

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 the Denial of an Out-
Of-Network Referral for:**

VIRGINIA A. QUEZADA, Respondent

Agency Case No. 2018-1268

OAH No. 2019050832

PROPOSED DECISION

John E. DeCure, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on October 1, 2019, in Sacramento, California.

Kevin Kreutz, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Adrian Barrio, Attorney at Law, appeared telephonically representing Virginia A. Quezada (respondent), who was not present and did not participate.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on October 1, 2019.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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ISSUE

Did Kaiser Permanente appropriately deny respondent's request for an out-of-network referral to receive water-assisted liposuction?

FACTUAL FINDINGS

Summary of Dispute and Jurisdiction

1. CalPERS is charged with administering the Public Employees' Medical and Hospital Care Act (PEMHCA) pursuant to Government Code section 22750 et seq. The PEMHCA authorizes CalPERS to provide health benefits for state employees, among others. Kaiser Permanente (Kaiser) is a Health Maintenance Organization (HMO) CalPERS contracts with and offers to persons eligible for health care benefits under PEMHCA. Respondent was a state employee due to her employment with the California Department of Rehabilitation, was eligible for PEMHCA health care benefits, and was enrolled in the Kaiser HMO health plan effective March 1, 2016.

2. In July 2017, respondent received care and treatment from Greg Lukaszewicz, M.D., a Kaiser surgeon, regarding her lipedema condition. She was displeased with his diagnosis and disagreed with his denial of her request to undergo water-assisted liposuction surgery to alleviate her lipedema. On September 25, 2017, Kaiser received a Complaint for Benefit Claim from respondent, dated September 12, 2017, in which respondent complained of Dr. Lukaszewicz's alleged failure to properly treat her condition, and appealed his decision to deny her request for an out-of-

network referral to undergo water-assisted liposuction surgery.¹ Kaiser acknowledged respondent's claim and requested further documentation. On October 25, 2017, Kaiser sent to respondent a Final Adverse Benefit Determination letter denying her request for the out-of-network liposuction referral. Respondent timely appealed Kaiser's denial and this hearing ensued. All jurisdictional requirements have been met.

Respondent's Condition and Kaiser's Denial

3. Respondent's health history relevant to the issues in this case began with 2015 medical records indicating that she was noted to have deep vein thrombosis (i.e., a blood clot that forms in a vein deep in the body) (DVT). Respondent also had a "Factor V deficiency," a rare bleeding disorder that results in poor clotting following an injury or surgery.

4. On July 21, 2016, she saw Dr. Lukaszewicz, presenting with a history of lipedema, a disorder characterized by symmetric enlargement of the legs due to deposits of fat beneath the skin, with noted excess weight increases on the buttocks, hips, and thighs following the birth of her first child. Respondent had a history of prior DVT and pulmonary embolism (PE), a condition in which one or more of the pulmonary arteries in the lungs become blocked, usually due to blood clots that form in the legs due to DVT and then travel to the lungs. She was noted to have abnormal adipose tissue (i.e., connective tissue containing fat cells) distribution along her hips, buttocks, thighs and ankles. She also had a history of chronic pain and was developing increasing problems with mobility and pain. She reported hyper-flexibility at the waist,

¹ Respondent's Complaint for Benefit Claim also included a 37-page, written complaint detailing her position.

easy bruising, and skin that was very sensitive to the touch. Dr. Lukaszewicz recommended oral supplements, a lymphatic system study, a CT (computed tomography) scan to assess the pelvic veins, and an IVC (inferior vena cava) filter placed to prevent DVT from traveling through her blood into her lungs. Dr. Lukaszewicz commented that water-assisted liposuction surgery has been shown to improve mobility and reduce chronic pain associated with lipedema, although it was "currently under investigation" at the time.

