ATTACHMENT A

THE PROPOSED DECISION

Attachment A

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal Regarding Denial of Benefit Coverage for Services Provided by Galileo Surgery Center to Derrick A. Young by:

MARLA L. YOUNG and DERRICK A. YOUNG, Respondents

Agency Case No. 2020-0837

OAH No. 2020120053

PROPOSED DECISION

Julie Cabos Owen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on May 3, 2021. The California Public Employees' Retirement System (Complainant or CalPERS) was represented by Kevin Kreutz, Senior Attorney for CalPERS. Marla L. Young and Derrick A. Young (Respondents) represented themselves.

Testimony and documents were received in evidence. The record closed and the matter was submitted for decision on May 3, 2021.

FACTUAL FINDINGS

1. Kimberly A. Malm, Chief of the Strategic Health Operations Division of CalPERS, filed the Statement of Issues while acting in her official capacity.

2A. CalPERS health benefits are governed by the Public Employees' Medical and Hospital Care Act (PEMHCA) (Gov. Code, § 22750 et seq.) and implemented through the Public Employees' Medical and Hospital Care Act Regulations (Cal. Code Regs., tit. 2, § 599.500 et seq.).

2B. PEMHCA requires CalPERS to provide health benefits for state employees and their dependents. Under PEMHCA, CalPERS offers health benefits through several health plans that service approximately 1.5 million members.

3A. One of the health plans offered by CalPERS is the PERS Select Plan (PERS Select), a preferred provider organization (PPO) health care plan. CalPERS contracts with Anthem Blue Cross (Anthem) to administer PERS Select's benefit coverage and claims.

3B. A PPO plan has a network of preferred providers and non-preferred providers. PERS Select members may call Anthem or look on its website to verify the status of preferred providers. Under PERS Select, claims for rendered services are subject to a deductible payable by the member prior to Anthem's payment. The member must also pay a percentage of coinsurance liability. For PERS Select coinsurance, the member pays 20 percent for preferred providers (and Anthem pays 80 percent), and the member pays 40 percent for non-preferred providers (and Anthem pays 60 percent), with some specified limitations.

4A. Respondent Marla Young established membership with CalPERS as a state employee. By virtue of her employment, Respondent Marla Young and her dependents are eligible for CalPERS health benefits under PEMHCA.

4B. Respondent Derrick Young is the spouse/dependent of Respondent Marla Young.

5. Respondent Marla Young elected to enroll in PERS Select for health benefits.

6A. The 2020 PERS Select Evidence of Coverage (EOC) booklet sets forth the terms of Respondents' health care coverage during the relevant time period.

6B. The EOC booklet Introduction notes the members' responsibility to ensure familiarity with the EOC terms. Specifically, the EOC booklet states:

> As a [PPO] plan, PERS Select allows you to manage your health care through the selection of Physicians, Hospitals, and other specialists who you determine will best meet your needs. By becoming familiar with your coverage and using it carefully, you will become a wise health care consumer.
>
> [¶] . . . [¶]
>
> Please take the time to familiarize yourself with this booklet. As a PERS Select Member, you are responsible for meeting the requirements of the Plan. **Lack of knowledge of, or lack of familiarity with, the information contained in this booklet does not serve as a reason for noncompliance.**

(Exhibit 6, p. 6) (Emphasis in original.)

6C. The EOC booklet informs members about how to find providers who are in the Preferred Provider network as follows:

> CHOOSING A PHYSICIAN/HOSPITAL
>
> Your Copayment or Coinsurance responsibility will be lower and claims submission easier if you choose Preferred Providers for your health care ....To receive the highest level of benefits available under this Plan, make sure the providers you are using are Preferred Providers.
>
> The Preferred Provider network available to PERS Select Members in California is called Select PPO. [Anthem] has designated certain doctors in California as participating in the Select PPO Preferred Provider network. This statewide network includes over 27,000 physicians and 372 hospitals, in addition to many other types of health care providers.
>
> To make sure you are using a Select PPO Preferred Provider, do the following:
>
> 1. Ask your Physician or provider if he or she is a Select PPO Preferred Provider and request their tax identification number (TIN).
>
> 2. Call Member Services at 1-877-737-7776 to verify that the provider you want to use is a Select PPO Preferred

Provider at the location where services are rendered along with the TIN used for billing purposes.

3. Visit the website at www.anthem.com/ca/calpers, but do not log in.

4. Request a Select PPO Preferred Plan Directory by calling 1-877-737-7776.

[¶] . . . [¶]

Changes frequently occur after the directories are published; therefore, it is your responsibility to verify that the provider you choose is still a Preferred Provider and that any providers you are referred to are also Preferred Providers. Check the [Anthem] website, www.anthem.com/ca/calpers, and call Member Services at 1-877-737-7776 one week prior to your visit or procedure to confirm that the provider is a Preferred Provider.

(Exhibit 6, p. 8.) (Emphasis in original.)

6D. The EOC booklet explains the differences in benefits available through Preferred Providers rather than Non-Preferred Providers. The explanation includes the following:

The benefits available through PERS Select depend on whether you and your family use Preferred Providers, except for emergencies.

[Anthem] has established and maintains a network of "Preferred Providers" throughout California......... They have agreed to accept payment amounts set by [Anthem] for their services. These "Allowable Amounts" are usually lower than what other Physicians and Hospitals charge for their services, so your portion of the charges, or your Copayment or Coinsurance, will also be lower.

[¶] . . . [¶]

Preferred Providers have agreed to accept the Plan's payment, plus applicable Member Deductibles and Copayments/Coinsurance, as payment in full for covered services. When you receive covered services from a Preferred Provider, the provider has agreed to submit a claim for payment directly, and the benefits of this Plan will be paid directly to the provider. This means you have no further financial responsibility, except for any Member Deductibles or Copayments that may apply, and therefore no claim forms to file.

If you go to a Non-Preferred Provider, payment for services may be substantially less than the amount billed. In addition to your Deductible and Coinsurance, you are responsible for any difference between the Allowable Amount and the amount billed by the Non-Preferred Provider. You will need to submit a claim if you received care from a Non-Preferred Provider.

(Exhibit 6, pp. 10 - 11.)

6E. The EOC booklet specifies a maximum payment for services at an Ambulatory Surgery Center (ASC) that is a Non-Preferred Provider. Specifically, the EOC states:

> **All covered services and supplies provided and billed by an [ASC] that is a Non-Preferred Provider are subject to a maximum Plan payment of $350 per Outpatient surgery.** This maximum payment does not apply to covered services provided by Preferred Providers and to Non-Preferred Provider Physician charges that are billed separate from the facility charges.
>
> [¶] . . . [¶]
>
> Please contact Member Services and/or visit www.anthem.com/ca/calpers to verify that the [ASC] is a Preferred Provider in Anthem Blue Cross' network.

(Exhibit 6, p. 19.) (Emphasis added.)

6F. The EOC booklet notes the member's liability for payment as follows:

> When covered services have been rendered by a Preferred Provider . . . and payment has been made by PERS Select, the Plan Member is responsible only for any applicable Deductible and/or Copayment/Coinsurance. However, if covered services are rendered by a Non-Preferred Provider .

> . . , the Member is responsible for any amount PERS Select does not pay.
>
> When a benefit specifies a maximum payment and the Plan's maximum has been paid, the Plan Member is responsible for any charges above the benefit maximum, regardless of the status of the provider who renders the services.

(Exhibit 6, p. 22.)

7. On January 16, 2020, Respondent Derrick Young received a knee injection provided by Shahriar Pirouz, M.D., at the Galileo Surgery Center (Galileo).

8. Galileo is an ASC and a Non-Preferred Provider that did not participate in Anthem's Preferred Provider network for PERS Select.

9A. Respondent Derrick Young previously received an epidural spinal injection at Galileo in September 2019. Prior to Respondent Derrick Young receiving his spinal injection at Galileo, Respondent Marla Young contacted Anthem by telephone to confirm that Galileo was part of the preferred provider network. During the telephone call, an Anthem representative informed Respondent Marla Young that Galileo was out-of-network and that Anthem would only cover a maximum of $350.

9B. Although Respondent Marla Young's telephone phone call was related to a prior epidural spine injection, the information from the Anthem representative confirmed that Galileo was not part of Anthem's Preferred Provider network and that maximum coverage was $350.

10. On February 7, 2020, Anthem processed a claim for services provided at Galileo for Respondent Derrick Young on January 16, 2020. Anthem paid only the maximum $350 for the January 16, 2020 services provided at Galileo.

11. On February 17, 2020, Respondent Marla Young, on behalf of Respondent Derrick Young, contacted Anthem, appealed the payment issued to Galileo, and requested additional payment. That same day, Anthem sent a letter to Respondent Derrick Young acknowledging his appeal.

12A. On April 10, 2020, a Grievances and Appeals Analyst from Anthem sent a Final Adverse Benefit Determination (FABD) letter to Respondent Derrick Young concluding that the claim had been properly processed. The letter informed Respondent Derrick Young of his right to request a CalPERS Administrative Review if he did not agree with the FABD.

12B. The FABD letter states in pertinent part, as follows:

> [You assert in] your appeal, the procedure performed at [Galileo] was done by a [PPO] Provider. However, the Explanation of Benefits (EOB) you received states the claim was processed at the Non-Preferred (Non-PPO) Provider benefit level. You were under the impression that, since your Pain Management provider (Doctor Shahriar Pirouz, MD) was a Preferred PPO Provider, the facility would also be a Preferred PPO Provider. You add that Dr. Pirouz did not advise you that [Galileo] was considered a Non-Preferred Non-PPO Provider. As a result, the claim was processed at the Non-Preferred Non-PPO Provider benefit level. You are

requesting that the claim be processed at the Preferred PPO Provider benefit level, since you were not advised by Dr. Pirouz that [Galileo] was not part of your Preferred PPO PERS Select provider network. The previous coverage decision is being upheld.

After careful review of your request, I have determined that the claim noted above has been processed correctly, at the Non-Preferred Non-PPO Provider benefit level, based on your health plan benefits and the Negotiated Amount. As a result, there will be no adjustments on this claim. According to your health plan benefits, covered services and supplies provided and billed by an [ASC] that is a Non-Preferred Provider are subject to a maximum Plan payment of $350 per Outpatient surgery.

The provider may not have understood the requirements of your 2020 PERS Select PPO Basic Plan. Although we empathize with your circumstances, ultimately, it is the responsibility of each PERS Select Basic Plan Member to verify with Anthem they are using providers in the Select PPO Preferred Provider Network (prior to accessing care), not the responsibility of the provider to advise the patient. It is also member's responsibility to be familiar with the health plan benefits.

The Negotiated Amount on this claim is $3,025.00. Our total payment was $350.00, and your responsibility on this claim

> is $319.22, which was applied to your 2020 Calendar Year Deductible, $1,082.31, which is your Forty Percent . . . coinsurance, plus $1,334.83, which are the charges in excess of the $350.00 Maximum Plan payment amount and not covered charges ($61.36 for procedure code A4649: Surgical Supply; Miscellaneous).

(Exhibit 9, pp. 1-2.)

13A. On April 26, 2020, Respondent Derrick Young sent a letter to CalPERS appealing Anthem's FABD, requesting an Administrative Review, and providing a completed Designation of Representative/Authorization Form designating Respondent Marla Young as his representative in the administrative review process.

13B. In his April 26, 2020 letter, Respondent Derrick Young acknowledges Galileo is a Non-Preferred Provider, but nevertheless requests payment be made as if Galileo were a Preferred Provider. Specifically, Respondent Derrick Young wrote:

> My pain specialist, Dr. Pirouz is within my network.........I have been seeing Dr. Pirouz for pain management for my back and my knee. The recommended treatment made [by] Dr. Pirouz was an injection to help the pain in my knee. I was made aware that since Dr. Pirouz was a preferred PPO Provider, his facility would also be in network. Therefore, it was my understanding there would be no payment and/or claim issues.
>
> In September of 2019, I received an injection from the same facility for back pain and the invoice [was] for only $74.20. I

> have read over the health plan benefits along with the EOC and I understanding [*sic*] it is the members responsibility to find out what is in network and what is not. I can assure you that I now have a clear understanding that my pain specialist doctor is in my network, but the facility in which he gives treatments is not with in my network.

(Exhibit 10, p. 1.)

14. On April 27, 2020, CalPERS sent a letter to Respondent Derrick Young acknowledging his request for an Administrative Review and providing him an opportunity to submit additional information by May 12, 2020.

15. On April 27, 2020, CalPERS sent a Request for Health Plan Information (RHPI) to Anthem to obtain all relevant information regarding Anthem's review of Respondent Derrick Young's appeal. CalPERS received the completed RHPI from Anthem.

16A. On May 27, 2020, CalPERS sent Respondent Derrick Young a letter with the results of its Administrative Review. In its May 27, 2020 letter, CalPERS concluded "Anthem appropriately adjudicated [Respondent Derrick Young's] medical claim in accordance with the terms and conditions of the 2020 PERS Select EOC" when Anthem denied additional benefit coverage for services provided by Galileo on January 16, 2020.

16B. CalPERS arrived at its conclusion based on the following stated reasons:

(1) Galileo Surgery Center did not participate in Anthem's Select PPO Preferred Provider network at the time services are rendered; therefore, it was considered a Non-Preferred Provider.

(2). Anthem processed the Galileo claim in accordance with the ASC benefit provision of the EOC for services performed by a Non-Preferred Provider. Galileo submitted a bill to Anthem in the amount of $3,086.36. Anthem issued the benefit maximum of $350 toward the claim. At the time services were rendered, Respondent Derrick Young had not satisfied his Maximum Calendar Year Deductible and Coinsurance; therefore, the amount of $319 was applied toward his deductible, and $1,082.31 was applied as his 40 percent Coinsurance requirement. Respondent Derrick Young was also responsible for the amount in excess of the benefit maximum, i.e., $1,334.83, and for the non-covered charges of $61.36 for miscellaneous surgical supplies. Respondent Derrick Young's total financial responsibility for the claim is $2,797.50.

(3) The PERS Select Plan does not contain any provision allowing a benefit payment higher than $350 for services performed at an ASC that is a Non-Preferred Provider.

(4) There are no benefit provisions in the PERS Select Plan to waive the $350 benefit maximum or to reduce the amount billed in excess of the Allowable Amount for services performed at a Non-Preferred ASC, unless an a member is approved for an out of network referral. Anthem identified 11 Preferred Ambulatory Surgery Centers within a 30-mile radius of Respondent Derrick Young's residence; therefore, the claim was not eligible for an Authorized Referral. (Members are required to obtain an Authorized Referral prior to receiving services by a Non-Preferred Provider for the claim to be eligible for the Preferred Provider benefit.)

(5). The PERS Select Plan excludes any expense incurred for covered services in excess of the PERS Select Plan benefits or maximums.

