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Staff Matters

Legal News from Union Syndicale

Ceiling of reimbursement for medical expenses – Art. 20 of the Rules on sickness insurance – JSIS - general implementing provisions for the reimbursement of medical expenses – literal interpretation

Reimbursement ceiling for rental of a medical device annulled

Case T-736/19, HA / Commission, of 16 December 2020

In this newsletter we report about a recent decision of the General Court on reimbursement of medical expenses. For the rental of a medical device, the appointing authority - in the absence of an explicit reimbursement ceiling in the applicable rules - chose to apply the same ceiling that is prescribed for the purchase of that device. The Court however disapproves this introduction of a ceiling because it is not written in the rules on the reimbursement of expenses. This points to a literal and narrow interpretation of the health insurance scheme. The way an appointing authority complies with its obligation to maintain a financial balance of the health insurance system is by establishing the appropriate system of rules. It cannot substitute the process for this by interpreting the existing rules differently than in accordance with their wording.

You can continue to send us your suggestions for new subjects or your questions and comments : **StaffMatters@unionsyndicale.eu**.

Facts of the Case

The applicant is affiliated to the Joint Sickness Insurance Scheme of the Institutions of the EU (JSIS). She had obtained prior authorisation for the rental of a socalled continuous positive pressure breathing apparatus intended to alleviate sleep apnea (hereinafter a "CPAP machine" or "the device") for the period from 2012 to 2014. In 2014, the applicant submitted a new request for prior authorization for the continued rental of the CPAP machine. In response, the settlements office first issued an authorization to purchase a device arguing that medically only the purchase of a CPAP machine is justified and no longer a rental. A few months later, the applicant submitted a request for reimbursement relating to the rental costs of her CPAP machine incurred. The settlements office authorised the rental of a CPAP machine partially retroactively and up to 2019 and at the same time imposed a reimbursement ceiling of 1700 €, corresponding to that provided by the general implementing provisions for the reimbursement of medical expenses (GIP) for the purchase of a CPAP machine. Upon the applicant's complaint, the appointing authority decided that the ceiling of 1700 € should be increased to a total of 3100 €. This increase corresponded to the reimbursement for four years of maintenance costs and the purchase of accessories incurred after the first year following the purchase of the CPAP machine. In 2018, the applicant requested an extension of the prior authorization for the rental of a CPAP machine. In response to this request, the settlement office authorized the rental of a device until 2024, by setting a reimbursement ceiling of 3100 €. The applicant challenged this decision.

As foreseen in the rules, in order to answer the complaint, the Appointing Authority sought the opinion of the JSIS Management Board. During the discussions, staff representatives coming from **Union Syndicale** defended the arguments of the complainant, but were unfortunately not followed, not even by the other staff representatives, while the ruling by the Court confirms the point of view of **Union Syndicale**.

The Appointing Authority confirmed the position of the Settlements Office and rejected the complaint. The applicant then filed her action to the General Court.

The Arguments of the Parties and the Decision of the Courts

At the General Court, the applicant raised one single plea, alleging that none of the applicable provisions provided for a reimbursement ceiling for the rental of a CPAP machine. The decision of 2019 which applies such a ceiling thus disregarded those provisions and was therefore illegal. The applicant also pleaded that the Commission had not shown that the purchase of a CPAP machine was necessary for long-term use and that the argument of the Commission was not valid according to which those insurance affiliates who buy a CPAP machine were otherwise discriminated against those one who rent it.

The Court sets aside the decision of the appointing authority. Art. 20 of the Rules on sickness insurance does not foresee a ceiling for the rental of this medical device. Art. 20 allows to establish certain ceilings; even where no ceiling is established, the settlements office may not reimburse that part of the expenses that is considered to be excessive in relation to the normal costs in the country where these costs were incurred. This shows that the possibility for GIPs not to introduce reimbursement ceilings is expressly envisaged in the Rules on sickness insurance. Even a specific procedure is foreseen in order to safeguard the financial balance of

the JSIS in such a case. The part of the costs considered as excessive is determined on a case-by-case basis by the settlements office. It is therefore for the Commission (the authority competent to adopt the GIP), where it intends to establish a reimbursement ceiling, to make this ceiling appear explicitly in the provisions thereof.

If there is however no ceiling expressly mentioned in the GIP, this does not mean that a ceiling may implicitly be established for financial reasons. But the specific procedure has to be followed which is intended to ensure the financial balance of the JSIS. The GIPs provide e.g. for a reimbursement ceiling for the costs generated by the rental of wheelchairs and they provide for a reimbursement ceiling for the purchase of a CPAP machine, however they do not provide for a reimbursement ceiling for the rental of a CPAP machine. So, the Court concludes from the wording of the applicable rules that there is no ceiling on the reimbursement of expenses for the rental of a CPAP machine.

This result, the Court continues, is not called into question by the other arguments of the Commission. The Commission did not provide arguments why for medical reasons a CPAP machine had to be purchased instead of being rented over a longer period. Also the fact that prior authorisation is required both for the longer-term rental and the purchase of the machine does not mean that the ceiling applies likewise in both cases.

Regarding the principle of equal treatment between JSIS members, the Court states that an unjustified difference in treatment between affiliates who buy a CPAP machine and those who rent the same machine for a long period, assuming it is established, would not be likely to lead, for the purposes of respecting the principle of equal treatment, to an interpretation of the GIP which would be contrary to their wording, as well as to the scheme of the relevant provisions of the Rules on sickness insurance and the GIP. In the opinion of the Court, the same applies to the risk of bypassing the ceiling provided for the purchase of a CPAP machine or of a risk of jeopardizing the financial balance of JSIS. It is up to the Rules on sickness insurance to provide for mechanisms in order to prevent certain excessive costs from being borne by the JSIS.

Apart from that neither the existence of a difference between the amounts of the costs generated by the rental of CPAP devices and those generated by the purchase of such devices, nor the existence of a practice of circumventing the limit applicable to the purchase of a CPAP machine was any further substantiated by the Commission. Finally, the Court found that the existence of a risk of jeopardizing the financial balance of the JSIS that would result from the absence of a reimbursement ceiling for the rental of CPAP devices has not been established by the Commission.

The Court concluded that the settlements office, by setting a reimbursement ceiling in its response to the request for prior authorization submitted by the applicant, disregarded the GIP.

Comments :

1. The contracting authority applied a sort of analogy to flexibly align the two types of benefit from the medical device: its rental and its purchase. With the intention to treat the two types equally it applied a ceiling for the reimbursement of rental that however only exists for the purchase of that device.

2. The Court decides in line with a literal interpretation of the applicable norms: in the absence of a ceiling for reimbursable cost that has been set in accordance with the pertinent process, it is not possible for the contracting authority to interpret the existing stipulations in the sense that they align in their economic consequences (here: rental of medical device and its purchase). It is thus not the economic equivalence that prevails when deciding on the limits of reimbursement but the literal specification whether an expense as such is reimbursable or not.

3. The scenario would have been different if the settlements office had insisted in a purchase and had not granted the reimbursement of expenses for rental at the outset. It was the appointing authority that decided that the ceiling of 1700 € should be increased to a total of 3100 €, and it calculated this increase by a comparison to the cost that typically arise as a consequence of a purchase of the CPAP machine (although it has not been purchased). Yet, also this confusion of rental and purchase method cannot possibly lead to the creation of other rules concerning the ceiling than those that apply to the rental of the device.

4. It is interesting to remark that the principle of equality of treatment cannot be instrumentalised against the beneficiary of the insurance scheme to the point that it is applied against the wording of the norm itself. Earlier case-law (cf. Case T-685/14, EEB / Commission, 17 July 2015) prepared this argumentation to the point that the need to interpret secondary Union law in line with an international convention cannot serve as the basis for an interpretation of that law *contra legem*.

5. Likewise, existing case law (cf. Case F-14/11, AW / Commission, 5 June 2012) on the reimbursement of medical expenses, firstly, has made clear that there is no entitlement to a maximum reimbursable rate in all cases. Secondly, it is clear that the health insurance scheme common to the institutions has to maintain a financial balance (meaning a healthy correlation between expenditure and contributions) and that in this context the institutions are empowered – where there are no reimbursement ceilings established in the Staff regulations – to set such ceilings in the implementing provisions, without, however, exceeding the limits drawn to their power by the principle of social security.

6. In the case at hands it was certainly advantageous for the applicant that there is such a procedure foreseen for amending the existing set of norms in order to prevent the incurrence of excessive cost on the side of the health insurance system, also by introducing certain ceilings for the reimbursement of medical expenses. This helped to argue in this case that the appointing authority had chosen not to establish a ceiling for the rental of the specific medical device (the CPAP).

7. It is not uncommon that the Settlement Office invents ceilings that have not been foreseen in the GIP, artificially limiting reimbursements claimed by affiliates. This has turned to be illegal. **Union Syndicale** is happy to help colleagues who would continue to be victims of such practices.