STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Tamara Douglas, Appellant, vs. South Carolina Public Employee Benefit Authority, Employee Insurance Program, Respondent.	)	Docket No. 19-ALJ-30-0142-AP **FINAL ORDER**

This matter comes before the South Carolina Administrative Law Court (ALC or Court) on an appeal by Tamara Douglas (Appellant) from a decision by South Carolina Public Employee Benefit Authority, Employee Insurance Program (PEBA) denying a pre-authorization request for replacement of a bone-anchored hearing aid (BAHA).

STATEMENT OF THE CASE

As an employee of the State of South Carolina, Appellant participated in the South Carolina Group Health Benefits Plan (Plan). Appellant's request was denied because hearing aids, including bone-anchored hearing aids, are specifically excluded under the Plan.

As the Plan's Utilization Review Agency, Medi-Call received preauthorization requests from Appellant's provider and the manufacturer of the device (Cochlear Americas). On May 7, 2018, Medi-Call sent denial letters to Appellant, Appellant's provider, and Cochlear Americas.

Appellant faxed an appeal to Medi-Call arguing that her BAHA system should be distinguished from non-implantable or external hearing aids and from "bone conduction hearing aids." (R. p 68.) She also contended that the BAHA should be considered a prosthetic device.

On June 20, 2018, Dr. Michael Lawhead, medical director for BCBSSC (Blue Cross Blue Shield of South Carolina), concluded that Appellant's BAHA, as a bone conduction (bone-anchored) hearing aid, was excluded under the Plan and upheld the denial. (R. pp. 133-134.) The letter informed Appellant that she could appeal to PEBA. (R. pp. 167-168.)

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Although Appellant initially forwarded her appeal to BCBSSC, she appealed to PEBA on October 5, 2018. On March 29, 2019, PEBA completed its review and upheld the denial. (R. pp. 6-9.)

On April 30, 2019, Appellant filed an appeal with the ALC.

BACKGROUND

I. Appellant's Preauthorization Request. On April 11, 2018, Appellant's physician submitted a letter of medical necessity with a preauthorization request to replace Appellant's external sound processor (L8691), actuator unit (L8694), and actuator cable (L8618) in Appellant's BAHA (Bone-Anchored Hearing Aid) implant. This request included a diagnosis of sensorineural hearing loss. (R. pp. 137-139.) Previously, Appellant's physician submitted an upgrade order form (R. pp. 54-55) and a letter of medical necessity and preauthorization request on January 16, 2017 (R. pp. 59-60). This latter document included a diagnosis of "complete sensorineural hearing loss in the left ear." (R. p. 59.) The description of medical necessity included the following:

> The Baha auditory osseointegrated system is an auditory prothesis that is an accepted medical treatment for this patient's condition. In addition to a surgically implanted fixture, the device requires an external sound processor. As such, the sound processor is not a hearing aid, but rather part of the implantable hearing device that is necessary to this patient's ability to hear.

(R. p. 59.)

II. Medi-Call's Consideration of Appellant's Preauthorization Request. On May 7, 2018, after reviewing all available information, Medi-Call issued denial of benefits letters to Appellant, Appellant's physician, and the supplier. The denial was based on the Plan's exclusion of benefits for "hearing aids (including bone-anchored hearing aids)" found at Article 9, Paragraph M. (R. pp. 144-149.)

Appellant sought further review in a letter submitted by facsimile on June 4, 2018. First she denied that the BAHA system was a hearing aid and contended that it "should not be confused with non-implantable or external hearing aids. (R. p. 151.) Second, she described her BAHA system as

> a (1) titanium fixture that is surgically implanted into the temporal bone just behind the ear, and which becomes integrated into the bone, (2) a skin penetrating or subdural magnet abutement [sic], and (3) a sound processor that connects to the abutement [sic] to complete the system.

Id.

Finally, she contended that the system should be considered as a prosthetic device that is a "reasonable and appropriate treatment to restore the function of an impaired body part." (*Id.*)

III. Review of Medi-Call's denial of Appellant's Preauthorization Request. BCBSSC's Medical Director reviewed Appellant's medical records and the relevant provisions of the Plan, that is, the Plan's Exclusions and Limitations found at Article 9.M. Based solely on the exclusion, the Medical Director denied Appellant's preauthorization request. Appellant sought further review by the Public Employee Benefits Authority.

IV. PEBA's Consideration of Appellant's Claim. PEBA denied Appellant's request for preauthorization of benefits for a bone-anchored hearing aid replacement was denied because the Plan specifically excludes bone-anchored hearing aids from coverage. PEBA considered that Article 9, Paragraph M was the only relevant provision of the Plan governing her request. PEBA acknowledged that Appellant believed the replacement was medically necessary and that "bone-anchored hearing aids are prosthetics" to which the exclusion should not apply. (R. pp. 6, 8.)

ISSUE ON APPEAL

Did the South Carolina Public Employee Benefit Authority, Employee Insurance Program, properly deny Appellant's preauthorization request to replace her implanted, bone-anchored hearing aid?

