

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

SAN GABRIEL POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2015040507

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on September 4, 2015, in Pomona, California. Claimant was represented by his sister and authorized representative.¹ His brother and his caregiver also appeared at the fair hearing. San Gabriel Pomona Regional Center (Service Agency or SGPRC) was represented by its Fair Hearings Program Manager, G. Daniela Santana.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on September 4, 2015.

¹ Names are omitted throughout this Decision to protect the parties' privacy.

ISSUE

Should the Service Agency be allowed to reduce Claimant's respite from 64 hours per month to 30 hours per month?

EVIDENCE

Documentary: Service Agency exhibits 1-7.

Testimonial: Claimant's sister; Claimant's brother; Claimant's caregiver.

FACTUAL FINDINGS

1. Claimant is a 58-year-old male client of SGPRC, under conservatorship. He has qualifying diagnoses of Moderate Intellectual Disability and seizure disorder, with additional diagnoses of Impulse Control Disorder, Schizophrenia, and Phenylketonuria (PKU).²

2(a). Claimant is able to interact with people in familiar settings. He is verbal and can communicate his needs, although he cannot engage in complex conversation or speak in complete sentences.

2(b). Claimant follows a special diet and takes several medications daily. Claimant eats independently with spillage. He is unable to cook, but he can help with rinsing and stirring food as long as directions are not complex.

2(c). Claimant is ambulatory, but due to a prior stroke, one of his legs is stiff, causing him to walk with an awkward gait. He uses a walker or manual

² PKU is a disorder which affects metabolism of the essential amino acid phenylalanine hydroxylase and which may result in symptoms including intellectual disability, delayed development, seizures, behavioral problems, and psychiatric disorders.

wheelchair with assistance for very long distances only. Claimant relies on his caregiver for transportation. His caregiver utilizes hand splints in the car when traveling long distances to prevent Claimant from hurting himself or others in the event he has a schizophrenic episode or engages in other problem behaviors.

2(d). Claimant can dress himself with prompting, and he needs assistance with buttons and tying his shoes. He also requires physical assistance to complete all hygiene and grooming tasks, including bathing. Claimant needs assistance with toileting. He cannot be left alone in the bathroom and must be carefully monitored since he will play with the toilet water and will rub feces on himself.

2(e). Claimant does not have good safety awareness skills and requires supervision in all settings. He displays self-injurious behavior which includes slapping and scratching himself and picking at his skin until it bleeds. He suffers from recurring staph infections on his legs and arms due to self-injurious behaviors and from recurring eye infections due to rubbing his eyes with his dirty hands when he is agitated. Claimant requires constant redirection to de-escalate his unpredictable behaviors as they arise. He has a history of physical aggression toward others which includes slapping and hitting. He also displays verbal aggression which includes screaming and cursing at others. This aggression typically occurs when he is having auditory hallucinations.

2(f). Claimant sometimes awakens at night and wanders around the house.

3. Claimant's family supports include his brother and sister, who live very far away from Claimant, and his caregiver, with whom he now lives. Claimant leases a room in his caregiver's home, where she lives with her husband and two minor daughters.

4. Although Claimant's caregiver is not a family member, she has

cared for him for almost 11 years, and she is regarded as part of Claimant's family. Claimant's caregiver began working with Claimant through Easter Seals. During those years, she became close with Claimant and his family. Approximately three years ago, when she discontinued working with Easter Seals, she became worried about leaving Claimant. She was concerned about a prior incident when she believed the staff gave him the wrong medication. She also wanted to ensure that Claimant did not suffer a stroke following his father's then-recent death as he had when his mother passed away. Claimant's caregiver spoke to Claimant's family, and they agreed to have him move into her home.

5. At the fair hearing, Claimant's sister recalled that, when their father passed away, Claimant had a difficult time adjusting to the loss. At that time, Claimant was living in an apartment and was receiving 24-hour care daily from several individuals throughout the week, including his current caregiver. She was the only person capable of calming him so that he did not damage property or hurt himself. On their father's passing, it became harder to keep Claimant calm, so when his caregiver graciously offered to take him into her home, Claimant's family readily agreed. According to Claimant's sister, it is "the best living situation [he] has ever been in, even when [their] parents were living." (Testimony of Claimant's sister.) Claimant's family is very satisfied with Claimant's current living arrangement and would like for it continue.

