 201107264400 in the amount of \$14,864.82).

² Throughout the claim review process and in this appeal, Mr. Waters frequently filed documents on Ms. Waters' behalf as her authorized representative. In such instances, Ms. Waters is referred to as the filing individual for convenience only.

the IMR, MAXIMUS agreed with BSC's determination. Consequently, on December 14, 2020, the DMHC denied Ms. Waters' complaint and advised her of her right to seek an administrative review by CalPERS.

7. On December 18, 2020, Ms. Waters timely requested CalPERS to perform an administrative review. CalPERS referred the matter to CoreVisory for another IMR. After conducting the IMR, CoreVisory also agreed with BSC's determination. Consequently, by letter dated March 24, 2021, CalPERS notified Ms. Waters of its determination that BSC had appropriately denied benefit coverage for Ms. Waters' surgery and hospitalization at Bangkok Hospital.

8. On April 19, 2021, Ms. Waters filed a timely appeal of CalPERS' determination. On September 2, 2021, Kimberly A. Malm, in her official capacity as Chief of CalPERS' Strategic Health Operations Division, filed a Statement of Issues for purposes of the appeal. The matter was set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

The Blue Shield Access+ Plan

9. The 2020 Blue Shield Access+ Evidence of Coverage (EOC) provides that a member and each eligible family member is able to select their own Personal Physician from a plan directory of providers. Generally, all services must have prior authorization by the selected Personal Physician or BSC; without prior authorization, the member is responsible for payment of services. Exceptions include covered emergency services and urgent services rendered outside of the Personal Physician service area.

10. For purposes of emergency services, an emergency is defined as follows:

An emergency means an unexpected medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a layperson who possesses an average knowledge of health and medicine could reasonably assume that the absence of immediate medical attention could be expected to result in any of the following: (1) placing the Member's health in serious jeopardy, (2) serious impairment to bodily functions, (3) serious dysfunction of any bodily organ or part.

11. Urgent services are defined as follows:

[T]hose covered services rendered outside of the Personal Physician service area (other than emergency services) which are medically necessary to prevent serious deterioration of a Member's health resulting from unforeseen illness, injury or complications from an existing medical condition, for which treatment cannot reasonably be delayed until the Member returns to the Personal Physician service area.

Ms. Waters' Right Hip Condition and Treatment

12. Ms. Waters, ordinarily a resident of Chico, California, started experiencing bilateral hip pain as early as 2015. In March 2018, she reported the hip pain to her primary care provider in Chico, David Alonso, MD.³ Dr. Alonso prescribed physical

³ MD is an abbreviation for Doctor of Medicine.

therapy and medication, ordered X-rays and an MRI, and referred Ms. Waters to an orthopedic specialist in Chico, Bill Watson, MD. Based on his examination and the imaging studies, Dr. Watson diagnosed hip osteoarthritis. He recommended conservative management with medication and physical therapy. Ms. Waters completed 24 sessions of physical therapy. Around November 2018, Dr. Watson advised Ms. Waters that she could accompany Mr. Waters to Thailand for his work between January 2019 and August 2020, without the need for a hip replacement.

13. Starting in January 2019, Ms. Waters sought treatment for her hip pain from the CM Mediclinic in Chiang Mai, Thailand. She underwent further physical therapy, but her right hip pain worsened to the point that she was also prescribed opioids starting in May 2019.

14. Around October 2019, Ms. Waters obtained coverage through the Blue Shield Access+ plan. By that time, Ms. Waters' right hip pain had significantly worsened and she could only walk short distances with a cane. She consulted with orthopedic specialist Urarat Vasuntaraporn, MD, at Bangkok Hospital. Dr. Vasuntaraporn ordered an additional MRI and X-rays. In November 2019, based on the imaging studies and her physical examinations of Ms. Waters, which revealed that Ms. Waters' right hip limited her motion in all directions, Dr. Vasuntaraporn recommended total right hip replacement surgery. Ms. Waters was also placed on a strict fall prevention protocol.

15. BSC initially authorized the surgery to take place between December 15 and 19, 2019, as an urgent procedure with direct payment from BSC to Bangkok Hospital. However, the surgery did not occur in that time frame due to the surgeon's unavailability and Ms. Waters' urinary tract infection at the time, which had to be resolved first to safely perform the surgery.

16. The surgery was ultimately rescheduled for January 29, 2020. Prior to the rescheduled surgery, Ms. Waters attempted to obtain authorization from BSC for the rescheduled date. However, this time, BSC advised that it could not authorize direct payment from BSC to Bangkok Hospital; Ms. Waters would have to pay Bangkok Hospital upfront and then file a claim for potential reimbursement by BSC.

17. Ms. Waters proceeded with surgery at Bangkok Hospital on January 29, 2020. She was discharged on February 6, 2020, with instructions to ambulate with a walker, attend rehabilitation sessions every other day, and follow a home exercise program including range of motion and strengthening exercises. As noted above, her claim for reimbursement of the costs related to her surgery and hospitalization at Bangkok Hospital was subsequently denied by BSC.

