

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

SAN DIEGO REGIONAL CENTER,
Service Agency.

OAH No. 2016010393

DECISION

On April 19, 2016, Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California.

Ron House, Attorney at Law, represented the San Diego Regional Center (SDRC).

Belinda Brav, Advocate, represented claimant.

By Order dated January 21, 2016, this matter was consolidated for hearing with two other matters because all three matters involve the same legal issue. Each matter received its own decision. Oral and documentary evidence was introduced and the matter was submitted on April 19, 2016.

ISSUE

Should claimant be excluded from receiving State Supplemental Payment (SSP) restoration benefits from May 1, 2013, to June 1, 2015, because he lived with his parents, despite the fact that he paid his parents for his rent and utilities during that time in the same manner he would if he were living outside of his parent's home?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant receives services from SDRC because he has developmental disabilities and meets the required qualifications under the Lanterman Act as set forth at Welfare and Institutions Code section 4500 et seq.

2. Claimant receives Supplemental Security Income (SSI), through a federally funded program, that provides income support to disabled individuals and is administered by the Social Security Administration (SSA).

3. Beginning May 1, 2013, claimant paid rent, utilities, water, and internet access fees to his parents in the amount of \$525 per month to live in their home. Despite making these payments on his own, claimant has never received State Supplementary Payments (SSP) from SDRC. SDRC informed claimant that he would not receive SSP payments because it is SDRC's policy that clients who live with their parents are not eligible for SSP payments regardless of whether they pay rent and utilities. Beginning June 1, 2015, claimant began to rent an apartment with a roommate outside of his family's home. As a result claimant began to receive SSP benefits beginning on July 29, 2015, because he no longer lived with a family member.

4. On January 11, 2016, SDRC received claimant's fair hearing request appealing SDRC's decision to deny him SSP payments during the time he lived with his family but paid rent, utilities, water and internet access as his share of the household expenses from May 1, 2013, to June 1, 2015.

BACKGROUND

5. Supplemental Security Income/State Supplementary Payment (SSI/SSP) grants are a critical source of income for disabled people in California. Unlike the SSI portion of these grants that is funded by the federal government, the SSP portion is

funded by the State of California. The SSP program augments SSI, but both benefits are administered by the SSA. Eligibility for both SSI and SSP are determined by federal criteria; if one qualifies for SSI, they also qualify for SSP. Welfare and Institutions Code sections 12000 et seq., is known as the Burton-Moscone-Bagley Citizen's Income Security Act for Aged, Blind and Disabled Californians. Section 12001 states as follows:

It is the intent of this chapter to implement a state supplementation program pursuant to Title XVI of the Social Security Act and a program for state services to the aged, blind or disabled.

6. Welfare and Institutions Code sections 12100 et seq. provide that the California State Department of Social Services (department) contract with the United States Secretary of Health and Human Services (secretary) to make payments to SSP recipients in order to supplement SSI payments made available pursuant to the federal Social Security Act.

7. Pursuant to Welfare and Institutions Code section 12200, SSP benefit payments are calculated by establishing the maximum level of nonexempt income and federal SSI benefits as determined by Part A of Title XVI of the Social Security Act and state SSP benefits for each living arrangement category of eligible recipient.

8. Pursuant to the Lanterman Act, Welfare and Institutions Code section 4659, subdivision (a)(1), a regional center is responsible for identifying and pursuing all possible sources of funding for consumers receiving regional center services, including governmental programs and state supplementary programs. Regional centers make eligibility and amount of payment determinations with guidance from the Department of Developmental Services (DDS) and pay SSP to regional center consumers.

CLAIMANT'S EVIDENCE

9. Claimant's father testified that claimant began paying rent, utilities (gas and electric), water, and internet access in the amount of \$525 per month beginning on May 1, 2013, pursuant to a rental agreement, which was received in evidence. Pursuant to the rental agreement, claimant is also responsible for purchasing his own food. Claimant's father testified that this rental agreement ended on June 1, 2015, when claimant moved out of the home into an apartment with a roommate.

10. Claimant's father further testified that claimant had a bank account from which claimant's rent of \$525 was deducted every month on the tenth day of the month and deposited into claimant's father's account. Claimant's father also stated that during the time he was paying rent from May 1, 2013, to June 1, 2015, claimant was paying for his own food and other living expenses. He stated that claimant lived independently in his home from May 1, 2013, to June 1, 2015, by paying his rent, utilities and food

11. Claimant's father also testified that before he was paying rent while living in his father's home, claimant was already receiving SSI benefits, the amount of which were determined by his living arrangement. He stated that after claimant began paying rent and living independently while in the father's home, his SSI benefits were increased from \$633.17 to \$877.40 per month.

SDRC'S EVIDENCE

12. Michael Rath has worked for SDRC for 33 years. He has held the position of assistant director of business services for the past one and a half years. In his career with SDRC, he has worked as a service coordinator, resource coordinator providing quality assurance reviews, program manager, and regional manager. His responsibilities as the assistant director of business services include oversight of SDRC's accounting department and facilities division. Mr. Rath also oversees purchases of service for client supports as

SDRC serves as the representative payee for SSI, Medi-Cal and other agencies for clients. In his current position he is responsible for overseeing the SSI/SSP program payments for SDRC's clients.

13. Mr. Rath explained that SSI is a federal program that provides monthly benefits to disabled people who meet the income and resource requirements. He stated that California provides a supplement to SSI called SSP. Mr. Rath stated that regional centers oversee the payment of SSP benefits to SDRC clients based upon guidance received from DDS.

14. Mr. Rath testified that, in 1993, California made a series of budget cuts to SSP benefits. A memo from DDS, dated July 15, 1994, provided instructions to regional center directors about how SSP payments to regional center clients should be distributed. The July 15, 1994, memo stated in part as follows:

This memorandum provides information regarding the restoration of reductions in SSI/SSP benefits for adult individuals not residing with a family member or in a licensed residential facility for Fiscal Year (FY) 1994-95.

SDRC interpreted this language to mean that a regional center client who lives with a family member is ineligible to receive SSP benefits. Mr. Rath stated that this interpretation became policy for SDRC and SDRC has not changed that policy since the July 15, 1994, memo. Accordingly, Mr. Rath instructs SDRC program managers that in order to be eligible for SSP payments, regional center clients may not reside with a family member.

15. Mr. Rath also testified that he searched for additional guidance from DDS on how SSP benefits should be distributed if a client resides with a family member, but also pays rent, utilities and is otherwise living independently, but he was unable to find any

more information. In his search he located four additional memos from DDS similar to the July 15, 1994, memo. The relevant substance of those memos is summarized below:

- DDS memo dated August 17, 1993, to regional center directors and received by Inland Regional Center on August 19, 1993, stated in part “[SSP] funds are to be used in accordance with the appropriation and legislative intent, and only for the purpose of offsetting any reductions in the Fiscal Year (FY) 1992-93 and FY 1993-94 ‘in the SSI/SSP benefits to adult persons not residing with a family member or in a licensed residential facility.’”
- DDS Memo dated September 6, 1995, to regional center directors, stated “This memorandum provides information regarding the restoration of reductions in SSI/SSP benefits for adult individuals not residing with a family member or in a licensed residential facility for Fiscal Year (FY) 1995-96.”
- DDS Memo dated November 17, 1995, to regional center directors and stated “We have just learned that federal approval for implementing the regional SSI/SSP benefit reductions is not expected prior to February 1, 1996. . . . Because of the delayed implementation, regional centers should continue to disburse the SSI/SSP restoration funds to consumers residing independently or semi-independently at the rate of . . .”¹

¹ This is the first memo that did not use language that the client must not reside with a family member.