5. When Dr. Lukaszewicz saw respondent on February 6, 2017, he noted that she had undergone a previous gastric bypass surgery and lost significant weight; however, she regained the weight and was unable to reduce her weight again, despite diet and exercise. She was on lifelong anti-coagulation medication, including Praxada, a blood thinner. Her pain and mobility issues were increasing in the lower extremities. While Dr. Lukaszewicz believed respondent had lipedema and potentially would benefit from water-assisted liposuction, he was concerned about the increased risk of undergoing surgery, since respondent had a history of recurring DVT, an IVC filter, and needed chronic lifelong anti-coagulation medication. Nonetheless, on February 6, 2017, he wrote a referral letter to David Amron, M.D., respondent's out-of-network surgeon of choice, for consideration of water-assisted liposuction. After describing respondent's condition, which included a diagnosis of Factor V Leiden mutation (a blood-clotting disorder due to a mutation of the blood's factor V protein), he stated his further concerns:

While I believe that [respondent] does have lipedema and potentially would benefit from water assisted liposuction, I am particularly concerned about the increased risk of surgery given her history of recurrent deep venous

thrombosis, the presence of an IVC filter and her need for chronic life-long anti-coagulation.

6. On February 17, 2017, following the referral from Dr. Lukaszewicz, respondent met with Dr. Amron for an evaluation. In a letter of medical necessity which he composed that day, Dr. Amron noted respondent presented with a medical diagnosis of lipedema and joint disease and had severe body disproportion of the extremities, with swelling and pain. Dr. Amron concluded that this condition could only be treated by water-assisted liposuction surgery, in four stages, to remove the abnormal fat tissue. In a subsequent physician's letter dated February 21, 2017, Dr. Amron reiterated a diagnosis of lipedema stage 4, and set forth a treatment plan involving liposuction surgery to respondent's bilateral hips, buttocks, thighs, knees, calves, ankles, and arms. However, he did not address the concerns Dr. Lukaszewicz raised in his letter of referral regarding the increased risk of surgery due to respondent's history of blood clotting; nor did he address the specific clinical risks this history created, or any clinical planning undertaken to adequately address and potentially mitigate those risks in the context of the proposed procedure.

7. On August 18, 2017, Dr. Lukaszewicz wrote a physician's letter stating that after considering respondent's history of DVT and PE, the water-assisted liposuction surgery she sought carried too high a risk without first attempting other treatment measures. As a result, he could not recommend the surgery for respondent.

8. In considering respondent's request for water-assisted liposuction surgery, Kaiser referred to its Evidence of Coverage (EOC) as stated in its Basic Plan, a detailed statement of what the medical plan covers, costs, considerations, and other factors in determining appropriate care and treatment for plan members. In particular,

it examined the issue of whether the surgery was medically necessary, and the definition of that term as set forth in the EOC:

Medically Necessary: A Service is Medically Necessary if it is medically appropriate and required to prevent, diagnose, or treat your condition or clinical symptoms in accord with generally accepted professional standards of practice that are consistent with a standard of care in the medical community.

(Kaiser Perm. EOC for Basic Plan (Jan. 2017) Definitions, p. 5.)

Kaiser also considered the basic parameters set forth in the EOC regarding plan coverage of respondent's desired surgery, specifically noting the following requirement:

We cover the following reconstructive surgery Services:

Reconstructive surgery to correct or repair abnormal structures of the body caused by congenital defects, developmental abnormalities, trauma, infection, tumors, or disease, if a Plan Physician determines that it is necessary to improve function, or create a normal appearance, to the extent possible

(EOC for Basic Plan, Reconstructive Surgery, p. 42.)

Kaiser further considered the EOC's statement of conditions that must be met for a service to be covered:

We cover the Services described in this . . . section only if all of the following conditions are satisfied:

[¶] . . . [¶]

The Services are Medically Necessary

[¶] . . . [¶]

The Services are provided, prescribed, authorized, or directed by a Plan Physician . . .

(EOC for Basic Plan, Benefits, Copayments, and Coinsurance, p. 18.)

9. Kaiser reviewed respondent's medical records, considered the numerous specific points she asserted in her request and the additional information she provided to support her points, and reviewed its coverage parameters. Kaiser noted that before Dr. Lukaszewicz decided not to authorize respondent's desired surgery, he consulted with Ali Salim, M.D., Kaiser's Chief of Plastic Surgery at its San Francisco Medical Center facility; Dr. Salim also did not recommend the surgery based on the same concerns. Additionally, on October 16, 2017, Kaiser's Chief Physician Reviewer for its Northern California Plastic Surgery departments conducted a separate review and opined that the water-assisted liposuction surgery was not recommended due to the risks of complications (due to respondent's history) outweighing the surgery's potential benefits, among other things. Based primarily on these factors, Kaiser denied respondent's request for authorization of the water-assisted liposuction surgery Dr. Amron had proposed.