6. Claimant qualifies for Social Security assistance totaling \$856 per month, which he uses to pay for room and board, his share of utilities, and any outings. Claimant's siblings also pay \$400 per month for his food and other expenses.

7. Claimant qualifies for 260 hours per month of protective supervision from In Home Supportive Services (IHSS). His caregiver provides all

260 IHSS hours.

8. Claimant also receives personal assistance services (PAS) through People's Care, five days per week, six hours per day. He participates in People's Care from Monday through Friday, from 8:00 a.m. through 3:00 p.m., including transportation. Claimant receives 1:1 support to ensure his safety while engaging in activities through People's Care.

9. While Claimant is participating in People's Care, his caregiver goes to work from 8:20 a.m. to 2:20 p.m. She is employed at People's Care as well, providing 1:1 personal assistance to another client.

10. According to Claimant's most recent Individualized Program Plan (IPP), Claimant currently receives 64 hours per month of respite through Accredited Respite Services. The 64 hours of respite exceeds the statutory limit of 90 hours per quarter. (See Factual Finding 14 and Legal Conclusion 3, below). However, Claimant's current IPP noted that the 64 hours of respite services had been "granted as an exception and is currently under review." (Exhibit 7.) The 64-hour exemption was approved by the Frank D. Lanterman Regional Center (FDLRC) in 2012, while Claimant was a consumer with that regional center. At the time the exemption was approved, FDLRC noted that Claimant's required 24-hour supervision to ensure his overall safety and that the additional respite hours were put in place to provide relief to his caregiver so that she would not burn out and to allow her time to participate in her children's outings without Claimant.

11. Respite services are provided by the caregiver's sister-in-law who has known Claimant for about five years. Claimant works well with the respite worker. The respite worker is employed at another job and attends school, so respite hours are provided around her schedule, with a majority of respite hours provided on Saturdays.

12. Claimant's caregiver provides all of his IHSS hours because Claimant does not like change. When she has attempted to bring in other caregivers to assist her, Claimant has engaged in negative behaviors including punching and scratching his own face. Consequently, she does not make changes which would upset Claimant's routine.

13. Claimant's caregiver testified credibly that, in the years she has been caring for him Claimant's behaviors have remained constant and are now becoming worse as he ages. He has a lower tolerance for being around other people, so it is becoming harder for her to take him on outings with her family.

14. In a letter and Notice of Proposed Action, dated March 19, 2015, SGPRC informed Claimant's sister that it would be decreasing funding for respite services from 64 hours to 30 hours per month. The stated reasons for the proposed action were as follows:

[Claimant] currently receives 64 hours per month of in-home respite services. [Claimant] also receives 260 hours per month of [IHSS], including hours for protective supervision. [Claimant] attends day program "People's Care" five days per week which is a service that also provides relief from [Claimant's] continual care.

On July 28, 2009, California State Law changed regarding respite services. Effective July 1, 2009, a regional center shall not purchase more than . . . 90 hours of in-home respite services in a quarter, for a client. Per the Welfare and Institutions Code 4686.5,

the regional center may grant an exemption to the requirements above if it is demonstrated that the intensity of the person's care and supervision needs are such that additional respite is necessary to maintain him/her in the family home . . . [Claimant's] needs were reviewed and SGPRC has determined an exemption is not warranted at this time.

Title 17 defines in-home respite as "intermittent or regularly scheduled temporary non-medical care and supervision provided in the consumer's own home." Respite services are designed for a short period during planned or emergency situations. We believe provision of in-home respite services of 30 hours per month is sufficient to meet [Claimant's] needs. (Exhibit 1.)

15. On April 1, 2015, Claimant's sister filed a Fair Hearing Request on Claimant's behalf, contesting the Service Agency's reduction of Claimant's respite hours. (Exhibit 1.)

