

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:**

PAMELA A. MCNEER, Respondent

Agency Case No. 2023-0182

OAH Case No. 2024010292

PROPOSED DECISION

Sean Gavin, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on March 28, 2024, from Sacramento, California.

Nhung Dao, Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Respondent Pamela A. McNeer appeared assisted by her son, Sean O'Neill, whom she designated as her non-attorney Authorized Individual by submitting the appropriate paperwork to CalPERS.

Evidence was received, the record closed, and the parties submitted the matter for decision on March 28, 2024.

ISSUE

Did the CalPERS Long-Term Care Program (LTC Program) correctly determine respondent was ineligible to be reimbursed for services she received at Greenwood Place (Greenwood), an assisted living facility in Florida?

FACTUAL FINDINGS

The LTC Program

1. The Public Employees' Long-Term Care 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 LTC Program. At all relevant times, the Board administered the LTC Program through Long Term Care Group, Inc. (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. In December 2021, she moved into Greenwood. On January 28, 2022, she signed and thereafter submitted to CalPERS a Long-Term Care Claim Form seeking benefits under the LTC Program to reimburse her costs for long-term care she received at Greenwood. LTCG denied the claim because it determined she did "not meet the Conditions for Receiving Benefits because [she did] not require substantial assistance

with at least 2 Activities of Daily Living for at least 90 days nor [did she] have a severe Cognitive Impairment requiring substantial supervision.”

3. Respondent submitted a request for reconsideration to LTCG. LTCG denied the request on the same basis that it denied her original application. Respondent filed an appeal with CalPERS. In October 2022, CalPERS denied the claim, and in January 2023, respondent requested an administrative hearing. On January 8, 2024, CalPERS filed and served a Statement of Issues. This hearing followed.

Respondent’s Policy and Coverage

4. A contract called CalPERS’s 1998 Evidence of Coverage (EOC) governs respondent’s long-term care insurance policy. The EOC includes the terms and conditions for receiving benefits and defines certain words and phrases.

5. The EOC includes a section titled “How You Become Eligible for Benefits,” which provides:

We will pay all benefits when We determine that You:

Cannot perform three (3) or more of the Activities of Daily Living without Substantial Assistance; or

Require Substantial Supervision due to Severe Cognitive Impairment; and

Meet the additional requirements for receiving benefits outlined below.

6. Jason Yorek, a Senior Claims Initiatives Specialist for LTCG since 2021, testified at hearing. He explained a rider amended the EOC such that covered

individuals are eligible if they cannot perform two or more Activities of Daily Living (ADLs) without substantial assistance.

7. The EOC identifies six ADLs: Bathing, Dressing, Toileting, Transferring, Contenance, and Eating. The EOC defines "substantial assistance" as follows:

Substantial Assistance means either Hands-on Assistance 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.

8. Mr. Yorek explained LTCG relied on information from Greenwood when it denied respondent's application and request for reconsideration. Specifically, on January 11, 2022, shortly after respondent moved into Greenwood, Malinda Newcombe, M.D., evaluated her health and need for assistance. Dr. Newcombe completed a Resident Health Assessment for Assisted Living Facilities in which she rated respondent as "Independent: Staff does not assist at all" for all six ADLs.

9. Additionally, Nadine Bryan, who was Greenwood's Executive Director and a Licensed Practical Nurse and Licensed Vocational Nurse, evaluated respondent on January 15, 2022, and prepared a written evaluation form summarizing the results (January 2022 evaluation). According to the January 2022 evaluation, respondent did not require assistance with any of the ADLs.

10. On February 14, 2022, Ms. Bryan completed a Claimant Care Needs Assessment form specific to the LTC Program. The form required her to rate the level of assistance respondent needed in the six ADLs on a scale from 1 to 6. The rating 1 meant "no assistance is provided, resident is independent." Ms. Bryan rated respondent a 1 for each ADL.

11. Ms. Bryan reevaluated respondent on May 17, 2022, and prepared a written evaluation form summarizing the results (May 2022 evaluation). According to the May 2022 evaluation, respondent required assistance with bathing, but did not require assistance with dressing, toileting, transferring, continence care, or eating.

12. Mr. Yorek also explained at hearing that, on September 26, 2023, LTCG approved respondent for long-term care benefits from that date forward. However, respondent believes she should have been eligible from June 1, 2022, through September 25, 2023, because she has suffered from incontinence for many years. Consequently, to Mr. Yorek's understanding, respondent believes her incontinence, combined with her need for assistance while bathing, as confirmed in her May 2022 evaluation, constitute two qualifying ADLs and therefore entitle her to reimbursement. Mr. Yorek acknowledged respondent's medical records show a history of incontinence. However, he noted there was no documentation to indicate respondent's incontinence required either the physical assistance or presence of another person. Therefore, her incontinence did not count as an ADL with which she needed "substantial assistance" as the EOC defines that term.