- DDS Memo dated August 2, 2011, to regional center directors stated that SSP benefits are to be provided to “consumers residing independently and semi-independently.”²

16. Mr. Rath said he first became aware of the issue of SSP payments to regional center clients living with family members while also paying for rent, utilities, food and other necessities in August 2015 when claimant’s representative brought it to his attention. He immediately contacted Sharon Jimenez of DDS for clarification regarding the issue. Ms. Jimenez researched the issue but was unable to provide any clarification beyond what is contained in the above referenced memos. Mr. Rath stated that Ms. Jimenez suggested the issue should be taken to a fair hearing.

17. Mr. Rath testified that regional centers undergo an audit every two years that requires them to show that they performed appropriate due diligence before a payment for SSI/SSP was made. He stated that in his experience, a rental agreement alone would be insufficient to show that a rent payment was actually made, and instead, more evidence, such as a copy of a check or bank transactions showing that funds were transferred would be sufficient to show that rent was paid.

THE PARTIES’ ARGUMENT

18. SDRC argued that they followed the DDS guidance memos, which provided that a regional center client who lives with a family member is not eligible to receive SSP benefits. It had no further basis for excluding claimant from receiving SSP benefits from May 1, 2013, to June 1, 2015.

19. Claimant’s representative argued that SDRC has erroneously applied a policy generated by DDS that is contrary to applicable law thereby excluding regional center

²This memo also did not use language stating that the client must not reside with a family member in order to be eligible for SSP.

consumers from receiving SSP benefits even if they live independently in their parent's home.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. Each party asserting a claim or defense has the burden of proof for establishing the facts essential to that specific claim or defense. (Evid. Code, §§ 110, 500.) In this case, claimant bears the burden to demonstrate that he is entitled to receive SSP benefits during the time he lived independently by paying his parents for his rent and utilities in the same manner he would if he were living outside of his parents' home.

2. The standard by which each party must prove those matters is the "preponderance of the evidence" standard. (Evid. Code, § 115.)

3. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

THE BURTON-MOSCONE-BAGLEY CITIZEN'S INCOME SECURITY ACT FOR AGED, BLIND AND DISABLED CALIFORNIANS

4. Welfare and Institutions Code section 12002 states as follows:

It is the object and purpose of this chapter to provide persons whose need results from age, blindness or disability with assistance and services which will encourage them to make greater efforts to achieve self-care and self-maintenance, whenever feasible, and to enlarge their opportunities for independence.

5. Welfare and Institutions Code section 12004 states as follows:

The provisions of this chapter shall be liberally construed in favor of aged, blind and disabled recipients.

6. Welfare and Institutions Code section 12100 states as follows:

The department shall enter into an agreement with the secretary providing for administration by the secretary of the provisions of this chapter. The agreement shall provide at least the following:

- (a) That the secretary shall, on behalf of the state, make supplementary payments to an applicant or recipient under this chapter at such times and in such installments as may be agreed upon.
- (b) That the state shall pay to the secretary an amount equal to expenditures made by the secretary as such supplemental payments less amounts payable by the federal government pursuant to Section 401 of Title IV of the Social Security Act Amendments of 1972.
- (c) That the department may enter into an agreement to administer on behalf of the secretary and at the secretary's expense all or such parts of the program under Title XVI of the Social Security Act during such portion of the fiscal year ending June 30, 1975, as may be provided in the agreement. In the event of such agreement, the department shall supervise the

counties' administration of all or such parts of the program under such agreement.

- (d) The application of such procedural and other general provisions as are necessary and proper to achieve efficient and effective administration of the provisions of Title XVI of the Social Security Act and of this chapter, including a provision authorizing the secretary to conduct fair hearings in accordance with rules promulgated by him in cases concerning aid under this chapter.
- (e) That the checks issued by the secretary containing the state supplemental payment shall clearly indicate by a separate notice accompanying the check or on the face of the check the fact that state funds are a part of the payment or the amount of check representing state funds.
- (f) That to the extent permitted by law, the state shall audit the expenditures made by the secretary under such an agreement.
- (g) That the state exercises its option to increase the payment level under Section 401(b)(1) of Title IV of the Social Security Act Amendments of 1972 by an amount equal to the sum of (A) and (B) of Section 401(b)(1) of that title.

