

ATTACHMENT A

THE PROPOSED DECISION

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

**In the Matter of the Denial of Long-Term Care Benefit
Eligibility of:**

SYLVIA M. CARR-HALL, Respondent

Agency Case No. 2023-0625

OAH No. 2024050508

PROPOSED DECISION

Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 19, 2024, from Sacramento, California.

Cristina Andrade, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Colin Carr-Hall, respondent's adult son, represented respondent, who was not present.

Oral and documentary evidence was received. The record was held open for the submission of written closing arguments, which were timely submitted. The record closed and the matter was submitted for decision on November 1, 2024.

ISSUE

Did CalPERS Long-Term Care Group (LTCG) comply with the terms of the Evidence of Coverage (EOC) in denying respondent long-term care benefits because she did not meet the conditions for receiving benefits as outlined in the EOC?

FACTUAL FINDINGS

The Long-Term Care Program

1. The Public Employees' Long-Term Care Act (Act) established a voluntary insurance program for long-term care for public employees, retirees, and qualified family members. (Gov. Code, §§ 21660 - 21664.) The Act required the CalPERS Board of Administration (Board) to administer the program. To do so, the Board established the Long-Term Care (LTC) Program. At all relevant times, the Board administered the LTC Program through the LTCG, a third-party administrator. A company called Illumifin bought LTCG in April 2022, but for consistency, this decision refers to the entity as LTCG throughout.

Respondent's Application and LTCG's Denial

2. Respondent has a CalPERS long-term care insurance policy administered by LTCG. Respondent contracted with CalPERS to receive long-term comprehensive coverage under the 1995 Comprehensive Plan (1995 Plan).

3. On September 10, 2022, respondent, acting through her representative, completed a Long-Term Care Claim Form to initiate long-term care benefit eligibility. On November 1, 2022, LTCG sent a letter to respondent denying long-term care

benefit eligibility because she did not have a deficiency in two or more activities of daily living, cognitive impairment, or a complex yet stable condition. On December 1, 2022, respondent requested reconsideration of the denial. On December 12, 2022, CalPERS upheld the denial. On February 1, 2023, respondent filed a Notice of Claim Appeal. On May 10, 2023, CalPERS upheld LTCG's denial. This hearing followed.

Respondent's Policy and Coverage

4. Respondent's coverage as specified in the 1995 Plan EOC specifies requirements she must meet to be eligible for the long-term benefits for which she applied. Under the terms of the EOC, respondent is eligible for benefits other than nursing home benefits if it is determined that she has: (1) a deficiency in two or more activities of daily living; (2) a cognitive impairment; or (3) a complex yet stable medical condition.

5. The EOC specifies that a "deficiency in activity of daily living" means that "you cannot perform one or more of the following six activities of daily living without substantial human physical assistance and/or constant supervision." The EOC lists the six activities of daily living, as follows: (1) bathing, using a tub, shower or sponge bath; (2) dressing, including putting on and taking off garments and special devices such as back or leg braces, corsets, elastic stockings, and artificial limbs or splints; (3) toileting, including getting on and off the toilet or commode, emptying a commode or bedpan, and wiping and cleaning the body after toileting; (4) transferring, including moving from one sitting or lying position to another sitting or lying position; (5) continence, including the ability to control bowel and bladder functions, use ostomy or catheter receptacles, and apply diapers and disposable barrier pads; and (6) eating, including use of utensils to eat, and cleaning face and hands following a meal.

6. The EOC specifies that “cognitive impairment” means “confusion or disorientation resulting from a deterioration or loss of intellectual capacity that is not related to, or a result of, mental illness, but which can result from Alzheimer’s disease, or similar forms of senility or irreversible dementia.” The EOC further specifies that the deterioration or loss of intellectual capacity “is established through use of standardized tests or work instruments.”

7. The EOC specifies that a “complex yet stable medical condition” is a condition that requires nursing observation 24 hours per day, or nursing intervention more than once per day, and that the observation or intervention has been prescribed by a physician for reasons other than the convenience of the patient or patient’s family.

