Id Cendoj:	28079140012009100974
Judicial body:	Supreme Court, Social Chamber (*Tribunal Supremo. Sala de lo Social*)
Place:	Madrid
Section:	1
Appeal number:	4426/2008
Resolution number:	
Procedure:	SOCIAL
Reporting judge:	MARÍA LUISA SEGOVIANO ASTABURUAGA
Resolution type:	Judgment

Key terms:

- x (SOCIAL SECURITY) BENEFITS x
- x (SOCIAL SECURITY) PREVENTIVE ACTION x
- x HEALTHCARE PROVISIONS x
- x MEDICAL EXPENSES REFUND x
- x LIFE THREATENING EMERGENCY

Summary:

Medical expenses refund.

JUDGMENT

In Madrid, November 16, 2009

After hearing the judicial orders before this Chamber, under the cassation appeal for the unification of doctrine brought by Mrs. María Dolores González Ruiz, for and on behalf of Mrs. Yolanda, against the judgment passed on September 9, 2008 by the Social Chamber of the High Court of Justice of Valencia (*Sala de lo Social del Tribunal Superior de Justicia de Valencia*), appeal number 3844/07, brought by the defendant, the Regional Healthcare Department (*Consellería de Sanidad*), against the judgment passed by the Social Court number 1 of Alicante (*Juzgado de lo Social número 1 de los de Alicante*), under the judicial orders number 884/06, followed at the request of Mrs. Yolanda against Regional Healthcare Department on refund of medical expenses, we confirm the appealed judgment in all its pronouncements.

The Reporting Judge is Her Honour Mrs. María Luisa Segoviano Astaburuaga, Judge of the Chamber.

FACTUAL BACKGROUND

FIRST - On July 3, 2007, the Social Court number 1 of Alicante passed a judgment stating the following facts: "**1.** – In the year 1995, it was found that the plaintiff, born on 04/06/1970, had a family record of multiple endocrine neoplasia type II (MEN II) and on December 15, 2005, she underwent a total

thyroidectomy surgery with bilateral recurrent functional voiding. - **2. -** After this operation, the patient decided to have a family, without becoming pregnant, so she began a study of infertility and for a period of 2 years, she underwent 4 cycles of IAC, with negative results (years 2001-2002). That is why she had to undergo an assisted reproduction technique (IVF), and after spending a year on the waiting list, she received the papers to begin the treatment at the Hospital "La Fe" in Valencia on December 30, 2003. - **3.** - At that time, she was diagnosed with feocromotizoma in left adrenal, which was operated on May 18, 2004 and thus postponing IVF treatment. - **4. -** One month after this second intervention she decided to keep on with assisted reproduction and that is when she was told that due to her illness, she had to take the IVF with preimplantation genetic diagnosis (page 29 of the judicial orders), because otherwise there would be a 50% chance that the child could suffer from the disease (page 31); so the hospital did not agree on keeping on with the IVF treatment without first making the genetic diagnosis. - **5. -** In October 2004, she went to the Regional Healthcare Department and she had an interview with Dr. Germán, who indicated that such treatment was not available in the public system of social security (page 32) and therefore she turned to private medicine. **6. -** That on 06/12/2005 and on 29/03/2006 she requested upon defendant the refund of medical expenses amounting up to 11,416.25 Euros and that the Regional Healthcare Department denied them and to which she filed the previous claim, rejected by the resolution of 11/08/2006 - **7. -** The patient and several close relatives underwent a direct genotypic analysis of family medullary carcinoma / multiple endocrine neoplasia syndrome at the Hospital Sant Pau, Barcelona in 1996 and, the results being positive, among others, the appellant and her mother and sister (page 20 of the judicial orders) were also operated of CMT (page 39). The disease also appears in the son (born 04/08/2004) of the sister also affected and indicated (pages 40 to 44)".

SECOND - The verdict of that judgment states as follows: "Upholding the lawsuit brought by Yolanda against the REGIONAL HEALTHCARE DEPARTMENT, regarding REFUND OF MEDICAL EXPENSES, I must condemn and I condemn the defendant - REGIONAL HEALTHCARE DEPARTMENT-, to the payment in favor of the appellant the amount of 11,416.25 Euros".

