

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DENY THE PETITION FOR RECONSIDERATION

Brian Aske (Respondent) petitions the Board of Administration to reconsider its adoption of the Administrative Law Judge's (ALJ) Proposed Decision dated September 4, 2019. For reasons discussed below, staff argues the Board deny the Petition and uphold its decision.

Brian Aske, as Executor and Trustee for the Estate of Barbara Aske (Respondent), submitted a request for reimbursement under a Long-Term Care policy (Policy) issued under the authority of the Public Employees' Long-Term Care Act (LTC Act) that Barbara C. Aske (Mrs. Aske) purchased. Mrs. Aske obtained coverage under the 1998 Long-Term Care comprehensive plan, effective December 1, 1998.

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 the Long-Term Care Group, Inc. (LTCG).

Mrs. Aske initially contacted LTCG in 2011 regarding reimbursement under the Policy. On March 8, 2011, LTCG informed Mrs. Aske that she was approved to receive benefits under the Policy, and provided her with information as to what benefits were reimbursable under the Policy and the steps she needed to take to obtain reimbursement for the qualifying costs she incurred. On April 19, 2011, Mrs. Aske's son, Damon Aske, contacted LTCG and cancelled Mrs. Aske's request for benefits under the Policy.

On June 14, 2014, Mrs. Aske's husband contacted LTCG and filed a claim for benefits under the Policy. On July 29, 2014, LTCG informed Mrs. Aske that she was approved to receive benefits under the Policy, and once again provided her with information as to what benefits were reimbursable under the Policy and the steps she needed to take to obtain reimbursement for the qualifying costs she incurred.

On February 17, 2017, Respondent contacted LTCG in his capacity as Executor and Trustee. Respondent sought reimbursement for certain costs Mrs. Aske allegedly incurred beginning in November 2012.

LTCG conducted an investigation and sought information from Respondent, as well as Fairwinds Desert Point (Fairwinds), the facility where Mrs. Aske lived from November 2012 to December 2014, to determine which costs were reimbursable under the Policy. On November 21, 2017, LTCG issued a letter providing Respondent with its determination that certain costs incurred by Mrs. Aske prior to May 14, 2014 were not reimbursable under the Policy. LTCG's determination was based on the fact that

Mrs. Aske did not meet the Policy's Conditions for Receiving Benefits. In particular, Respondent did not establish that a Plan of Care existed prior to May 14, 2014, or that Fairwinds provided Qualified Long-Term Care Services. In addition, Mr. Aske, who did provide long-term care services for his wife, is not eligible to seek reimbursement for the services he provided. The Policy specifically provides expenses related to services provided by immediate family members are not covered under the Policy unless the family member works for an organization providing the care, and Mr. Aske was not a regular employee of an organization providing long-term care service.

On January 19, 2018, Respondent requested that LTCG reconsider its determination. On February 1, 2018, LTCG informed Respondent that its November 21, 2017, determination was affirmed and informed Respondent of his right to appeal the determination to the LTC Program.

Respondent appealed LTCG's determination. The LTC Program completed a thorough review of the facts, the applicable law, and the applicable provisions of the Policy. The LTC Program determined that the services provided for Mrs. Aske prior to May 14, 2014, were not eligible for reimbursement for several reasons. First, it was determined that Fairwinds, prior to May 14, 2014, did not provide qualifying long-term care services. Actually, prior to May 14, 2014, Fairwinds did not provide services for Mrs. Aske. In fact, it was a condition of her being allowed to reside at Fairwinds that Mr. Aske specifically provide those services. Starting on May 14, 2014, Mrs. Aske contracted with Fairwinds to provide services that qualified as reimbursable under the Policy. Next, the LTC Program also determined that Mr. Aske, as an immediate family member, was not eligible to seek reimbursement for the services he provided. It was also determined that, prior to May 14, 2014, no Plan of Care existed relating to long-term care services for Mrs. Aske. The Policy requires that for services to be reimbursable they must be provided pursuant to a individualized plan of services prescribed by a licensed health care practitioner. Last, the LTC Program determined that Respondent's claim was untimely since it was brought outside the Policy's limit for submitting a claim for reimbursement.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings. A hearing was held on July 9, 2019. Respondent represented himself at the hearing.

The LTC Program presented evidence in support of its determination through witness testimony and documents. That evidence established Mrs. Aske and Mr. Aske were informed in 2014 that Mrs. Aske was approved to receive benefits under the Policy, and were provided instructions as to what services were reimbursable under the Policy and how to submit a claim to receive reimbursement for covered expenses. Evidence was presented that Mrs. Aske had a plan of care in place as of May 14, 2014, and that she incurred expenses in connection with qualified long-term care services provided by a residential care facility. On or around this date Fairwinds, the facility where Mrs. Aske lived with Mr. Aske, began charging and providing qualified long-term care services for

Mrs. Aske. The LTC Program's witness testified that for these reasons Mrs. Aske, or her estate, were reimbursed for long-term care expenses she incurred on or after May 14, 2014.

