

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MANUEL C.,

Claimant,

OAH No. 2012120240

vs.

SAN ANDREAS REGIONAL CENTER,

Service Agency.

DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on January 7, 2013, in Campbell, California.

Claimant was present and was represented by his mother, Maria G.

San Andreas Regional Center was represented by Jacques Maitre, M.S.W., District Manager, Intake and Clinical Services.

The matter was submitted for decision on January 7, 2013.

ISSUE

Should the San Andreas Regional Center fund an adaptive tricycle for claimant?

FACTUAL FINDINGS

INTRODUCTION

1. Claimant is a 20-year-old young man with profound mental retardation, severe cerebral palsy (spastic quadriplegia), neurofibromatosis, and seizure disorder. He is 66 inches tall and weighs approximately 160 pounds. Claimant is non-ambulatory and has limited use of his upper and lower extremities. He must use a wheelchair and is completely dependent upon others for all of his daily living needs. Claimant has limited verbal skills and safety awareness. He is supervised by an adult to ensure his safety on a daily basis. Claimant's father works outside of the home and his mother is his primary care provider. Claimant lives at home with his parents, his developmentally disabled twin brother, an older sister and a younger brother. Claimant and his twin brother are consumers of San Andreas Regional Center (SARC).

2. Claimant has use of a manual wheelchair, bilateral ankle foot orthosis, a bath chair, a stander, portable ramps and a Hoyer lift, a device used to assist claimant's family in transferring him from a chair to a bed.

3. The goals of claimant's Individual Program Plan (IPP) include: 1) maintaining his current status and stability to the extent possible; 2) having the opportunity to participate with family and peers in recreational activities; and 3) ensuring claimant's safety and well-being.

4. Claimant requested funding for an adaptive tricycle from SARC. On November 19, 2012, SARC issued a Notice of Proposed Action denying the request. SARC staff members had determined that the tricycle was not medically necessary, and the documentation they reviewed did not support its purchase. SARC explained in its Notice of Proposed Action that members of the interdisciplinary team, including the service coordinator, director of consumer services and occupational therapist, reviewed

the request and were unable to substantiate a medical need for the tricycle. The members of the team also concurred that the requested equipment was not appropriate given claimant's functional challenges. Claimant filed a request for a fair hearing on November 30, 2012, and this hearing followed.

CLAIMANT'S REQUEST TO CALIFORNIA CHILDREN'S SERVICES

5. On April 12, 2012, claimant requested that California Children's Services (CCS)¹ fund the purchase of an adaptive tricycle. In support of the request, claimant submitted a prescription and letter dated April 2, 2012, from orthopedic surgeon Lawrence A. Rinsky, M.D., one of claimant's treating physicians. Dr. Rinsky stated:

I do support Mom's desire to obtain a three wheeled independent mobility device such as a Freedom bike for the many benefits in behavior, seizure control, and just exercise. Literally, his face lit up at the thought of that when we mentioned it.

¹ CCS is a state and county program providing medically necessary benefits to persons under 21 years of age with physically handicapping conditions, who meet medical, financial, and residential eligibility requirements. (Cal. Code Regs., tit. 22, § 41410.) Claimant receives services from CCS. SARC considers CCS to be a generic resource for services and supports for its consumers. If a request for durable medical equipment is denied by CCS, a consumer may request funding for the equipment from SARC. If SARC determines that the equipment is reasonably calculated to meet a goal in the IPP and is a cost-effective way to achieve that goal, SARC funds the equipment.

6. On May 17, 2012, CCS denied claimant's request. The supervising CCS therapist advised claimant that the CCS guidelines for the authorization of durable medical equipment provide that an adaptive tricycle is not a device that CCS is authorized to fund. The CCS therapist stated further that although the adaptive tricycle might be useful and beneficial, he did not consider it to be medically necessary.

SARC'S EVALUATION OF THE REQUEST

7. After CCS denied the request, claimant applied to SARC for funding of the adaptive tricycle. On June 26, 2012, occupational therapist Elaine Hikido, who is on staff with SARC, reviewed claimant's request. Hikido has been licensed as an occupational therapist since 1986, and has worked exclusively with developmentally disabled individuals and their families during her career. She is familiar with the physical challenges of individuals with claimant's diagnoses. Hikido reviewed claimant's IPP, Dr. Rinsky's letter of April 27, 2012, the CCS denial letter, and a quote for the cost of an adaptive tricycle.

In addition, Hikido contacted CCS physical therapist Kathy Kalar to discuss the request. Kalar advised Hikido that claimant displays lower extremity reciprocal movements, but has limited safety awareness and cannot steer an adaptive tricycle.

