STSJCL 660-2009 - excerpts

Health care benefits: reimbursement of expenses for the assistance provided by external services to the Social Security: services or treatments not provided by public health: lack of specialized organs that solve or mitigate illnesses.

FACTUAL BACKGROUND

[not excerpted]

Evidentiary facts:

FIRST.- Mrs. Almudena, ID NUM000, born on the 12-14-68 and resident of Villahizan de Treviño (Burgos), is affiliated to the General Regime of the Social Security with the number NUM001 under her condition of Sanitary Services' worker of the Autonomous Community of Madrid and has as such the right to health care of the Social Security.

SECOND.- The party (applicant) has undergone a long eating disorder, alcohol poisoning and behavioral and personality disorder process. It goes back to at least 1991. Since then, to date she has had to be assisted in the emergency services of the Social Security in Burgos and Madrid.

THIRD .- In the General Hospital of Burgos she has been admitted in the following dates: 07-04-92, 04-16-92, 08-27-01, 07-09-04, 04-16-04. On the latter it was for a three meter fall resulting in joint and bone injuries.

FORTH.- Likewise she has been treated both on outpatient and inpatient basis in several centers. She was referred to the Aldama center in Palencia by the Burgos' services.

FIFTH. – On 10-15-07 she was dismissed from the Jimenez Diaz Foundation's services and she was told that in the event of deterioration or appearance of new symptomatology she was to turn to the emergency services. On 11-03-07 and under the advice of Dr. Cecilia, psychiatry's specialist in Madrid not belonging to the Social Security Services who had been doing the party's follow up since 2005, the party is admitted in the I.T.A. Center in Barcelona, which is a specialized center in treatments for the illnesses as the suffered by the applicant today. There she was hospitalized from November 7th of 2007 until November 2008. The incurred expenses amounted to 35,740.82 euro.

SIXTH.- This center is not subsidized by the Social Security.

SEVENTH.- The applicant claims the reimbursement of the mentioned amount. After exhausting the preliminary complaint procedure she made the application before this Court on 03-20-09.

THIRD – [not excerpted]

FOURTH.- In the resolution of this appeal current legal provisions have been observed.

The legal representative of the party on the basis of a series of motives within the appeal:

In the first place, and on the basis of the article 191 b of the LPL, it advocates a modification of the evidentiary facts in the sense that the sub-paragraph fifth reads as follows: "and under the advice of Dr. Cecilia, psychiatry's specialist of Madrid, belonging to the Social Security's Services, who had been doing the party's follow up since 2005" (sic.). Although it should read: since 2001.

In this regard, it cites as documentary evidence sheet 99 and sheet 123. From sheet 99, it can be drawn that in fact the mentioned doctor had treated Mrs. Almudena since 2005, - and earlier- being also true that the mentioned doctor belongs to the Social Security services, as it can be drawn from sheet 123, which states that her work is developed in the *Hospital Clínico*, and therefore she provides her services to the Social Security.

In essence, the modification of the evidentiary facts has to be accepted, what significance is to be attached to this revision in regard to the resolution of this procedure is a different matter.

SECOND.- On the basis of article 191 b of LPL, the withdrawal of the sentence issued in III is expected taken into account that it breaches the content of article 4.3 of the RD 1030/06 of September 15th *and article 102.3 of the LGSS, and another series of provisions.*

It considers, in short, that public health care services could not be used owed to the emergency of the situation on the one side, being EXIGIBLE to the public health care system the rehabilitation of patients with a recoverable functional deficit, meeting the present situation the "vital emergency" requirement.