Evidence was also presented that prior to May 14, 2014, Mrs. Aske did not have a plan of care in place and did not incur expenses related to qualified long-term care services. Evidence was introduced that established Fairwinds only charged Mrs. Aske for room and board, and that Fairwinds specifically required Mr. Aske to provide services for his wife as a condition of them living there. Last, the LTC Program argued that Mr. Aske, as an immediate family member, is not eligible to be reimbursed for providing services for Mrs. Aske. Testimony was also presented that Respondent's claim was not timely submitted. For these reasons, the LTC Program's witness testified expenses Mrs. Aske incurred were not reimbursable under the Policy.

Respondent testified on behalf of Mrs. Aske and her estate. Respondent testified that he believed a note from Mrs. Aske's doctor qualified as a plan of care. Respondent also testified that he believed Fairwinds provided services for his mother and father, and that as a result of Mr. Aske's declining health he did not believe he could have been responsible for providing the services she needed prior to May 14, 2014. However, Respondent testified that he was not sure how much assistance Fairwinds provided Mrs. Aske prior to May 2014, and that because Mr. Aske was protective of information he did not have records to fully support his claim. Respondent testified that he believes he filed his claim in as timely a manner as possible.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that Respondent had the burden of establishing Mrs. Aske received services that qualified for reimbursement under the Policy.

The ALJ concluded that Respondent's claim was timely; however, the ALJ found that Respondent failed to establish Mrs. Aske paid any expense to Fairwinds that is reimbursable under the Policy. The ALJ found that the evidence established Mr. Aske provided all care and supervision of Mrs. Aske prior to moving into Fairwinds, and a condition of them moving there was Mr. Aske continuing to provide this care and supervision. The ALJ found that it was not until May 2014, when Mr. Aske's health prevented him from providing the requisite care and supervision, that Mrs. Aske paid expenses to Fairwinds associated with qualified long-term care services. Last, the ALJ found that the Policy expressly excluded reimbursement of care provided by an immediately family member, so the care provided by Mr. Aske would not be reimbursable under the Policy.

In the Proposed Decision, the ALJ concludes that the LTC Program's decision to deny Respondent's claim for reimbursement for costs incurred prior to May 14, 2014, must be affirmed.

The Board of Administration adopted the Proposed Decision at its November 20, 2019 meeting. Respondent was notified of the Board's Decision on November 21, 2019.

On December 2, 2019, Respondent submitted a Petition for Reconsideration. The Petition largely presents the same evidence and arguments that were presented at the hearing and rejected by the ALJ. The Petition also presents the same arguments that were submitted by Respondent and considered by the Board at its November 20, 2019 meeting.

Respondent argues that the administrative hearing was unfair because the LTC Program did not respond to his discovery. This argument is misleading. On July 3, 2019, CalPERS' staff provided Respondent with a list of all exhibits/documents the LTC Program intended to introduce as evidence at the July 9, 2019 hearing. The vast majority, if not all, of the documents, were previously provided to Respondent during the course of the appeal process. In addition, CalPERS' staff exchanged numerous emails with Respondent on July 5, 2019, providing him with all documents that were on the exhibit list that he claimed he did not have. The exhibits in this matter largely consisted of correspondence between Respondent, LTCG and the LTC Program. Consequently, Respondent had all of the evidence introduced in this matter well before the hearing, and his argument that the hearing was unfair is devoid of merit.

Respondent also argues the Decision did not consider or address certain issues or arguments. Respondent argues the Decision did not consider (1) Mrs. Aske's severe cognitive impairment, (2) Mr. Aske's medical condition at the time he provided care for Mrs. Aske, (3) the room and board charges she incurred, or (4) the "plan of care" that she allegedly was under at the time she moved into Fairwinds. Respondent's arguments lack merit.

First, the Proposed Decision, at paragraphs 6 and 7 on pages 8 and 9, addresses Mrs. Aske's severe cognitive impairment. The LTC Program did not dispute that she suffered from a severe cognitive impairment. The LTC Program sent Mrs. Aske and her husband information regarding how she could submit a claim for reimbursement of long-term care expenses under the Policy. However, Mrs. Aske initially cancelled the claim. In addition, Mrs. Aske did not incur expenses covered by the Policy prior to May 14, 2014. The LTC Program has paid the full amount Mrs. Aske, or Respondent, is entitled to receive for covered expenses incurred on or after May 14, 2014.

Second, the Proposed Decision makes clear that Mr. Aske's condition was considered and addressed by the ALJ when the Proposed Decision was issued. (See Proposed Decision at Paragraphs 21, 22, 23, 24, 25, 26, 27, 41, 42 and Legal Conclusion Paragraph 4.)

Third, the ALJ considered the "room and board charges" Mrs. Aske incurred, but ultimately rejected the argument that these were reimbursable under the Policy. (See Proposed Decision at Paragraph 41 on pages 20 and 21.)

Third, the ALJ considered the evidence that Respondent submitted at the hearing that he characterized as a “plan of care.” Again, the ALJ rejected Respondent’s argument that the document constituted a “plan of care” as defined in the Policy. (See Proposed Decision at Paragraph 42 on page. 21.)

No new evidence has been presented by Respondent that would alter the analysis of the ALJ. The Proposed Decision that was adopted by the Board at the November 20, 2019, meeting was well reasoned and based on the credible evidence presented at hearing.

For all the foregoing reasons, staff recommends that Respondent’s Petition for Reconsideration be denied.

December 18, 2019

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