

ATTACHMENT C

**RESPONDENT'S ARGUMENT REGARDING THE PETITION FOR
RECONSIDERATION**

December 8, 2019

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
PO Box 942701
Sacramento, CA 94229-2701
Fax: (916) 795-3972



RE: **Respondent's Argument in Support of Petition for Reconsideration** in the Matter of the Appeal of the Denial of Reimbursement for Long Term Care Benefits of Barbara Aske, by BRIAN ASKE, Respondent. OAH No. 2019030610

Dear Board of Administration of the California Public Employees' Retirement System,

Please reconsider your November 20, 2019 decision to adopt the Proposed Decision of the Administrative Law Judge of Case No. 2018-1266, OAH No. 2019030610. The Board based its decision by relying on a process that was incomplete, disconnected and far from comprehensive. It did not consider many important factors and considerations.

Here are the reasons why you should reconsider your Decision:

1. CalPERS never responded to the Respondent's valid Discovery Request in preparation for the Administrative Hearing. This led to an unfair Administrative Hearing, as the Respondent was not provided copies of any of CalPERS' records or information.
2. The Decision did not consider that the Claims Administrator ignored Barbara Aske's primary qualifying condition of a severe cognitive impairment when administrating and canceling her claim during the period in question. The Claims Administrator did not offer Care Advisory Services (p. 15 of E.O.C), as an appropriate assessment in March of 2011 would have helped guide her husband, H. Dale Aske, to setting up the correct care and clear documentation from the start. However, this did not happen.
3. One of the two CalPERS opposing arguments was based on a premise that part of Barbara Aske's supervision care was provided by her husband. This argument did not consider that Dale Aske was chronically ill himself as well, living in long term care and that he also had a CalPERS long term care policy that did not reimburse his care costs during the same period of time, either. The Proposed Decision, Factual Finding 23, on page 15 is incorrect. Hospice was never considered for Barbara Aske by her husband, H. Dale Aske. This statement is incorrect and was never stated at the Administrative Hearing or ever included in any documentation. It was H. Dale Aske that was qualified for hospice when they both moved into the long-term care facility in November 2012. The Administrative Law Judge could not have considered this circumstance as he seemed to mis-understand, H. Dale Aske's condition.
4. Neither the Decision of the Board, the Administrative Law Judge, or the Health Care Appeals unit addressed the fact that "Room and Board" from a long term care facility is a "mitigating", "maintenance" or "personal service" for someone with a Severe Cognitive Impairment who can't live on their own or make meals for themselves. Room and Board are therefore "Qualified Services" under the policy requiring reimbursement.
5. Neither the Decision of the Board, the Administrative Law Judge, or the Health Care Appeals unit addressed the fact that Barbara Aske had a written "Plan of Care" by a licensed Health Care provider that completely met the entire definition of a "Plan of Care" included in the Long Term Care Insurance policy, prior to moving into the Long Term Care Facility before the period of time in question. This qualified her long-term care expenses and required them to be reimbursed under the policy.

Here are the facts:

1. Barbara Aske, a CalPERS' member bought long-term care insurance for her and her husband, H. Dale Aske. Policies that had limits and were not inflation protected, practical policies a 40 year kindergarten teacher, working in a disadvantaged school district and her engineer husband could afford and rely on for the future.
2. They dutifully paid their premiums continuously for 16 years, even as she developed Alzheimer's and he broke both hips, contracted untreatable stage 4 liver failure, prostate cancer and a host of other conditions qualifying him for hospice.
3. They worked out a solution with their primary care physician to sell their house and move into an assisted living facility in November of 2012. They did not want to move, but had to in order to receive help and care.
4. Both LTCG, the CalPERS long-term care insurance administrator, and the CalPERS Health Appeals Unit agree, that Barbara Aske had a severe cognitive impairment, qualifying her for reimbursement under the policy. In fact, she was already approved for long-term care reimbursement previously in March of 2011, almost two years before moving into a long term care facility.
5. It was also agreed that the facility they moved into was appropriately licensed and approved for reimbursement under the policy.
6. The CalPERS Health Appeals Unit argued that a claim and documentation was not submitted in a timely fashion, after all, Barbara and Dale were weak, sick and dying and just trying to get by day to day. The Administrative Judge disagreed and found that the claim was timely under the policy.

They needed long-term care, they qualified for long-term care, they paid for long-term care, they received long-term care. So what's the problem?

Here are my observations after having four parents pass away in 4.5 years, all needing some amount of long-term care as they declined and all having similar CalPERS long term care insurance plans.

Long Term Care Explained

First of all, it is important to explain how long term care and long term care insurance work and how different they really are from medical care and medical insurance. I have found through many experiences that until someone actually has to go through arranging and paying for long-term care, they don't understand. This includes the CalPERS Health Appeals Unit and Administrative Judges.

My wife and I have worked with seven different long-term care facilities and the requirements and approaches were virtually all the same.

In order to move into a long-term care facility and continue to reside in one, one must pay monthly, in advance for all room and board, care and ancillary services. In order to be reimbursed by long-term care insurance, you must submit documentation, demonstrating that you qualified for reimbursement, paid for the care, the facility was licensed and approved, the facility provided the care, and you received the care for the entire time period. Documentation can not be submitted early, and all submitted documentation must perfectly correspond. So, an individual will always be over a month out of pocket before receiving any portion of reimbursement.

Long-term care facilities will all tell you that they will try and document, and try to assist with long-term care policies, but they will not be responsible if the cost doesn't get reimbursed. That is why they collect all of their

money up front. They are also typically under-staffed, especially for administration, and have a difficult time finding and keeping qualified, dependable people.

Long Term Care Insurance Administrator, LTCG

The long-term care insurance administrator is supposed to properly administer claims in accordance with the policy. Effectively, that means they collect the documentation, interpret the documentation, and possibly issue a reimbursement someday, if everything perfectly aligns. They typically issue many form letters to claimants, medical providers and long term care providers, usually confusing and vague with multiple worded possibilities for the recipient to try and decipher and guess what the request might be for. Many of the requests are never responded to by the care providers. As far as I can tell, hospitals especially, rarely respond to these confusing requests for comprehensive medical files. Hospitals' primary missions are to treat patients and as a result invest minimal amounts in staff to provide documentation to long term care insurance companies which have no bearing on the hospital's mission or its funding.

The policy states that the CalPERS administrator may assess the person and the person's qualification for long-term care themselves. I have never seen this actually happen, although it could be beneficial to all parties if it was properly performed, by a qualified professional. Instead, LTCG relies solely on the limited documentation it might receive from the long-term care facility or the hospital. Then it makes important interpretations and decisions on qualification and issuance of reimbursement for members.

The administration company also attempts to ignore claims based on "Severe Cognitive Impairment", even though that is a qualifying condition, as it is much easier for them to deal with approvals and administration under the qualification of needing substantial assistance with Activities of Daily Living.

When I initially took over my mother's claim, I left countless messages for LTCG staff, never to receive a return phone call. When it came to formally requesting a reconsideration of claim decisions to them, that they made, four out of four times, responses were "rubber stamped" with the same original decision, issued exactly seven days after the request was received by them. These actions all had the goal of reducing their administration costs and minimizing pay-outs for their client, CalPERS.

After several years of experience with LTCG, it seems that they too have trouble properly staffing, hiring, and retaining qualified people. I have attempted many phone conversations with LTCG claim representatives who were confused, unclear, could not provide good information, or insight on what was going on or even needed to happen in order to receive reimbursement. As a matter of fact, this administration company actually filed for bankruptcy during the time they should have been administering the claim in question. They eventually resurfaced with a new name indicating a great deal of disarray.

CalPERS Health Appeals Unit

When one questions the work and decisions of the claims administration company, they file an appeal and it goes to the CalPERS Health Appeal Unit. The Health Appeals Unit works to make sure that the actions of LTCG, the long-term care insurance administration company are defensible based on the documentation collected and received. It became clear at the hearing that the members of this team take their jobs seriously and fight hard to protect CalPERS funds, and not pay claims if they can find any technicality to support the decision and often questionable work of the administration company. I have no doubt that this team fights many medical claim appeals, but long term care insurance claims and reimbursements are very different than medical insurance and claims.

As a matter of fact, seven people showed up at the hearing and spent all day watching and listening to the hearing, looking for how to better defend denials going forward. What if that kind of fire power was directed at supporting members, versus fighting them and the requests for reimbursement of their qualified claim costs?