THIRD – Against that judgment Mrs. Yolanda brought an appeal and the Social Chamber of the High Court of Justice of Valencia, issued a ruling on September 9, 2008, with the following verdict: "We uphold the appeal brought on behalf of the Regional Healthcare Department of the Generalitat Valenciana, against the judgment passed by the Social Court number 1 of Alicante, dated 03/07/2007, under the claim filed by Yolanda, and therefore, we revoke the appealed judgment and, with dismissal of the action initiating this proceeding, we absolve the defendant from the claim".

FOURTH - Mrs. María Dolores González Ruiz, for and on behalf of Mrs. Yolanda, brought an appeal for the unification of doctrine against the judgment of the High Court of Justice of Valencia and, the parties having been summoned, it was formulated, in writing time of interposition of this appeal, indicating as a contradiction with the appealed ruling, the judgment of the Social

Chamber of the High Court of Justice of Castile and Leon (*Tribunal Superior de Justicia de Castilla y León*), with seat in Burgos, on February 13, 2008, appeal 11/08.

FIFTH - By order of this Chamber, the appeal was given lead to proceed, and having been challenged by the appealed judgment, the proceedings moved to the Public Prosecutor, who presented the report, considering the application inadmissible. And the Honorable Mrs. Reporting judge declared the judicial orders as conclusive, and voted and decided on November 10, 2009, date on which it took place.

LEGAL ARGUMENTS

FIRST - The Social Court number 1 of Alicante passed a judgment on July 3, 2007, judicial orders 884/06, upholding the claim filed by Mrs. Yolanda against the Regional Healthcare Department, in claim for refund of medical expenses, condemning the defendant, the Regional Healthcare Department to pay the plaintiff the sum of 11,416.25 Euros. As stated in this judgment, it was found that the plaintiff had a family record of multiple endocrine neoplasia type II (MEN II) - her mother and sister, who were operated of CMT, and her sister's son, born on 04/08/04, suffer it - and underwent surgery for total thyroidectomy surgery with bilateral recurrent functional voiding on December 15, 1995. She decided to undergo the assisted reproduction technique (IVF) and, after spending a year on the waiting list, she received the documentation to start the treatment at the Hospital “La Fe” in Valencia on December 30, 2003, shortly after being diagnosed pheochromocytoma in left adrenal, of which she was operated on May 18, 2004. She was told that in order to take the IVF she had to undergo a preimplantation genetic diagnosis, because otherwise there was a 50% chance that the child could suffer the disease, so the treatment was not going to be carried out without first performing the genetic diagnosis. Mr. Germán informed her that the treatment was not available in the public system of Social Security, so she turned to private medicine. The judgment understood that the appellant was entitled to a medical assistance such as the one provided because, first, parents cannot be denied the right to have a child and second, the medical prescription itself requires, in order to go ahead with the IVF, the preimplantation diagnosis, which means that the patient meets the requirements for accessing the requested refund of expenses within the constitutional right to health care in appropriate conditions.

The defendant Regional Healthcare Department having appealed, the Social Chamber of the High Court of Justice of Valencia issued a ruling on September 9, 2008, appeal number 3844/07, upholding the filed appeal, revoking the appealed judgment and, after dismissing the claim, acquitted the defendant from the claims. The judgment, invoking this Chamber’s doctrine in the judgment passed on March 25, 2004, appeal 1737/03, understood that there should be no refund of expenses because we are not facing a life-threatening emergency in which Public Healthcare System cannot be used, which is the case provided in Article 5 of Royal Decree 63/1995, but before a case in which genetic tests were necessary for further IVF treatment. If the said tests had been denied, the claim may be brought in the appropriate way, but the

said denial would not involve any life threatening risk for the situation in which the appellant was at that time.

The appellant filed a cassation appeal against the said judgment for the unification of doctrine and, as the party did not choose any sentence of all those mentioned in the written proceedings, for which the Chamber gave her ten days in February 2, 2009, the most recent of the alleged was selected by default, which was the judgment of the Social Chamber of the Social Chamber of the High Court of Justice of Castile and Leon, with seat in Burgos, February 13, 2008, appeal number 11/08, firm at the time of publication of the appealed.

