

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Richard B. Cory (Respondent) submitted a claim for reimbursement to the Long-term Care Group, Inc. (LTCG) under his long-term care policy (Policy). The Policy was issued under the authority of the Public Employees' Long-Term Care Act (LTC Act). Respondent obtained coverage under the 1995 Long-Term Care Comprehensive Plan.

Under the LTC Act, CalPERS' Board of Administration has the jurisdiction and authority to administer the California Public Employees' Long-Term Care Program (LTC Program). The LTC Program is a self-funded program designed to cover costs associated with qualified long-term care services and is administered by LTCG.

Respondent contacted LTCG on October 24, 2019, to initiate a claim for reimbursement. LTCG provided him with a Claim Intake Packet. At the time, he was living at Windchime of Chico (Windchime), an assisted living facility. On November 12, 2019, Respondent completed, signed, and submitted a claim form to LTCG to be reimbursed for the costs associated with his room and services at Windchime.

On December 18, 2019, LTCG sent Respondent a letter denying his claim for reimbursement. LTCG had determined that Respondent did not meet the conditions for receiving benefits as outlined in the 1995 Comprehensive Plan Evidence of Coverage (EOC), because he did not have a deficiency in two or more activities of daily living (ADLs), did not have a "Cognitive Impairment," and did not have a "Complex, Yet Stable Medical Condition." LTCG's determination was based on a review of a Claimant Care Needs Assessment form completed by Windchime LVN Doug Kelly (LVN Kelly); a Physician's Report; a Plan of Care completed by Windchime Resident Service Director, Vocational Nurse, Jessica Hinojosa and a phone conversation between LTCG and Ms. Hinojosa.

Respondent submitted a Notice of Claim Reconsideration form dated January 2, 2020, requesting LTCG reconsider its denial. After receiving Respondent's Notice, LTCG requested additional information and documentation from Windchime regarding Respondent's needs and services. LTCG was provided a Mini-Mental State Examination completed on November 12, 2019, by LVN Kelly and an assessment by LVN Kelly, effective January 16, 2020. In addition, LTCG spoke with LVN Kelly on January 15 and 22, 2020, to obtain information necessary in making its determination.

LTCG sent Respondent a letter dated January 23, 2020, denying his request for reconsideration. LTCG once again found that Respondent did not meet the conditions for receiving benefits as outlined in the EOC because he did not have a deficiency in two or more ADLs, did not have a "Cognitive Impairment" and did not have a "Complex, Yet Stable Medical Condition." LTCG's determination was based on re-review of previously submitted information and documentation, the additional documents provided

by Windchime on Respondent's behalf, and the telephone calls between LTCG and LVN Kelly.

Respondent appealed LTCG's determination by letter dated January 27, 2020.

On February 4, 2020, LTCG sent an acknowledgment letter to Respondent and notified him that it would forward the appeal to the LTC Program for processing.

The LTC Program conducted a thorough review of the information gathered by LTCG and submitted by Respondent. The LTC Program sent Respondent a letter dated March 30, 2020, informing him that the LTC Program was upholding LTCG's denial of benefit eligibility. The LTC Program confirmed that, based on the evidence submitted, Respondent did not have a deficiency in two or more ADLs, did not have a "Cognitive Impairment," and did not have a "Complex, Yet Stable Medical Condition." For these reasons, the LTC Program determined that that the costs incurred by Respondent were not eligible for reimbursement because he did not qualify for benefits under the Policy. Respondent was provided appeal rights.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). The hearing took place on April 12, 2021 and May 7, 2021. Respondent was represented by counsel at the hearing.

The LTC Program presented evidence in support of its determination through witness testimony and documents. Dr. Stephen K. Holland, LTCG's Medical Director, testified at the hearing. Dr. Holland testified that Respondent did not meet any of the eligibility requirements as outlined by the EOC.

First, Dr. Holland testified that the documentation shows Respondent did not have a deficiency in two or more ADLs as the term "Deficiency in Activity of Daily Living" is defined in the EOC.¹ Here, a deficiency would require Respondent to need substantial assistance and/or constant supervision with an ADL. At the time Respondent was admitted to Windchime, the evidence established Respondent did not have any ADL deficiencies. Dr. Holland testified that although bathing came to be a deficiency, it was the only ADL Respondent needed substantial assistance and constant supervision in performing. Consequently, even if Respondent had a deficiency with bathing, Dr. Holland testified this was only one ADL. Respondent did not qualify under the Policy because it requires a deficiency in two or more ADLs.

Second, Dr. Holland testified that the medical evidence did not show that Respondent had a "Cognitive Impairment" as that term is defined in the EOC.² Dr. Holland testified

¹ Under the EOC, "Deficiency in Activity of Daily Living" means "that **You** cannot perform one or more of the following six (6) Activities of Daily Living without substantial human, physical assistance and/or constant supervision."

² The EOC defines "Cognitive Impairment" as "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

that Respondent is not confused and shows little to no signs of “Cognitive Impairment. Dr. Holland also noted that Respondent received no services for “Cognitive Impairment” from Windchime.

Third, Dr. Holland testified that Respondent did not have a “Complex, Yet Stable Medical Condition” as that term is defined in the EOC.³ Respondent did not need or receive 24-hour-a-day nursing observation. The medical treatment Respondent received from an LVN, and/or Medical Technician, consisted primarily of assistance with taking medication; however, those services do not qualify as “Professional Nursing Intervention.” Furthermore, medication supervision alone does not qualify as evidence of a “Complex, Yet Stable Medical Condition.”

