

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CYNTHIA A.

Claimant,

vs.

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency.

OAH No. 2013070672

DECISION

This matter came on regularly for hearing on August 27, 2013, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Cynthia A.¹ (Claimant) was represented by her authorized representative, James Huyck, Advocate/Consultant.

Frank D. Lanterman Regional Center (Service Agency) was represented by Marc Baca, Appeals Coordinator.

Oral and documentary evidence was received. The record was closed on the hearing date, and the matter was submitted for decision.

¹ Initials are used in lieu of Claimant's surname in order to protect her privacy.

ISSUE

The parties stipulated that the sole issue in this matter is whether Claimant is entitled to receive Service Agency funding for an additional three hours of personal assistance for cerebral palsy, shingles pain, and bathroom assistance.

EVIDENCE CONSIDERED

1. Exhibits 1 through 14
2. Exhibit A (Exhibit B was excluded on grounds that it was untimely.)
3. Testimony of Claimant
4. Testimony of Marconia Kasee
5. Testimony of Irene Owuor
6. Testimony of Michelle Johnson

FACTUAL FINDINGS

1. Claimant is an adult consumer of the Service Agency. She has suffered from cerebral palsy since birth.

2. Claimant is non-ambulatory. She uses a motorized wheelchair for mobility. She is dependent on personal assistants for all activities of daily living.

3. As of the hearing date, Claimant was receiving funding from In-Home Support Services (IHSS) for 260 hours per month of personal assistance, and the Service Agency was funding 372 hours per month for the same purpose. Those two sources ensured funding for 21.1 hours of personal care per day. Accordingly, Claimant has been without personal assistance approximately 2.9 hours per day. However, although there was no documentary evidence on the subject, Claimant testified at the hearing that she had just signed a new Individual Program Plan (IPP) that will increase the personal assistance hours funded by the Service Agency to 395 per month. Together

with the IHSS hours, her total hours will be 21.8 hours per day, leaving her unassisted 2.2 hours per day.

4. Claimant's personal care assistants are provided through Caring Connections. Depending on her condition and needs, one of her assistants periodically volunteers extra time to her care, and Caring Connections occasionally offers additional personal assistance without compensation. Neither Caring Connections nor its assistants are required to provide any free services, and they may terminate those services at any time and in their sole discretion.

5. On October 14, 2011, Claimant asked the Service Agency to fund an additional three hours per day of personal assistance because she had contracted shingles and needed assistance in changing her wound dressings at night. The Service Agency asked Claimant to provide a letter from her physician confirming the need for the additional care to change the dressings. (Exhibit 1.)

6. Claimant did not provide the letter until September 10, 2012. According to that letter, her physician, Michael Marsh, M.D., recommended a "continuation of an extra thirty hours of home care per week." However, Dr. Marsh did not explain the reasons for his recommendation or why he believed Claimant was already receiving the additional care which he believed should be continued. Further, an additional 30 hours per week of personal assistance, as recommended by Dr. Marsh, coupled with the hours Claimant was already receiving, would exceed the number of hours in a month. The Service Agency denied the request. (Exhibit 1.)

7. On November 9, 2012, Claimant provided another letter from Dr. Marsh. In that letter, Dr. Marsh recommended an extra three hours per day of 1:1 care due to pain from shingles. The Service Agency found that the letter lacked sufficient information. First, the Service Agency assumed that Claimant slept at least three hours per night. Therefore, it was unclear why she needed 24-hour assistance for shingles

pain. Secondly, since the personal assistants who attended to Claimant were not medical professionals, the Service Agency did not recognize any medical intervention the assistants could offer. (Exhibit 1.)

8. An informal meeting was held on August 8, 2013. On August 13, 2013, the Service Agency upheld its earlier denial of Claimant's request for funding for an additional three hours per day of personal assistance. (Exhibit 3.)

9. On August 22, 2013, Dr. Marsh wrote a third letter on Claimant's behalf. In that letter, he wrote:

In November 2011 Miss A . . . first requested additional hours from you because of her coming down with the Shingles in August. As a result of that she needed and continues to need more medical care when the Shingles manifest themselves because the symptoms related can be anything from vomiting to diarrhea to pain to excessive bleeding, etc. Since the Shingles in Miss A . . .'s case can be, and have been [a] recurring issue, most times brought on by stress, I am sure you can see why the three hours that she is requesting can become important. During the time she experiences the above symptoms she needs the assistance of her attendants and if the three hours are not provided for and she has an attack of symptoms or recurrence of the Shingles she is left without an immediate medical solution, [w]hich can lead to a further medical emergency situation. I am sure the Regional Center and the state would not like to see that happen.

The recurrences of the Shingles can occur at any time, the symptoms that accompany it, in Miss A . . .s case are varied and sometimes multiple. I emphatically restate she needs the extra three hours covered at all times.

(Exhibit A.)

10. At the hearing, Claimant testified that she requires personal care in all activities of daily living including toileting, dressing, brushing her teeth, changing her sanitary pad, driving, grocery shopping and all other activities that enable her to live independently. Because she is unable to transfer from her wheelchair to the commode, if she must urinate, defecate or vomit when her assistants are absent, those bodily functions occur wherever she is and she must wait in soiled clothing for an assistant to return to clean her up. This has occurred numerous times in the past, and Claimant finds it very humiliating. It also increases the risk of urinary tract infection, bowel infection, and colon problems.

11. Claimant's description of her daily activities and needs was corroborated by her caregiver, Marconia Kassee. Based on his experience in caring for Claimant, Mr. Kassee believes Claimant is in need of 24-hour per day care. As an example, he related an incident that occurred on the day of the hearing. In order to carry her purse, Claimant must place its strap around her neck. That day, while she was carrying her purse in that manner, the strap caught on a chair and began to strangle her. Mr. Kassee was able to free the strap from the chair before Claimant began to struggle with it. Mr. Kassee believes that incident could have had serious untoward results had it occurred at home in the absence of a caregiver.

12. In an Annual Review dated March 8, 2013, Claimant's Service Coordinator, Irene Owuor, wrote:

Cynthia lives independently in her own apartment in Burbank with supports from her personal assistant. She lives in a two bedroom, two bath apartment. Cynthia is dependent upon her care giver for all of her care needs as well as chores around the house. This includes washing, cooking, vacuuming, dusting, laundry, shopping and others. Cynthia is unable to do any household chores. All of Cynthia's daily living activities require assistance from her Personal Assistance [sic]; this includes a 2 ½ hours routine in the morning and evening; plus a minimum of 45 minutes of personal assistance any time during the day, she uses the restroom at an average of 8 times per day and 3 times per night and requires assistance with transfer to and from the wheelchair. Cynthia is non-ambulatory and uses a motorized wheelchair to get around. She has a van with a ramp for her transportation needs. Her ability to move around in the community is dependent upon her personal assistant who drives her around in her van. Cynthia's apartment is reportedly wheelchair accessible and she is able to maneuver through her apartment successfully into her home. Cynthia is verbal and converses with others.

[²] (Exhibit 8.)

² Although Ms. Owuor testified that she recorded what Claimant told her, nothing in the evidence indicates that she or anyone else at the Service Agency had any reason to disbelieve that information.

13. Claimant sleeps intermittently at night, usually for no more than 1.5 hours at a time. She awakens frequently at night with the need to use the restroom. She does not want to be catheterized or placed on a bowel program because those measures would lead to an increased risk of infection and other medical complications.

14. Ms. Owuor testified that, although cerebral palsy is a permanent condition and that Claimant requires personal assistance, she does not believe Claimant requires that assistance on a 24-hour basis because Claimant is asleep part of the time. Ms. Owuor believes that, although Claimant might require care at any time, she does not “need someone to sit by her 24 hours.” (Ms. Owuor’s testimony.) She did not explain what Claimant would be expected to do when she awakened during the night needing assistance and a caregiver was not present.

15. Claimant also testified that she has required medical care in an emergency room in the middle of the night on a number of occasions. Presumably, those occasions arose during the hours when no assistants were present. She has not provided the Service Agency with documentation of any of those visits, and she did not explain how she traveled to the emergency room in the absence of her assistants. Therefore, that portion of her testimony is found lacking in credibility.

16. In March 2012, the Service Agency requested that Claimant submit to an evaluation by a nurse in connection with her request for the additional three hours per day of personal assistance. Claimant denied that request.³ Although, at the hearing, Claimant denied receiving the request for a nurse evaluation, the documentation of her declination is the stronger evidence on that issue. (Exhibit 9.)

³ For reasons not disclosed by the evidence, Claimant also insists that all in-person meetings with Service Agency personnel take place at the regional center. Therefore, Claimant’s service coordinator has never been to Claimant’s home.

LEGAL CONCLUSIONS

1. Claimant must enable the Service Agency to acquire additional information before a determination of the propriety of additional hours of personal assistance can be made.

2. Welfare and Institutions Code⁴ section 4501 states in pertinent part:

Services and supports should be available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age. Consumers of services and supports, and where appropriate, their parents, legal guardian, or conservator, should be empowered to make choices in all life areas. These include promoting opportunities for individuals with developmental disabilities to be integrated into the mainstream of life in their home communities, including supported living and other appropriate community living arrangements. In providing these services, consumers and their families, when appropriate, should participate in decisions affecting their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community, the way in which they spend their time, including education, employment, and leisure, the pursuit of their own personal future, and program planning and implementation. The contributions made by parents and

⁴ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

family members in support of their children and relatives with developmental disabilities are important and those relationships should also be respected and fostered, to the maximum extent feasible, so that consumers and their families can build circles of support within the community.

The Legislature finds that the mere existence or the delivery of services and supports is, in itself, insufficient evidence of program effectiveness. It is the intent of the Legislature that agencies serving persons with developmental disabilities shall produce evidence that their services have resulted in consumer or family empowerment and in more independent, productive, and normal lives for the persons served. It is further the intent of the Legislature that the Department of Developmental Services, through appropriate and regular monitoring activities, ensure that regional centers meet their statutory, regulatory, and contractual obligations in providing services to persons with developmental disabilities. The Legislature declares its intent to monitor program results through continued legislative oversight and review of requests for appropriations to support developmental disabilities programs.

3. Regional center services are to be provided in conformity with the IPP, per section 4646, subdivision (d), and section 4512, subdivision (b). Consumer choice is to play a part in the construction of the IPP. Where the parties cannot agree on the terms

and conditions of the IPP, a Fair Hearing may establish such terms. (See § 4710.5, subd. (a).)

4. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each client's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subds. (a)(1) & (a)(2).) Otherwise, an IPP would be unnecessary, and the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subds. (a)(1) & (a)(2).)

5. However, services provided must be cost effective (§ 4512, subd. (b), *supra*), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) A regional center's obligations to other consumers are not controlling in the individual decision-making process, but a fair reading of the law is that a regional center is not required to meet a consumer's every possible need or desire, in part because it is obligated to meet the needs of many consumers and families.

6. Section 4512, subdivision (b), of the Lanterman Act provides, in pertinent part, that

“Services and supports for person with developmental disabilities” means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a

developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. . . .

The determination of which services and supports are necessary shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.

7. The IPP is to be prepared jointly by the planning team, and services purchased or otherwise obtained by agreement between the regional center representative and the consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be purchased, is made up of the individual consumer, or their parents, guardian or representative, one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

8. The planning process includes the gathering of information about the consumer and conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. . . . Assessments shall be conducted by qualified individuals . . . " (§ 4646.5, subd. (a)(1).) Given that services must be cost effective and designed to meet the consumer's needs, it is plain that assessments must be made so that services can be properly provided, in a cost effective manner.

9. In this case, the Service Agency proceeded on an assumption that Claimant sleeps at least three hours per night. Based on the decisions it has made thus far, a reasonable inference is drawn that the Service Agency has also assumed that those three hours of sleep are uninterrupted. The evidence established that this is not the case. Claimant's sleep is fitful, and she frequently awakens with the urge to use the restroom for various bodily functions. When her personal assistant is not present, she is unable to transfer to the commode which results in her urinating, defecating, or vomiting on herself and her surroundings, and she must remain in that state until help arrives. This has occurred on numerous occasions, and it leaves Claimant at risk of infection and other medical complications. It also leaves her uncomfortable, humiliated, and without the dignity to which those with developmental disabilities are entitled equally to those without them. Thus, the problem is not Claimant's ability to be alone; it is her inability to be alone when she requires assistance, such as when she awakens during the night with the need to use the restroom.

10. However, the Service Agency is charged with not only providing appropriate services and supports to its clients, it is also charged with providing them in a cost-effective manner. Therefore, the Service Agency is entitled to gather necessary information in order to satisfy its statutory mandate. In its attempt to do so, pursuant to section 4646.5, subdivision (a)(1), the Service Agency requested that Claimant submit to an evaluation by a nurse. Claimant declined that request. Further, although Claimant's late-night visits to emergency rooms could provide additional evidence for the Service Agency to consider in determining if additional hours of personal assistance are necessary, Claimant has not provided documentation of those visits, the reasons for them, the results, and/or the assistance she received from the time the emergency arose to the time she returned to her home. If such documentation is within Claimant's

possession, custody or control, she should use it to assist the Service Agency in making its decision.

11. The Service Agency must be provided additional evidence before a decision on the issue in this case can be made.

ORDER

1. Should the Service Agency still require an evaluation by a nurse in order to assist it in determining whether additional hours of personal assistance should be funded, it shall notify the Claimant of its request within the next 30 days. Claimant shall respond to the request within 10 days of receiving it. Should Claimant decline the request for a nurse evaluation, that declination shall serve as grounds to decline the request for additional personal assistance hours.

2. Within 30 days, Claimant shall provide emergency room records and other documentation requested by the Service Agency that are within her possession, custody or control, that will assist the Service Agency in making the determination of whether it should fund additional hours for personal assistance.

3. Within 30 days thereafter, the Service Agency shall decide whether to fund the additional hours requested for personal care and inform Claimant in writing of its decision. The decision shall be based on all of the evidence accrued to date, including but not limited to the evidence received at the August 28, 2013 fair hearing, Dr. Marsh's August 22, 2013 letter, and any and all documentation produced by or on behalf of Claimant pursuant to this Order. The Service Agency's decision shall be without prejudice to Claimant's right to request another fair hearing on this issue.

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.

Dated: August 30, 2013

H. STUART WAMAN

Administrative Law Judge

Office of Administrative Hearings