Claimant is capable of indoor crawling, sitting and independently propelling his manual wheelchair. Claimant needs assistance with standing, transferring from the wheelchair to a mat table, and moving from the floor to a standing position.

On July 26, 2012, Hikido wrote a report in which she concluded that an adaptive tricycle was not a medical necessity for claimant. While she agreed that the tricycle might be beneficial for his aerobic conditioning and endurance, Hikido felt that in light of claimant's physical limitations and his size, it would be unsafe for claimant's mother to transfer him from his wheelchair to the adaptive tricycle. In Hikido's opinion, claimant

would need to use the tricycle at least three times each week in order to obtain a benefit from it, and she was concerned about both claimant's and his mother's safety.

8. On August 10, 2012, Dr. Rinsky wrote another letter in support of claimant's request for an adaptive tricycle. Dr. Rinsky stated:

I am writing this letter to request authorization for and justify a three-wheeled mobility device for [claimant]. . . . He has some behavioral problems, which are significantly improved when he is able to do some sort of exercise. However, his multiple comorbidities make many forms of exercise difficult. He has been tried in a three-wheeled mobility device, which he not only enjoys, but is capable of operating with only observational assistance. He is capable of [pedaling] and thus getting some exercise and "burning off some steam." This makes him more manageable and better behaved. I think it is justified and certainly beneficial for him to get exercise. He is not stable enough to do anything independently, such as walking, and he needs a large three-wheel device to be safe enough to prevent tipping, etc. In any case, I totally support his family's request. . . .

Dr. Rinsky has not personally observed claimant use the adaptive tricycle, but discussed a trial use of an adaptive tricycle with claimant's mother.

9. Hikido decided to schedule a trial run at CCS to see if claimant was able to use the adaptive tricycle. On October 23, 2012, occupational therapist Hikido, claimant, his mother, claimant's service coordinator, and the SARC director of consumer services, met with Kalar at the CCS treatment center to observe claimant's ability to use an

adaptive tricycle. During his transfer from the wheelchair to the adaptive tricycle, claimant's knees began to collapse and Kalar and Hikido had assist his mother. Claimant required full assistance with steering. Claimant simulated a few pedal revolutions, but was unable to propel the tricycle independently or initiate pedaling. Claimant was unable to use the hand brakes and had limited cognitive awareness of where he was going.

Unless a consumer is able to initiate pedaling, and propel the tricycle for 20 to 30 feet independently, Hikido is reluctant to recommend its purchase. The ability to independently propel the device is critical to achieving lower extremity strength and increasing cardiovascular endurance, thereby providing a meaningful benefit. Based on Hikido's observations, her discussion with the CCS therapist, and her review of claimant's chart, Hikido concluded that an adaptive tricycle was not medically necessary in this case due to claimant's functional challenges. In addition, after observing the transfer from claimant's wheelchair to the adaptive tricycle (which has a higher seat), Hikido concluded that its use was unsafe for claimant and his mother.

Hikido agrees that exercise is beneficial for claimant's condition, but she opines that he can more safely exercise by performing the activities of daily living, including, moving to a standing position, assisting with dressing himself, and with other weight bearing activities. The rest of the SARC interdisciplinary team concurred with her.

CLAIMANT'S EVIDENCE

10. Claimant's mother is a very devoted parent who is trying to do everything in her power to help claimant meet the challenges of his medical condition. Claimant's mother was able to borrow an adaptive tricycle for three weeks from a family that has since moved away. During the time that they had access to the tricycle, claimant became more and more accustomed to using it and enjoyed it very much. Claimant's mother pushed the tricycle at the beginning, but toward the end of the three weeks, he was able

to perform some pedaling on his own. Claimant's mother observed that while claimant had access to the adaptive tricycle, his mood and behavior improved, he slept better, and the swelling of his legs decreased.

11. On October 23, 2012, when claimant tried to use the adaptive tricycle in front of SARC employees, he had not used one in several months and did not cooperate with his mother, sensing her nervousness. Claimant's mother forced him to try to ride the tricycle, but they both became frustrated and were unable to demonstrate his ability to use the device. Claimant's mother feels it is unfair to base this decision on one observation.

Claimant's mother has had no problems transferring claimant to the tricycle on previous occasions because he enjoys it. She does have difficulty transferring him to the stander because he does not like it. Due to claimant's size and resistance, his mother is unable to work with him on other exercises. Claimant's mother does not consider the tricycle to be unsafe. It would allow claimant to be outdoors with his family during walks.

