

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of the Appeal of the Denial of Reimbursement  
at the Nursing Home Benefit Rate of:**

**JEAN K. SPEES, Respondent.**

**Agency Case No. 2020-0503**

**OAH No. 2021080894**

**PROPOSED DECISION**

Administrative Law Judge Karen Reichmann, State of California, Office of Administrative Hearings, heard this matter on August 1, 2022, by videoconference.

The estate of respondent Jean K. Spees (deceased) was represented by her son, John K. Spees.

Senior Attorney John Shipley represented the California Public Employees' Retirement System (CalPERS).

The record closed and the matter was submitted for decision on August 1, 2022.

## **ISSUE**

Did CalPERS err in its determination that respondent was not entitled to reimbursement under her long-term care policy at the Nursing Home Benefit rate instead of the Residential Care Facility Benefit rate, from when she established she was cognitively impaired until her death?

## **FACTUAL FINDINGS**

### **Background**

1. Respondent Jean K. Spees was the beneficiary of a long-term care insurance policy administered for CalPERS by a third-party insurer, Long Term Care Group, Inc. (LTCG). The scope of her benefits is set forth in the 2002 CalPERS Comprehensive Plan Long Term Care Evidence of Coverage (EOC). Among the provisions of the long-term care policy available to eligible beneficiaries are a Nursing Home Benefit and a Residential Care Facility Benefit. The Nursing Home Benefit reimbursement rate is higher than the Residential Care Facility reimbursement rate.

2. Respondent became eligible for long-term care pursuant to the EOC in November 2016, because she required assistance with at least two activities of daily living. Respondent lived with her husband in an apartment at the Cardinal Point assisted living facility in Alameda. Once respondent was deemed eligible for benefits, she was reimbursed at the daily Residential Care Facility Benefit rate.

3. In early 2020, respondent's functioning declined so that the Cardinal Point facility could no longer meet all of her daily needs. Cardinal Point operates a nearby sister facility where a higher level of care is provided, but respondent's family

felt strongly that it would be detrimental to both respondent and her husband of 70 years to separate them. To address respondent's additional needs, the family contracted with an agency to provide trained caregivers for six hours each day, at an initial cost of \$25 per hour. This supplemental care allowed respondent to continue residing at Cardinal Point with her husband.

4. Around May 2020, respondent's family notified LTCG that respondent needed additional assistance, in the hopes of increasing her coverage to the Nursing Home Benefit reimbursement rate. In June 2020, the family submitted documentation establishing that respondent suffered moderately severe cognitive impairment. The family requested increased reimbursement from LTCG. The family provided all information requested by LTCG in support of the request in a timely fashion.

5. In October 2020, LTCG notified respondent that it was denying the request to increase the reimbursement rate, based on its determination that Cardinal Point is an assisted living facility and does not provide memory care. The letter noted that the denial was based upon a review of the EOC, a state licensing matrix, continued monthly residence forms prepared by Cardinal Point, and a phone conversation with Cardinal Point's Health Service Director.

6. Respondent's family submitted a request for reconsideration to LTCG, which was denied on February 1, 2021.

7. On February 5, the family appealed LTCG's denial to CalPERS.

8. On May 3, 2021, the manager of the Strategic Health Operations Division of CalPERS, sent respondent's family a Determination Letter upholding LTCG's decision denying reimbursement at the Nursing Home Benefit rate.

9. On May 11, 2021, respondent appealed the determination to the Board of Administration, and this hearing ensued.

## **Terms of the EOC**

10. The EOC defines Nursing Home as either a facility licensed to provide nursing care to inpatients by licensed registered nurses, practical nurses, or vocational nurses; or a facility that is licensed as a specialized Alzheimer's care unit. The EOC specifies that Nursing Home does not refer to a facility that provides only residential or retirement care.

11. The EOC defines Residential Care Facility (also referred to as Assisted Living Facility) as providing "24-hour a day care and services sufficient to support needs resulting from inability to perform Activities of Daily Living or Severe Cognitive Impairment."

12. The EOC provides that the Nursing Home Benefit pays for covered expenses incurred for nursing home care while an eligible individual is an inpatient in a Nursing Home.

13. The EOC provides that the Residential Care Facility Benefit pays for covered expenses incurred while an eligible individual is residing in a residential care facility.

14. The Nursing Home Benefit for respondent was 100% of covered expenses, up to \$213 per day.

15. The Residential Care Facility Benefit for respondent was 100% of covered expenses, up to \$107 per day.

## **Respondent's Evidence**

16. At hearing, respondent's son acknowledged that Cardinal Point is not a Nursing Home and does not have a secured Alzheimer's/memory care unit. He explained that respondent's deteriorating health required increased supervision and that the family incurred significant expenses to provide for her care needs, beginning in February 2020 until respondent died in July 2021. Rather than cause emotional harm by separating respondent from her husband, the family, in essence, duplicated the level of care of an Alzheimer's/memory care unit. Respondent's son further noted that the cost of the care provided just by Cardinal Point during this period exceeded the \$107 daily Residential Care Facility Benefit reimbursement respondent received.

Respondent's family is frustrated that the long-term care policy failed to meet respondent's needs. Respondent's son contended that an exception to the EOC would be appropriate under the circumstances, because respondent required the level of care of a Nursing Home, and incurred expenses for this care in excess of the Residential Care Facility Benefit reimbursement rate she received.

## **LEGAL CONCLUSIONS**

1. The party asserting the affirmative in an administrative hearing bears the burden of proof, and the standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) Therefore, respondent had the burden to prove by a preponderance of the evidence that her estate is entitled to be reimbursed for the difference between the Residential Care Facility Benefit rate and the Nursing Home Benefit rate (\$106 per day) from when she established her increased need for care until her death.

2. The Public Employees' Long-Term Care Act (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.)

3. Pursuant to the Act, "The board shall contract with carriers offering long-term care insurance plans." (Gov. Code, § 21661, subd. (a).) "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 . . . ." (*Id.*, subd. (c).) In addition, "The 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. (h).)

4. As set forth in Factual Finding 12, the EOC provided that the Nursing Home Benefit is only available for expenses incurred while an individual is an inpatient in a Nursing Home. It is undisputed that the Cardinal Point facility where respondent resided and received services was not a Nursing Home as defined by the EOC.

5. CalPERS correctly applied the terms and provisions of the EOC and made the correct determination that respondent could not be reimbursed at the Nursing Home Benefit rate for the costs for care she incurred while living at Cardinal Point. There is no provision in the EOC to reimburse an individual residing in a Residential Care Facility for expenses in excess of the daily Residential Care Facility Benefit reimbursement rate.

6. Respondent's appeal must be denied, and the May 3, 2021, Determination Letter denying reimbursement at the Nursing Home Benefit rate must be affirmed.

## **ORDER**

The appeal of respondent Jean K. Spees is denied. CalPERS's Determination Letter is affirmed.

DATE: 08/22/2022

*Karen Reichmann*

KAREN REICHMANN

Administrative Law Judge

Office of Administrative Hearings