BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: IDOTHIA C., Claimant, vs. SAN GABRIEL/POMONA REGIONAL CENTER, Service Agency.	OAH No. 2014010636

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on March 12, 2014, in Pomona, California.

Idothia C. (Claimant) was represented by her sister Juanita M., who is her authorized representative and Caretaker (Caretaker).[1] Claimant did not attend the hearing.

Daniela Santana, Fair Hearing Manager, represented San Gabriel Pomona Regional Center (SGPRC or Service Agency).

Claimant's case was consolidated with Claimant sister's appeal (OAH case number 2014010633) for purposes of hearing only. Agency's Motion to Dismiss Claimant's Fair Hearing Request was also heard concurrently with the hearing on the

[1] Claimant and her sisters are identified by first name and last initial to protect their privacy.

matter. Evidence was received as to both matters and the Motion to Dismiss, and submitted for decision at the conclusion of the hearing on March 12, 2014.

ISSUE

Should Claimant be authorized to use regular, non-medical respite in lieu of respite provided by a licensed vocational nurse?

Should Claimant be permitted to use unused Licensed Vocational Nurse respite hours accrued since November 19, 2014 by no later than April 30, 2014?[2]

FACTUAL FINDINGS

JURISDICTIONAL FACTS

1. Claimant is a 69-year-old woman who resides with her sister, Idothia, in the home of her 71-year-old sister and Caretaker, Juanita. Claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.) on the basis of an intellectual disability.[3] Idothia, who is 74-years-old, is also eligible for Lanterman Act services on the basis of an intellectual disability.

2. The issue of respite was recently addressed in a decision by the Office of Administrative Hearings (OAH) (Decision). On November 4, 2014, the parties appeared before Judge Deborah M. Gmeiner and litigated the issue of Claimant's request for additional respite services. On November 19, 2012, Judge Gmeiner issued a Decision in

[2] This issue was not included in Claimant's Fair Hearing Request (FHR); Service Agency did not object to the issue being considered at the hearing on Claimant's FHR.

[3] All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

OAH Case No. 2013060306, which included the following order:"Service Agency is . . . ordered to fund the previously approved 90 hours per quarter of respite with services to be provided by an HHA/LVN at the sibling rate." (Order).[4]

3. On December 23, 2013, Claimant contacted OAH, requesting clarification of Judge Gmeiner"s Decision and Order. Claimant's request for clarification was denied by Judge Susan L. Formaker, Presiding Administrative Law Judge. On January 21, 2014, Claimant filed a Fair Hearing Request (2014 FHR) directly with OAH. On January 21, 2014, Agency filed a Motion to Dismiss Claimant's Fair Hearing Request (Motion to Dismiss) contending that the issues were already determined in OAH Case No. 2013060306. Claimant filed a response contending that the way that the service agency has applied the decision was different from what was ordered. On March 7, 2014, Judge Formaker issued an Order Denying Motion to Dismiss, Without Prejudice, finding that any consideration of the issues raised by the Motion to Dismiss is dependent on findings of fact after a hearing on the issues.

BACKGROUND

4. Claimant has been diagnosed with moderate mental retardation, hypertension, and dementia. She is ambulatory. She routinely takes several medications to address her various medical ailments. Her blood sugar level is tested several times daily due to her diabetes.

5. Claimant requires supervision and assistance with all self-care needs. Claimant can be aggressive when she does not get what she wants. Claimant requires

[4] The Order provided Claimant with an additional 31 hours per quarter of "regular" respite at the sibling rate. Claimant's right to 31 hours of "regular" respite at the sibling rate is not in issue in this case and remains in full force and effect.

constant supervision when in the community. Claimant attends a program at Casa Colina for several hours each day five days per week.

6. Prior to the Decision, Caretaker utilized a "regular" non-medical respite worker (regular) to care for both Claimant and Idothia, who also has medical, self-care, and behavioral problems. Service Agency had authorized 90 hours of such respite at the sibling rate. The "sibling rate" is the respite rate paid to the respite agency because Claimant and her sister are typically together during respite. The sibling rate is lower than the individual rate. The sibling rate is authorized by California Code of Regulation, title 17, section 58140. The regular respite worker preferred by Claimant and Caretaker was unable to administer Claimant's medication or test Claimant's blood sugar. As a result, Caretaker was unable to utilize respite for more than a few hours at a time. Claimant's Individual Program Plan (IPP) includes provision for respite in order that Claimant may continue to live in Caretaker"s home.

7. In an effort to implement the Decision and Order, Agency suggested to Claimant several agencies that were able to provide a Licensed Vocation Nurse (LVN) to provide respite services (LVN respite). This service was in addition to the additional 31 hours per quarter of regular respite at the sibling rate that Caretaker could use for short absences from the care of Claimant. Caretaker was having difficulty effectively utilizing the LVN respite offered because the respite agency could not schedule an LVN during the hours the Caretaker needed the service. Caretaker asked the Agency to authorize the use of regular respite in lieu of the LVN respite. Service Agency declined this request, citing the Decision and Order. This dispute led to Claimant filing the December 23, 2013 request for clarification of the Decision and Order and her 2014 FHR. Clearly, the use of the phrase HHA/LVN in the Order led to confusion. In Caretaker"s view the use of the term meant that she was able to use either a home health aide (HHA) or an

LVN for respite. Agency disagreed and understood the order to mean that a home health agency (HHA) would provide an LVN for respite.

8. After filing her 2014 FHR, Claimant's sister, Augusta suffered a fall. Augusta"s physician ordered Visiting Nurses Association (VNA) to conduct an in home evaluation to determine Augusta"s care needs. A Registered Nurse (RN) conducted that evaluation. According to Caretaker, the RN determined that Augusta needed an LVN to assist with her care at home when Caretaker is not available. VNA was able to provide the LVN services needed. Moreover, VNA is vendored by Service Agency to provide respite services to Service Agency consumers. According to Caretaker, having a VNA LVN respite provider solved several problems because VNA is able to provide the needed level of care at the times when Caretaker needs respite. As a result, Caretaker has been able to enjoy several day-long visits with her children and grandchildren, giving her needed relief from caring for Claimant and her sister Augusta. While Caretaker believes, and Service Agency does not disagree, that neither Claimant nor Augusta need LVN care for those times when Caretaker is away from the home for brief periods and could return home easily in the event of an emergency, Caretaker has come to appreciate having the LVN services and was agreeable to receiving 90 hours per quarter of LVN services in addition to the 31 hours per quarter of regular non-medical respite as previously ordered. Claimant and Service Agency agreed to an order specifying that 90 hours of respite per quarter would be provided by an LVN.

9. The only issue remaining was whether Agency would extend the time to use respite that Claimant was unable to use since the Decision, because of the unavailability of a suitable LVN respite provider. During the hearing, Service Agency agreed that Claimant may use unused LVN respite hours accrued since November 19, 2014 by no later than April 30, 2014.

LEGAL CONCLUSIONS

SERVICE AGENCY'S MOTION TO DISMISS

1. The Lanterman Act governs this case. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a regional center decision. (§§ 4700-4716.) Claimant requested a fair hearing to compel the Service Agency to allow her to use regular, non-medical respite providers in lieu of an LVN for respite. At the hearing, Claimant also asked that Service Agency to allow her to use respite services that she had not been able to use since the date of the Decision. Service Agency did not object to this matter being considered at the hearing.

2. Service Agency filed a Motion to Dismiss Claimant's Fair Hearing Request, claiming all issues have been decided by the Decision, and that the Agency was properly implementing Judge Gmeiner"s Order. Claimant disagrees with Service Agency interpretation of the Order, arguing that the Order permitted her to use the 90 hour of "HHA/LVN" respite, utilizing either a regular non-medical home health aide or an LVN.

3. A decision whether to grant Service Agency's Motion to Dismiss is determined under the related doctrines of *res judicata* and collateral estoppel. The doctrine of *res judicata* gives conclusive effect to a former judgment in subsequent litigation involving the same controversy. The doctrine of collateral estoppel gives conclusive effect to issues actually litigated between the parties in the former action. *(Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1244.) "The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceedings. [Citations.]" (*People v. Barrington* (2004) 32

Cal.4th 236, 252-253.), However, "[u]nless the issue or cause of action in the two actions is identical, the first judgment does not stand as a bar to the second suit. [Citations.] „"If „anything is left to conjecture as to what was necessarily involved and decided‟ there can be no collateral estoppel [citations] .... „[I]t must appear ... that the precise question was raised and determined in the former suit....‟ [Citation.]' (Southwell v. Mallery, Stern & Warford (1987) 194 Cal. App. 3d 140, 144.)" (*Dunkin v. Boskey* (2000) 82 Cal. App. 4th 171, 181-182.)

4. In this case, Claimant is not asking to re-litigate the issues decided in the prior case. The facts in this case involve problems implementing the prior Order. As such this case involves new facts and circumstances, such that the doctrines of *res judicata* and collateral estoppel do not apply. Service Agency's Motion to Dismiss is denied.

JURISDICTION AND BURDEN OF PROOF

5. Under the Lanterman Act, a consumer‟s needs and the services and supports required to achieve those needs are identified as part of the Individual Program Planning (IPP) process. (See §§ 4646 et seq.) Claimant's IPP includes respite. Although a formal Individual Program Planning (IPP), meeting was not held to discuss the problems Caretaker was having in obtaining suitable LVN respite, Claimant established that she requested and Agency denied her request to use regular respite in lieu of LVN respite. Service Agency does not dispute the request and its denial. Thus, Claimant's request for a service, and Service Agency's denial of that request is an adequate basis for Claimant's 2014 FHR. Jurisdiction in this case was thus established. (Factual Findings 1 through 7.)

6. The standard of proof in this case is a preponderance of the evidence, because no applicable law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Because Claimant is requesting a change in an existing service, she bears the burden of proof. In seeking government benefits, the burden of proof is on

the person asking for the benefits. (See, *Lindsay v. San Diego Retirement Bd .*(1964) 231 Cal.App.2d 156, 161 (disability benefits).)

7. The Lanterman Act sets forth a regional center‟s obligations and responsibilities to provide services to individuals with developmental disabilities. As the California Supreme Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act is twofold: "to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community" and "to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community."

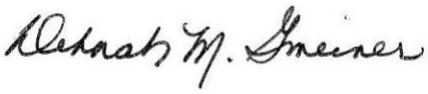
8. In light of Factual Findings 1-9 and Legal Conclusions 5 through 7, and in particular Claimant and her Caretaker‟s willingness to continue to use an LVN respite provider in light of Caretaker‟s ability to secure such services from the Visiting Nurses Association, and the fact that VNA is vendored by Service Agency to provide such services, the Service Agency is ordered to fund 90 hours per quarter of LVN respite to be provided by a home health agency at the sibling rate. Claimant's request to use regular, non-medical in lieu of LVN respite is denied.

9. In light of Factual Finding 9 and Legal Conclusions 5 through 7, Claimant may use through April 30, 2014, any LVN respite Claimant has accrued but not used since November 19, 2013.

ORDER

Service Agency is ordered to fund 90 hours per quarter of respite with services to be provided by an LVN at the sibling rate. Service Agency is further ordered to extend through April 30, 2014 the time to use any LVN respite Claimant has accrued but not used since November 19, 2013.

Dated: March 25, 2014



DEBORAH M. GMEINER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

Under the Lanterman Developmental Disabilities Services Act, this is a 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.