

**ATTACHMENT A**

**THE PROPOSED DECISION**

**BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA**

**In the Matter of the Statement of Issues Against:**

**ANDY R. WILSON, JR., Respondent**

**Agency Case No. 2023-0057**

**OAH No. 2023060709**

**PROPOSED DECISION**

Matthew S. Block, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on April 4, 2024, by videoconference from Sacramento, California.

Cristina M. Andrade represented the California Public Employees' Retirement System (CalPERS).

Alan R. Wilson (Mr. Wilson) appeared on behalf of his father, Andy R. Wilson, Jr. (respondent), who was unable to appear at hearing due to advanced dementia.

Evidence was received, the record closed, and the matter submitted for decision on April 4, 2024.

## **ISSUE**

Did the CalPERS Long-Term Care Program (LTC Program) appropriately deny respondent's benefit eligibility prior to March 28, 2022?

## **FACTUAL FINDINGS**

1. CalPERS is the state agency responsible for administering the Public Employees' Long-Term Care Act (PELTCA, Gov. Code, § 21660 et seq.) PELTCA requires the CalPERS Board of Administration (Board) to establish an optional long-term care insurance program for public employees and retirees, as well as certain members of their family. In turn, the Board established the LTC Program; created two insurance plan options, Comprehensive and the California Partnership; and adopted underwriting standards and benefit criteria for both plans. The plans are voluntary and funded entirely by enrollee premiums. The Long-Term Care Group, Inc., (LTCG) administers the LTC Program for CalPERS.

2. Respondent obtained coverage under the Nursing Home and Assisted Living/Residential Care Facilities Only Plan (Facilities Plan), effective December 1, 2000. On September 25, 2021, respondent moved into his own apartment at Watermark at Cherry Hills (Watermark), an assisted living facility located in Albuquerque, New Mexico.

3. Mr. Wilson has power of attorney to act on respondent's behalf. On November 16, 2021, Mr. Wilson submitted a Long-Term Care Claim Form to LTCG to initiate a benefit eligibility determination for reimbursement of the costs of respondent's care at Watermark. On March 4, 2022, LTCG sent a letter denying

respondent benefit eligibility because he did not qualify under the terms of his Facilities Plan.

4. On April 7, 2022, LTCG received a request on behalf of respondent for reconsideration of the denial of benefit eligibility effective August 27, 2021. On May 4, 2022, LTCG sent a letter denying respondent's request for reconsideration of the denial of benefit eligibility prior to March 28, 2022, but approving benefit eligibility beginning March 28, 2022.

5. On June 8, 2022, Mr. Wilson submitted a Notice of Claim Appeal to LTCG on respondent's behalf, along with a letter requesting "CalPERS to perform its contractual obligations and pay for covered services beginning November 25, 2021" or in the alternative, "rescind its contract with [respondent] and return his premiums, with interest."

6. On June 20, 2023, Dennis De Vore, Interim Chief of the Strategic Health Operations Division for CalPERS, signed and subsequently filed the Statement of Issues in his official capacity for purposes of respondent's appeal. Respondent timely filed a Notice of Defense. The matter was set for evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

### **Evidence of Coverage**

7. When respondent obtained coverage, the LTC Program provided him with an Evidence of Coverage (EOC) Comprehensive Plan Booklet, which explains the relevant terms and conditions for eligibility and receipt of benefits. The EOC provides, in part:

The California Public Employees' Retirement System (CalPERS) is pleased to issue this long-term care coverage to you. Benefits are payable subject to the terms and conditions outlined in this Evidence of Coverage. Please read it carefully.

[¶] . . . [¶]

## **DEFINITIONS**

This section provides the definition of words used often in this Agreement which have a special meaning when applied to **Your** Nursing Home and Assisted Living/Residential Care Facility Only Plan. To help **You** recognize these special words and phrased used in this **Agreement**, the word will be **bolded** and the first letter of each word is capitalized wherever it appears.

**Activities of Daily Living** means the following self-care functions:

**Bathing** Cleaning the body using a tub, shower or sponge bath, including getting a basin of water, managing faucets, getting in and out of tub or shower, reach head and body parts for soaping, rinsing and drying.