13. Furthermore, Mr. Yorek is aware respondent argued in her appeals that she became eligible for reimbursement on June 1, 2022, because that is when Greenwood began to charge her for "Level 2" care associated with bathing assistance. Mr. Yorek disagreed with respondent's position, noting that facilities often elevate

residents to enhanced care levels when they require assistance with even one ADL, such as bathing. In Mr. Yorek's opinion, LTCG and CalPERS are bound by the terms of the EOC, not the facility's internal assignment process.

14. Sheri Alvarado has been a Research Data Specialist for CalPERS for more than 10 years. She works in the Health Benefit Compliance Appeals Unit, where she reviews medical and long-term care cases and appeals regarding member coverage. She is the only CalPERS analyst who reviews long-term care cases. At hearing, she explained she reviewed respondent's file, determined LTCG complied with the EOC, and concluded it was appropriate to deny respondent's application for reimbursement for her care at Greenwood before September 26, 2023.

Respondent's Evidence

15. At hearing, respondent presented medical documents showing, among other things, a history of urinary incontinence. She also presented a written statement summarizing her arguments and authorized her son, Mr. O'Neill, to explain her position. Mr. O'Neill has been deeply involved in arranging respondent's care and is knowledgeable about the underlying facts and circumstances.

16. Mr. O'Neill explained respondent has had a diagnosis of incontinence for many years. Therefore, when the May 2022 evaluation determined she needed assistance with bathing, he and respondent believed she would qualify for long-term care benefits because continence and bathing are two separate ADLs. Additionally, after Greenwood determined respondent needed assistance with bathing, it began to charge her more money for Level 2 care. Mr. O'Neill and respondent believe those charges are the very reason someone in respondent's position would elect to carry long-term care coverage. Finally, Mr. O'Neill noted respondent's medical records show

“50 things wrong with her.” Based on respondent’s incontinence and need for assistance with bathing, her Level 2 care at Greenwood, and her general health condition, Mr. O’Neill and respondent believe she qualifies to be reimbursed for her long-term care at Greenwood from June 1, 2022, through September 25, 2023.

Analysis

17. The facts in this case are essentially undisputed. Respondent has a history of urinary incontinence. There is no indication her incontinence required either the physical assistance or presence of another person. As confirmed in her May 2022 evaluation, respondent needed assistance with bathing as of May 17, 2022. As a result, Greenwood elevated her to Level 2 care beginning June 1, 2022. On September 26, 2023, LTCG approved respondent for long-term care benefits from that date forward.

18. Based on the undisputed facts, CalPERS’s decision to deny respondent’s claim was legally correct. Under the EOC, as modified by the rider, respondent was eligible for benefits when she could not perform two or more ADLs without substantial assistance. Also under the EOC, “substantial assistance” meant the need for physical assistance or presence of another person. The evidence did not prove respondent required substantial assistance with her incontinence. Therefore, between June 1, 2022, and September 25, 2023, she needed substantial assistance with only one ADL, bathing. Consequently, CalPERS properly denied her claim during that time period.

19. Respondent’s other arguments, namely that she qualified for benefits based on receiving Level 2 care at Greenwood and on her general health, are not legally sufficient. The EOC governs the LTC Program, and one party cannot alter its contractual terms unilaterally.

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 had the burden to prove by a preponderance of the evidence that she was eligible to be reimbursed for long-term care she received at Greenwood prior to September 26, 2023.

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. In addition, CalPERS owes a fiduciary duty to each individual member of the LTC Program, along with the Long-Term Care Fund (Fund) as a whole. As part of its fiduciary duty, CalPERS cannot allow an individual member to receive benefits for which the member is not eligible, as that unlawfully depletes the reserves of the Fund. CalPERS cannot provide benefits to ineligible members because doing so could deprive other members of benefits to which they are entitled.

4. Respondent purchased long-term care insurance through the CalPERS LTC Program. Respondent's coverage is defined by the EOC. As explained above, CalPERS correctly applied the terms and provisions of the EOC and denied respondent reimbursement for long-term care she received at Greenwood prior to September 26, 2023. Therefore, respondent's appeal must be denied and CalPERS's decision to deny respondent's claim must be affirmed.

ORDER

The appeal of Pamel A. McNeer is DENIED and CalPERS's determination is AFFIRMED.

DATE: April 29, 2024


[Sean Gavin \(Apr 29, 2024 13:11 PDT\)](#)

SEAN GAVIN

Administrative Law Judge

Office of Administrative Hearings