Evidence and Analysis Regarding Respondent’s Eligibility for Benefits

8. The evidence did not show, and respondent’s representative did not argue, that respondent qualifies for benefits because of a “complex yet stable medical condition.” Therefore, no further discussion or analysis on this point is necessary.

9. With respect to activities of daily living, the documentary evidence in respondent’s 2022 care plan shows the following limitations: (1) respondent can bathe without physical assistance but may require a reminder and standby assistance; and (2) respondent can dress and undress, but may need to be reminded or supervised. None of the evidence presented shows that respondent requires “substantial human physical assistance and/or constant supervision” as set forth in the Plan EOC. For these reasons, respondent does not qualify for benefits based on activities of daily living under the terms specified in the EOC.

10. With respect to cognitive impairment, a physician's report and a mini-mental state examination, both dated July 2021, establish that respondent has "mild cognitive impairment," meaning that her cognitive abilities are in a "conditional state" between dementia and normal aging. The physician's report specifies that respondent's mental condition is "confused/disoriented" and that she displays "wandering" and "sundowning" behavior. The physician's report also states that respondent is able to store and administer her own prescription medications. The physician's orders show that respondent was taking medication for hypertension, and did not have a complicated medication regimen.

11. Under the plain language of the EOC, respondent qualifies for benefits based on cognitive impairment. Her loss of intellectual capacity is evident based on the physician's report and the mini-mental state examination. Further, and significantly for purposes of this analysis, the physician's report established that respondent suffers from confusion and disorientation because of her cognitive decline.

12. CalPERS called Jason Yorek, RN, to testify. Mr. Yorek has worked for LTCG since 2007, and for the past four years has served as a senior claims initiatives specialist with LTCG. With respect to the issue of respondent's cognitive impairment, Mr. Yorek testified that the mini-mental state examination is not intended to diagnose but rather to determine whether additional screening is necessary. Mr. Yorek's opinion is not persuasive that additional screening is necessary to establish that respondent has mild cognitive impairment. This fact is clear based on the July 2021 physician's report and the mini-mental state examination results.

13. Mr. Yorek further testified, and CalPERS argued, that the EOC "does not provide a clear delineation of what constitutes cognitive impairment." Further, in part because of the purported lack of clarity regarding "cognitive impairment" it was

necessary for CalPERS and the LTCG to develop a training bulletin to provide guidance regarding how to determine cognitive impairment eligibility under the terms of the EOC. CalPERS presented evidence that the training bulletin includes a requirement, not included in the EOC, of clinical documentation that the cognitive impairment is so severe that the patient cannot self-administer medication. As stated in the physician's report referenced above, respondent is able to administer her own prescription medication.

14. CalPERS's argument is misplaced in this matter. Under the facts of this case, the terms of the EOC do in fact provide a clear standard of what constitutes cognitive impairment. The clinical records establish that respondent suffers from confusion and disorientation because of her cognitive decline. This fits squarely within the definition of cognitive impairment set forth in the EOC. On these grounds, respondent qualifies for long-term care benefit eligibility. It is therefore not necessary to review the additional guidance developed by CalPERS and the LTCG.

LEGAL CONCLUSIONS

1. 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 she is eligible for long-term care benefits.

2. Pursuant to the Public Employees' Long-Term Care Act, "[t]he [B]oard 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 [B]oard, 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.....” (*Id.*, subd. (d).) In addition, “[t]he [B]oard 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).)

3. Respondent purchased long-term care insurance through the CalPERS LTC Program. Respondent’s coverage is defined by the EOC. As explained above, respondent qualifies for long-term care benefits under the EOC. Therefore, respondent’s appeal must be granted and CalPERS’s decision to deny respondent’s claim must be reversed.

ORDER

The appeal of Sylvia M. Carr-Hall is GRANTED and CalPERS’s denial is REVERSED.

DATE: November 21, 2024

Timothy Aspinwall

TIMOTHY J. ASPINWALL

Administrative Law Judge

Office of Administrative Hearings