

**ATTACHMENT C**

**RESPONDENT'S ARGUMENT**

# GARY P. SIMONIAN, APC

March 29, 2023

## **Sent via Electronic and Facsimile Transmission**

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Re: In the Matter of the Appeal of the Denial of PatrickXavierPT LLC as an Eligible Home Health Agency and Patrick Matibag as an Eligible Independent Provider  
Agency Case No. 2022-0093  
OAH No. 2022050386

## **RESPONDENT'S ARGUMENT**

This Respondent's Argument is being submitted on behalf of Respondent Vahe Simonian, in accordance with the March 16, 2023 letter from the Legal Office of CalPERS and signed by Dejeune Johnson, regarding the above-entitled matter and the Proposed Decision issued by the Administrative Law Judge ("ALJ") on March 13, 2023.

Dr. Simonian requests that the Board either decline to adopt the proposed decision or remand the matter for further evidentiary testimony for the following reasons.

Dr. Simonian contends that the primary burden of persuasion and proof lay with CalPERS. CalPERS initiated the administrative as petitioner for the purpose of obtaining a determination as to whether its decisions were correct 1) to deny eligibility of PatrickXavierPT as a Home Health Agency and 2) to consequentially deny reimbursement for services PatrickXavierPT provided to Dr. Simonian for a specific time period. The Proposed Decision identifies Dr. Simonian as the respondent. Though Dr. Simonian contends and argues that CalPERS breached its agreement and acted arbitrarily in its decision-making, CalPERS had the burden of proof to establish a *prima facie* case that its determinations were correct.

CalPERS did not satisfy its burden because it did not identify any specific lacking of PatrickXavierPT as required by the 2000 Plan's Evidence of Coverage ("2000 Plan's EOC"), which CalPERS argued was the governing terms and conditions of Dr. Simonian's rights. Instead, CalPERS adopted an apparent *ad hoc* standard in making decisions and determinations concerning PatrickXavierPT's eligibility under the 2000 Plan's EOC. Put another way, CalPERS did not produce a written ascertainable standard for applying discretion regarding the eligibility of a care provider, other than the 2000 Plan's EOC. Without an articulable standard that is incorporated into the agreement, CalPERS's decision 1) that PatrickXavierPT was not an eligible Home Health Agency, and 2) that PatrickXavierPT's eligibility could not be revived or reinstated if the perceived discrepancies could be resolved, was arbitrary.

Under the 2000 Plan's EOC, Home Health Agency is defined as an entity that regularly engages in providing Home Health Care Services for compensation and *whose personnel are qualified by training and/or experience to provide care*. The entity must have the appropriate state licensure / certification and must be bonded or hold appropriate liability insurance. It must also provide ongoing supervision / training to its employees appropriate to the services to be provided. CalPERS was not able to introduce or elicit testimony or evidence that PatrickXavierPT 1) was not licensed / certified in California, 2) was not bonded or insured, 3) did not provide ongoing supervision / training to its employees, or 4) utilized personnel that were not qualified to provide care. Though CalPERS relied heavily on the language of the 2000 Plan's EOC, it failed to demonstrate that PatrickXavierPT was ineligible under the 2000 Plan's EOC terms.

CalPERS's examination of Patrick Matibag ("Matibag") was entirely unremarkable. CalPERS did not ask Matibag to explain any of the pretextual discrepancies it relied upon to deny eligibility. The record discloses that Matibag had payroll records for PatrickXavierPT's employees assigned to provide services to Dr. Simonian, that were sent to CalPERS, and were also presented at the evidentiary hearing. Matibag testified that the employees of PatrickXavierPT assigned to Dr. Simonian were qualified. CalPERS did not provide any evidence to the contrary. CalPERS made no issue or inquiry of whether PatrickXavierPT was adequately bonded / insured or whether it supervised its personnel. And, Ms. Forsell conceded during her examination that the certification of PatrickXavierPT's employees was of no concern.

