

**ATTACHMENT E**

**THE PROPOSED DECISION**

**BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA**

**In the Matter of the Appeal of the Denial for Long Term Care  
Benefits of Barbara C. Aske, deceased, by BRIAN ASKE, as  
Executor and Trustee for the Estate of Barbara Aske,  
Respondent,**

**Case No. 2018-1266**

**OAH No. 2019030610**

**PROPOSED DECISION**

Administrative Law Judge Ed Washington, Office of Administrative Hearings,  
State of California, heard this matter in Sacramento, California on July 9, 2019.

Senior Staff Counsel John Shipley represented the California Public Employees'  
Retirement System (CalPERS).

Brian Aske (respondent) represented the Estate of Barbara C. Aske.

Evidence was received and the hearing concluded. The record was left open for  
receipt of written closing briefs. Both parties submitted written closing briefs. The  
record was closed and the matter was submitted for decision on July 29, 2019.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED Sept. 6 20 19  
LEA

## **ISSUE**

**Did CalPERS correctly apply the terms and provisions of the Evidence of Coverage to the facts in respondent's case in determining services provided to Mrs. Aske before May 14, 2014, did not qualify for Long Term Care reimbursement benefits?**

## **FACTUAL FINDINGS**

- 1. On March 15, 2019, Kathy Donneson made and filed allegations contained in the Statement of Issues in her official capacity only as Chief of CalPERS' Health Plan Administration Division.**
- 2. The Board of Administration (the Board) of CalPERS is the agency of the State of California charged with the jurisdiction and authority to administer the California Public Employees' Long Term Care (LTC) program pursuant to the California Public Employees Long Term Care Act.**
- 3. The LTC program is a self-funded program designed to cover costs associated with LTC. CalPERS must pay LTC expenses covered under the LTC policy, but cannot and should not pay for expenses not covered. Long-Term Care Group, Inc., (LTGG) administers the program for CalPERS.**
- 4. Barbara Aske (Mrs. Aske) purchased an LTC policy from CalPERS, and obtained coverage under the 1998 LTC comprehensive plan, effective December 1, 1998. The LTC comprehensive plan provides potential coverage for expenses related to home and community care, residential care facilities, nursing homes, respite care and hospice care.**

5. As a participant in the LTC comprehensive plan, Mrs. Aske was subject to the eligibility and benefit payment provisions of her contract for benefits of her LTC comprehensive plan. The terms and conditions of Mrs. Aske's LTC comprehensive plan contract are specified in detail in the plan's Evidence of Coverage booklet (EOC). The EOC, containing terms and conditions of eligibility and benefits payments, is provided to all participants in the program. All relevant terms and conditions for eligibility and receipt of benefits are specified in the EOC, in pertinent part, as follows:

**EVIDENCE OF COVERAGE**

[CalPERS] is pleased to issue this long-term care coverage to you. Benefits are payable subject to the terms and conditions outlined in this evidence of coverage. Please read carefully.

[ ] . . . [ ]

**Notice to Buyer**

This plan may not cover all of the costs associated with long-term care incurred by the buyer during the period of coverage. Buyer is advised to review carefully all plan limitations.

[ ] . . . [ ]

**DEFINITIONS:**

This section provides the definitions or words used often in this agreement which have a special meaning when applied

**to your comprehensive plan. To help you recognize the special words and phrases used in this agreement, the word will be bolded and the first letter of each word capitalized whenever it appears.**

**Activities of Daily Living means the following self-care functions:**

**Bathing**

**Dressing**

**Toileting**

**Transferring**

**Continence**

**Eating**

**Immediate Family means your spouse and your children, grandchildren, parents, brothers, and sisters, and their spouses.**

**Plan of Care means a written individualized plan of services prescribed by a Licensed Health Care Practitioner.**

**Qualified Long-Term Care Services are necessary diagnostic, preventative, therapeutic, curing, treating, mitigating, and rehabilitative services, and maintenance or personal services needed to assist with the disabling conditions that cause**

**you to be a Chronically Ill Individual. All of the service covered by this Agreement are Qualified Long-Term Care Services.**

**Respite Care means supervision and care of persons with deficiencies in Activities of Daily Living, or Severe Cognitive Impairment, in the home or out of the home, while the family or other individuals who normally provide care on a daily basis take short-term leave or rest that provides them with temporary relief from the responsibilities of caregiving.**

**Severe Cognitive Impairment means confusion or disorientation resulting from the deterioration or loss of intellectual capacity that is not related to, or the result of, mental illness, but which can result from Alzheimer's disease, or similar forms from senility or a reversible dementia.**

#### **CONDITIONS FOR RECEIVING BENEFITS**

##### **Benefits Covered by This Agreement**

**The benefits included in this coverage are:**

**Nursing Home Benefit**

**Residential Care Facility Benefit**

**Home and Community Care Benefit**

**Respite Care Benefit**

### **Care Advisory Services Benefit**

**[Benefits will be paid] when we determined that you:**

**Cannot perform two (2) or more the activities of daily living without substantial assistance; or require substantial supervision due to severe cognitive impairment; and**

**Meet the additional requirements for receiving benefits outlined below.**

**[0] ... [0]**

### **Additional Requirements Receiving Benefits**

**We will pay the benefits described in this agreement when the following requirements are met:**

**The coverage is in force on the date(s) the care is approved and received;**

**The service is a qualified long-term care service covered under this agreement and provided pursuant to the plan of care;**

**You incur covered expenses;**

**You have completed the deductible that applies; and**

**You have not exhausted the total coverage amount for the home and community care monthly maximum, if applicable.**

[9] . . . [9]

### **Covered Expenses .**

**Covered expenses for respite care means:**

**Covered expenses for home and community care;**

**covered expenses for nursing home care; or**

**covered expenses in a residential care facility.**

### **Eligible Providers of Respite Care**

**Respite care may be provided by a nursing home, the residential care facility, or by eligible providers of home health care services, personal care services, homemaker services, incidental personal care, or adult day health/social care.**

**This benefit will be paid as long as:**

**The . . . covered expenses occurred over the calendar year and have not reached the home and community care monthly maximum;**

**the conditions for receiving benefits are met; and**

**the total coverage amount has not been reached.**

### **EXCLUSIONS**

**What Expenses Are Not Covered?**

**We will not pay benefits under the evidence of coverage for:**

**Care provided by your immediate family unless the family member is a regular employee of an organization providing care, the organization receives payment for care and the family member receives no compensation other than the normal compensation as an employee . . . .**

**CLAIMS INFORMATION AND HOW BENEFITS ARE PAID**

**[1] . . . [8]**

**Information We Need from You to Process Your Claim**

**You or your representative should provide written documentation regarding your condition, your needs for benefits under this coverage and costs you may have incurred. This information should be provided to us within 90 days of the occurrence, or as soon thereafter as possible. The additional time allowed cannot exceed one year unless you are legally incapacitated. If you desire, the care advisor can assist you in providing written documentation, as specified above.**

**(Capitalization in original.)**

**6. On March 8, 2011, following a determination that she needed assistance performing at least two activities of daily living, LTCG informed Mrs. Aske that she was approved to receive benefits under the LTC program. The benefit approval period was**

from February 23, 2011 to June 30, 2011. Based on this determination, Mrs. Aske was eligible to receive benefit payments under her plan for: Home and Community Care Benefit; Residential Care Facility Benefit; Nursing Facility Benefit; Respite Care Benefit; and Hospice Care Benefit, pending completion of any required deductible period, and approval by her care manager. On April 19, 2011, Mrs. Aske's son, Damon Aske, canceled the request for program benefits.

7. In October 2012, Mrs. Aske was diagnosed with Alzheimer's disease. Due to her declining health, Mrs. Aske and her husband, H. Dale Aske, moved into Fairwinds Desert Point (Fairwinds), in Oro Valley, Arizona. Fairwinds is a senior living community that offers blended independent living and assisted living services to its residents. Those who chose independent living resided in residential apartments and received meals and on-call support services from staff. Fairwinds employees did not provide them with regular and ongoing assistance with their daily needs.

8. Mrs. and Mr. Aske lived in a residential apartment at Fairwinds from November 12, 2012 through December 14, 2014. Due to her severe cognitive impairment, Mrs. Aske relied on her husband to assist her with her regular, ongoing, daily needs. As a condition of their residency at Fairwinds, Mr. Aske agreed he would provide the constant supervision and 24-hour care Mrs. Aske required due to her condition.

9. On June 14, 2014, Mr. Aske contacted LTCG and filed a claim for program benefits on behalf of his wife. On July 29, 2014, LTCG approved the request for program benefits effective June 7, 2014 through January 29, 2015.

10. In early December 2014, Mr. Aske passed away. Following Mr. Aske's death, Fairwinds contacted Mrs. Aske's family and informed them that without the

assistance of Mr. Aske, Mrs. Aske's needs exceeded what Fairwinds could provide in a residential facility. Fairwinds recommended that Mrs. Aske be moved to a nursing home to receive the full-time care and supervision her condition required.

11. On December 14, 2014, Mrs. Aske's family moved her out of Fairwinds and into Private Nursing Care, Inc., (PNC) a nursing home in Issaquah, Washington. Mrs. Aske passed away on February 14, 2016.

12. Respondent is Mrs. Aske's son and is the executor and trustee of her estate. On February 27, 2017, respondent sent a letter to LTCG requesting that Mrs. Aske's estate be reimbursed for costs associated with her care at both Fairwinds and PNC, as a benefit covered under her LTC program.<sup>1</sup> The letter including the following information:

Mrs. Aske met the conditions for receiving benefits at the time of admission to Fairwinds in November 2012, which was two years prior to filing her claim. Accordingly, Mrs. Aske's estate request a reimbursement from [November 12, 2012 to November 13, 2013 and November 14, 2013 to May 13, 2014].

In addition, CalPERS and LTCG created an unfeasible care plan for Mrs. Aske during and after her deductible. Mrs. Aske's care plan listed her spouse, Henry Aske, as an unpaid

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<sup>1</sup> Whether the decedent's estate is entitled to reimbursement for care she received while residing at PNC is not at issue.

caregiver. This was unfeasible because Mr. Aske filed a concurrent claim for LTC benefits with his wife in May 2014. Unfortunately, the evaluator failed to recognize that Mr. Aske had simultaneously applied for LTC benefits and was unfit to provide any supervisory role [in providing care for Mrs. Aske].

13. On March 9, 2017, LTCG denied respondent's request and informed him of his right to file an appeal. On May 1, 2017, respondent appealed from LTCG's denial. By way of a letter, dated May 1, 2017, respondent filed a formal claim appeal with LTCG.

14. On July 14, 2017, Julie Sevener, a care coordinator in the LTCG Claims Department, sent a letter to Fairwinds requesting information regarding the services provided to Mrs. Aske to assist with accessing her LTC benefits. The requested information included:

[Mrs. Aske's] initial and most recent plan of care, service agreement or similar nursing assessment that indicates Activities of Daily Living (ADL's) and cognitive needs assessment.

Medication administration record.

Physician's order for facility admission and/or physician appraisal.

Claimant Care Needs Assessment form [completed by a licensed health care professional.]

**Mini-Mental Status Exam (MMSE) or similar cognitive assessment.**

**Billing statements or invoices showing each date of service [with any] corresponding Continued Monthly Residence Forms.**

**15. On July 26, 2017, after receiving no reply, Ms. Sevener sent a second letter to Fairwinds requesting the same information. On August 2, 2017, an unidentified person from the Fairwinds Wellness Department sent Ms. Sevener a message by facsimile, titled "Henry & Barbara Aske, LTC," which stated: "Please do not request information, son is taking care of it, contact him. Thank you."**

**16. On an unspecified date prior to August 8, 2017, respondent contacted LTCG and requested that the LTC benefits previously approved, effective June 7, 2014 through January 29, 2015, be backdated to be effective 90 days prior to the original approved effective date of June 7, 2014.**

**17. On August 8, 2017 and September 13, 2017, LTCG requested additional information from respondent to support his claims for benefits under Mrs. Aske's LTC program. Respondent provided LTCG with additional information on multiple occasions between August 26, 2017 and October 19, 2017.**

**18. During its review of respondent's request, LTCG obtained copies of a Fairwinds Service Plan for Barbara Aske, dated June 7, 2014, and an Assessment and Services Planning document (assessment), dated June 6, 2014. The assessment reflects that the appropriate service package for Mrs. Aske, based on her medical condition, was the Enhanced Services Package. The Service Plan reflects that, pursuant to the**

approved Enhanced Services Package, Mrs. Aske was to receive personal care services while at Fairwinds, as follows:

Mrs. Aske is ambulatory and continent and shall address her own toileting with assistance from Fairwinds staff as needed.

Mrs. Aske's family shall provide social assistance; cognitive assistance; communication assistance; meal assistance; and incidental assistance with activities of daily living.

A Shower Provider shall provide assistance with showers twice weekly and monitor skin while bathing and report bruises or other wounds.

Wellness Staff shall maintain health record and monitor and report behaviors or other indicators that could impact health and safety.

A Fairwinds Caregiver shall provide assistance with dressing and undressing twice daily; provide twice daily personal care at the sink; escort to meals three times a day with spouse.

19. By letter dated November 21, 2017, LTCG informed respondent that, based on its review of the information provided, Mrs. Aske's approved claim for the period of June 7, 2014 through January 29, 2015, was being modified to cover May 14, 2014 through January 29, 2015. Any claims for LTC program benefits for service dates prior to May 14, 2014, were denied. The letter also included the following notation:

**Based on all the documentation on file, we agree that Barbara Aske had a Severe Cognitive Impairment and may have qualified for her benefits prior to May 14, 2014. However, we have not received documentation from Fairwinds to substantiate that Barbara Aske incurred covered expenses or received Qualified Long-Term Care Service covered under the Evidence of Coverage (EOC) provided pursuant to a Plan of Care.**

**20. On January 19, 2018, respondent requested that LTCG reconsider its November 21, 2017 determination. On February 1, 2018, after reconsideration, LTCG upheld its prior determination. On March 30, 2018, respondent appealed LTCG's determination to CalPERS. By letter dated July 31, 2018, CalPERS denied respondent's appeal. Respondent appealed from CalPERS's determination and requested an administrative hearing.**

### **Respondent's Testimony**

**21. Respondent testified at hearing. He lives in Seattle, Washington. His brother, Damon Aske, is an airline pilot based in Arizona. Both respondent's parents had separate LTC policies. Mrs. Aske suffered significant cognitive decline over time that became obvious to her entire family in 2009. Mr. Aske's health was also declining simultaneously. He suffered from heart disease, diabetes, liver failure, and vertigo. He would frequently fall due to his vertigo and suffered injuries in 2010 and 2011 that required surgery and limited his mobility long-term.**

**22. Respondent testified that his father was "the ultimate provider for his family" and that it was very important for his father to provide for their family. In this**

regard, Mr. Aske took on all responsibility to care for Mrs. Aske, as she experienced cognitive decline.

23. While living in their home of nearly 50 years, Mr. Aske considered several methods to obtain assistance caring for his wife, including hospice. He filed at least one claim through Mrs. Aske's LTC plan to be reimbursed for in-home care. However, given her condition, Mrs. Aske was not receptive to accepting assistance from in-home care providers. Respondent explained that Mrs. Aske did not want "strangers" coming into the house to care for her, and would refuse their care.

24. Eventually, Mr. Aske could no longer meet Mrs. Aske's needs without assistance. Respondent and his brother convinced their parents to move into Fairwinds to ensure they had the care and assistance their conditions required.

25. Mr. and Mrs. Aske sold their home in 2012 and moved into Fairwinds. The administrators at Fairwinds expressed concern about accepting Mrs. Aske as a tenant, as they felt her medical needs exceeded their capabilities. However, Fairwinds allowed Mr. and Mrs. Aske to move in as long as Mr. Aske would reside in the same unit as Mrs. Aske and provide her with 24-hour supervision.

26. Fairwinds provided the support Mr. and Mrs. Aske needed. In exchange for their monthly plan payment, their apartment was regularly cleaned and they were provided three meals a day that could be delivered to their apartment. Mr. and Mrs. Aske would receive an immediate response from Fairwinds staff whenever they needed help. In case of emergency, the apartment had pull cords in several areas to call for emergency assistance if they could not reach a telephone. Respondent also believed that many of the Fairwinds staff were nurses or received medical training, due to the nature of the service Fairwinds provides.

27. Mr. Aske's liver disease worsened shortly after moving into Fairwinds. His medical providers did not believe he would survive surgery and opted instead to treat his symptoms. Mr. Aske's health continued to decline thereafter for approximately two years. At an undetermined date in or before May 2014, Mr. Aske requested and received assistance from Fairwinds staff to help Mrs. Aske with ADLs, including medication assistance, on a regular and continuing basis. In late 2014, Mr. Aske fell in the bathroom and struck his head, injuring himself. He passed away seven days later.

28. When Mr. Aske passed away, Fairwinds contacted respondent and his brother and requested that Mrs. Aske be moved to a nursing home, as it was not equipped to meet her needs without Mr. Aske's assistance. Respondent and his brother assumed responsibility for ensuring Mrs. Aske received the care she needed. They moved her into a small nursing home in Washington, where she remained until her passing in February 2016.

29. Respondent found it very challenging to access and fully-utilize Mrs. Aske's LTC plan benefits. He found that LTCG frequently made decisions regarding the provision of benefits without communicating the bases for those decisions. He further noted that LTCG rarely responded to or followed up to his inquiries. Finally, he found the LTC benefits claims process to be unwieldy and burdensome, and concluded that the process must have been even more challenging to his elderly parents in their diminished capacities.

30. To make matters worse, during the final years of his life, Mr. Aske had been protective of his and his wife's financial and medical information. Respondent testified that his father did not want to be a burden to his children. Mr. Aske provided no meaningful guidance or succession plan to respondent or his brother prior to his passing beyond telling them that if he dies one of them will "have to scoop up mom."

Mr. Aske also began "downsizing" before his passing and destroyed much of the documentation related to their care.

31. In January 2015, respondent discovered that LTCG had been reimbursing Mrs. Aske at the lower residential care home benefit rate rather than at the higher nursing home benefit reimbursement rate, for the time she resided in PNC and for part of the time she received assistance with ADLs at Fairwinds. Respondent provided LTCG with documentation to establish that Mrs. Aske should have been reimbursed at the higher nursing home rate as early as May 2014. LTCG retroactively reimbursed Mrs. Aske at the higher nursing home rate for the period covering May 14, 2014 through January 2016.

32. At hearing, respondent contended that LTCG should have reimbursed Mrs. Aske at the nursing home rate prior to May 2014. To support this contention, respondent argued that although Mr. Aske was required to provide 24-hour supervision of Mrs. Aske as a condition of their residency at Fairwinds, his father's deteriorating health prevented him from providing the ongoing assistance with the ADLs Mrs. Aske required. Given his father's limitations, respondent argued, the Fairwinds staff must have provided regular and ongoing assistance with Mrs. Aske's ADL's prior to May 2014.

33. Respondent also submitted into evidence what is commonly described as a "SOAP" note, dated October 15, 2012, and prepared by Nam M. Lai, M.D., Mrs. Aske's primary treating physician. The SOAP note contained subjective and objective patient

information, as well as an assessment and plan of care.<sup>2</sup> The note reflects that on that date, Mr. Aske and Dr. Lai discussed how Mr. Aske could properly care for his wife once they relocated to an assisted living facility.

34. The subjective portion of the note specifies that Mrs. Aske was having poor sleep, that it was unclear whether she was taking Zolpidem to help her sleep, and that she must complete an MMSE to determine her cognitive capacity. The objective portion of the note describes Mrs. Aske as well-nourished and well developed with equal blood pressure in both arms, in no acute distress, alert, oriented, with normal and intact sensations and motor reflexes. The assessment specifies that Mrs. Aske suffered from Alzheimer's disease and Insomnia, Not Otherwise Specified. The plan portion of the note, in its entirety, states that the MMSE results will be sent to Fairwinds, with a copy given to Mrs. Aske, and that she should be reminded to take Zolpidem for her insomnia. Respondent asserted this note establishes that Mrs. Aske was under a plan of care, as defined in the EOC, from the time she moved into Fairwinds, and that this plan of care made her eligible to receive reimbursement benefits from that time, pursuant to her LTC plan.

35. Respondent does not know how much, if any, assistance with ADLs his mother received from staff at Fairwinds prior to May 2014. He concluded that they received assistance as early as May 2014 because he obtained documentation which shows that his parents were billed for assistance with ADLs as early as May 2014. He could not secure documentation which indicated that his parents were billed for

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<sup>2</sup> "SOAP" is an acronym for a medical note that contains subjective and objective patient information, an assessment based on that information, and a plan of care.

assistance with ADLs prior to May 2014. He recalled that a physician had to respond to his parent's apartment while at Fairwinds, but does not know whether any of the costs associated with this response were covered by the charges his parents regularly paid to Fairwinds.

## **Discussion**

36. The Board has a fiduciary duty to LTC program enrollees to permanently maintain viable LTC plans that are voluntary and paid for entirely by enrollee premiums. Maintaining and enforcing adequate criteria for the receipt of benefits is an essential part of carrying out this fiduciary duty.

37. Here, it was respondent's obligation to establish that Mrs. Aske was eligible to receive reimbursement benefits under her LTC plan between November 12, 2012 and May 14, 2014, that she received services that qualified for reimbursement benefits during that time, and that the claim for reimbursement benefits based on those services was timely.

38. Respondent established that Mrs. Aske was eligible to receive the reimbursement benefits between November 12, 2012 and May 14, 2014. She obtained coverage under the CalPERS 1998 LTC comprehensive plan, effective December 1, 1998. During all times relevant to this decision, Mrs. Aske was a chronically ill individual, as defined in the EOC, as she could not perform two or more ADLs without substantial assistance or required substantial supervision due to severe cognitive impairment.

39. Respondent also established that his claim for reimbursement benefits on behalf of Mrs. Aske's estate was timely. While CalPERS challenged the timeliness of respondent's request, the timeliness notification requirements in the EOC simply

specify that the LTCG be notified of the need for benefits "as soon as possible . . . to better help [the] family plan for financial obligations." The EOC also specifies that an individual covered by the plan or their representative "should" provide documentation regarding their condition and any costs incurred within 90 days of the occurrence, or as soon thereafter as possible, not to exceed one year unless legally incapacitated.

40. Respondent began investigating his mother's right to receive current and retroactive reimbursement benefits under her LTC plan shortly after his father's passing in December 2014. He reviewed the limited materials left by his father, made multiple telephone calls and wrote several letters to LTCG, before concluding that his mother was entitled to benefits she had not received and filing a claim on her behalf. Respondent filed the claim giving rise to this action in February 2017, approximately one year after Mrs. Aske passed away. He maintained frequent and regular contact with LTCG regarding his potential claim since his father's passing. When all the circumstances are considered, respondent's notification to LTCG of his request for benefits on behalf of Mrs. Aske's estate was timely.

41. However, respondent did not establish that Mrs. Aske paid any expense to Fairwinds which is reimbursable under her LTC plan between November 12, 2012, and May 14, 2014. By his own admission, he had no evidence that Fairwinds provided any LTC plan-covered services to his mother prior to May 14, 2014. Although respondent contends his father's deteriorating health would have prevented him from providing his mother with substantial assistance to perform two or more ADLs, this claim was contrary to the evidence. Mr. Aske provided all care and supervision Mrs. Aske required prior to moving into Fairwinds on November 12, 2012. The evidence presented at hearing, including respondent's testimony, demonstrated that Mr. Aske provided care for Mrs. Aske while they lived at Fairwinds until he could no longer do

so due to his deteriorating health, in or around May 2014. The EOC expressly excludes from reimbursement care provided by an immediate family member, unless the family member is a regular employee of an organization providing care.

42. Mr. and Mrs. Aske were allowed to reside at Fairwinds on the express condition that Mr. Aske accompany and provide 24-hour supervision for Mrs. Aske. There was no evidence that anyone at Fairwinds was paid for providing anything more than room, board, and on-call assistance to Mrs. Aske prior to May 14, 2014. Those on-call services did not constitute a plan of care, as defined in the EOC, because they were not part of a written individualized plan of services prescribed by a licensed health care provider. For the same reasons, the SOAP note from Dr. Lai is also not a plan of care, as defined in the EOC.

43. When all the evidence is considered, there is no evidence that CalPERS's determination that Mrs. Aske's estate is not eligible for receive LTC plan reimbursement benefits for any services provided between November 12, 2012, and May 14, 2014, was inappropriate, not factually founded, or not in accord with the EOC requirements for receipt of the requested benefits. CalPERS's decision to deny respondent's claim for reimbursement benefits must therefore be affirmed.

## **LEGAL CONCLUSIONS**

1. The party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.) Therefore, respondent had the burden to prove by a preponderance of the evidence

**the estate of Mrs. Aske is entitled to reimbursement benefits for the services provided to her between November 12, 2012 and May 14, 2014.**

**2. Government Code section 21661 provides CalPERS the authority to contract with insurance carriers to offer LTC insurance benefits to its membership. Mrs. Aske took advantage of the offer to obtain LTC benefits through the CalPERS program, and became eligible to receive LTC benefits, effective December 1, 1998, pursuant to the criteria specified in the LTC program contract, the terms of which appear in the EOC. As an eligible enrollee, Mrs. Aske received benefits from the LTC program to the extent she met eligibility requirements.**

**3. Section 21661, subdivision (f) and (h) state:**

**(f) Notwithstanding paragraphs (1) to (7), inclusive, of subdivision (d), no person may be enrolled unless he or she meets the eligibility and underwriting criteria established by the board.**

**[ ] . . . [ ]**

**(h) The board shall establish eligibility criteria for enrollment, establish appropriate underwriting criteria for potential enrollees, defined the scope of covered benefits, define the criteria to receive benefits, and set any other standards as needed.**

**4. As specified in Factual Findings 36 through 43, although Mrs. Aske qualified to receive reimbursement benefits between November 12, 2012 and May 14, 2014, Fairwinds did not provide LTC services to her during that time pursuant to a plan**

of care as defined in the EOC. Instead, Mr. Aske provided care for Mrs. Aske during this time period. As an immediate family member his services are expressly excluded from LTC plan coverage in the EOC. Therefore, Mrs. Aske paid no reimbursable LTC expenses during that time as defined in the EOC, and is not entitled to reimbursement benefits for LTC services received during that time period. Accordingly, CalPERS's decision to deny respondent's claim must be affirmed and respondent's appeal must be denied.

### **ORDER**

The appeal of Brian Aske, as Executor and Trustee for the Estate of Barbara C. Aske is DENIED. CalPERS's determination that Mrs. Aske was not entitled to reimbursement for cost-incurred services between November 12, 2012 and May 13, 2014, is AFFIRMED.

DATE: September 4, 2019

DocuSigned by:  
*Ed Washington*  
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**ED WASHINGTON**

**Administrative Law Judge**

**Office of Administrative Hearings**