CalPERS’ LTC Program also called Angela Forsell, LTCCG’s Vice President of Clinical Services, as a witness. Ms. Forsell, like Dr. Holland, testified regarding the information LTCCG utilized in making its determination that Respondent was not eligible for benefits. Ms. Forsell expanded on the criteria in the EOC, explaining why Respondent did not meet the criteria. Ms. Forsell explained the triggers for qualifying as a deficiency with an ADL and why Respondent did not need or receive substantial human, physical assistance and/or constant supervision. Ms. Forsell also testified regarding the processes employed by LTCCG to ensure that all relevant and necessary information is obtained and reviewed before an eligibility determination is made.

CalPERS’ Program Representative, Sheri Alvarado, testified on behalf of the LTC Program. Ms. Alvarado explained the process undertaken by the LTC Program to review the evidence obtained by LTCCG to obtain any additional evidence from the Respondent and ultimately to make a determination as to whether he was eligible for benefits under the Policy. After reviewing all of the evidence, the LTC Program upheld LTCCG’s denial of coverage because (1) there was no evidence that Respondent needed or received substantial human, physical assistance and/or constant supervision with two or more ADLs; (2) there was no evidence that Respondent had a “Cognitive Impairment,” as that term is defined in the EOC, or that he received services for a “Cognitive Impairment;” and (3) there was no evidence the Respondent had a “Complex, Yet Stable Medical Condition” that required professional nursing intervention. For these reasons, the LTC Program determined that Respondent did not meet the conditions for receiving benefits as outlined in the EOC and was not eligible for reimbursement of the expenses he incurred at Windchime.

Respondent testified on his own behalf. Respondent testified that he was diagnosed with diabetes and has been insulin dependent since he was 20 years old. The charges at issue here were incurred from October 2019 to May 2020. He was admitted to the

Alzheimer’s disease, or similar forms of senility or irreversible dementia. This deterioration or loss of intellectual capacity is established through use of standardized tests or instruments.”

³ Under the EOC, “Complex, Yet Stable Medical Condition” means “that twenty-four (24) hour a day nursing observation, or professional nursing intervention more than once a day, in a setting other than the acute care unit of a hospital is medically necessary, that is, the observation or intervention has been prescribed by a **Physician** and it is not designed primarily for the convenience of **You** or **Your** family.”

hospital in diabetic shock, and after a nearly two-month hospitalization, he entered Windchime. At the time he entered Windchime, he needed 24-hour monitoring for his blood sugar and assistance with insulin administration. Respondent believes his health improved because of the care and supervision he received at Windchime. He is frustrated that his claim was denied because he paid the required premiums for LTC, and he believes LTCG should have paid the expenses he incurred as a result of the care he needed and received while at Windchime.

Respondent also called Cristina Flores, a Registered Nurse, to testify at the hearing. RN Flores is the founder of Eldercare Advocacy Bay Area, a statewide advocacy agency to help consumers. RN Flores testified that resident care facilities for the elderly (RCFEs) would be covered under the Policy if Respondent had deficiencies in two or more ADLs, a "Cognitive Impairment" or a "Complex, Yet Stable Medical Condition. RN Flores believes that Respondent has deficiencies with these ADLs: bathing, dressing and grooming. She also believes Respondent presents with a "Complex, Yet Stable Medical Condition" that needs professional nursing intervention. RN Flores testified that the term, "professional nursing intervention" means services performed by an LVN or Medical Technician.

Despite asserting that Respondent qualified for benefits under the Policy, Respondent argued in the alternative, that the EOC's definition makes the Policy's benefits untenable, illusory, arbitrary and unfair. Respondent argued that it was impossible for him to qualify for benefits while at Windchime, and for this reason, the Policy should be invalidated, and he should either (1) be provided coverage under the Policy; or (2) have the Policy voided and his premiums returned to him as well as the LTC program paying his attorney fees.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that the facts of this matter are not in dispute. The ALJ found that the EOC defines the terms and conditions for coverage and benefits. In this matter, to be eligible for coverage, Respondent must establish that he has (1) a deficiency in two or more ADLs; (2) a "Cognitive Impairment;" or (3) a "Complex, Yet Stable Medical Condition."

The ALJ found that Respondent did not have a deficiency in two or more ADLs. The ALJ found that Respondent met the definition of deficiency in an ADL for bathing because he needed substantial human, physical assistance and/or constant supervision. However, the ALJ found that Respondent did not have a deficiency in any other ADL.

The ALJ also found that Respondent did not have a "Cognitive Impairment." The ALJ's finding was based in part on the fact that Respondent took a Mini-Mental State Examination administered by LVN Kelly, and he got every answer correct. In addition, the ALJ found that Windchime staff regularly evaluated Respondent and repeatedly found no signs of "Cognitive Impairment."

Finally, the ALJ found that Respondent did not have a “Complex, Yet Stable Medical Condition.” The ALJ noted that the facts in this matter are not in dispute; however, the application of those facts to the EOC is what is in dispute. The ALJ noted that the parties disagreed about who can provide nursing intervention to qualify for reimbursement under the terms of the EOC. The ALJ ultimately found that Respondent did not have a “Complex, Yet Stable Medical Condition” because Respondent did not receive twenty-four-hour a day nursing observation or professional nursing intervention while at Windchime. The ALJ found that Windchime does not offer professional nursing services and that Respondent did not receive any while at Windchime, a necessary prerequisite to find Respondent had a “Complex, Yet Stable Medical Condition.”

The ALJ held that the LTC Program correctly denied Respondent’s claim. Respondent was not eligible to be reimbursed for services provided to him at Windchime from October 11, 2019 through May 1, 2020.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

September 15, 2021

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