**Dressing** Putting on and taking off, fastening and unfastening garments and undergarments, and special

devices such as back or leg braces, corsets, elastic stocking/garments and artificial limbs or splints.

**Toileting** Getting on and off a toilet or commode and emptying a commode, managing clothes and wiping and cleaning the body after toileting, and using and emptying a bedpan and urinal.

**Transferring** Moving from one sitting or lying position (e.g., from bed to or from a wheelchair or sofa), coming to a standing position and/or repositioning to promote circulation and prevent skin breakdown.

**Continence** Ability to control bowel and bladder as well as use ostomy and/or catheter receptacles; and apply diapers and disposable barrier pads.

**Eating** Reaching for, picking up, grasping a utensil and cup; getting food on a utensil, bringing food, utensil, and cup to mouth; manipulating food on plate; and cleaning face and hands as necessary following meal.

[¶] . . . [¶]

**Chronically Ill Individual** means **You** have been certified by a **Licensed Health Care Practitioner** within the preceding 12 months as being unable to perform (without **Substantial Assistance** from another person) at least two (2) **Activities of Daily Living** for at least a period of 90

consecutive days due to a loss of functional capacity; or  
**You** require **Substantial Supervision** to protect **You** from threats to **Your** health or safety due to **Severe Cognitive Impairment**.

[¶] . . . [¶]

**Plan of Care** means a written individualized plan of services prescribed by a **Licensed Health Care Practitioner**.

[¶] . . . [¶]

**Severe Cognitive Impairment** means a loss or deterioration in intellectual capacity that is (a) comparable to and includes Alzheimer’s disease and similar forms of irreversible dementia, and (b) measured by clinical evidence and standardized tests that reliably measure impairment in the individual’s short-term or long-term memory, orientation as to people, places or time, and deductive or abstract reasoning.

[¶] . . . [¶]

**Substantial Assistance** means either Hands-on or Standby Assistance. Hands-on Assistance is the physical assistance of another person without which **You** would be unable to perform the **Activities of Daily Living**. Standby Assistance means the presence of another person, within **Your** arm’s reach, that is necessary to prevent, by physical intervention,

**Your** injury while **You** are performing the **Activities of Daily Living**.

**Substantial Supervision** means continual (24-hour) supervision (including cueing by verbal prompting, gestures, or other demonstrations) by another person that is necessary to protect **You** from threats to **Your** health or safety (including, but not limited to, such threats as may result from wandering).

## **CONDITIONS FOR RECEIVING BENEFITS**

This section describes important features of **Your** coverage and how **You** become eligible to receive benefits. You will be eligible to receive **Qualified Long-Term Care Services** covered by this plan if **You** become a **Chronically Ill Individual** and meet all of the Conditions for Receiving Benefits as described in this section. **Your** eligibility for benefits will continue for as long as **You** continue to be a **Chronically Ill Individual**, as determined by **Us** through periodic reassessments of **Your** eligibility, or until the **Total Coverage Amount** has been reached. Whichever occurs first.

### **Benefits Covered by This Agreement**

The benefits included in this **Agreement** are:

- Nursing Home Benefit



- Residential Care Facility Benefit
- Respite Care Benefit
- Hospice Care Benefit
- Care Advisory Services Benefit
- Inflation Protection, if **You** have elected it
- Benefit Increase Option, if **You** have elected it
- Return of Premium Death Benefit
- Nonforfeiture Benefit Option, if **You** have elected it
- Contingent Benefit Upon Lapse

**How You Become Eligible for Benefits:**

**Nursing Home Benefit**

**We** will pay the Nursing Home Benefit when **We** determine that:

- **You** cannot perform two (2) or more of the **Activities of Daily Living** without **Substantial Assistance**; or
- **You** require **Substantial Supervision** due to **Severe Cognitive Impairment**; and
- **You** meet the additional requirements for receiving benefits below.

## All Other Benefits

**We** will pay all other benefits when **We** determine that:

- **You** cannot perform two (2) or more of the **Activities of Daily Living** without **Substantial Assistance**; or
- You require **Substantial Supervision** due to **Severe Cognitive Impairment**;
- **Your** need for **Substantial Supervision** is such that **You** do not continue to operate a motor vehicle, **You** require assistance to take medication, **You** are not left alone for substantial portions of the day and, if a resident in an eligible long-term care facility, **You** are not able to leave that facility without competent adult supervision; and
- **You** meet the additional requirements for receiving benefits outline below.