It also became clear that no one in the group actually understood how long term care services actually worked, what qualified someone as "severely cognitively impaired" and what care was appropriate for someone in that condition.

Administrative Hearing and Judge

When one questions the appropriateness of an upheld decision by the Appeals Unit, they request an Administrative Hearing. The burden of proof is solely on the claimant to prove that the Appeals Unit reviewer did something wrong in their review of the documentation they received. The hearing or judge does not consider whether a claim was properly managed by the claim administration company and whether proper assessments were performed or the proper documentation was requested or obtained or frankly whether the claim was legitimate and should be paid.

The Judge and attorneys are all about legal process, positioning, and tactical moves, the truth and the "right result" have little or nothing to do with it.

When the CalPERS law team got involved they immediately issued a Discovery Request. I fully complied and sent the limited documentation I had been able to compile and issued a Discovery Request myself, as I knew CalPERS and LTCG should have much more documentation than I did. The CalPERS law team felt so confident that they could squash the appeal that they ignored my discovery request and essentially said this is a slam-dunk case, we will be done by lunch.

The Judge questioned the CalPERS lawyer as to why the discovery request was ignored, and the CalPERS lawyer stated that the claimant had all the documentation that CalPERS did. That could not and should not possibly be true. The claim dated back to March of 2011, when it was initially approved, long before I was involved. I did not have documentation that went back that far, I had minimal documentation before May of 2014.

The Judge stated he would consider the unfulfilled Discovery Request in his decision, but he did not. He was annoyed that Barbara Aske's estate had not hired an attorney to represent them. As a practical matter, remember above, a claimant has to pay all of the long-term care costs, themselves first, and then seek reimbursement. Barbara Aske and her estate had already paid out \$250,000 of long term costs, received reimbursement of about \$58,000, then after writing an additional eighteen letters, several thousand dollars of attorney fees and over 100 hours of executor time, received an additional reimbursement of \$42,000 and was pursuing for the estate the remaining \$55,000 of qualified long term care reimbursement. Where would the money come from to pay a lawyer? Wouldn't the legal costs quickly eat up the reimbursement the estate was trying to recover anyhow? What would be the point?

It became very clear during the hearing that neither the Judge nor any of the CalPERS staff, lawyers and appeals analyst actually understood how long term care services worked, what qualified someone as "Severely Cognitively Impaired" and what the appropriate care and needs of someone in that condition would be. An entire day of testimony did not appear to be enough, as there were many issues and technicalities discussed, confusion by the Judge and CalPERS Appeals team of the time line, conditions, facts and issues of the claim. If one were to compare the documentation and transcripts of what was said and discussed with what ended up in the Proposed Decision they would find several inconsistencies and confusion about the facts and arguments.

The whole long-term care insurance appeal process is akin to the Leaning Tower of Pisa, where everyone put a good deal of work building their part of the tower but no one actually checked to make sure it was actually built on a solid foundation. That is where the CalPERS Board responsibility comes in, no one else actually makes sure that the CalPERS mission is being implemented to serve its members.

As trustee, here is what I have done for the CalPERS member and beneficiaries:

- Took over as claimant, pursuing the reimbursement of the expended long-term care costs in late 2015.
- Called LTCG and questioned why she was not being reimbursed at the nursing home rate when she had been in a nursing home for over a year. LTCG adjusted only the current month to the nursing home rate.
- Made multiple phone calls to LTCG for five months until April 2016, never once receiving a return phone call.
- Wrote nine letters including reconsideration requests and appeals, eventually CalPERS overturned LTCG's bad decision and reimbursed \$35,000 of nursing home care costs.
- Wrote an additional nine letters and made the case to LTCG that it had not paid reimbursement it clearly had documentation to pay in 2014. LTCG provided an additional \$6700 of care reimbursement.
- Wrote an additional five letters, spent over \$1000 to travel to the Administrative Hearing and invested another 90 hours of executor time, to pursue the qualified long term care costs from the time Barbara Aske moved into long-term care in November 2012, until when CalPERS reluctantly reimbursed the qualified long term care costs starting in May of 2014.

Why has CalPERS and LTCG fought so hard to not reimburse the qualified care costs the member has already paid? This reimbursement of these costs is exactly why the member spent their hard-earned money buying the insurance in the first place.

It is now up to the CalPERS Board to carry through with its mission to "deliver retirement and health care benefits to members and their beneficiaries" and follow through on its commitment under the Long Term Care Insurance program to reimburse the qualified long-term care costs of its participating members.

Summary and Recap

Barbara C. Aske worked teaching Kindergarten for 40 years in a disadvantaged community of Los Angeles. She taught three generations in the same neighborhood. She served her community and the state of California well. She was married to her husband, Henry Dale Aske for 53 years. He served his country as a Korean War veteran and engineer in aerospace for over 34 years. H. Dale Aske respected authority and trusted people at their word.

Barbara purchased Long Term Care Insurance from CalPERS for her and her husband. They religiously paid their insurance premiums for 16 years, so that the policy would be available and ready for them should they need it to pay for long-term care. They understood how expensive long-term care could be and did not want to spend their lifetime savings in this way. They wished to pass their hard-earned savings down to their heirs as providing for and taking care of their family was very important to them.

Barbara Aske exhibited signs of Alzheimer's starting early in the 2000 decade. H. Dale Aske had his own multiple, major chronic health conditions, including untreatable stage 4 liver failure, he qualified for hospice let alone, long term care reimbursement himself when they moved into a long term care facility in November 2012. Affording the expense of the long-term care they needed should have not been a problem, after all they both had CalPERS Long-Term Care policies for many years.

1. Dale and Barbara Aske made a plan with their primary care physician, to sell their house and move into an Assisted Living Facility, in November 2012. The physician wrote this plan down in his Subjective, Objective, Assessment and Plan report. Essentially, a written plan of care by a licensed health care

provider. That is the entire definition of a "Plan of Care" in the long-term care policy. Neither, the CalPERS Health Appeals Unit, nor the Administrative Judge were sure whether this was a plan of care or not. CalPERS did not want it to be so they could deny the claim on these grounds and win.

2. Ultimately, there became no disagreement that Barbara Aske had a Severe Cognitive Impairment at the time she and her husband moved into the long-term care facility, although LTCG did try to ignore it for the six years they administered the claim on their own.
3. Just room and board alone provided by an assisted living facility would constitute "mitigating" and "maintenance or personal services" for someone with a Severe Cognitive Impairment who can't live on their own or make meals for themselves. "Mitigating," "maintenance," or "personal services" are all covered as qualified services under the long-term care policy and "room and board" are covered expenses. Ample documentation has been provided demonstrating that Barbara Aske and her husband both received care and support from the long term care facility including but not limited to "room and board".
4. CalPERS used the defense that Barbara Aske, who had a Severe Cognitive Impairment waited too long to file a claim. She could not do it herself, she had a Severe Cognitive Impairment and besides, her husband had passed away while in the assisted living facility, after all he was very sick and weak himself when they moved in. The judge disagreed and said that the claim had been made in a timely fashion under the policy.

So, what is the problem? Why is it that CalPERS has not followed through on its obligation to provide the reimbursement of qualified long-term care costs to its participating members? It seems that through a good deal of incompetence, confusion, bureaucracy, defensiveness and down-right competitiveness the organization has lost its way and its mission.

Even before Alzheimer's took over my sweet, soft-spoken Kindergarten teaching mom, she would have been no match for the incompetence, obstacles, and confrontation exhibited by the CalPERS Long Term Care Insurance Plan.

It is up to you, the CalPERS Board, to steer the ship toward your mission of delivering retirement and health care benefits to your members and their beneficiaries. It continues now with making this claim right.

Please reconsider your Decision to adopt the Proposed Decision in favor of a reconsideration to support your member and their beneficiaries. I also strongly recommend that the CalPERS Board closely examine how your Long Term Care Insurance policy claims are actually being administered, even beyond this case. This claim and case has not been administered consistently with CalPERS mission of delivering benefits to your members and their beneficiaries.

Thank you for review and consideration of this issue.

Sincerely,



Brian Aske

Executor and Trustee for the Estate of Barbara C. Aske and H. Dale Aske

Cc: Mathew G. Jacobs, General Counsel, Via Fax (916) 795-3659