16. At the fair hearing, Claimant's sister argued against the Service Agency's proposed change and reduction of Claimant's respite hours. She pointed out that Claimant continues to require 24 hour per day supervision and that his caregiver is the only person who can keep him calm. When Claimant travels to visit his siblings, the caregiver and her family come along because nobody else can provide the calming care needed. She noted sadly that the burden is heavy for the caregiver because she does not have a lot of support

from Claimant's family due to their distance and their own responsibilities. She asserted that the currently-provided 64 hours of respite are necessary to ensure that the caregiver will be able to continue caring for Claimant in his current home.

17. The evidence established no change in Claimant's condition or the intensity of his supervision needs since FDLRC initially approved the exemption and determined that 64 hours was the level of respite required for Claimant to remain in his home. Rather, SGPRC disagreed with FDLRC's approval of the exemption, noting that Claimant qualifies for the maximum amount of respite (30 hours), but not 64 hours.

18(a). The Service Agency explained the bases for its proposed reduction of respite by pointing out that respite is defined as "intermittent and temporary" relief from continual care and is not intended to "cover all 24 hours of the day." However, the evidence did not establish that the Service Agency was prohibited from "covering" all 24 hours of the day if the evidence warranted the provision of a certain level of respite.

18(b). The Service Agency also pointed out that family members are expected to contribute their time and to use generic resources and that regional centers take into consideration that consumers attend other programs, such as day programs. The Service Agency acknowledged that it could see how Claimant's caregiver could burn out from working full-time with another client on the weekdays and going home to provide 260 hours of IHSS for Claimant. The Service Agency agreed that respite is intended to provide a break and that the caregiver "should get a break." However, the Service Agency recommended that the caregiver use existing IHSS hours to pay either the respite worker or another worker to provide the 34 hours of respite which the Service Agency proposed to

eliminate. The Service Agency argued that it is important for all clients to become accustomed to working with other individuals in case their caregiver becomes unavailable due to emergency.

LEGAL CONCLUSIONS

1. Claimant's appeal of the Service Agency's reduction of the number of respite hours from 64 to 30 hours is sustained. (Factual Findings 1 through 18; Legal Conclusions 2 through 4.)

2. Where a change in services is sought, the party seeking the change has the burden of proving that a change in services is necessary. (See, Evid. Code, §§ 115 and 500.) In attempting to reduce Claimant's respite hours, the Service Agency bears the burden of proving by a preponderance of the evidence that the reduction in hours is necessary. The Service Agency has not met its burden of proof with respect to the need for reduction of respite hours from 64 to 30 hours (i.e. that the bases for the previously-approved exemption no longer exist).

3. Welfare and Institutions Code section 4686.5 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 hours 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) 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) A regional center shall not purchase day care services to replace or supplant respite services. For purposes of this section, "day care" is defined as regularly provide care, protection, and supervision of a consumer living in the home of his or her parents, for periods of less than 24 hours per day, while the parents are engaged in employment outside of the home or educational activities leading to employment, or both.
- (5) A regional center shall only consider in-home supportive services a generic resource when the approved in-home supportive services meets the respite need as identified in the consumer's individual program plan (IPP) or individualized family service plan (IFSP).
- (b) For consumer receiving respite services on July 1, 2009, as part of their IPP or IFSP, subdivision (a) shall apply on August 1, 2009.

4. Pursuant to Welfare and Institutions Code section 4686.5, Claimant's respite may not exceed 90 hours per quarter unless an exemption is granted. Taking into consideration the intensity of Claimant's care and supervision needs, FDLRC granted Claimant an exemption because the additional respite was necessary to maintain him in his home. The evidence did not establish that Claimant's current condition or needs have changed since FDLRC approved the exemption and determined that the 64 respite hours were the appropriate level for Claimant. SGPRC did not prove that the bases for the previously-approved exemption no longer exist or that other circumstances now exist such

that it is necessary to reduce Claimant's respite from 64 to 30 hours.

ORDER

The Service Agency's proposed reduction of Claimant's respite hours from 64 hours to 30 hours is overruled, and Claimant's appeal is sustained.

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: September 18, 2015

JULIE CABOS-OWEN

Administrative Law Judge

Office of Administrative Hearings