[¶] . . . [¶]

## Benefit Eligibility

8. Sheri Alvarado, a Health Benefit Analyst with CalPERS, testified at hearing. Her duties include reviewing medical and long-term care appeals cases to determine member eligibility for reimbursement and benefits. She explained that when a member makes a claim for benefits under the LTC Program, the initial eligibility determination

is made by LTCG. To make the determination, LTCG reviews the claim submitted by the member, documents submitted in support of the claim, and the member's EOC. If the member disagrees with LTCG's determination, he or she may submit a request for reconsideration to LTCG. If LTCG upholds its initial eligibility determination, the member may file an appeal with CalPERS.

9. By letter dated December 6, 2021, LTCG acknowledged receipt of respondent's claim and requested additional information from Watermark to assist LTCG in determining respondent's eligibility for benefits. Specifically, LTCG asked for: (1) respondent's plan of care, service agreement, or nursing assessment that identified respondent's ADLs and cognitive needs; (2) a Claimant Care Needs Assessment (CCNA) form; (3) respondent's Medication Administration Record (MAR); (4) results from respondent's Mini Mental State Examination (MMSE); and (5) a physician appraisal or physician's order for facility admission.

10. The CCNA form asked whether respondent had a "known formal diagnosis of cognitive impairment." It also required Watermark to rank, on a scale of 1 to 6, the level of assistance respondent needed with "Activities of Daily Living (ADLs)," which included "bathing, dressing, toileting, transferring, incontinence, eating," and "Additional Care Needs," which included "mobility/ambulation (indoors only)" and "medication administration." A ranking of 1 meant "no assistance" was provided to respondent and that he was "independent." A ranking of 6 meant respondent was "unable to participate in any form of the ADL."

11. Watermark provided a copy of respondent's plan of care and the completed CCNA form to LTCG on December 29, 2021. The Watermark employee who filled out the form marked the "No" box in response to the question of whether respondent had a known formal diagnosis of cognitive impairment. Regarding the

ADLs of incontinence and eating, Watermark ranked respondent as a 1. Regarding the ADLs of toileting and transferring, Watermark ranked respondent as a 2, which means respondent uses equipment but "does not receive assistance from another person." Regarding the ADL of dressing, Watermark ranked respondent as a 3, which means he "receives cueing/prompting to initiate or complete the ADL due to memory loss." Watermark ranked respondent as a 4 in the ADL of bathing, which means he receives "stand-by assistance" to complete the ADL. Watermark ranked respondent as a 1 in mobility and a 6 in medication administration.

12. In January 2022, Watermark returned respondent's MAR and MMSE results to LTCG. The results of the MMSE indicated respondent had "mild" cognitive impairment, and that he "may require some supervision, support, and assistance." Watermark also provided LTCG with an "Assisted Living Physician Report" dated August 27, 2021, which included a diagnosis of dementia and indicated "memory care" was appropriate.

13. By letter dated January 21, 2022, LTCG requested that Roberto Jordan, M.D., who is respondent's primary treating physician through Presbyterian Health, complete a "Cognitive Questionnaire Form" to assist in determining respondent's eligibility for benefits. Dr. Jordan completed the "Cognitive Questionnaire Form" and provided it to LTCG on February 9, 2022. Dr. Jordan wrote that respondent was diagnosed with "Alzheimers [*sic*] dementia" in January 2016 by another Presbyterian Health physician. He indicated respondent suffers from "severe cognitive impairment," and that he is "dependent on others for some or all ADLs." However, he indicated respondent's egress at Watermark was not restricted, and he "can come and go without an escort." On February 25, 2022, Watermark provided LTCG with a copy of

respondent's updated care plan, which indicated respondent suffers from mild cognitive impairment.

14. By letter dated March 4, 2022, LTCG denied respondent's claim. The letter stated, in part:

According to your EOC, to qualify for benefits you must be certified as a Chronically Ill Individual within the preceding 12-month period by a Licensed Health Practitioner as:

- Being unable to perform (without Substantial Assistance from another person) at least 2 [ADLs] for a period of at least 90 consecutive days due to a loss of functional capacity; or
- You require Substantial Supervision to protect You from threats to Your health or safety due to Severe Cognitive Impairment.

