

ATTACHMENT A
PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal Regarding
Reimbursement for the Purchase of Banked
Breast Milk by:

ROBERT D. GUNSALUS,
father of J., a minor,¹

Respondent.

Case No. 2011-0783

OAH No. 2012090230

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter on January 15 and February 12, 2013, in Oakland, California. On February 12, complainant's counsel and Richard KP Sun, M.D., M.P.H., appeared by telephone, with respondent's consent.

Senior Staff Counsel Renee Salazar represented complainant Kathy Donneson, Chief, Office of Health Plan Administration, California Public Employees' Retirement System.

Respondent Robert D. Gunsalus appeared on behalf of himself and his son.

The record closed and the matter was submitted on February 12, 2013.

FACTUAL FINDINGS

1. The California Public Employees' Retirement System (CalPERS) is the agency charged with administering the Public Employees' Medical and Hospital Care Act. (Gov. Code, § 22750 et seq.) The Act requires CalPERS to provide health benefits for state employees and their dependents. At all times relevant to this proceeding, PERS Choice was a preferred provider plan offered by CalPERS under the Act. CalPERS contracted with Anthem Blue Cross to administer PERS Choice medical claims.

2. At all relevant times, respondent Robert D. Gunsalus was enrolled in the PERS Choice health plan.

¹ Respondent's son, a minor, is identified as "J." to protect his privacy.

3. Respondent seeks reimbursement for banked breast milk purchased for his newborn son, J., between October 12, 2006, and August 14, 2007. Respondent filed his claim on September 7, 2007, and CalPERS denied it on August 4, 2010. Respondent appealed. Complainant Kathy Donneson, Chief of the Office of Health Plan Administration for CalPERS, issued the statement of issues on December 20, 2012, and this hearing followed.²

4. J. was born on February 15, 2006, and became enrolled in the PERS Choice Health Plan on July 1, 2006.

5. Mother's milk was attempted from birth. J.'s parents avoided formulas so that J. would take the mother's milk but, because of low weight gain, they began to introduce various types of hypoallergenic formulas, while continuing the mother's breast milk. J. developed a skin condition – eczema – which J's parents felt was an allergic reaction to the formulas. (J.'s older sibling had also had eczema and food allergies.) J.'s mother had avoided wheat, eggs and dairy, but not fish, during pregnancy and during the time she was breastfeeding.

6. Pediatrician Jeffrey Corral-Ribordy, M.D., saw J. for the first time on July 3, 2006, when J. was four months old. Dr. Ribordy thought J. was small at that time, but he was not particularly concerned as J.'s family is small. At six months, however, Dr. Ribordy diagnosed J. with failure to thrive, as there had been almost no weight change or growth since the visit at four months.

7. Dr. Ribordy recommended a full, failure-to-thrive/allergy workup. After discussing the matter with Dr. Ribordy and an allergist, J.'s parents decided to delay further testing in favor of a continued trial of hypoallergenic formulas and the introduction of banked breast milk. (The mother's breast milk was insufficient.) J.'s parents felt that there was "no point" to an allergy work-up at that time, for two reasons: first, they felt the work-up would not be reliable, because they were informed that false positives and negatives are common when infants are tested for allergies; second, they felt an allergy work-up would only result in a recommendation to introduce hypoallergenic formulas, which they had already tried without success. J.'s parents were also concerned that introducing foods to identify allergies could in itself cause allergic reactions, or at least increase the likelihood that their child would become allergic to that food in the future.

² Between 2007 and 2012, respondent's claim was the subject of numerous reviews by Anthem and by the MAXIMUS Center for Health Dispute Resolution, a company that reviews medical claims for CalPERS. All of these reviews resulted in a recommendation that respondent's claim be denied, but for different reasons. It appears that CalPERS took respondent's claim seriously, and initiated numerous reviews to insure that his claim was fully explored. Respondent, however, is understandably frustrated by the length of time it has taken to resolve his claim, and by the changing rationales that have been advanced to deny his claim.

8. On October 9, 2006, Dr. Ribordy prescribed 15 ounces per day of banked breast milk for J., as treatment for severe eczema, allergies, and failure to thrive. J.'s parents found that, when they introduced banked breast milk, he improved. His skin cleared up and he began to gain weight. Whenever they tried to wean him from the banked breast milk by reintroducing a hypoallergenic formula, his eczema flared up.

9. In 2008, J. underwent full allergy testing which revealed a reaction to (among other things) egg whites, fish and milk.

Evidence of Coverage

10. Respondent's benefits under the PERS Choice Health Plan, and CalPERS's obligations, are established by the "Evidence of Coverage," a 99-page document that sets forth the terms of the plan. Under the EOC, "benefits are provided only for covered services . . . and supplies which are medically necessary and delivered with optimum efficiency." Services not "specifically listed" as benefits under the EOC are "non-listed benefits" and are expressly excluded from coverage.

11. Covered services include certain identified medical and hospital benefits, and an outpatient prescription drug program. Covered medical and hospital benefits are specified in detail. Banked breast milk is not among the benefits specifically listed. The EOC defines what is covered under the outpatient prescription drug program. Banked breast milk is not among the benefits specifically listed.

12. The term "medical necessity" is defined by the EOC as follows:

Medical necessity means services and supplied as determined through the Plan's review process to be necessary, appropriate, and established as safe and effective treatment of the patient's illness . . . , consistent with acceptable treatment patterns found in established managed care environments and consistent with Blue Cross Medical Policy. **The fact that a provider may prescribe, order, recommend or approve a service [or] supply . . . does not in itself make it medically necessary, even though it is not specifically listed as an exclusion or limitation.** A service may be determined not to be medically necessary even though it may be considered beneficial to the patient. Established medical criteria for medical necessity must be met before that service . . . or supply is determined to be medically necessary.