The defendant, the Regional Healthcare Department of the Generalitat Valenciana, has challenged the appeal and informed the Public Prosecution that the appeal is considered inadmissible.

SECOND – The contrasting judgment should be examined to determine whether it satisfies the condition of the contradiction, as stated in Article 217 of the Employment Procedure Act (*Ley de Procedimiento Laboral*), which says that with substantially identical facts, grounds and claims, compared judgments have issued different statements.

The contrasting judgment, passed by the Social Chamber of the High Court of Justice of Castile and Leon, with seat in Burgos, on February 13, 2008, appeal 11/08, upheld the appeal filed by Mr. Jorge Sopeña Sanz and Mrs. María Eugenia Gómez Yaguez against the judgment passed by the Social Court number 3 of Burgos, on November 19, 2007, judicial orders 545/07, followed at the request of the appellants against SACYL, condemning the defendant to pay the appellants the amount of 9,445 Euros. According to that judgment it appears that the appellants were diagnosed to be carriers of the cystic fibrosis disease and due to the rejection by the Gerencia to pay the medical treatment through assisted reproduction and preimplantation diagnosis to achieve pregnancy of healthy children, they attended private healthcare, which performed the preimplantation genetic diagnosis (IVI). The judgment states that, as it has not been proven that the Public Health has facilities for the treatment of preimplantation diagnosis to achieve pregnancy with healthy children, even if it is not a life-threatening emergency, the fact is that such treatment is required, so, under Articles 39.1 and 43.2 of the Spanish Constitution, 98.1 of the General Law of Social Security (*Ley General de la Seguridad Social*) and 102.3 of the said law, it should be recognized that the appellants are entitled to get a refund for the requested expenses.

Between the appealed judgment and the contrast judgment, come together the identities required by Article 217 of the Labor Procedure Act because in both cases the refund of health expenses generated outside the Social Security system is claimed, consisting in a preimplantation genetic diagnosis, required by the Public Health System for the assisted reproductive treatment the beneficiary was going to undergo, in view of the risk that the child may suffer from certain genetic disease. It is found irrelevant the fact that in the appealed judgment the disease was only suffered by the woman and that it was about left adrenal pheochromocytoma, while in the contrast judgment the

disease was suffered by both appellants and it was cystic fibrosis. So, what matters is that, given the risk of genetic transmission of the disease, the Public Health System requires, for the realization of the assisted reproduction technique, a preimplantation genetic diagnosis that cannot be done through the said public system, so the beneficiaries have turned to the private healthcare and claim a refund for the expenses incurred. The compared judgments have reached contradictory results because, while the appeal understands that such refund is not appropriate, the contrast judgment states the opposite.

The requirements of Articles 217 and 222 of the Labor Procedure Act having been fulfilled, it is appropriate to enter the substance of the matter.

THIRD - The appellant alleges infringement of Articles 15, 39 and 43 of the Spanish Constitution, and 5.3 of Royal Decree 63/95 of March 20 and 4.3 of Royal Decree 1030/06 of 15 September.

The appellant puts forward that she is entitled to refund and payment of the claimed expenses for an intended, logical, fair and protectable purpose, because it has not been proven that the Public Health has the facilities required for the treatment of preimplantation diagnosis to achieve pregnancy with healthy children. The case is framed in what law and jurisprudence understand as “life-threatening emergency" because although it does not pose an imminent danger to the assistance beneficiary’s life, if the treatment had not been received, it could have meant a serious health risk for her unborn child.

The scope and limits of the right to health care has been examined by this Court in many judgments, among which we note the judgment of July 4, 2007, appeal 2215/06, which was upheld, condemning the defendant to refund the requested medical expenses, considering that it was a “life-threatening emergency”, as such term not only includes the imminent danger of death, but also the risk of loss of functionality of important organs for the person’s self-assurance. This judgment reasons out as follows: “1. -Article 102.3 LGSS/74, not repealed by Legislative Royal Decree 1/1994, states that “the institutions responsible of providing health care will not charge expenses that may arise if the beneficiary uses other health services different from those assigned, except in prescribed cases determined by regulation”. And with a similar content, Article 14 LGS (14/1986 April, 25) states that “Public Administrations required to provide health care to citizens will not charge the expenses that may arise from the use of health services different from those allocated in accordance with the provisions of this Act, with the provisions enacted for its development and with the rules approved by the Autonomous Communities in the exercise of their powers”.

