

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION**

Robert Gunsalus (Respondent) was employed by the California State University at Humboldt, which contracts with CalPERS to provide health care coverage to its employees. By virtue of his employment, Respondent was eligible to participate in the PERS Choice health care plan offered through the provisions of the Public Employees' Medical and Hospital Care Act (PEMHCA). Respondent has a son who was eligible for health benefits under PEMHCA through Respondent's health care plan. As part of his health care coverage, PERS Choice provided Respondent with an Evidence of Coverage (EOC) booklet each year. The EOC contains the terms and conditions of the plan, including provisions concerning covered benefits and payment of claims.

When Respondent's son was six months old, his doctor diagnosed him with failure to thrive because he had gained little weight or growth since he saw him at four months old. As a result, his doctor recommended a failure to thrive/allergy workup. However, Respondent decided to delay the testing, and continued trying hypoallergenic formulas, and introduced banked breast milk. When Respondent's son was seven months old, his doctor prescribed banked breast milk as treatment for allergies and failure to thrive.

After ten months of receiving banked breast milk, Respondent filed a claim with PERS Choice for reimbursement of the banked breast milk purchased for his son. In support of his claim, Respondent submitted a medical report from his son's doctor indicating that banked breast milk was medically necessary, but without any explanation to support the medical necessity. After numerous reviews by various medical professionals, including two independent medical reviewers, CalPERS denied Respondent's request for reimbursement of banked breast milk as not medically necessary. In addition, reimbursement of banked breast milk was denied because it is not a covered benefit. Respondent appealed CalPERS' determination and a hearing was held on January 15, and February 12, 2013.

At the hearing, Respondent was present and represented himself. Respondent testified that his son's condition improved when given banked breast milk. Thus, he believed it was medically necessary. Respondent also had his son's doctor, Jeffrey Corral-Ribordy, M.D., testify at the hearing. According to Dr. Ribordy, Respondent's son did well on donated breast milk, and to him, "that's medical necessity." However, Dr. Ribordy admitted that he did not do any research on banked breast milk before prescribing it, and was unaware if data exists on its medical necessity.

Also present at the hearing was CalPERS Medical Consultant, Richard KP Sun, M.D., M.P.H. Dr. Sun testified that the PERS Choice EOC did not include banked breast milk as a covered benefit. As such, Dr. Sun opined that banked breast milk is a non-listed benefit and thus excluded from coverage. Dr. Sun's testimony also established that, pursuant to his review of the literature, scientific evidence does not support the use of banked breast milk as a long-term treatment for infants with the same condition as Respondent's son.

According to the terms of the PERS Choice EOC, services not “specifically listed” as benefits under the EOC are “non-listed benefits” and are expressly excluded from coverage. Moreover, the EOC explains that “benefits are provided only for covered services . . . which are medically necessary and delivered with optimum efficiency.” The term medical necessity, as defined in the EOC, indicates:

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.

Another requirement for a service to be medically necessary is that “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 . . . than other possible alternatives . . . .”

Based on the EOC, combined with Dr. Sun’s testimony, the Administrative Law Judge (ALJ) found that banked breast milk is not a covered benefit and, as a non-listed benefit, it is excluded from coverage. For that reason, the ALJ concluded that Respondent is not entitled to reimbursement for purchase of banked breast milk. In addition, Respondent did not produce “valid scientific evidence demonstrating” that the expected health benefits from banked breast milk are “clinically significant” and will produce a greater likelihood of success than other treatments. For that additional reason, the ALJ concluded that Respondent failed to establish the medical necessity of banked breast milk. Accordingly, the ALJ denied Respondent’s request for reimbursement for the purchase of banked breast milk.

The Proposed Decision is supported by the law and the facts. Staff argues that the Board should adopt the Proposed Decision.

Because the Proposed Decision applies the law to the salient facts of this case, the risks of adopting the Proposed Decision are minimal. The member may file a Writ Petition in Superior Court seeking to overturn the Decision of the Board.

May 15, 2013



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