We shall turn to the evidentiary facts. From them it can be drawn that:

a) The party shows an eating disorder, alcohol poisoning and a behavioral and personality disorder. She had been admitted in several occasions by the Emergency Services of Madrid and Burgos since 1991. She had been assisted for a three meter fall resulting in bone fractures.

b) Having been referred to the Aldama service in Palencia.

c) She was dismissed from the Jimenez Diaz Foundation, with the particular mention to turn to the emergency services in the event of deterioration. On November 3rd of 2007, under the advice provided by a psychiatrist doctor belonging to the Social Security's Services, who had being doing the party's follow up since 2005,- revised evidentiary fact-, the party was admitted in the ITA center of Barcelona, specialized center in the treatment of the illnesses suffered by the party, staying in the mentioned center from November 7th of 2007 until November of 2008, amounting the expenses to 35.740,82 euros.

From all the above the following can be drawn. In the first place, the clear existence of the party's serious illnesses: eating disorder, alcohol poisoning and behavioral and personality disorder. This situation however, did not have an origin immediate to her admission in the ITA center of Barcelona, as it goes back to 1991. And it is since then that the party has been treated by the Public Health Care services. Both in Burgos and Madrid.

She had even been admitted in Burgos on the following dates: July's 4th of 1991, April's 16th of 1992, expending over nine years since then until her next admission on August 27th of 2001, and afterward on August 27th of 2001 and April 16th of 2004, in the latter case because of a three meter fall resulting in serious injuries.

The treatment consisted both of hospitalization in several centers and of an outpatient basis. From 1991 she has been assisted uninterruptedly by Public Health Care and, in an identical way, she hasn't always been hospitalized, in several occasions she has been treated on an outpatient basis. And, on the other side, her admissions in the emergency services have been spaced in time as since 1991 to 2004 she has only been hospitalized five times.

In the same way, taken a *contrario sensu*, it is obvious that given the proven facts the party has not yet recovered from her illnesses, as short after her dismissal from Jimenez Diaz Foundation she was advised to go to a specialized center external to the Public Health, in particular the ITA, to cure her pathology. In a *contrario sensu this* states Public Health Care's recognition of its own incapacity to cure the mentioned illness through its sanitary services. And, regardless the fact they had been treating the beneficiary for a long period of time, she has not recovered- not even closely- her health or well being. Altogether the evidentiary facts reveal that the only way that public health's organs have to cure the party's illness is limited to "emergency assistance when she's seriously ill" - paragraph fifth related to paragraph third-. Which, applying common sense, do not seem very convincing means.

As it has been stated by reiterated doctrine, article 43 of the Spanish Constitution, enshrines the right of citizens to the protection of their health, stating that public

authorities are responsible for organizing and guarding public health through preventive measures and health provisions and services. This is why the provision of health assistance by the Social Security, since the Constitution's validity and in particular the April 25th of 1986's law (Health general law), it doesn't have to be understood as a real public insurance mechanism but as an essential public service of compulsory provision by the public authorities. However, its content and beneficiaries are to be stated, according to the Constitution's article 53.3, by the laws that develop the constitutional text.

The Spanish legislator has opted for the provision of this service through the national system of Health's own means, of a public nature. The right's holder cannot address sanitary institutions different from the foreseen ones to obtain the corresponding provisions, being the originated expenses charged exclusively to it.

Therefore, we begin with the existence of a generic right to health protection, it gathers within it specific rights to health assistance, provision that shall be obtained through the means designated by the public health system in accordance with the terms described in the current legislation. To the degree that public means used to make the mentioned provisions effective by the Administrations are indeed limited and are composed by political and budget decisions which are adopted by the Public Authorities throughout time, there's a tendency to think that the specific content of health care benefits is defined by the adequate availability of the mentioned means. But it isn't like this, the content of the right to health care benefits comes defined by this law and not by the real possibility to exercise the benefit through the public services. If the existing health care benefits right is not fulfilled by the Administration obliged to it, we find ourselves before the breach of an Administration's obligation, consisting of an undue refusal of assistance. The same happens when, given the Administration's lack of means, the beneficiary finds himself/ herself deprived from the possibility to turn to the public health care.