Testimony by CoreVisory Reviewing Physician

18. Peter John Leslie Jebson, MD, is the CoreVisory physician who performed Ms. Waters' IMR at CalPERS' request. Dr. Jebson is a board-certified orthopedic surgeon who had an active clinical practice from 1996 through 2020. He retired from clinical practice in 2020, but still performs medical reviews for insurance companies involving authorizations for procedures, including hip replacement surgeries. He reviewed Ms. Waters' available medical records, prepared an IMR Report dated March 15, 2021, and testified consistently with that report at hearing.

19. Dr. Jebson noted that Ms. Waters was 70 at the time of his IMR and had a history of coronary heart disease, hypertension, fibromyalgia, gastroesophageal reflux disease, and chronic bilateral hip and back pain. The hip pain had been present since at least March 2018 and had been treated with physical therapy, pain medication, and anti-inflammatory medication. Dr. Jebson explained that Ms. Waters likely met the

criteria for hip replacement surgery, because she had exhausted conservative treatment options without adequate resolution of symptoms.

20. Nevertheless, Dr. Jebson concluded that Ms. Waters' hip replacement surgery at Bangkok Hospital was an elective procedure, not an emergency or urgent procedure.

Dr. Jebson noted that hip replacement surgery is rarely performed on an urgent basis. There are two exceptions: (1) when a patient sustains a hip fracture or dislocation, and the patient is either older or has pre-existing osteoarthritis in that hip; or (2) when there is protrusio—a condition where the hip ball penetrates through the pelvis. Based on his review of the imaging studies and clinical notes, Dr. Jebson found no evidence that Ms. Waters had sustained a hip fracture or dislocation, nor that she had protrusio.

Additionally, although Ms. Waters experienced progressively worsening pain and could not walk even short distances without a cane, that is very common with her hip condition and not indicative of the need for urgent surgery. Severe pain is ordinarily treated with opioid and other medications, as well as steroid injections, until the surgery can be scheduled in the ordinary course. It was also appropriate to use an ambulatory aid until surgery.

In sum, Dr. Jebson opined that delaying Ms. Waters' surgery, even for a few months, to allow her to return to California for surgery would not have resulted in serious deterioration of her health. Additionally, her orthopedic condition would not have prevented her from safely traveling to California, with appropriate pain medication. As such, Ms. Waters' right hip replacement surgery and hospitalization at Bangkok Hospital was an elective, and not emergency or urgent, procedure.

21. Dr. Jebson could not explain why BSC had previously approved Ms. Waters' right hip replacement surgery for December 2019 as an urgent procedure. He noted that he did not have access to BSC's records related to that prior determination.

Testimony by Ms. and Mr. Waters

22. Ms. and Mr. Waters both testified at hearing. Mr. Waters is a former professor of sociology at California State University, Chico. He retired in August 2021. Prior to his retirement, he also taught at universities in Thailand for periods of time, including from January 2019 through August 2020. Ms. Waters accompanied him to Thailand, where she also did some teaching.

23. Mr. and Ms. Waters testified consistent with Ms. Waters' medical history outlined above. Ms. Waters is "normally not a complainer," but by November 2019 she was never pain free, "in tears all the time," and had to stop teaching, because she could no longer walk to her classrooms. She also disliked being on high doses of opioid medication, which gave her bad dreams. Dr. Vasuntaraporn informed Ms. Waters that there was no solution other than a total hip replacement.

24. Mr. and Ms. Waters do not understand why BSC deemed the surgery urgent and approved it to take place between December 15 and 19, 2019, but then failed to approve it for January 29, 2020. Nothing in Ms. Waters' medical condition had changed; the surgery was postponed due to factors beyond her control—the surgeon's unavailability and a urinary tract infection. Although BSC at the time did not outright deny approval of the January 29, 2020 surgery, it also would not expressly authorize it. Instead, it instructed Ms. Waters to submit a claim for potential reimbursement after the surgery.

25. Ms. Waters ultimately proceeded with surgery at Bangkok Hospital for three reasons. First, she was eager to resolve her pain and limited mobility, which impaired her quality of life and ability to work. Second, returning to California for surgery would have required Mr. Waters to leave his work in Thailand. Alternatively, if she returned to California on her own, she would have had no support system in California following the surgery. Third, Ms. Waters did not believe she would be able to fly to California given her pain. Ms. Waters describes the decision to proceed with surgery at Bangkok Hospital as “the best decision I ever made”; her symptoms subsequently improved significantly, and she has regained her quality of life.

26. Given the foregoing, Mr. and Ms. Waters believe the surgery at Bangkok Hospital was an urgent service under the terms of the Blue Shield Access+ plan. As such, BSC should have approved their claim for reimbursement.