15. LTCG further explained that the determination to deny respondent's claim was based on: (1) the completed CCNA form; (2) respondent's plans of care at Watermark; (3) the Cognitive Questionnaire filled out by Dr. Jordan; (4) a telephonic assessment with a Watermark employee who indicated respondent has a cognitive impairment but that his egress was not restricted; and (5) a telephonic assessment with Mr. Wilson, who indicated respondent did not require assistance with dressing, toileting, transferring, continence, and eating. Based on that information, LTCG determined respondent did not meet the conditions for receiving benefits because he does "not require Substantial Assistance with at least two (2) [ADLs] for a period of at least 90 consecutive days and [does] not have a Severe Cognitive Impairment requiring

Substantial Supervision.” LTCG advised respondent that if he disagreed with the determination, he could file a written request for reconsideration.

16. Mr. Wilson filed a request for reconsideration on respondent’s behalf on April 7, 2022. He explained “[respondent] is suffering from dementia and depression, and requires constant assistance in managing medications, receiving timely and adequate food and nutrition, and in staying oriented in time and place.”

17. By letter dated May 4, 2022, LTCG upheld the denial of reimbursement benefits from the date respondent moved into Watermark through March 27, 2022. However, LTCG approved reimbursement benefits for respondent’s care at Watermark starting on March 28, 2022, because it found sufficient evidence that he was a chronically ill individual as of that date. In making the determination, LTCG relied on an amended Watermark service plan dated March 28, 2022, which indicated respondent now needed assistance with bathing, dressing, and medication, and a telephonic assessment by a Watermark nurse, who reported a decline in respondent’s condition and newly imposed restrictions on his egress within the facility.

18. By letter dated June 8, 2022, Mr. Wilson appealed the LTCG decision denying reimbursement benefits prior to March 28, 2022. CalPERS upheld the decision by letter dated September 27, 2022.

19. On November 10, 2022, Mr. Wilson appealed CalPERS’s decision to uphold LTCG’s decision. By letter dated November 16, 2022, CalPERS acknowledged receipt of respondent’s appeal and request for hearing.

## **Respondent's Evidence**

20. Mr. Wilson testified at hearing. His father was born in 1928 and served in World War II. He became a mechanical engineer and worked at the Los Alamos National Laboratory in New Mexico. He became a CalPERS member by virtue of his employment at Los Alamos, which used to be administered by the University of California.

21. Respondent began showing signs of dementia in 2018 or 2019. His family administered his medications because he would either take too many or forget to take them entirely. Respondent's wife passed away in 2021, after which he moved to Watermark. It was a difficult transition for respondent. By the time he moved in, he could not remember when and why he agreed to live there and tried to escape. He started in the assisted living division of the facility but has since moved into the memory care division. He now carries a tracking device so facility staff can monitor his location. Although he is allowed to go outside into the facility courtyard for walks, there is always an attendant in the vicinity to keep an eye on him.

22. According to Mr. Wilson, the Watermark employee who filled out the CCNA form denying that respondent had a known formal diagnosis of cognitive impairment was "wrong." He acknowledges respondent is able to perform most ADLs independently. However, he is unable to remember when to perform them, and has to be prompted or cued to do so.

## **Analysis**

23. Respondent may establish his eligibility for benefits prior to March 28, 2022, in one of two ways. The first is by demonstrating he was unable to perform two or more ADLs without substantial assistance. Substantial assistance means either

hands-on or standby assistance. Hands-on assistance is the physical assistance of another person without which a person would be unable to perform ADLs. Standby assistance means the presence of another person, within arm's reach, that is physically necessary to prevent injury to a person while you are performing ADLs.

24. The evidence at hearing established that prior to March 28, 2022, the only ADL respondent required substantial assistance to perform was bathing, in that he received stand-by assistance from another person within arm's reach to prevent injury. He required no assistance from another person with eating, incontinence, transferring, or toileting, and needed only cueing or prompting to dress. As such, respondent did not establish he was unable to perform two or more ADLs without substantial assistance prior to March 28, 2022.

25. The second way respondent may establish eligibility for benefits prior to March 28, 2022, is by demonstrating he required substantial supervision due to a severe cognitive impairment. A severe cognitive impairment means a loss or deterioration in intellectual capacity that includes Alzheimer's disease and similar forms of irreversible dementia, measured by clinical evidence and standardized tests that reliably measure impairment in the individual's short-term or long-term memory, orientation as to people, places or time, and deductive or abstract reasoning.

26. The Watermark employee who filled out the CCNA form checked the box marked "No" in response to the question of whether respondent had a known formal diagnosis of cognitive impairment. However, Mr. Wilson testified that respondent began experiencing symptoms of dementia in 2018 or 2019. The Assisted Living Physician Report dated August 28, 2021, included a diagnosis of dementia, and indicated memory care would be appropriate. Moreover, when Dr. Jordan filled out the Cognitive Questionnaire form in February 2022, he indicated respondent was first



diagnosed with dementia in 2016. When all the evidence is considered, respondent established he had a severe cognitive impairment prior to March 28, 2022.

27. However, the inquiry does not end there. Respondent must also establish he required substantial supervision because of his cognitive impairment. Substantial supervision means continual (24-hour) supervision, including cueing by verbal prompting, gestures, or other demonstrations by another person, that is necessary to protect respondent from threats to his health and safety. In that regard, respondent did not meet his burden. Despite suffering from dementia, the evidence established respondent was relatively independent until a decline in his condition in early 2022. He lived alone, and he was able to complete ADLs with relatively little assistance.

28. The decline in respondent's condition is unfortunate, and CalPERS correctly determined he is eligible for benefits effective March 28, 2022. However, respondent bears the burden of proving he was eligible for reimbursement prior to that date, which he did not do. Consequently, the decision to deny respondent's claim for reimbursement benefits prior to March 28, 2022, must be affirmed.

## **LEGAL CONCLUSIONS**

1. Government Code section 21660 provides that this chapter may be cited as the Public Employees' Long-Term Care Act. The Act was enacted by the California Legislature in 1990 to establish a voluntary insurance program for long-term care for public employees, retirees, and qualified family members. (Gov. Code, §§ 21660-21664.)

2. The party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of

the evidence. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

Therefore, respondent has the burden to prove by a preponderance of the evidence that he was eligible to be reimbursed for services provided to him prior to March 28, 2022.

3. Pursuant to the PELTCA, “[t]he Board shall contract with carriers offering long-term care insurance plans.” (Gov. Code, § 21661, subd. (b).) “The long-term care insurance plans shall include home, community, and institutional care and shall, to the extent determined by the board, provide substantially equivalent coverage to that required under Chapter 2.6 (commencing with Section 10231) of Part 2 of Division 2 of the Insurance Code.....” (*Ibid.*, subd. (d).) In addition, “[t]he board shall establish eligibility criteria for enrollment, establish appropriate underwriting criteria for potential enrollees, define the scope of covered benefits, define the criteria to receive benefits, and set any other standards as needed.) (*Id.*, subd. (j).)

4. Government Code section 21663, subdivision (a), provides:

The board may enter into contracts with long-term care insurance carriers, pursuant to Section 21661, and with entities offering services relating to the administration of long-term care plans, without compliance with any provisions of law relating to competitive bidding.

5. Government Code section 21664 provides in pertinent part:

(a) The Public Employees’ Long-term Care Fund is established for the purpose of administering any self-funded long-term care plan developed by the board and for

recovering the administrative costs of the long-term care program from insurance carriers and premiums. [¶] . . . [¶]

[¶] . . . [¶]

(c) The board shall have the exclusive control of the administration and investment of the Public Employees' Long-term Care Fund.

6. Based on the Factual Findings and Legal Conclusions as a whole, CalPERS correctly applied the terms and provisions of the EOC and made the correct determination that respondent was not eligible to be reimbursed for services provided to him prior to March 28, 2022. Consequently, CalPERS's decision to deny respondent's claim must be affirmed.

## **ORDER**

The appeal of respondent Andy R. Wilson, Jr. is DENIED. CalPERS's determinations are AFFIRMED.

DATE: May 3, 2024

*Matthew Block*

MATTHEW S. BLOCK

Administrative Law Judge

Office of Administrative Hearings