Services . . . and supplies that are medically necessary must:

1. be appropriate and necessary for the diagnosis or treatment of the medical condition.

2. be consistent with the symptoms or diagnosis in treatment of the illness . . . or condition.
3. be within standards of good medical practice within the organized medical community.
4. not be furnished primarily for the convenience of the patient [or] the treating physician.
5. be consistent with Blue Cross Medical Policy
6. [¶]
7. be the most appropriate . . . supply . . . or service which can be safely provided. The most appropriate . . . supply . . . or service must satisfy the following requirements:
 - a. There must be valid scientific evidence demonstrating that the expected health benefits from the . . . supply . . . or service are clinically significant and produce a greater likelihood of benefit, without a disproportionately greater risk of harm or complications, for you with the particular medical condition being treated than other possible alternatives . . .

[¶] . . . [¶]

(Original emphasis.)

13. The EOC also identifies over 40 benefits that are expressly excluded from coverage. Included among those is “Nutrition. Vitamins, minerals, and nutritional supplements whether or not prescribed by a physician; nutritional counseling or food supplements taken orally, except as specifically provided under the Diabetes Self-Management Education Program provision or the Outpatient Prescription Drug Program section.”

14. Respondent and Dr. Ribordy, J.’s pediatrician, believe strongly that banked breast milk was medically necessary for J. Dr. Ribordy testified that J. failed to thrive on mother’s breast milk and formulas, but did well on donated breast milk – “that’s medical necessity.” Dr. Ribordy did not do any research on the subject before prescribing banked breast milk for J., and he is not sure whether there is data on the subject. Dr. Ribordy stated that when he saw that banked breast milk was helping J., there was no reason for him to discontinue it. Dr. Ribordy acknowledges that there are other causes of failure to thrive besides food allergies, but he had reason to believe it was food allergies in J.’s case because

allergies are associated with eczema and because of the family history of food allergies. Dr. Ribordy stated, "It's not exact, but it worked."

15. Richard KP Sun, M.D., M.P.H., is a Medical Consultant for CalPERS. He reviews all appeals to the CalPERS board that relate to the issue of medical necessity.

In this case, Dr. Sun examined the EOC and found no provision that includes banked breast milk as a covered benefit. In Dr. Sun's opinion, banked breast milk is a non-listed benefit and is therefore excluded from coverage. His testimony on this point is consistent with the EOC, and his opinion is persuasive.

Dr. Sun reviewed the medical literature concerning banked breast milk. He found that scientific evidence supports the use of breast milk as treatment for a short duration under certain circumstances, for example, in pre-term infants to support their immune systems. Dr. Sun did not find any scientific evidence to support the use of breast milk on a long-term basis as a treatment for other conditions. Dr. Sun does not dispute that J. appeared to benefit from the banked breast milk, nor does he dispute that the American Academy of Pediatrics believes that mother's milk is the most beneficial food for infants. His only point is that, based on his review of the literature, no scientific evidence supports the use of banked breast milk as a long-term treatment for infants with J.'s conditions. Dr. Sun's testimony on this point was also persuasive.

In addition, Dr. Sun believes that banked breast milk falls within the EOC's definition of "Nutrition," and is therefore expressly excluded from coverage.

LEGAL CONCLUSIONS

1. The burden of proof is on respondent to establish each fact that is essential to his claim. (Evid. Code, § 500.) Since no provision in the plan states otherwise, the standard of proof to be applied is preponderance of the evidence. (Evid. Code, § 115.)

2. It is respondent's burden to prove that the use of banked breast milk is a covered benefit under the EOC, and that the use of banked breast milk was medically necessary, as that term is defined by the EOC. Respondent has not met his burden. Banked breast milk is not a covered benefit; as a non-listed benefit, it is excluded from coverage. (Findings 11 & 15.) In addition, the evidence fails to establish that the extended use of banked breast milk for J.'s condition was medically necessary. (Findings 12 & 15.)

It is emphasized that the term "medically necessary" is used as it is defined in the EOC. It must be given that definition: respondent seeks benefits pursuant to the plan, and those benefits are established by the terms of the EOC. Respondent's observation that J. thrived on banked breast milk, and the sincerity of respondent's conviction that banked breast milk was essential to his son's well-being, are not questioned. Similarly, Dr. Ribordy's medical judgment in prescribing banked breast milk is not questioned. Under the EOC, however, the term "medically necessary" has a precise and strict definition. There must be "valid scientific evidence

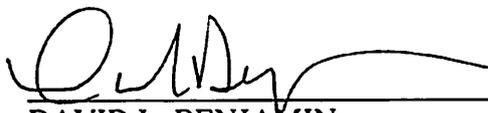
demonstrating” that, in a case like J.’s, the expected health benefits from banked breast milk are “clinically significant” and will produce a greater likelihood of success than other treatments. No such evidence was produced.

3. Because banked breast milk is a non-listed benefit, and because the evidence fails to establish its medical necessity in this case, it is not necessary to reach complainant’s contention that banked breast milk falls within the excluded category of “Nutrition.”

ORDER

The appeal of respondent Robert D. Gunsalus, from the decision of CalPERS denying his request to be reimbursed for the purchase of banked breast milk between October 12, 2006, and August 14, 2007, is denied.

DATED: March 13, 2013



DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings