ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Denial of Long-Term Care Benefit Eligibility of:

RICHARD B. CORY, Respondent

Agency Case No. 2020-0567

OAH No. 2020110187

PROPOSED DECISION

Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on April 12, and May 7, 2021, from Sacramento, California.

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

Ellen Mendelson, Attorney at Law, represented Richard B. Cory (respondent) who appeared by telephone.

Evidence was received, the record closed, and the matter submitted for decision on May 7, 2021.

ISSUE

Did the CalPERS Long-Term Care Program (LTC Program) properly deny respondent's benefit coverage for the reimbursement of room and care at Windchime of Chico, an assisted living facility, from October 11, 2019 through May 1, 2020?

FACTUAL FINDINGS

LTC Program

1. CalPERS is the State agency charged with administering the Public Employees' Long-Term Care Act (PELTCA, Gov. Code § 21660 et seq.). PELTCA requires the CalPERS Board of Administration (Board) to establish an optional long-term care insurance program for public employees and retirees, as well as certain of their family members. In turn, the Board established the LTC Program; created two insurance plan options, Comprehensive and the California Partnership; and adopted underwriting standards and benefit criteria for both plans. The plans are voluntary and funded entirely by enrollee premiums. To administer and manage the LTC Program, the Board retained The Long-Term Care Group, Inc. (LTCG).

Plan Coverage and Appeal

2. On January 1, 1997, respondent authorized the payment of monthly premiums for $585.39 for the Comprehensive Plan (Plan). Respondent's Plan is governed by the 1995 Evidence of Coverage.

3. In November 2019, respondent submitted a claim for benefits to LTCG, and in December 2019, LTCG denied the claim. In January 2020, respondent submitted

a request for reconsideration to LTCG. LTCG denied the same, and respondent filed an appeal with CalPERS. In March 2020, CalPERS denied the claim, and in April 2020, respondent made a request to CalPERS for an administrative hearing. On October 28, 2020, CalPERS filed and served a Statement of Issues. This hearing followed.

1995 Evidence of Coverage (EOC)

4. The EOC outlines the terms and conditions for receiving benefits under the Plan. In this case, respondent seeks coverage for his room and services at Windchime, from October 11, 2019 through May 1, 2020. To be eligible for benefits, the EOC requires the following conditions be met:

> the coverage is in force on the date(s) the care is approved and received; the service is covered under this Agreement; You have completed the Deductible Period that applies; and You have not exhausted the Total Coverage Amount or the Home and Community Care Monthly Maximum, if applicable.

According to the EOC, Residential Care Facility (RCF) benefits are included. An RFC, also called an Assisted Living Facility, means:

> a licensed facility primarily in providing ongoing care and related services that meets all of the following criteria: it provides 24-hour a day care and services sufficient to support needs resulting from inability to perform Activities of Daily Living [ADL] or Cognitive Impairment; it has an awake, trained and ready-to-respond employee on duty in the facility at all times to provide care; it provides three

meals a day and accommodates special dietary needs; it has written contractual arrangements or otherwise ensures that residents receive the medical care services of a Physician or nurse in case of emergency; and it has appropriate methods and procedures to assist residents in self-administration of prescribed medications.

5. However, to provide benefits for expenses incurred at an RCF, the EOC also requires respondent have: "a **Deficiency** in two (2) or more **Activities of Daily Living** [ADL]; or a **Cognitive Impairment**; or a **Complex, Yet Stable Medical Condition**." The EOC offers the following relevant definitions:

- **Deficiency in ADLs:**

  means that **You** cannot perform one or more of the following six (6) [ADL] without substantial human physical assistance and/or constant supervision:

  Bathing: Cleaning the body using a tub, shower or sponge bath, including getting a basin of water; managing faucets; getting in and out of tub or shower, reaching head and body parts for soaping, rinsing and drying.

  Dressing: Putting on and taking off, fastening and unfastening garments and undergarments, and special devices such as back or leg braces, corsets, elastic stockings/garments and artificial limbs or splints.

Toileting: Getting on and off a toilet or commode and emptying a commode; managing clothes and wiping and cleaning the body after toileting; and using and emptying a bedpan and urinal.

Transferring: Moving from one sitting or lying position to another sitting or lying position (e.g., from bed to or from a wheelchair or sofa, coming to a standing position and/or repositioning to promote circulation and prevent skin breakdown).

Continence: Ability to control bowel and bladder as well as use ostomy and/or catheter receptacles, and apply diapers and disposable barrier pads.

Eating: Reaching for, picking up, grasping a utensil and cup; getting food on a utensil, bringing food, utensil, and cup to mouth; manipulating food on plate; and cleaning face and hands as necessary following meal.

- **Cognitive Impairment**:

  means confusion or disorientation resulting from a deterioration or loss of intellectual capacity that is not related to, or a result of, mental illness, but which can result from Alzheimer's disease, or similar forms of senility or irreversible dementia. This deterioration or loss of intellectual capacity is established through use of standardized tests or instruments.

- **Complex, Yet Stable Medical Condition**:

  means that twenty-four (24) hour a day nursing observation, or professional nursing intervention more than once a day, in a setting other than the acute care unit of a hospital is medically necessary, that is, the observation or intervention has been prescribed by a **Physician** and it is not designed primarily for the convenience of **You** or **Your** family.

Claim for Benefits

6. Following hospitalizations in August, September, and October 2019, and multiple stays in a skilled nursing facility, on October 11, 2019, respondent moved into Windchime. On October 24, 2019, respondent contacted LTCG by telephone, seeking benefits under the Plan. On October 25, 2019, LTCG sent respondent a claim intake packet. On November 12, 2019, respondent completed, signed, and submitted a claim form to LTCG for his room and services at Windchime. Thereafter, LTCG requested additional information and documentation from Windchime regarding respondent's needs and services.

7. On December 18, 2019, LTCG sent respondent a letter, denying his claim. LTCG indicated, respondent did not meet the conditions for receiving benefits as outlined in the EOC, because he did not have: a deficiency in two or more ADL, a Cognitive Impairment, or a Complex Yet Stable Medical Condition. LTCG based its decision on a review of: a Claimant Care Needs Assessment form (Assessment) completed by Licensed Vocational Nurse (LVN) Doug Kelly, Windchime Resident Care Coordinator, dated November 1, 2019; a Physician's Report by Jason Vance, M.D,

dated October 3, 2019; a Plan of Care by Vocational Nurse (VN) Jessica Hinojosa, Windchime Resident Service Director, effective December 16, 2019; and a telephone conversation with VN Hinojosa on December 16, 2019.

8. From the documentation and conversation with VN Hinojosa, LTCG learned the following information. First, the Assessment report: for ADLs, respondent needs stand-by assistance (person within arm's reach) for weekly bathing, and no assistance for dressing, toileting, transferring, incontinence, or eating. For additional care needs, respondent needs no assistance with mobility or ambulation indoors, but he receives daily hands-on assistance from staff for his medication administration. Respondent is living in a non-secured assisted living unit and he has no known diagnosis of cognitive impairment. Further, the Assessment notes: there is no physician's order in place to ensure respondent does not leave the premises without an escort, but respondent needs assistance to evacuate in the event of an emergency and is prevented from or unable to drive. Second, the Physician's Report by Dr. Vance diagnoses respondent with congestive heart failure but notes respondent can manage his own treatment/medication/equipment. Dr. Vance also checked the box for a mild cognitive impairment, meaning "cognitive abilities are in a 'conditional state' between normal aging and dementia." Dr. Vance found respondent had no physical health impairments, no mental condition, and possessed the capacity for self-care and medication management. Finally, the Plan of Care, completed by VN Hinojosa, records the following Windchime services for respondent: (1) diabetic alerts – respondent will notify the nurse or medical aide of signs and symptoms of low blood sugar; (2) bathing assist – respondent requires physical assistance while bathing; (3) basic housekeeping and linen laundry; (4) administer/manage medications – medical technician (MT) will assist with medication administration, ordering, monitor for side effects, and communicate with physician; (5) monthly vitals and weight checks; and (6)

nighttime checks once a night. Also in the Plan of Care, VN Hinojosa recorded respondent was: alert and oriented, and independent when dressing, eating, grooming, movement and transfers, socialization, and toileting.

9. On or about January 2, 2020, respondent submitted a Notice of Claim Reconsideration form to LTCG. Respondent wrote:

> My heart condition requires more care than initially stated. Balance is an increasing problem so there is danger of falling. I plan to request help getting in and out of the shower. I believe the severity of my diabetes management was not given due credit. I depend on Windchime for providing physical therapy (workouts) as well as diet based on exertion as well as calories. I am a brittle diabetic. Additional (significant) expense has increased with Freestyle blood sugar monitor.

Thereafter, LTCG requested additional information and documentation from Windchime regarding respondent's needs and services.

10. On January 23, 2020, LTCG sent respondent a letter, denying his request for reconsideration, again indicating he did not meet the conditions for receiving benefits as outlined in the EOC, because he did not have: a deficiency in two or more ADLs, a Cognitive Impairment, or a Complex Yet Stable Medical Condition. LTCG based its decision on a review of all documentation previously submitted and: a Mini-Mental State Examination completed by LVN Kelly, dated November 12, 2019; respondent's Notice of Claim for Reconsideration form, dated January 2, 2020; an Assessment by

LVN Kelly, dated January 2, 2020; a Plan of Care by LVN Kelly, effective January 16, 2020; and telephone calls with LVN Kelly on January 15, 2020 and January 22, 2020.

11. From the new documentation and conversations with LVN Kelly, LTCG learned the following information. First, for the Mini-Mental State Examination, LVN Kelly asked respondent to perform several tasks and answer multiple questions, including: count backwards from 100 by sevens, follow written and oral directions to perform tasks, and identify the month, date, year, day, city, etc. Respondent completed all 20 items correctly, indicating no cognitive impairment. Second, the Assessment, dated January 2, 2020, reports: for ADLs, respondent needs stand-by assistance (person within arm's reach) for weekly bathing, and no assistance for dressing, toileting, transferring, incontinence, or eating. For additional care needs, respondent needs no assistance with mobility or ambulation indoors, but he receives daily hands-on assistance from staff for his medication administration. Further, the Assessment notes: there is no physician's order in place to ensure respondent does not leave the premises without an escort, but respondent needs assistance to evacuate in the event of an emergency and is prevented from or unable to drive. Finally, the Plan of Care by LVN Kelly records the following Windchime services for respondent: (1) diabetic alerts – respondent will notify the nurse or medical aide of signs and symptoms of low blood sugar; (2) bathing assist – respondent requires physical assistance while bathing; **(3) dressing – cueing and reminders to dress**;[1] **(4) grooming – cueing and reminders to groom, but the resident can complete the task independently**; (5) basic housekeeping and linen laundry; (6) administer/manage medications **- medication**

[1] Items in bold represent new and/or different information from the Plan of Care dated December 16, 2019.

management will be monitored by a licensed nurse; MT will assist with medication administration, ordering, monitor for side effects, and communicate with physician; (7) monthly vitals and weight checked; and (8) nighttime checks once a night. In addition, LVN Kelly recorded respondent was alert and oriented, and independent when eating, transferring, socialization, and toileting.[2]

12. At hearing, Stephen K. Holland, M.D., LTCG Medical Director, and Angela Forsell, LTCG Vice President, Clinical Services, testified. Both were familiar with respondent's appeal, and the associated medical information, and explained the reasoning for his denial of benefits. They referenced several definitions in the EOC, including the eligibility terms: Deficiency in ADLs, Cognitive Impairment, and Complex, Yet Stable Medical Condition. They supported the decision to deny benefits, noting respondent did not meet any of the three eligibility terms. First, respondent was initially able to perform all ADLs without substantial human assistance and/or constant supervision, although bathing may have become a deficiency as time went on. Second, respondent is not confused or disoriented resulting from a deterioration or loss of intellectual capacity; and third, he does not need, nor was he prescribed 24 hour a day nursing observation, or need professional nursing intervention more than once a day. Next, Dr. Holland and Ms. Forsell explained the services respondent received at Windchime, were/are not eligibility triggers. First, grooming and medication administration are not considered ADLs and stand-by assistance for bathing does not mean respondent cannot bath himself ["cleaning the body using a tub, shower or sponge bath, including getting a basin of water; managing faucets; getting in and out of tub or shower, reaching head and body parts for soaping, rinsing and drying."]. Even

[2] Dressing and grooming were removed from the list of independent activities.

still, if respondent did require "substantial human physical assistance and/or constant supervision" with bathing, he has no other ADL needs and he must have two ADLs to qualify for benefits. Second, respondent received no services for cognitive impairment. Third, for a Complex, Yet Stable Medical Condition, "professional nursing intervention" requires intervention by an registered nurse (RN), not an LVN or MT, at least once per day; and no physician has prescribed such intervention for respondent. In addition, an RFC is not required to, and often does not employ an RN; instead, having LVNs and/or MTs for the care and supervision of its residents. In this case, Windchime employs LVNs and MTs on-site, adequately trained to monitor respondent's insulin and help him administer the same; neither of which is considered a "professional nursing intervention."

13. On or about January 27, 2020, respondent submitted an appeal letter to CalPERS. Respondent appealed the LTCG denials, as well as indicating the following.

> 1. I have tendons pulled in my lower lumbar region. Each night I must stretch out to snap vertebrae back in place. This back pain is especially strong if I don't wear a brace or walk any distance beyond a block or so. I'm working with staff to get daily message [*sic*] stretching, and help cinching-up the brace.
>
> 2. My balance is not stabilizing and will probably need to return [to] using my walker.
>
> 3. I'm 83 and have been diabetic, type I for 61 years. My brother who developed type I diabetes at the same age (22)

died at age 84. The condition is hereditary. This is a constant concern.

4. I am not capable of independent living. Whether living here or trying to "reclaim" my gutted home; I will need care. Please take into account these reconsiderations.

14. On February 4, 2020, LCTG sent respondent a letter, confirming receipt of his request for an appeal. LCTG forwarded respondent's appeal to CalPERS, along with all supporting documentation. After completing an administrative review, on March 30, 2020, CalPERS wrote respondent a letter, finding him ineligible for coverage under the Plan. The letter stated:

> • CalPERS could not verify with the documentation made available to us that you met the Conditions for Receiving Benefits in accordance with Plan requirements. Specifically, our review of available documents failed to validate that you require substantial human physical assistance with at least two (2) Activities of Daily Living (ADL), have a Cognitive Impairment (CI), or a Complex, Yet Stable Medical Condition in a prescribed or written Plan of Care.
>
> The Cognitive Questionnaire Form completed by Dr. James Westcott on February 18, 2020, does not indicate that you have a CI, as defined by the EOC. The form documented that your current cognitive status as "forgetful, normal for age". Although Dr. Westcott noted you need regular meal and medication supervision, this would not qualify as an

> ADL or a condition for receiving benefits under your Plan EOC.
>
> The Plan of Care dated January 3, 2020, completed by Windchime of Chico, indicates they provide assistance with bathing. The document did include you need reminders and cueing for dressing, which does not qualify as needing substantial human physical assistance under the Plan EOC.
>
> There is no provision or benefit in the EOC to allow benefit eligibility for participants that do not require assistance with two or more ADL, who do not have a CI, or who do not have a Complex, Yet Stable Medical Condition in a prescribed Plan of Care.

CalPERS based its decision on a review of all documentation previously submitted to LTCG and a one-page medical questionnaire completed by James Wescott, M.D., dated February 18, 2020. For the questionnaire, Dr. Wescott provided the following information.[3]

> 1. Are there any extenuating circumstances or behaviors we should know about? Yes or No. If yes, please explain:

[3] At hearing, respondent provided a one-paragraph letter from Dr. Westcott, dated July 28, 2020. Among other things, Dr. Westcott states: "I feel his stay at the SNF [Skilled Nursing Facility] and assisted living were necessary and important to allow him to improve his health. He was not able at that time to care for himself."

Answer: [No box checked.] Multiple low blood sugar events requiring hospitalization.

2. Do you have evidence that this individual has a level of moderate or intermittent confusion that is causing impaired judgement and safety concerns? Yes or No. If yes, please explain.

Answer: Yes [box checked]. Multiple hypoglycemic events due to poor meals and/or misuse of insulin.

3. Does the patient continue to drive? Yes, No, I do not know.

Answer: I do not know [box checked].

4. Because of unsafe behavior, impaired judgement, confusion, wandering, etc., do you feel this patient requires:

No supervision – can be left alone for prolonged periods without danger to self;

Intermittent supervision at home – can be left alone with no one else in the home for periods of time without danger to self.

Intermittent supervisions in a facility – egress is not restricted, can come and go without an escort.

24-hour supervision by family members, in-home caregivers or within a facility – should never be left alone at home for

any period of time or be allowed to leave their facility without a competent escort.

Answer: [No box checked.] Needs regular meals and supervised insulin.

15. On or about April 11, 2020, respondent sent CalPERS a request for an administrative hearing. In the letter, respondent noted: a new primary care physician, Tayyiba Awan, M.D., a diabetes specialist; a five-day hospitalization at Enloe Medical Center (Enloe), starting on February 28, 2020, for mini strokes that caused him to fall and hit his head against the wall at Windchime; at present, he is wearing a 14-day heart monitor, to be assessed on April 21, 2020; Windchime staff time monitoring his blood sugar levels 24 hours a day and assisting with insulin doses four times per day consumes more time than assisting any other resident with two ADLs; and even still, he has recurring low blood sugar levels, making his diabetes require nursing intervention more than once per day. On April 21, 2020, CalPERS sent respondent a letter, confirming receipt of his request for an administrative hearing.

Respondent

16. Respondent is 84 years old. He has been diagnosed with diabetes – type 1, and he has been insulin dependent since age 20; and congestive heart failure, with a stent placed in 1998. Currently, he lives in a mobile home with his significant other, Ruthie, who has memory problems. In August 2019, respondent was taken to the Emergency Department at Enloe by ambulance. He was in diabetic shock and Ruthie had been unable to get sugar to him fast enough; she called 9-1-1. Respondent was hospitalized for almost two months. Thereafter, he entered Windchime. At the time, respondent does not believe he was able to care for himself independently. He needed

24-hour monitoring for his blood sugar levels and assistance with his insulin administration. After he was released from Enloe, respondent believes his health improved solely because of the care and supervision he received at Windchime. Unfortunately, he was forced to leave Windchime on May 1, 2020, because he could no longer afford the placement. By then, respondent had already depleted all of his personal financial resources, as well as monies he had borrowed via a home-equity loan.

17. Respondent is frustrated. He bought the long-term care insurance so he would be covered at this time in his life for circumstances exactly like this. He has unfailingly paid his premiums monthly and has never before made a claim. Had he known "the fine print" would obstruct the exact coverage he needed, respondent says he would never have purchased the insurance.

RN CRISTINA FLORES, ELDERCARE ADVOCACY BAY AREA, LLC

18. Respondent called RN Flores to testify on his behalf. RN Flores is the founder of Eldercare Advocacy Bay Area; a statewide nonprofit advocacy agency to help consumers. RN Flores is familiar with the California licensing laws for residential care facilities for the elderly (RCFE); she operated an RCFE for more than 30 years. RN Flores reviewed the material provided to her including the EOC, the denial letters and respondent's requests for benefits, and well as the medical documentation referenced in each letter. RN Flores appreciates the requirements of the Plan. She opined: an RCFE would be covered under the Plan, if respondent had deficiencies in two or more ADLs, a Cognitive Impairment, or a Complex, Yet Stable Medical Condition. RN Flores believes respondent has deficiencies in two ADLs and a complex, yet stable medical condition. First, RN Flores believes respondent has deficiencies with two ADLs: respondent required stand-by assistance and then substantial human physical

assistance for bathing; and cueing for dressing and grooming. Both require constant supervision to ensure respondent does not fall in and around the shower and to ensure he completes the ADL of dressing. Moreover, if respondent is not cued, on most occassions, he will not dress or groom himself; and if respondent does not practice dressing and grooming himself, he will lose the ability to do either task, with or without cueing. As such, respondent cannot complete the ADLs in bathing and dressing; thereby qualifying him for benefits under the Plan.

19. Second, based on the medical documentation, RN Flores believes respondent has a complex, yet stable medical condition because his diabetes requires 24-hour nursing oversight to monitor his blood sugar levels, to calculate and make ready the proper insulin dose, and ensure the same is administered. Respondent cannot monitor and treat his blood sugar independently. If he has a drop in blood sugar, he will have cognitive impairment, falls, and further hospitalizations; and Dr. Vance already identified respondent with a mild cognitive impairment, regardless of blood sugar. Ultimately, RN Flores sees respondent as a brittle diabetic, because his blood sugar is so variable, and his insulin must be adjusted and administered on an as needed basis. As such, respondent needs nursing intervention more than once per day. In addition, RN Flores interprets the term "professional nursing intervention" to mean any professionally licensed health professional, including LVNs and MTs; otherwise, she believes no one staying in an RCFE would ever qualify for benefits under the Plan. Nonetheless, RN Flores agrees, an RCFE is not required to employ an RN; instead, MTs and LVNs can be trained to handle most care need, including medication management.

PUBLIC POLICY AND CONTRACT LAW

20. Finally, respondent's counsel offers several alternative theories, arguing to invalidate the Plan coverage as to respondent. First, citing to the California Insurance Code, noting all "[l]ong-term care policies, certificates, and riders shall be regulated under this chapter" (Ins. Code, § 10231.2); and "care in a residential care facility must be covered" (Ins. Code, § 10232.92, subd. (a).)[4] Second, the LTCG and CalPERS interpretation of the EOC language makes the Plan benefits untenable and illusory, arbitrary and unfair. For example, to interpret "professional nursing intervention" to mean only an RN can provide the intervention is inconsistent with the State certification requirements of an RCFE. An RCFE provides nursing services to the elderly and does so by hiring licensed health care providers, including LVNs or MTs. Counsel offers two options: (1) provide respondent coverage under the Plan or (2) void the Plan coverage as to respondent, because the terms are impossible for execution and return all of his monthly premiums as well as pay his attorneys fees.

Analysis

21. The facts are not in dispute. Respondent stayed at Windchime, an assisted living facility, from October 11, 2019 through May 1, 2020; leaving Windchime only because he was denied coverage under the Plan and he could no longer afford to

[4] Government Code section 21661, subdivision (c), states: "[t]he long-term care insurance plans shall include home, community, and institutional care and shall, to the extent determined by the board, provide substantially equivalent coverage to that required under Chapter 2.6 (commencing with Section 10231) of Part 2 of Division 2 of the Insurance Code . . . ." As such, the PELTCA is not regulated by the Insurance Code.

remain at the facility. Windchime meets the definition of an RCF under the Plan: providing 24-hour a day care and services; a trained employee on duty at all times; three meals a day; provides the medical care services of a physician or nurse in case of emergency; and assists residents in self-administration of prescribed medications. While at Windchime, respondent received services including stand-by assistance, moving to hands-on assistance for bathing, cueing for dressing and grooming, and medication management, including blood sugar monitoring, and administration.

22. The parties agree the 1995 EOC defines the terms and conditions for coverage and benefits under the Plan. To be eligible for coverage under the Plan, respondent must have: "a **Deficiency** in two (2) or more **[ADLs]**; or a **Cognitive Impairment**; or a **Complex, Yet Stable Medical Condition**." First, a deficiency in ADLs requires "substantial human physical assistance and/or constant supervision" in: bathing, dressing, toileting, transferring, continence, and eating. When respondent needed hand-on assistance to shower, he met the definition of a deficiency in an ADL. Bathing is "[c]leaning the body using a tub, shower or sponge bath, including getting a basin of water; managing faucets; getting in and out of tub or shower, reaching head and body parts for soaping, rinsing and drying." However, 24-hour a day care for monitoring blood sugar, managing medication and assisting with its administration, as well as cueing for dressing and grooming, do not fall within an ADL. According to the EOC, dressing is "[p]utting on and taking off, fastening and unfastening garments and undergarments, and special devices such as back or leg braces, corsets, elastic stockings/garments and artificial limbs or splints." Given the above, respondent is not eligible under the Plan because he did not have a deficiency in two or more ADLs; he had a deficiency in only one ADL.

23. Second, a Cognitive Impairment "means confusion or disorientation resulting from a deterioration or loss of intellectual capacity . . . . This deterioration or loss of intellectual capacity is established through use of standardized tests or instruments." Respondent was given the Mini-Mental State Examination by LVN Kelly and got every answer correct, indicating no cognitive impairment. RN Flores points to Dr. Vance's diagnosis of Mild Cognitive Impairment, which "refers to people whose cognitive abilities are in a 'conditional state' between normal aging and dementia"; and asserts greater cognitive impairment will occur if respondent's blood sugar drops, which it does often. However, Windchime provided respondent with 24-hour a day care and services, including checking his blood sugar and helping him to administer insulin as needed, in order to prevent repeated blood sugar drops. In addition, Windchime staff evaluated respondent on a monthly basis and repeatedly found no signs of cognitive impairment. Finally, respondent is 84 years old, mild cognitive impairment can reasonably be expected at his age. Given the above, respondent is not eligible under the Plan because he did not have a Cognitive Impairment.

24. Finally, a Complex, Yet Stable Medical Condition:

> means that twenty-four (24) hour a day nursing observation, or professional nursing intervention more than once a day, . . . , that is, the observation or intervention has been prescribed by a **Physician** and it is not designed primarily for the convenience of **You** or **Your** family.

25. Here, the parties disagree about who is qualified to provide "nursing intervention." The Business and Professions Code provides the limitations of practice for each of the healing arts. By law, a nurse cannot independently practice medicine and an LVN or MT cannot independently practice nursing. A physician's order for

"nursing observation or professional nursing intervention" of a patient requires the knowledge, skill, and ability of a licensed nurse/RN. Windchime, an RCF, does not offer "professional nursing" services. In addition, respondent did not have, at any time while at Windchime, a physician's order for "professional nursing" services. In addition, respondent's contention that he is a brittle diabetic is not supported by any physician diagnosis; while respondent's blood sugar may frequently fluctuate, he cannot make a reliable self-diagnosis. Given the above, respondent is not eligible under the Plan because he did not have a complex, yet stable medical condition.

26. Considering the evidence as a whole, CalPERS correctly determined that respondent did not qualify for benefits under the Plan for room and services at Windchime from October 11, 2019, through May 1, 2020. All other arguments and defenses raised have been considered and are rejected.[5]

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

[5] Within Exhibit B, respondent submitted pages 19 through 22, and 25 of a 39-page document regarding respondent's needs when entering Windchime. It appears the document includes information provided by respondent and Ruthie, as well as opinions of Windchime staff. However, this document lacks completeness, and a review of the five pages does not provide enough foundation to know who provided the statements/opinions therein. As such, the document is not used to make independent factual findings or hearsay corroboration of any testimony.

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 that he was eligible to be reimbursed for room and services provided to him at Windchime from October 11, 2019 through May 1, 2020.

2. Pursuant to the PELTCA, "[t]he [B]oard shall contract with carriers offering long-term care insurance plans." (Gov. Code, § 21661, subd. (a).) "The long-term care insurance plans shall include home, community, and institutional care and shall, to the extent determined by the [B]oard, provide substantially equivalent coverage to that required under Chapter 2.6 (commencing with Section 10231) of Part 2 of Division 2 of the Insurance Code . . . ." (*Ibid.*, subd. (c).) In addition, "[t]he [B]oard shall establish eligibility criteria for enrollment, establish appropriate underwriting criteria for potential enrollees, define the scope of covered benefits, define the criteria to receive benefits, and set any other standards as needed." (*Id.*, subd. (h).)

3. In addition, CalPERS owes a fiduciary duty to each individual member of the LTC Program, along with the Long-Term Care Fund (Fund) as a whole. As part of its fiduciary duty, CalPERS cannot allow an individual member to receive benefits to which the member is not eligible for, as that unlawfully depletes the reserves of the Fund, violates actuarial assumptions inherent in the calculation of appropriate premiums and the reservation of funds available to pay benefits to members who meet the eligibility criteria set forth in the EOC. In other words, CalPERS cannot provide benefits to ineligible members and thereby deprive a benefit to which another member may be entitled.

4. Effective December 1, 2017, respondent purchased long-term care insurance through the CalPERS LTC Program. Respondent chose the Comprehensive Plan and diligently made his monthly premium payments. Respondent's coverage is

defined by the 1995 Evidence of Coverage. Respondent applied for benefits under the same.

5. As set forth in Factual Findings as a whole, CalPERS correctly applied the terms and provisions of the EOC and denied respondent coverage/reimbursement for room and services provided to him at Windchime from October 11, 2019, through May 1, 2020. Therefore, respondent's appeal must be denied and CalPERS's decision to deny respondent's claim must be affirmed.

ORDER

The appeal of Richard Cory is DENIED and CalPERS's determination is AFFIRMED.

DATE: July 14, 2021

ERIN R. KOCH-GOODMAN
Administrative Law Judge
Office of Administrative Hearings