27. Apart from the unfavorable outcome, Mr. and Ms. Waters are also frustrated with the manner in which BSC handled their claim. In their view, the claim process and subsequent reviews were opaque, complex, and designed to discourage a consumer from pursuing a legitimate claim. Additionally, it was frequently difficult to communicate with BSC. Moreover, BSC refused to produce relevant records and claim documentation until forced to do so in the subsequent grievances and reviews. To date, BSC has not produced documentation concerning its initial approval of the surgery for December 2019, even though Mr. and Ms. Waters subpoenaed that information well in advance of the OAH hearing. They believe BSC’s failure to comply with the subpoena prejudices their current appeal.

Analysis

28. Since October 2019, and at all times relevant here, Ms. Waters was covered by the Blue Shield Access+ plan. The terms of the 2020 Blue Shield Access+ EOC apply, because Ms. Waters' surgery and hospitalization at Bangkok Hospital took place in 2020.

29. Ms. Waters credibly testified that she experienced progressively worsening right hip pain, could not walk even short distances without a cane, and had exhausted conservative treatment options by January 2020. Additionally, Dr. Jebson opined that she was likely an appropriate candidate for hip replacement surgery. However, there is also no dispute that BSC did not provide prior authorization for the January 29, 2020, through February 6, 2020 surgery and hospitalization. Thus, to obtain reimbursement of costs, Ms. Waters must demonstrate that the surgery was an emergency or urgent service under the terms of the 2020 Blue Shield Access+ EOC.

30. Ms. Waters does not contend that her surgery and hospitalization at Bangkok Hospital was an emergency service. Her right hip condition was not an "unexpected medical condition" (see Factual Finding No. 10 [definition of an emergency]), but instead a longstanding, chronic condition that her doctors have monitored since at least 2018.

31. Instead, Ms. Waters contends that her right hip replacement surgery was an urgent service that was required to address "complications from an existing medical condition." (See Factual Finding No. 11 [definition of urgent services].) However, considering the record as a whole, she does not meet the remainder of the definition for urgent services.

More specifically, Dr. Jebson persuasively explained that delaying Ms. Waters' surgery, even for a few months, to allow her to return to California for surgery would not have resulted in serious deterioration of her health. Until then, her pain could be managed with pain medication and steroid injections. Additionally, her orthopedic condition would not have prevented her from safely traveling to California. Ms. Waters did not offer a contrary medical opinion at hearing.⁴ Although she credibly testified that she subjectively felt unable to undertake such a long journey, her lay testimony alone is insufficient to rebut Dr. Jebson's medical expert opinion. Also, even though Ms. Waters' concern about interrupting her husband's work in Thailand is understandable, the terms of the 2020 Blue Shield Access+ EOC do not allow for consideration of such non-medical concerns in determining whether a particular service is deemed urgent.

32. That BSC initially approved Ms. Waters' surgery to be performed between December 15 and 19, 2019 does not change the result. To be sure, that prior approval is puzzling, given the absence of any evidence that Ms. Waters' condition improved between December 19, 2019 and January 29, 2020. However, because the prior approval had a sunset date of December 19, 2019, and the January 29, 2020 surgery thus required a new approval in a different plan year, BSC was not bound by its prior determination and was entitled to reconsider the matter. For that reason, BSC's failure

⁴ Ms. Waters' argument that urgency should be determined not by a medical expert, but by a "layperson who possesses an average knowledge of health and medicine" is misplaced. That language appears in the definition of an emergency, not the definition of an urgent service, in the 2020 Blue Shield Access+ EOC. (Compare Factual Finding Nos. 10 and 11.)

to comply with the subpoena for documents concerning its prior approval of the December 2019 surgery does not prejudice Ms. Waters.

33. In sum, when the record as a whole is considered, Ms. Waters did not establish that BSC erroneously denied benefit coverage for her right hip replacement surgery at Bangkok Hospital. That surgery was not an urgent service under the terms of the 2020 Blue Shield Access+ EOC.

34. That said, BSC's handling of Ms. Waters' claim was far from exemplary. Promptly denying authorization for the January 2020 surgery and explaining why it was not an urgent service would have allowed Ms. Waters to make an informed decision about whether to proceed with surgery in Thailand. Instead, BSC ambiguously instructed Ms. Waters to seek *potential* reimbursement after surgery. Then, when BSC subsequently denied the claim and Ms. Waters sought review, BSC was difficult to communicate with and obstructed efforts to obtain her records and claim documentation. Although BSC's actions here ultimately do not change the substantive outcome, Ms. Waters' frustration is understandable. BSC ought to do better by its members.

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, Ms. Waters has the burden of proving by a preponderance of the evidence that BSC erroneously denied benefit coverage for services Bangkok Hospital provided her from January 29, 2020, through February 6, 2020. (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 28 through 34, Ms. Waters did not establish that BSC erroneously denied benefit coverage for services Bangkok Hospital provided her from January 29, 2020, through February 6, 2020.

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ORDER

The appeal of respondent Dagmar H. Waters is DENIED.

DATE: April 4, 2022

Wim vanRooyen

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings