

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

VALLEY MOUNTAIN REGIONAL
CENTER,

Service Agency.

OAH Case No. 2013120777

DECISION

Administrative Law Judge Rebecca Freie, Office of Administrative Hearings (OAH), State of California, heard this matter in Modesto, California on June 3, 2014.¹

The Service Agency, Valley Mountain Regional Center (VMRC), was represented by Anthony Hill, Assistant Director of Case Management.

Claimant was represented by her sister who is also her conservator (Conservator). Claimant was not present.

This matter was previously consolidated with a case concerning Claimant's brother (Brother) who is also a client of VMRC, and both cases were heard together. Oral and documentary evidence was received and the matter was submitted on June 3, 2014.

¹ALJ Jonathon Lew started the hearing on March 5, 2014. However, after listening to opening statements and admitting the parties' documentary evidence, the matter was continued. ALJ Lew was unavailable for the hearing on June 3, 2014.

ISSUE

Should VMRC'S decision to deny Claimant's request to increase her respective respite hours and provide her with a one-to-one respite care worker be affirmed?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On November 18, 2013, VMRC sent a notice of proposed action to Claimant denying a request for a one-to-one respite care worker, and additional hours of respite care each month. On December 18, 2013, Conservator submitted Fair Hearing Requests on behalf of Claimant and Brother to VMRC, asking that the 20 hours of in-home respite care for Claimant and 18 hours of respite care for Brother be combined for a total of 38 hours per month, and that each be provided with a one-to-one respite care provider when respite hours were used.²

EVIDENCE INTRODUCED AT HEARING

Needs of Claimant

2. Claimant is 31 years of age and has been a client of VMRC for several years. She is developmentally disabled, and suffers from osteoarthritis, to the extent that she now requires a hip replacement which may occur in the next few months. She is in constant pain, and requires a wheelchair if she will be walking some distance. She cannot operate her wheelchair independently. Claimant also takes Risperdal and sees a psychiatrist to monitor medications. Conservator has been her conservator since April or May 2010, and Claimant and Brother have resided with her since that time.

² The evidence established that VMRC had actually authorized 20 hours of care for each claimant.

3. Claimant receives 210 hours of In Home Support Services (IHSS) per month. She requires this assistance for bathing and dressing, as well as all other self-care tasks. She is incontinent at night. There was no evidence as to when the IHSS workers come to the home, although it appeared there is some type of schedule for their services. There was no evidence presented that IHSS services are used to provide Conservator with respite from her caregiving duties. Conservator is not an IHSS provider for Claimant.

4. Claimant has behavioral excesses. She will sometimes physically attack Brother, Conservator, and/or IHSS workers in the home. She tends to be noncompliant when given directions, and when angry may respond by hitting people, throwing objects, etc. Her maladaptive behaviors are more severe and frequent in the home setting. Although VMRC sent a behavior interventionist into the home to provide behavioral instructional services to address these behaviors for approximately six months in the past, the behaviors did not change.

5. Claimant must be constantly supervised both at home and in the community. She has no fear of strangers, often attempting to engage them in conversation, and will open the door to strangers and let them into the home if she is not supervised. She attends a behavioral day program for 30 hours a week (six hours per day on weekdays).

Needs of Brother

6. Brother is also a client of VMRC, and has been for many years. He is 46 years of age, developmentally disabled, and also has a mental health diagnosis of psychosis, not otherwise specified. Conservator obtained conservatorship of him in April or May 2010, and Brother has lived with her and Claimant since that time.

7. Each month Brother receives 235 hours per month of IHSS to assist with meal preparation, personal care, scheduling of appointments, dressing and hygiene.

Conservator is responsible for monitoring those hours. An IHSS provider accompanies him several times a week to a gym where he works out. There was no evidence that Brother's IHSS hours are used to provide respite to Conservator. Conservator is not an IHSS provider for Brother.

8. Brother requires constant supervision both at home and out in the community. In the home he must be supervised to ensure that he and Claimant do not engage in physically aggressive behavior with each other; Claimant is the aggressor and he is trying to defend himself. Efforts are made to keep them separate from each other in the home. At least one time per week Conservator or an IHSS provider will assist Brother in showering to ensure he is thoroughly clean, although he does shower with supervision more often during the week. Brother cannot shave himself independently and bears scarring on his face for attempts to do so in the past. His food must be cut into small pieces, and he must be supervised when eating so that he will chew his food completely before swallowing. Otherwise he has a tendency to choke. On one occasion he had to be stopped from spraying Raid insecticide on a muffin because he thought the poppy seeds were insects. He did not understand verbal explanations to the contrary. Like Claimant, Brother will let strangers into the home when they come to the door if he is unsupervised. He does not know how to safely cross a street. Both at home and in the community, Brother is very animated and physically active, constantly moving.

9. When out in the community Brother has a tendency to stare at strangers, approach them, and try to engage in conversation, or he will yell at them. Sometimes he uses profanity. On at least one occasion two adult males chased Brother through the gym he goes to because they perceived he had insulted them in the men's locker room. Although he was accompanied to the gym by an IHSS worker, Conservator had to come

to the gym to help resolve that issue. Since that time, Brother and his IHSS worker have used the family locker room for changing, etc.

10. Brother does not sleep well at night. Although prescribed Risperdal to help him sleep, he has a tendency to get up in the middle of the night and walk through the house. He must then be supervised.

11. Brother attends a day program for 30 hours each week (six hours per day on weekdays). However, the hours he attends the program are not exactly the same hours that Claimant attends her program. Conservator sometimes must go to the program to bring Brother dry clothes when he has not toileted as carefully as necessary, or has gotten into a conflict there and needs to leave early.

VMRC'S DETERMINATION OF RESPITE CARE HOURS

12. VMRC uses a five page form entitled Family Respite Needs Assessment to calculate the number of monthly hours of respite for each VMRC consumer. There was no evidence as to how the form was developed, or who developed it. It has been used by VMRC for at least 15 years. Many years ago the Department of Developmental Services (DDS) approved use of the form by VMRC to assist Independent Planning Program (IPP) teams in determining the amount of respite hours per month the caregiver will be allowed. VMRC believes the form is an objective and consistent tool to be used for this purpose, and is a fair way to determine the amount of respite services its clients need.

13. The form looks at eight areas of a consumer's needs and living situation, as well as the services the consumer is receiving, and assigns a varying number of points in each category, based on information contained in VMRC's file, the knowledge of the service coordinator of the consumer's needs, and information from the consumer and/or caregiver. Monthly respite hours are determined by the total number of points scored in the eight areas.

14. The first category in the assessment tool looks at the age of the consumer. Children up to age six do not receive any points. The maximum number of points is seven for a consumer 18 years of age or older. Other age categories below 18 are entitled to either three or five points.

15. The second category rates the consumer according to adaptive skills. Points range from zero to four. Children under three do not receive any points. Adults requiring no special care receive zero points, while a consumer requiring total care ("not capable of self-care in any activity of daily living") receives four points, the maximum number of points in this category. One, two, or three points will be given based on the level of care the consumer requires in his area.

16. Mobility is the third category, with a maximum of five points received if the "Consumer is immobile and incapable of independent movement" One point is allowed if the consumer (over age three) needs some help or adaptive equipment is used independently, and two points are allowed if the consumer is mobile only with assistance, such as being unable to independently use a wheelchair. Three points are available if the consumer is mobile only with assistance, and requires lifting in and out of a wheelchair, bed, etc. Four points are not available in this area.

17. The fourth category looks at whether the consumer attends school or a day program, with no points available for a child under five, or an older child or adult attending an out-of-home program 20 or more hours a week. Lesser amounts of time in school or a day program will result in a score of one, two, or three, with three points available if the consumer does not attend school or a home program and is home all day.

18. The fifth category looks at the consumer's medical needs. A consumer with no health problems other than those requiring routine care (described as "vitamins, allergy, shots [sic], etc.") is not allowed any points. Some "minimal health problems," that

will result in one point, include “nebulizer treatment . . . but not during respite hours,” or a “regular medication schedule.” If the “consumer has frequent illnesses or a condition requiring medical appointments 3 or 4 times per month,” or daily monitoring, three points will be allowed. If a consumer requires “almost constant attention to medical conditions or procedures,” in which the family is actively participating, five points are allowed. There is no category described worth either two or four points.

19. Behavioral needs are explored in the sixth category. Points available range from zero to four, based on the frequency and nature of maladaptive behaviors, danger to self or others, need for restraint and its frequency, and whether or not behavioral services are being accessed by the family. “Medication therapy” is a component of behavioral services. Severe behavior is described as “aggressive towards others potentially causing injury, self-abusive requiring occasional restraint as a preventive measure or requiring occasional medical attention serious property destruction, etc.” The form states “If consumer displays severe behavioral excesses more often than weekly . . . [t]he Planning Team must be convened to determine respite needs.”

20. The seventh category looks at the “utilization of natural and other supports,” with a point scale of zero to four. Points may be given based on the age of the consumer, participation (or lack thereof) in the community outside the home, and the involvement of extended family or others who are able to provide some respite care. The more restricted to the home environment the consumer is, the more points will be given.

21. The eighth and final category looks at “family situation.” Points available range from zero to eight, and 22 different living arrangements are described, several with the same points as others. There is no description of claimants’ current living arrangement: two consumers living with a lone adult who also has a disability. The form does not take into account whether a consumer is receiving IHSS services.

22. After each category in the assessment has been scored, the number of points are totaled. No respite care is available if a consumer's score is less than six points. Six to 10 points entitles the consumer's family to 12 hours per month of respite care. There are then categories of score ranges with each entitling the family of the consumer to an increasing number of respite hours. The maximum respite hours allowed in the assessment are 24, which are available to the family if the assessment scores total 25 to 30 points. There is no provision for additional hours when one adult is responsible for the care of more than one consumer. If the assessment score is more than 30 points, the tool calls for an "expanded Planning team determination" of the number of respite hours allowed.

Claimant's Score on the Family Respite Needs Assessment

23. The assessment was completed for Claimant at her IPP team meeting on July 31, 2013. Her total point score was 23, which entitled her to 20 hours of respite care each month. She received seven points for her age. In the area of adaptive skills she received a two and she received a one in mobility. Due to her attendance in a day program, she received no points in that area, but she did receive one point in the area of medical needs. She was entitled to one point due to her having "minimal health problems." Claimant was given a score of two points in the area of behavioral needs, and three points in the area of utilization of natural and other supports. Among the community activities Conservator described her as participating in were going out to eat, going to the gym (although she only goes to sit in the spa), going to the movies, and going to a nail salon.

24. During the course of the hearing, based on the testimony of Conservator and two of the family's IHSS workers, Amy Scott and Scarlett Azof, one of whom also provides respite services, the VMRC personnel in attendance recalculated the scoring of the assessment tool. VMRC personnel gave Claimant an increase of one point in the

area of adaptive skills, and an increase of two points in the area of medical needs.³ An additional one point was given in the area of behavioral needs, which increased the total score on the assessment to 27. This entitles Claimant to 24 hours each month of respite care.

Brother's Score on the Family Respite Needs Assessment

25. At an IPP meeting on August 20, 2013, Brother was given a total point score of 20, which meant he was entitled to 20 hours per month of respite care. In the first category, age of the consumer, he was given seven points based on his age. In the second category, adaptive living skills, he received two points. In the third category, mobility he received no points as he is mobile. In the fourth category he also received zero points because he attends a day program 30 hours each week. He also was given no points in the area of medical needs. He received one point in the area of behavioral needs. This category describes "some behavioral excesses, may be hyperactive or irritable, but not aggressive or destructive of property. . . ." In the category describing utilization of natural and other supports, Brother was given three points based on his participation at a gym, and going out to restaurants with Conservator. In the last category, family situation, the team assigned seven points, although none of the categories in that part of the assessment tool describes his current living situation.

26. After hearing the testimony of Conservator and the IHSS workers, VMRC personnel recalculated Brother's score on the assessment tool. They added one point in the area of adaptive skills, and one point in the area of behavioral needs. This raised

³ Although Claimant's current service coordinator, Leana Protiva testified that she was unaware of Claimant often using a wheelchair, and her inability to use it independently, the IPP dated August 15, 2013, reports that she uses a wheelchair.

Brother's total score to 22 on the assessment, but this increase did not result in additional hours based on the assessment scoring rubric.

Conservator's Dispute with VMRC's Determination of Respite Hours

27. Conservator lives alone with Claimant and Brother. She is disabled with a back injury. Conservator has no assistance, other than from the IHSS workers who come into the home, and accompany Claimant and Brother on some community outings. It took her several years to find IHSS workers whom she could trust in her home (she had one initially who stole, for example), and who were willing to work with Claimant and Brother, both of whom have the need for assistance with day-to-day basic living skills, as well as behavioral issues which require constant supervision. Conservator provides direction and supervision to the IHSS workers, and assists them when they are caring for Claimant and Brother. Although there are times when more than one IHSS worker will be providing services in the home, for example one IHSS worker may be preparing meals while another may be assisting Claimant or Brother, the evidence did not establish that the IHSS hours are used by Conservator in lieu of respite care. Conservator cares for Claimant and Brother alone when IHSS workers are not being used. There was evidence that the day programs Claimant and Brother attend do not have the same hours, although there is some overlap.

28. VMRC decided that if the respite hours were used, only one respite worker was necessary to care for both Claimant and Brother. The person who occasionally provides respite care, Ms. Scott, testified credibly that the only time Conservator can use the respite care is at night when Claimant and Brother are asleep. Although Conservator is able to care for Claimant and Brother by herself, and does so for part of the time, it is difficult for her to do so without the additional assistance of the IHSS workers for part of the day. There was no evidence that any of the IHSS workers are able to care for Claimant and Brother simultaneously without additional adult assistance.

29. Conservator uses the night-time respite hours to catch up on her sleep. In order to do so, she leaves the house after Claimant and Brother have gone to bed, goes to a friend's home, and sleeps there. It is clear that she is exhausted most of the time, and is on-call to meet the needs of Claimant and Brother all of the time. The stress and exhaustion she experiences caring for two consumers is obvious, and impacts her ability to maintain their current living situation.

30. Conservator loves her siblings and does not want to give up caring for them. There was no evidence that any other family members or friends participate in the care of Claimant and Brother. In her request for fair hearing, Conservator asked that the hours of respite care for both Claimant and Brother be added together. In other words, rather than getting 20 hours each month for both, she asked that she be given 38 total hours per month.⁴ VMRC was originally willing to authorize 20 total hours per month for Claimant and an additional 20 hours per month for Brother. However, its method of providing respite care is to provide one in-home respite provider for both Claimant and Brother at the same time, resulting in respite services of only 20 hours per month being available for Conservator to use. At the hearing VMRC indicated it is now willing to authorize a total of 24 hours per month for both, based on the increase in Claimant's score on the assessment tool.

31. Conservator is willing to accept in-home behavioral instructional services again to see if another provider can work with Claimant and Brother to develop strategies that she, IHSS workers, and respite workers can use to ameliorate Claimant and Brother's maladaptive behaviors. These behaviors currently necessitate two simultaneous caregivers when Conservator is not at home, and Claimant and Brother are

⁴ This number of hours was based on her mistaken belief that only 18 hours of respite had been authorized for Brother.

not asleep. The evidence established that out-of-home respite care is not appropriate for Claimant and Brother as both have difficulty transitioning to new situations. Nor was there evidence that out-of-home respite care is even available for Claimant and Brother.

32. The current service coordinator, Ms. Protiva, testified that she has worked for VMRC for 15 years, and has been the service coordinator for Claimant and Brother for a year and a half. She is supervised by Jacinta Groves, a program manager who was previously the service coordinator for Claimant and Brother, and has also been employed by VMRC for 15 years. Although both testified that they were aware of other situations where a single caregiver was responsible for more than one adult consumer, neither had any specific recollection of such a case.

33. Ms. Scott works in Brother's day program, provides some of the IHSS services, and also provides claimants' respite care. Ms. Scott testified that in her 10 years of caring for VMRC clients, she was not aware of any caregiver who was totally responsible for the care of two adult consumers.

34. Finally, Neil Fromm, a former service coordinator for another regional center, now employed by Area Board 6, testified that he was not aware of any living situation similar to that of Claimant and Brother. He also testified credibly that caring for adults with significant self-help and behavioral issues is much more difficult than caring for similarly disabled children. Although he had used the same assessment tool as a service coordinator to determine a family's respite needs, he believes the assessment tool is not an appropriate tool to use to determine respite care for this family. The evidence established that Conservator's circumstances as the caregiver for two adult developmentally disabled consumers who need constant supervision is a unique situation, and this family's need for respite services cannot solely be based on the results of the Family Respite Care Assessment Tool. Nor is it appropriate for just one respite worker to care for Claimant and Brother when they are not both asleep.

LEGAL CONCLUSIONS

1. The Lanterman Act sets forth the regional centers' responsibility for providing services to persons with development disabilities. An "array of services and supports should be established . . . meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community." (Welf. & Inst. Code, § 4501.)⁵ The purpose of these services and supports are "to prevent dislocation of persons with developmental disabilities from their home communities." (*Ibid*; see also § 4648, subd (a)(1).) The Lanterman Act requires regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP includes the consumer's goals and objectives as well as required services and supports. (§§ 4646.5, subd. (a)(2); 4648, subd. (a).)

2. In-home and out-of-home respite is a service that regional centers may purchase for consumers. Section 4690.2, subdivision (a), provides:

"In home respite services" means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client's own home, for a regional center client who resides with a family member. These services are designed to do all of the following:

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision to ensure the client's safety in the absence of family members.

⁵ Unless otherwise specified, all citations are to the Welfare and Institutions Code.

(3) Relieve family members from the constantly demanding responsibility of caring for the client.

(4) Attend to the client's basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family members.

3. Section 4686.5, subdivision (a)(1)-(3), provides:

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

(1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.

(2) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.

(3) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or

there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer.

[¶] . . . [¶]

4. Claimant's care and supervision needs were determined by her IPP teams and respite hours were determined for both Claimant and Brother using the Family Respite Care Assessment form. However, it became apparent during the hearing that the form, while appropriate in many situations, does not fully take into account the needs of Conservator for respite care for Claimant, in that there is no provision for determining a need for additional hours when a caregiver is caring for two adult consumers simultaneously.

5. Additionally, it became apparent during the hearing that although VMRC prefers a respite care model where one respite care worker cares for two consumers simultaneously, this may not be appropriate in the instant case. The consumers are full grown adults with behavioral excesses. In the current circumstances the only time that Conservator can take advantage of the respite hours awarded is at night when Claimant and Brother are both sleeping. And the number of hours now offered by VMRC, 24 hours per month, is only sufficient for her to have three eight hour periods per month at night to catch up on her sleep at a friend's home. This makes it impossible for her to pursue any leisure activities available in the daytime and evening that might help relieve the stress of caring for two seriously disabled adults who need constant care.

6. The fact that Conservator is caring for two adults with serious developmental delays and behavioral issues who require constant supervision is an extraordinary event that warrants an exemption. Accordingly, Claimant's request to have her respite hours pooled with Brother's is granted. At the hearing, VMRC determined that Claimant was to

be allowed 24 hours of respite care. Brother was allowed 20 hours at the IPP meeting, and this amount was not increased based on the testimony at hearing. If both Claimant and Brother's hours are added together, the family has 44 monthly respite hours available. If Conservator wishes to use some of these hours during daytime or evening hours when she would otherwise be required to care for Claimants, VMRC shall permit the use of two separate respite care workers, one for each consumer, during these hours. During nighttime hours, when claimants are asleep, only one respite worker is required.

7. Claimant has met the burden that 44 monthly hours of in-home respite care is appropriate for this family, and if respite care is provided during daytime or evening hours, two respite workers may be used.

ORDER

1. The appeal of Claimant is granted in part.
2. VMRC shall authorize a total of 44 hours of respite care monthly for this family, as long as Claimant and Brother continue to reside in the same household, and Conservator remains their sole caregiver, or until the next IPP meeting for each, whichever is sooner.

DATED: June 17, 2014

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)