16C. In addressing Respondents Derrick Young's concerns stated in his April 26, 2020 letter, CalPERS noted:

> [Y]ou explained that since your provider was a Preferred Provider, you assumed that the [ASC] where your provider was going to perform service was also a Preferred ASC. You indicated that you [were] unaware that there would be any claims issue.
>
> Please note that CalPERS has verified with Anthem that your provider contacted Anthem twice to obtain benefit information for your knee injection. The provider was informed that a benefit maximum of $350 applies to a Non-Preferred ASC. In addition, you called Anthem on September 5, 2019 and was advised that Galileo Surgery Center was not a Preferred ASC and that the benefit limitation would apply.
>
> As a PERS Select Member, you are responsible for meeting the requirements of the Plan. The EOC encourages members to contact Anthem's Member Services and/or visit www.anthem.com/ca/calpers to verify that the [ASC] is a Preferred Provider in [Anthem's] network. Regardless of the reason (medical or otherwise), referrals by Preferred

> Providers to Non-Preferred Providers will be reimbursed at the Non-Preferred Provider level.
>
> As explained in the EOC, the benefits available through PERS Select depend on whether you use Preferred Providers or Non-Preferred Providers. Preferred Providers have agreed to accept payment amounts set by [Anthem] for their services; therefore, reducing the member's financial responsibility. Non-Preferred Providers may often reduce or eliminate part of the charges that remain the member's responsibility to pay. You may be able to establish a discount agreement with the non-preferred provider. We cannot arrange or request a discount agreement for you. You are responsible for pursuing this arrangement.

(Exhibit 3, p. 11.)

16D. In its May 27, 2020 letter CalPERS noted:

> Your request involves a dispute of the health plan's Allowable Amount. Please understand that controlling case law exists surrounding an Allowable Amount dispute. On July 15, 2014, the Court of Appeal for the State of California in *Orthopedic Specialists of Southern California v. California Public Employees' Retirement System* held that contractual provisions outlined in an EOC did not obligate CalPERS to pay an out-of-network provider the provider's usual and customary rates. Additionally, payment for nonemergency

> services provided by out-of-network providers is governed solely by the applicable EOC. The Court found that the EOC clearly stated that an out-of-network provider would be paid 60 percent of the Allowable Amount, which was broadly defined as the amount the plan "has determined is an appropriate payment" for the services rendered. Thus, provisions contained in an EOC are determinative with regard to allowable amounts paid to out-of-network providers for nonemergency services.

(Exhibit 3, p. 12.)

16E. The May 27, 2020 letter advised Respondent Derrick Young of his appeal rights.

17. By letter dated June 1, 2020, Respondent Derrick Young filed a timely appeal and requested an administrative hearing. In his June 1, 2020 letter, Respondent Derrick Young noted:

> While I greatly appreciate the 12 pages of EOC to explain the CalPERS decision, I am more than disappointed in the compassion and empathy in regards to this case. It is very concerning to me that during the biggest pandemic in world history, that there is a lack of respect for essential workers and a lack of understanding of what the public has had to endure to survive financially.
>
> I am a self-employed electrical contractor and my spouse is a correctional healthcare worker. We currently have a

> household of 6 people living in our home. During the course of this economic shutdown, my family has been deeply impacted by the ramifications of COVID-19. Along with construction slowing down due to social distancing, my spouse is in jeopardy of losing 10 percent of her income due to California's budget crises. [¶] . . . [¶]
>
> I would also like to add that since switching to Anthem Blue Cross, I have been a loyal member. All claims that I receive have been paid in full and have no outstanding balances due. The fact that no consideration has been determined in this case is beyond belief.

(Exhibit 4, pp. 1-2.)

18. This appeal is limited to the issue of whether Anthem appropriately denied additional benefit coverage for the services provided by Galileo to Respondent Derrick Young on January 16, 2020.

19. Sheri Alvarado, Research Data Specialist, testified credibly at the administrative hearing. She has worked in the CalPERS Health Benefits and Appeals Compliance Unit for 11 years. Ms. Alvarado's testimony, along with documentary evidence, established many of the factual findings set forth above and supported CalPERS's conclusions after Administrative Review, as noted in CalPERS's May 27, 2020 letter. Although Respondents' seek payment from Anthem different from that set forth in the EOC, Ms. Alvarado noted all members must receive the same benefits under the EOC.

20A. Respondent Derrick Young testified at the administrative hearing. He contended that his first injection at Galileo in Atascadero was covered, that Galileo initially had two locations but "because of COVID, they closed the Atascadero" location, and that his provider instructed him to go to the remaining location for his January 2020 services. Respondent Derrick Young also contended his provider told him the Galileo facility "was covered," and he was "under the assumption it was covered." These contentions are unconvincing and are contrary to the evidence. The services provided to Respondent Derrick Young on January 16, 2020 predated the shutdowns prompted by the COVID-19 pandemic, which began in about March 2020. Consequently, it is questionable that any facility shutdown in January 2020 was prompted by the COVID-19 pandemic. Additionally, the evidence established Respondents were informed by Anthem, at the time of Respondent Derrick Young's 2019 epidural injection, that Galileo was a non-preferred provider. (See Factual Finding 9.)

20B. Respondent Marla Young testified at the administrative hearing. She asserted that the Galileo services "should be covered" because the physician who gave the injection was a preferred provider. This is contrary to the terms of the EOC. During cross examination, Respondent Marla Young could not recall where Respondent Derrick Young received his epidural spine injection in 2019. Nevertheless, when asked if the facility used for the 2019 spine injection had been closed due to COVID (as asserted by Respondent Derrick Young in his testimony), Respondent Marla Young responded, "Yes," while Respondent Derrick Young could be heard in the background coaching her response. Although Respondent Marla Young called in 2019 to determine if Galileo was a preferred provider, there was no evidence that Respondent Marla Young called again in 2020, after the purported closure of the first facility, to

determine if the Galileo facility used for the 2020 knee injection was a preferred provider.

20C. Respondents' testimony failed to establish that Galileo was a preferred provider or that it should have been treated as a preferred provider. Additionally, their purported lack of knowledge of Galileo's status as a non-preferred provider bears no weight because, as set forth in the EOC, it was their "responsibility to verify that the provider you choose is still a Preferred Provider and that any providers you are referred to are also Preferred Providers." (Exhibit 6, p. 8.)

LEGAL CONCLUSIONS

1. CalPERS is governed by the California Public Employees' Retirement Law, and the provisions of PEMHCA.

2. Government Code section 22848 provides:

> An employee or annuitant who is dissatisfied with any action or failure to act in connection with his or her coverage or the coverage of his or her family members under this part shall have the right of appeal to the board and shall be accorded an opportunity for a fair hearing. The hearings shall be conducted, insofar as practicable, pursuant to the provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3.

3. Where CalPERS denies or modifies a benefit to a member/applicant and either the member/applicant or another respondent appeals CalPERS' decision, the

proceeding is initiated by a Statement of Issues, and the appealing respondent has the burden of proof that the determination was incorrect. (See also, Evid. Code, § 500.) Nevertheless, CalPERS does have the burden of producing the evidence to support its determination before the appealing party seeks to establish the impropriety of that determination.

4. The standard of proof in administrative matters is the preponderance of the evidence unless a law or statute requires otherwise. (Evid. Code, § 115.) In this case, no other law or statute was cited or applies.

5. Respondents elected to obtain health benefits under PERS Select. The PERS Select EOC noted it was Respondents' responsibility to verify that their provider was a Preferred Provider and that any providers to whom they were referred were also Preferred Providers. Respondent Derrick Young's physician was a Preferred Provider who referred him to Galileo. However, Galileo was an ASC Non-Preferred Provider. The EOC specified the maximum payment to an ASC Non-Preferred Provider was $350. Therefore, services provided by Galileo were subject to the $350 benefit maximum, which Anthem issued, and CalPERS affirmed. Given the foregoing, Anthem appropriately denied additional benefit coverage for the services provided by Galileo to Respondent Derrick Young on January 16, 2020.

6. Respondents did not establish, by a preponderance of the evidence, that CalPERS' determination affirming Anthem's denial was incorrect.

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ORDER

The appeal of Respondents Derrick A. Young and Marla L. Young is denied.

DATE: 05/11/2021

Julie Cabos-Owen

JULIE CABOS-OWEN

Administrative Law Judge

Office of Administrative Hearings