10. Dennis Devore, a Kaiser Health Program Manager in its Health Benefits and Compliance Appeal Unit, was assigned to review respondent's appeal of Kaiser's denial to authorize the water-assisted liposuction surgery. Mr. Devore testified that Kaiser performed a comprehensive review of respondent's appeal and determined, yet again, that its decision not to authorize her desired liposuction surgery was correct in that, due to the risks involved, it was not a medically necessary procedure.

Further Review

11. Respondent appealed to the State of California's Department of Managed Health Care (DMHC), an independent consumer-protection agency which regulates health care service plans for California residents. As a matter of course, DMHC referred respondent's appeal of her request for authorization for water-assisted liposuction surgery to MAXIMUS Federal Services, Inc. (MAXIMUS), an Independent Medical Review organization. In a February 15, 2018 letter, MAXIMUS informed respondent that its physician reviewer, a board-certified vascular surgeon, "determined that the requested surgery is not medically necessary for treatment of [respondent's] condition," and thus, Kaiser's denial "should be upheld."

12. Respondent appealed the matter to CalPERS. Although CalPERS uses MAXIMUS as a resource for independent reviews, it elected to send the appeal to Claims Eval, Inc. (Claims Eval), another Independent Medical Review organization. Three separate physicians reviewed the matter for Claims Eval, and all three concluded that given respondent's clinical issues, Kaiser's decision to deny authorization for the water-assisted liposuction surgery was appropriate, as the surgery was not considered medically necessary.

Expert Opinion

13. CalPERS additionally requested that Joseph Link, M.D., an Associate Director of Member Services for Kaiser, review respondent's appeal. Dr. Link has supervised physicians at non-Kaiser medical centers and managed appeals for Kaiser for approximately 11 years. He is board-certified in internal medicine, but routinely contemplates medical issues beyond this subspecialty on Kaiser's behalf. Dr. Link reviewed respondent's medical records and other documentation and information she provided, and consulted with a physician with expertise in lipedema, and three plastic surgeons with experience treating patients suffering from lipedema. He testified at hearing about his opinions and conclusions.

14. Dr. Link considered respondent's history of lipedema diagnoses, her Body Mass Index (BMI) of 38, her gastric bypass surgeries and weight loss of 78 pounds, her chronic pain and other symptoms associated with lipedema, and her history of blood clotting and Factor V Leiden mutation. He considered her BMI of 38, which is in the obesity range, as an indication that she was at higher risk of developing serious complications from water-assisted liposuction, as she may have faced infection, experience poor wound-healing, and an increased risk of blood clots. In particular, because she would have to stop taking blood-thinning medication to prepare for and undergo any surgery, her risk of blood clots would increase in the absence of such medication. The surgery would also address parts of respondent's body where blood clots form, again increasing the risk of serious complications, a pulmonary embolism, and death. Dr. Link agreed with Dr. Lukaszewicz's assessments and conclusions. He also shared Dr. Lukaszewicz's concern that Dr. Amron did not address the risk factors Dr. Lukaszewicz raised based on respondent's medical history of DVT and PE and blood clots.

15. In addition, Dr. Link questioned whether respondent's chronic pain, which may also be due to degenerative joint disease, spinal stenosis, and bursitis in her left leg, would be alleviated effectively by the proposed liposuction. According to the medical data and literature, liposuction surgery is not a recognized procedure for pain relief. Dr. Link agreed with the bases of Kaiser's initial denial because in his opinion, the risks associated with liposuction surgery outweighed the potential benefits. He further noted that Dr. Amron had developed no specific plan to mitigate the risks of the proposed surgery. Because those risks, which involve blood clotting, could be "deadly," Dr. Link found the lack of a risk-mitigation plan concerning.

16. On cross-examination, respondent suggested Kaiser had an "official position" regarding the use of water-assisted liposuction. Dr. Link credibly attested that no such official position exists, and he knew of several prior cases in which Kaiser had approved the surgery. He did not consider the proposed surgery to be cosmetic, but rather viewed it as intended to relieve respondent's pain and improve her mobility. Dr. Link was aware that respondent had successfully undergone knee surgery several years ago, but he had no information regarding how the risks of surgery had been managed in that instance.

Respondent's Evidence

17. No physicians or medical practitioners testified on respondent's behalf. In making her case, respondent relied entirely upon Dr. Amron's Treatment Recommendation and Letter of Medical Necessity, and her several written statements in support of her appeal. She did not submit any further medical documentation or reports in support of her appeal at hearing, and offered no argument.

Discussion

18. The medical evidence established that Dr. Lukaszewicz's decision not to authorize the water-assisted liposuction surgery respondent sought was carefully considered and sound. Similarly, Kaiser's review of her appeal of its denial was thorough and supported by the opinions of several qualified physicians as well as the medical record. The MAXIMUS and Claims Eval reviews, involving four independent physician reviewers, again supported the conclusions of Dr. Lukaszewicz, Kaiser's reviewers, and CalPERS.

19. Respondent's evidence primarily consisted of lengthy written arguments and a wide range of allegations against Kaiser, including alleged breach of contract, refusal to provide for proper treatment "based solely on corporate interest," failure (by Dr. Lukaszewicz) to perform Kaiser's duty to provide treatment, ongoing delay tactics, failure to consider the surgery's cost-effectiveness, disregard for the serious health risk caused by denial of the surgery, irreparable harm, and so on. She criticized Dr. Lukaszewicz for incorrectly noting that she had one prior gastric bypass surgery, when in fact she had undergone two such surgeries. She faulted him for finding she suffered from a pulmonary embolism, despite his assessment that she had DVT with the associated risk of pulmonary embolism, a life-threatening condition. She alleged that he initially approved of the water-based liposuction surgery, then changed his opinion; but in fact, Dr. Lukaszewicz was careful not to authorize the surgery without receiving assurances from Dr. Amron that the risks inherent with the surgery could be managed and mitigated. Such assurances never came. Although respondent's arguments were passionate, they were not based on demonstrable medical evidence.

20. The primary, overriding concern of the many reviewers in this case was that respondent's medical history and condition raised a substantial risk in the event

that she underwent the proposed procedure, which actually involved a total of four surgeries. In short, her well-established history of DVT and susceptibility to blood-clotting raised her exposure from the proposed surgery to the apex of risk: *death*. Notably, neither respondent nor Dr. Amron offered any evidence to suggest that her chances of not surviving four such surgical interventions could be managed or mitigated in any way.

21. Dr. Link was thorough, capable, and persuasive in reaching his opinion that the surgery at issue was not medically necessary, because the substantial risks inherent with the surgery at issue outweigh the potential pain relief and lifestyle improvement the surgery was intended to provide. His persuasive support of Dr. Lukaszewicz's decision not to authorize the liposuction surgery served to substantiate this second basis for Kaiser's denial. Dr. Link's opinions were convincing and consistent with the medical records he reviewed.

22. In sum, when all the evidence is considered, respondent failed to establish that Kaiser's denial of her request for an out-of-network referral to receive water-assisted liposuction was inappropriate. Consequently, her appeal must be denied.

LEGAL CONCLUSIONS

1. Respondent was a state employee due to her employment with the California Department of Rehabilitation, and was eligible for PEMHCA health care benefits. CalPERS is charged with administering the Public Employees' Medical and Hospital Care Act (PEMHCA) pursuant to Government Code section 22750 et seq. The PEMHCA authorizes CalPERS to provide health benefits for state employees, among

others. Kaiser is an HMO CalPERS contracts with and offers to persons eligible for health care benefits under PEMHCA. Respondent was eligible for PEMHCA health care benefits, and was enrolled in the Kaiser HMO health plan effective March 1, 2016.

2. Government Code section 22848 provides:

An 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.

3. Evidence Code section 500 provides:

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.

4. Evidence Code section 115 provides in relevant part, that "burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The party assuming the affirmative at an administrative hearing has the burden of proof, including the initial burden of going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) Respondent has not met her burden.

5. When all the evidence in this matter is considered, respondent did not establish that her appeal should be granted. Despite her claims, there was not sufficient evidence based upon competent medical opinion that CalPERS' determination supporting Kaiser's denial to approve water-assisted liposuction with an out-of-network provider was inappropriate. Consequently, her appeal must be denied.

ORDER

The appeal of respondent Virginia A. Quezada regarding the denial of an out-of-network referral for water-assisted liposuction surgery is DENIED.

DATE: October 30, 2019

DocuSigned by:
John DeCure
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JOHN E. DeCURE

Administrative Law Judge

Office of Administrative Hearings