Contrary to the ALJs conclusion, checks were written to PatrickXavierPT for home care services it provided to Dr. Simonian. For example, check number 6199, dated October 18, 2019, in the amount of \$2,600.00 was written to PatrickXavierPT for services invoiced in the amount of \$2,600.00 for the month of September 2019 (see Exhibit I – 6).

CalPERS's argument that certain payments were more or different than the amounts invoiced as a reason to deny eligibility finds no support in the 2000 Plan's EOC or any other document CalPERS presented. The 2000 Plan's EOC places a limit on what CalPERS will reimburse.

CalPERS did not present any agreement or documents incorporated into an agreement that conditioned its obligation to reimburse on whether Dr. Simonian was paying more than what was invoiced. Put another way, CalPERS did not identify any written policy criterion, other than the language of the 2000 Plan's EOC, that defined eligibility of a Home Health Agency. CalPERS cited to no legal authority or governing terms or conditions that would authorize it to deny reimbursement under such circumstances. Dr. Simonian and Matibag testified that PatrickXavierPT provided home care services to Dr. Simonian and that Dr. Simonian would pay PatrickXavierPT for those services. They also testified that Matibag provided services not covered by CalPERS and paid separately by Dr. Simonian to Matibag. Those non-covered services included physical therapy, which Dr. Simonian paid to Matibag, not the agency, under a separate agreement. CalPERS did not provide any document or elicit any statement to contradict Dr. Simonian or Matibag's testimony on this point.

In this same regard, the ALJ erred in determining that the invoices lacked detail for the care provided on each day. Again, CalPERS did not introduce any document that required a Home Health Agency to or conditioned its eligibility on providing specific details of services rendered in an *invoice* to Dr. Simonian. To the contrary, PatrickXavierPT provided detailed health care notes in addition to the invoice when submitting its documents to CalPERS. The ALJ erred in determining that PatrickXavierPT did not demonstrate to CalPERS that its employees were *registered* home health care aides. The 2000 Plan's EOC does not expressly require this as a condition of eligibility. The same is true for requiring that all case notes be signed by the provider and the recipient.

The ALJ failed to determine whether PatrickXavierPT was eligible for reinstatement given the evidence that after CalPERS's decision, PatrickXavierPT provided claims information that was not in discrepancy. Here, even assuming the existence of discrepancies for the limited period, which Dr. Simonian does not concede, PatrickXavierPT provided documentation after CalPERS's determination of ineligibility in connection with Dr. Simonian's appeal that PatrickXavierPT eligibility be reinstated.

The ALJ did not determine whether CalPERS was in breach of its obligations when it proposed four alternates that either could not provide services to Dr. Simonian due to the then recent COVID-19 restrictions in place or would cost Dr. Simonian much more than what PatrickXavierPT was charging. Dr. Simonian's claims against CalPERS are based on the contract between them and on the arbitrary nature of CalPERS's refusal to reimburse Dr. Simonian for payments of covered services he made to his home care provider. The framework of these issues was detailed in Dr. Simonian's "Summation Brief" submitted on or about January 10, 2023. The issue the ALJ did not address was the conundrum that CalPERS placed upon Dr. Simonian. On the first hand, CalPERS's representative stated that it appeared to her that Dr. Simonian was paying too much, yet on the second hand the only alternative eligible provider

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would have cost Dr. Simonian more than what PatrickXavierPT was charging. Choosing a more expensive provider is a material consideration due to the 2000 Plan's EOC provision that benefits will end when the Total Coverage Amount has been reached. That is, there is a finite amount of reimbursement payments to which Dr. Simonian would be entitled.

Dr. Simonian requests that CalPERS and LTCG preserve all documents, claims records, written communications, notes, and other writings pertaining to his claims for reimbursement from the date of his first proof of loss to the present.

Sincerely,

GARY P. SIMONIAN, APC

/s/ Gary Simonian

GARY P. SIMONIAN