STANDARD OF REVIEW

The enabling statute for the Plan provides that "claims for benefits under any self-insured plan of insurance offered by the State to state . . . employees and other eligible individuals must be resolved by procedures established by [PEBA Insurance Benefits], which . . . shall be subject only to judicial review consistent with . . . Section 1-23-380." S.C. Code Ann. § 1-11-710(C). Accordingly, the Administrative Procedures Act's standard of review governs appeals from decisions of PEBA Insurance Benefits. *See* S.C. Code Ann. §§ 1-23-380, 1-23-600(D) (Supp. 2017). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5). *See* § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380(5)). S.C. Code Ann. § 1-23-380(5) provides:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of

the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In this case, there are no disputed facts. Appellant's medical records show that the device needed is medically necessary. Respondent does not dispute that. Instead, Respondent's refusal of the preauthorization request is grounded in the terms of the insurance Plan's Exclusions and Limitations clause. Therefore, it is a question of contract interpretation.

When the issue is one to be determined by the interpretation and application of a policy exclusion, in the absence of material issues of fact, a judgment as a matter of law is appropriate. *See Gardner Trucking Co., Inc. v. South Carolina Ins. Guar. Ass'n,* 297 S.C. 235, 376 S.E.2d 260 (1989). Thus, review in this case is limited to whether the result is affected by an error of law pursuant to § 1-23-380(5)(d).

DISCUSSION

In its decision to deny Appellant's Preauthorization Request, PEBA considered Appellant's medical records and the Plan's Exclusions and Limitations as the relevant provision controlling the result. "Insurance policies are subject to the general rules of contract construction." *Beaufort County School Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011). "If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect." *Id.* at 516, 709 S.E.2d at 90. In addition, the "[i]nterpretation of an unambiguous policy . . . is for the court." *Id.* at 526, 709 S.E.2d 85, 95-96.

In its policy guidelines, BCBSSC notes that commencing in 2005, the Centers for Medicare and Medicaid Services began considering bone conduction hearing aids as prosthetic devices. BCBSSC recognized that contract language limiting benefits for hearing aids might not accord with this Medicare/Medicaid change. (R. p. 156.) Appellant relies on the Medicare/Medicaid

change and the reference to it in this policy to argue that her BAHA is a prosthetic device and is not subject to the exclusion of Article 9.M.

The Plan includes in its list of Covered Medical Benefits the general class of

> Prosthetic Appliances necessary for the correction of conditions caused by trauma or disease and that restore a function to the body. The Plan will provide benefits for the replacement of those prosthetic appliances that assist the body to function when the replacement is Medically Necessary and required by wear to the appliance . . . .

Plan, Article 7.2.H (R. p. 212).

The general coverage provided by Article 7.2 of the Plan is superseded by the specific exclusion of Article 9.M, which does not permit benefits to be paid for "hearing aids (including bone-anchored hearing aids)." "An insurance contract is read as a whole document so that 'one may not by pointing out a single sentence or clause, create an ambiguity.'" *Beaufort County School District*, 392 S.C. at 516, 709 S.E.2d 85, 90 (quoting *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)). However, "[a]ny inconsistency between a general clause and a specific clause must be resolved in favor of the specific." *Richland-Lexington Airport Dist. v. American Airlines, Inc.*, 306 F.Supp.2d, 548 (2002).

Appellant also claims that the Plan paid benefits for her original implantation in 2013. She apparently believes partial payment for that procedure bars denial of her current preauthorization request. Respondent correctly contends that payment of a previous claim does not create a reasonable expectation that a similar claim will be paid in the future. Respondent also argues that estoppel and waiver cannot be used to create or expand insurance coverage. *Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 287 S.C. 43, 53, 524 S.E.2d 847, 852 (Ct. App. 1999); *Alverson v. Minnesota Mut. Life Ins. Co.*, 287 S.C. 432, 434, 339 S.E.2d 140, 142 (Ct. App. 1985) ("The doctrines of waiver and estoppel cannot operate to bring excluded risks within the coverage of an insurance policy . . . .")

Respondent also contends that Appellant has raised issues under the Americans With Disabilities Act (ADA) without citing legal support and while ignoring the "safe harbor" provision of the ADA, 42 U.S.C. § 12201(c), which states that the ADA "shall not be construed to prohibit or restrict . . . an insurer, . . . or any agent, or entity that administers benefit plans . . . from underwriting risks, classifying risks, or administering such risks that are based on or not

inconsistent with State law." Appellant has not shown that the Record contains any evidence that the Plan's BAHA exclusion is inconsistent with South Carolina law.

The Court concludes that Respondent has properly construed and interpreted the Plan in its determination that Appellant's implanted cochlear device, a bone-anchored hearing aid, is not a covered benefit. Therefore, PEBA's decision to deny Appellant's Preauthorization Request is **AFFIRMED**.

AND IT IS SO ORDERED.

August 30, 2019
Columbia, South Carolina

H.W. Funderburk, Jr.
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Elizabeth A. Perkins, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

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