Regulatory determination that at this date is set out in the Royal Decree 63/1995 (20/January) on the Regulation of Health Assistance of the Public Health System, of which Repeal Provision’s only rule is that “any provisions of equal or lower rank that conflict with the established in this Royal Decree shall be repealed” and, in particular, Article 18 of Royal Decree 2766/1967 of November 16, and Decree 2575/1973 of September 14, by which this provision is amended. Well, the Article 5 of Royal Decree 63/1995, in force, states: “1. The use of the services shall be performed with the available means in the

Public Health System, in the terms and conditions provided in the General Health Act (*Ley General de Sanidad*) and other provisions which may apply and respecting the principles of equality, proper and responsible use and prevention and punishment of cases of fraud, abuse or diversion. 2. The services listed in Appendix 1 shall be requirable only in respect of the staff, the facilities and the services, owned or concerted by the Public Health System, except as provided in international agreements. 3. In cases of health care emergency, immediate and of a life-threatening character, treated outside the Public Health System, expenses shall be refund after checking that the adequate use of the Public Health System was not possible and that it does not constitute an abusive or diverted use of this exception".

2. – Certainly, the comparison between the two Regulations [Decree 2766/1967 and Royal Decree 63/95] shows that nowadays, non-justified denial of assistance putting forward the express (legal) cause of refund has disappeared (as indicated in the STS 03/25/04 -rcud 1737/03 -), which arise the (non-peaceful) question of knowing the amount of the refund in such cases, after the validity of Art 2-e of Law 29/1998 (13/July) and the amendment of Article 9.4 LOPJ, conducted by the Organic Act 6/1998 (13/July). But the truth is that it is unnecessary to deal with such a question, because the alleged denial of life-threatening emergencies and denial of assistance are not often presented in their conceptual purity, but more usually do so in circumstances that offer a complex mixture of the characteristics of both. In this specific case, although the patient was included in a "waiting list", what in a sense could be considered an objective denial of providing adequate health care service, as late health provision involves the improper satisfaction of the right to health care, the truth is that factual details asserting the existence of an "urgent, immediate and life-threatening character" health care need are also influent. We deal with this last aspect as follows".

The judgment of May 29, 2007, appeal 4407/05, denied the refund of expenses requested for a surgery for gender reassignment. The unified doctrine contained in the judgments of this Court of October 31, 1988, October, 13, 1994 and December, 21, 1995 state as follows: "a) The refund of expenses incurred for medical health care stands between the patient's demand of having the means for the treatment or health recovery, and the obligation by the Social Security to provide them, and therefore, to have them available for the patient. Case law has considered the problem usually based on the demands of the patient. However, the judgment of June 4, 1986, which doctrine reiterates the February 16, 1988's one, states that Social Security, like any similar entity, has to ensure both efficiency and equity in services provided, as well as the needed financial stability of the system. This involves the recognition of inherent limits to the assistance due by Social Security, although by its special nature, these are not usually required as occurs in relation to money allowances...

b) The problem of due care is a medical issue, which legally only requires to determine if in fact it was demanded by the patient as such, and if in fact it was or it was not provided by the entity obliged to do so. But alongside with this assessment, that starts from the patient individually considered and ignores the specific context of the place and the means in which he is placed, a

reverse direction must be considered, we have to start from a whole of available means in a specific, real, and not indeterminate way, i.e. the barely existing ones for medical science and according to them, measuring the assistance required by the patient. These points of view is essentially social and as a legal issue it sets out the determination of what means are requirable to the Management Entity to make them available for the patient.

c) The conflict between one term and another (the individual and the social ones) is already in the Constitution, as its Article 43 begins with the recognition of the right to health care, what opens in an indeterminate way the expectation to as many means are appropriate for the recovery of health. The second paragraph concludes stating that “the law shall establish everyone’s rights and duties on the matter”, and as it extends the right to “everyone”, it is excluding necessarily those means that are outside the special area of sovereignty of law, which because of its emerging or limited nature, such as the services of an exceptional physician, are only available to some but not to all.