It is not alleged in this case that the provision was not covered by the public health care, but the lack of the needed health assistance in the required time on the basis of the patient's illness, which forced her to turn to private health care following the advice of a doctor from the Public Health care. In the foretold Private Health Care she was to try to find cure to her illness.

The undue refusal of assistance is an assumed scenario of reimbursement of expenses which is gathered in the legislation prior to the RD 63/95, but that it is omitted in the latter. In regard to this matter an interpretation problem has raised related to the replacement of the provision of article 18 in the Decree 2766/67 of November 16th, by the article 5.3 of the RD 63/95. In regard to the disappearance of the express reference to the undue refusal of health assistance in the new law, it has been interpreted as a restriction to the reimbursement of expenses scenarios, which

would then be limited to vital emergency with an additional required of immediacy introduced by the new law.

However, the STSS of November 8th of 1999 notes in regard to the replacement of article 18 in the DECRETO 2766/67 of November 16th, by the article 5.3 of the RD 63/95 that “when examining if the legislative variation has the necessary scope to provoke inconsistencies in the decisions, or if on the contrary, even though we are dealing with diverse provisions, given the equity of legislation in the matter that's relevant to solve the executed claim, it can be referred to as identity of legal grounds, thesis that the High Court is leaned to support”.

The Supreme Court adds that the medical expenses' reimbursement obligation shall take place not only in the event of neglect or vital emergency, already expressly regulated, but also if the lack of assistance or the error jeopardized the definitive cure of the patient.

This responsibility shall be preached in the new legislation, and that's because the same reasons that led to this doctrine remain, in this sense the new legislation is the same as that of article 18 of Decree2766/67, and it is wider than the one of article 73 of the *Compulsory Sickness Insurance Act*, but it is also expressly foreseen in the statement of purpose of the RD of January 20th of 1995, that health care benefits and the equal protection of health according to the Constitution's article 43.

Actually, RD 63/95 observes these directions when it regulates the exclusion from treatment leading to breach of the constitutional principle of equity, or significant omissions in its regulation, such as the exclusion from psychiatric treatment, and according to this direction, the lack of a mention of how a diagnosis' mistake cannot lead us to the conclusion that in that event the reimbursement obligation should be excluded.

In the same way, we can note that the High Court has repeatedly declared that “emergency assistance in regard to medical expenses' reimbursement has to be defined not by the mere emergency of the assistance but by the fact that this emergency implies the impossibility of access of the beneficiary to the Social Security’s services”, but when the possible emergency has not prevented the access of the party to the Social Security’s Health care services, but what has really happened is that the demanded provision has been denied on the basis of unavailability or not dispensable, we are before an event of reimbursement for undue refusal of assistance, which obviously still exists even though it is not expressly gathered in RD 63/95.

In the cases in which the state of need does not show seriousness and immediacy, some additional requirements could be established, as the beneficiary, in the event of disagreement with the denial or the diagnosis would have the burden to exercise the claim or appealing measures foreseen, or turn to the specialized doctors different to

those of the emergency system. Moreover, in accordance with article 22 of the CEE Act 1408/71, the managing body is obliged to authorize the referral to other countries' health services, when the due assistance cannot be provided at the required time by the Spanish Health Care. The current health and probable evolution of the beneficiary's health has to be taken into account. That is, when the wait to obtain the required assistance implies a serious risk for the protected rights in the Constitution's article 15. It would then be absurd that the managing entity could authorize an external provision of assistance abroad and not in the national territory. In the same way, an interpretation according to which an authorization does not have to be processed prior to receiving the assistance cannot be reached, appealing denial resolutions before the judicial organs. Since the risk that the patient's health state does not allow to wait for Health Care, it would neither allow the wait for Justice Administration. This is where article 5.3 of the RD 63/95 enables the beneficiary to adopt the decision to turn to external means, with the right to expenses' reimbursement, assuming the right to mistake the assessment of the concurring circumstances and, therefore, that of the possibility of reimbursement. It is important to highlight that in these circumstances the reimbursement's mechanisms operate as an authorization to use external means with a retroactive effect (option allowed by article 57.3 of Law 30/92). Authorization can be revised through a legal action.

That is why it is possible to re-orientate these undue refusal of assistance cases to article 5.3 of RD 63/95, which on the basis of its own reduced rank, it cannot introduce substantial variations in the regulated right, which has constitutional rank.

In essence, the emergency implies relating two different time terms, the one needed to obtain the due public assistance and the one needed to obtain an external assistance. If the difference between them implies a time lapse from which a serious risk for life, health or physical integrity may emerge, then we will be in an emergency situation. The emergency could take place both when access to public services within the right time to receive treatment becomes not viable as a consequence of remoteness, and when it is owed to its shortage or to the undue refusal of assistance. Or when the mentioned assistance cannot be provided through its own means, as it is proven in this case, that although the party had been assisted during a long period of time her health hasn't improved.

And even that circumstance is backed up by the fact that Public Health Care had previously referred the patient to Jimenez Diaz Foundation, which is the reason why and in a contrario sensu states it acknowledging its incapacity to find a solution to the party's illness.

Moreover, the emergency will also be determined when as a consequence from a time lapse in treatment, that is a period of time in which the party is not treated, it could affect negatively a first importance legally protected good, such as her health. It has to be pointed out that vital emergency is not strictly limited to “life”, it is

something “important and trascendent to a maximum extent”. In fact, not even the first meaning of “vital” has to be interpreted as death threat, because there are many other possible injuries that, without implying death threats, do affect substantially to a person's life quality. Therefore, it is the foreseeable affection of life, without reaching its loss, to what the concept “vital” refers to.

That's why, regardless the used terms in article 5 of the RD 63/95, it must not be forgotten that in virtue of the normative hierarchy, regulations cannot override law. Even less when the latter is the Constitution itself, which occupies the highest RANGO in the Spanish legal system, in particular article 5 cannot interpret restrictively or limit the content of articles 15 and 43 of the Constitution. The mentioned article 5.3 of the RD has then to be interpreted systematically in relation with the protection of citizens' health obligation. For the expenses' reimbursement to be appropriate, it isn't necessary for the life of the patient to be in real and imminent risk, it is enough with a rational probability of delay in receiving assistance that could lead to serious health harm in the shape of sequels or even the enlargement of serious sufferings, as that is the extent to which goods are protected by article 15 of the Constitution.

Moreover, in the present case the mentioned emergency clearly derives from the patient's history, who had been hospitalized in several occasions in the Emergency Service, once with serious injuries after a three meter fall. This backs up the thesis that a delay in treatment, or when it hasn't been appropriate- as it has been proved throughout her assistance within the Public Health Care-, it is perfectly possible that the patient may become sick again, to the extent that it may become irreversible, even life threatening.

Consequently, in accordance with the second paragraph of article 22.2 of the current CEE Act 1408/71, the use of external means will have to be authorized, consisting of a provision included in the services of the managing entity, when it is not possible to receive an ideal efficiency degree that allows the patient to recover her health within a useful time lapse. If it weren't the case, we'd reach the absurd event in which the patient would have the right to receive treatment in another member State to the CEE, charging the Spanish Public Service, but she wouldn't be able to receive it in the national territory.

In addition, that right is exercised, not only when health assistance has to be received from external means to the Social Security, but when requirements to obtain authorization are met, and even though it is unreasonably denied. It isn't necessary to process a previous authorization for the mentioned reasons.

In order to back up this doctrine, we can cite the STSJ of Andalucía of January 18th of 2000, which notes that “vital” emergency, as gathered in the mentioned RD63/95, would also take place, not only in cases of impossibility to use the Social Security's Health Benefits, but also because of the delay in receiving the provision of that assistance, or given the fact that these weren't in the condition to provide them in the

required manner, and therefore they would risk not only the patient's life but also the cure of her illness, as it would be the present case".

It is precisely in the case this procedure deals with, when the Social Security's psychiatrist who has been doing the patient's follow up since 2005, - as noted in the appeal's first motif- or 2001- as it is mentioned in the rest of the appeal-, and therefore, with a perfect knowledge of the patient's state, and who has indicated that she should turn to the ITA to cure her illnesses. Consequently, the patient did not leave the system, she has even been treated within it since 1991, she followed its recommendations, among them the one to turn to the Jimenez Diaz Foundation and then to the ITA in Barcelona. She followed the advice and guidance of the Public Health Care. Taking into account that it was the public health care that referred the patient to the Jimenez Diaz Foundation, it implied the express recognition of its lack of adequate means to treat the patient's illness. And once the treatment in the Foundation was over, no solution was offered to the patient, but to turn to emergency services when her illnesses suffered deterioration. That is, after her stay in the mentioned Foundation, the patient was left to her own devices.

It has to be assessed that in this case, the effect of the party's good faith following the advice provided by Dr. Cecilia, psychiatrist of the Madrid's Social Security, being necessary to add that in accordance with article 7.1 of the Civil Code "the general principle of good faith is EXIGIBLE in Law, qualified as LAPIDARIO and CATEGORICO, according to which rights are to be exercised complying with good faith rules, and if initially a loyal behavior in every action, it's necessary to understand and keep the VALIDEZ in Law of the exercised actions by the beneficiary, when this has acted loyally and out of good faith". And this rule, has even taken to condemn Social Security's managing entities, in the factual events which are similar to the problem that now rises. (STSJ of the Canary Islands, November 30th of 2007).

In conclusion, it is clear that this illness cannot be treated by the Public Health Services, as it was proven by the fact that she was referred to the Jimenez Diaz Foundation initially, and afterward, on the basis of the advice of the psychiatrist who has always treated her within the Social Security, to the ITA, in such a way that only the latter treatment is revealed as a possible cure of the patient. Therefore, if it's not possible to use the Public Health Care to protect a legal good considered** as fundamental, such as health- because there are no specialized organs in the Public Health Care-, and the beneficiary has to turn to Private Health Care, it seems clear that there's a deficiency in the Public Health Care that shall lead to the necessary reimbursement of the incurred medical expenses by the party. In essence, the party should not be obliged to undertake expenses which have their origin in the inexistence of specialized organs, within the Public Health Care, that can solve her illnesses or at least mitigate them. And that has determined the need to turn to Private Health, and curiously on the basis of the specialists of the Public Health Care itself. Therefore, we do not find ourselves before a misuse or abuse by the party of the capacity to turn to Private Centers.

The Supplication Appeal has to, therefore, be estimated, which leads to the integral revocation of the lower Court ruling and the assessment granting the application. The amount of the claimed expenses has not been argued by the demanded entity throughout this procedure. Being understood that these expenses have been effectively originated in the ITA of Barcelona during the time that the patient was hospitalized in the center.

Accordingly, on behalf of the King and the pursuance of the authority granted by the Spanish people,

WE RULE

That we must assess and we assess granting the appeal made by the legal representative of D. Ignacio and D. Almudena, against the judgment issued by the *Social Court number One of Burgos*, of June 30th of 2009, on the present case 315/09, followed in the mentioned Court in virtue of the claim opposed by the claimants against SACYL regarding Social Security (expenses' reimbursement) and, consequently, the overturn of the appealed judgment and the complete assessment of the claim, we shall declare and we declare the plaintiff's right to the reimbursement of the medical expenses' derived from the treatment received in the *Institute for Eating Disorders* of Barcelona during her stay from her admission on November 7th of 2007 until her dismissal on November of 2008. In the same way, we shall sentence and we sentence the HEALTH MANAGING AREA OF THE PRIMARY HEALTH CARE OF BURGOS, to pay to the plaintiff Almudena the amount of 35,740.82 euro (thirty-five thousand, seven hundred and forty euro, eighty-two cents).