12. Claimant's mother contacted Mark Nguyen, M.D., one of claimant's treating physicians, who specializes in physical medicine and rehabilitation to request support for this request. In a letter dated November 19, 2012, Dr. Nguyen wrote a letter in which he states:

I am writing on behalf of [claimant] who has a very severe form of Cerebral Palsy making him at risk for weakness and contractures from immobility. He already has some contractures occurring in both lower extremities. In addition to passive range of motion performed by his family, I have recommended that he participate in active range of motion as well as muscle building exercises of which he tried biking with an adult size tricycle. I believe this would be an excellent

way of having him stay active and a way to [sic] preventing worsening contractures as well as weakness from immobility.

Dr. Nguyen did not observe claimant attempt to use the adaptive tricycle.

13. On December 24, 2012, another of claimant's treating physicians, internist Longhang Nguyen, M.D., wrote a letter at claimant's mother's request, in which she states, "[Claimant] is currently a patient under my medical care. The patient's medical condition makes it medically necessary for him to have a special tricycle to do exercises for circulation and muscle spasticity." Dr. Nguyen did not observe claimant attempt to use the adaptive tricycle.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act (Lanterman Act), the State of California accepts responsibility for persons with developmental disabilities. (Welf. & Inst. Code, § 4500 et seq.)² Individuals with developmental disabilities have the right to services and supports directed toward the achievement of the most independent and normal lives possible. (§ 4502, subd. (b).) The Lanterman Act authorizes the Department of Developmental Services to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetimes. (§ 4620.)

2. Neither the Lanterman Act appeal process (§ 4700 et seq.) nor its implementing regulations (Cal. Code Regs., tit. 17, § 50900 et seq.) assigns burdens of proof. Here, claimant is requesting an additional support and therefore bears the burden of proof. And, as there is no statute that provides otherwise, the standard of

² All citations are to the Welfare and Institutions Code unless otherwise indicated.

proof to be applied in this proceeding is the preponderance of the evidence. (Evid. Code, § 115.)

3. The consumer's needs are determined through the IPP process. (§ 4646.) The process "is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments." (§ 4646, subd. (a).) Section 4685, subdivision (c)(1), similarly provides that in order to provide opportunities for children to live with their families, regional centers shall give a very high priority to services and supports designed to assist families care for their children, including "special adaptive equipment such as wheelchairs, hospital beds, communication devices, and other necessary appliances and supplies"

4. The IPP is developed by an interdisciplinary team and must include participation by the consumer and or his or her representative. The IPP must set forth goals and objectives for the consumer, contain provisions for the acquisition of services (which must be provided based upon the consumer's developmental needs), and reflect the consumer's particular desires and preferences. (§§ 4646, 4646.5, subds. (a)(1), (a)(2) and (a)(4), 4512, subd. (b), and 4648, subd. (a)(6)(E).)

5. Although an IPP must reflect the needs and preferences of the consumer, a regional center is not mandated to provide all the services a consumer may request. A regional center's provision of services to consumers and their families must "reflect the cost-effective use of public resources." (§ 4646, subd. (a).) A regional center also has discretion in determining which services it should purchase to best accomplish all or any part of a consumer's IPP. (§ 4648.) This entails a review of a consumer's needs, progress and circumstances, as well as consideration of a regional center's service policies, resources and professional judgment as to how the IPP can best be implemented. (§§

4646, 4648, 4624, 4630, subd. (b), and 4651; *Williams v. Macomber* (1990) 226 Cal.App.3d 225, 233.)

In this matter, the goals of claimant's IPP include: 1) maintaining his current status and stability to the extent possible; 2) having the opportunity to participate with family and peers in recreational activities; and 3) ensuring claimant's safety and well-being at home. All those involved agree that claimant's use of an adaptive tricycle may be beneficial. However, SARC's occupational therapist concluded, based upon her observations of claimant attempting to use the tricycle, it was unsafe for him and his mother, and was of limited use medically because of his functional challenges. The CCS therapist concurred with this opinion. The occupational therapist also concluded that there are safer and more cost-effective ways for claimant to exercise.

Claimant's treating physicians recommended the adaptive tricycle without the opportunity to observe claimant use it. Claimant did not submit evidence from a professional who witnessed claimant successfully using an adaptive tricycle.

Claimant did not meet his burden of proving that SARC should fund an adaptive tricycle. SARC's determination that an adaptive tricycle is not necessary, nor cost-effective, as required by section 4512, subdivision (b), and that is potentially dangerous for claimant and his mother to use, was based on the interdisciplinary team's review of the evidence and its observations of claimant attempting to use the device. Its decision was reasonable.

ORDER

Claimant's appeal seeking funding of an adaptive tricycle is denied.

DATED: January 15, 2013

JILL SCHLICHTMANN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.