d) The same conflict between the two terms is found in the regulations of Social Security, as the Article 98 of the Social Security Act of May 30, 1994, sets as an objective of the health care medical and pharmacist services to maintain and restore health, without specifying their scope; while Article 11 of Decree 2766/67 November 16, limited therapeutic and diagnostic techniques “to all those considered requirable by the physicians assistants” and art 18 itself of that same Decree, when it refers to the unjustified denial of the due service to the patient, leaves open the possibility of even if the health care assistance to the patient is mandatory, its refusal is although justified, Social Security is not obliged to give it...”.

This doctrine is reiterated in the judgments of October 20, 2003, and March 20, 2004, (appeal 1737/03), the latter stating that “healthcare due by Social Security has its limits, and the content of the protective action of the system, characterized by limited means and its projection towards universal coverage of vocations, cannot constitute the application of those means that are not accessible or available in the Spanish Healthcare for those requesting them”.

The appeal must be dismissed in application of the doctrine previously recorded, as in the examined case there is not a “life-threatening emergency”, according to the broad sense interpreted by the Chamber in accordance with the constitutional mandate on the right to health protection, Article 43.1 of the Constitution, which refers not only to the danger of imminent death, but also to cases of loss of function of organs of great importance for the self-assurance of the person. Indeed, the right to refund of expenses incurred in the performance of a genetic diagnosis in private healthcare, so that, in view thereof, the Public Health conducted on the patient the assisted reproduction treatment, lacks of a life-threatening nature as it does not involve an imminent danger of death or a loss of function of organs of great importance for the self-assurance of the person, so the appealed judgment does not breach the provisions contained in Article 5 of Royal Decree 63/1995 (applicable for chronological reasons). After formulating the appeal on the infringement of Articles 15, 39 and 43 of the

Spanish Constitution, 5.3 of Royal Decree 63/1995 of January 20, and 4.3 of Royal Decree 1030/06 of September 15, the last two provisions being the ones developing the Constitutional mandate of protection of health, it must be concluded that the judgment has not infringed any of the stated provisions. First, it should be noted that the Royal Decree 1030/06 of September 15 does not apply to the case, based on the date on which the appellant underwent assisted reproductive techniques, with completion prior preimplantation genetic diagnosis. The alleged breach of Article 5.3 of Royal Decree 63/1995 of January 20 is thus also dismissed. Indeed, such provision envisages the refund of medical expenses incurred outside the Public Health System, in cases of urgent, immediate and life-threatening health care, but as it could not be proven that the services of the Public Health System could not be used, and as the use of external services have not had a deviant or abusive nature, and as was reasoned above, this case did not involve a “life-threatening emergency”, the refund of expenses is overruled. We must emphasize that in the Appendix I of the above mentioned Decree, which contains the list of health allowances, not only the preimplantation genetic diagnosis is not mentioned among the allowances provided by the Public Health System, but it is not mentioned as well in the Public Health common services portfolio, regulated in Appendix I of Royal Decree 1030/06 of September 15, for assisted reproduction.

For all the rationale, the appeal is dismissed.

For the above, in the name of Mr. Germán and by the authority given by the Spanish people.

WE DECIDE

We dismiss the cassation appeal for the unification of doctrine filed by the representation of Mrs. Yolanda against the judgment passed on September 9, 2008, by the Social Chamber of the High Court of Justice of Valencia, appeal number 3844/07, brought by the defendant Regional Healthcare Department against the judgment passed by the Social Court number 1 of Alicante, judicial orders number 884/06, followed on demand of Mrs. Yolanda against Regional Healthcare Department for refund of medical expenses. We confirm the appealed judgment in all its pronouncements, without judicial costs.

Deliver the proceedings to the relevant judicial body, along with the certification and the communication of this judgment.

Through this judgment, which is to be inserted in the LEGISLATIVE COLLECTION, we pronounce, command and sign it.

PUBLICATION - On the same day it was read and published the previous judgment by Hon. Judge María Luisa Segoviano Astaburuaga, being held Public Hearing the Social Chamber of the Supreme Court, of which as Secretary, I certify.