7. Welfare and Institutions Code section 12102 provides as follows:

Notwithstanding any other provisions of law, no agreement entered into for state administration of the state supplementary payment program on behalf of the secretary or as agent of the federal government or otherwise, shall provide for any difference in administration of or eligibility for the state supplementary program than if such program were directly administered by the secretary pursuant to this chapter.

8. The SSA implements the payment of SSI benefits pursuant to the Social Security Act. SSI is the income of last resort for the low-income aged, blind and disabled. Eligibility requirements are generally set forth at 42 U.S.C. section 1382. Additionally, 42 U.S.C. section 1382e provides for the payment of SSP by states with an agreement between the Commissioner of Social Security and the state.

9. The Social Security Act is a complex and voluminous statute, and the SSA also issues policies for implementation of the SSI payments for eligible recipients. The SSA takes into account all income and resources of a disabled recipient in the determination of the amount of SSI payment to be made to that individual. There are generally four living arrangement categories used by SSA for this determination. Two of those living arrangements are not applicable to claimant. The remaining two living arrangements are applicable here. The SSA determines whether the person is an adult living in his or her "own" household or in the household of another. Living in one's "own" household means the person owns the home, has rental liability, or pays a pro rata share of household expenses. If the person is living in the household of another and receives both food and shelter from the other members of the household, then that person's SSI benefit is reduced by 33 and 1/3 percent (or one third) as described in 42 U.S.C. section 1382a(a)(2)(A).

EVALUATION

10. Claimant established by a preponderance of the evidence that he lived independently in his parent's home and paid for his rent, utilities, internet access, and food from May 1, 2013, to June 1, 2015. SDRC's policy for its determination that a consumer is not entitled to SSP benefits if he or she is living with a family member regardless of his or her rental liability has no statutory or regulatory basis. Even the DDS memorandums produced by SDRC as support for their position are internally inconsistent. Some memorandums state that regional center consumers are eligible for SSP payments only if they are not living with a family member, while others state that regional center consumers can receive SSP benefits if they are residing independently or semi-independently. SDRC's policy demonstrates an underlying and erroneous assumption that a regional center consumer who lives with a family member cannot also be residing independently or semi-independently. Significantly, SDRC received no assistance from DDS on this issue and was required to bring the matter to a Fair Hearing for resolution.

11. One purpose of Government Code section 11340, et seq., (Administrative Regulations and Rulemaking) is to prevent the adoption of what amounts to a regulation that implements a law without giving a voice to the people affected. This unauthorized adoption is commonly referred to as an underground regulation. The DDS "policy" as interpreted by SDRC relating to eligibility determinations for SSP benefits appears to be an inappropriate underground regulation.

12. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 558 – 559, provides an excellent review of the law concerning underground regulations.³ There the

³ The court in *Tidewater Marine Western* refers to the Administrative Procedure Act (APA) as beginning at Government Code section 11340, et seq., however, the APA actually begins at Government Code section 11370, et seq., and the Administrative Regulations and

court said:

The APA establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action (Gov. Code, §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code, § 11346.2, subds. (a), (b)); give interested parties an opportunity to comment on the proposed regulation (Gov. Code, § 11346.8); respond in writing to public comments (Gov. Code, §§ 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code, § 11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity (Gov. Code, §§ 11349.1, 11349.3).

One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204-205 [149 Cal.Rptr. 1, 583 P.2d 744] (*Armistead*)), as well as notice of the law's requirements so that they can conform their conduct accordingly (*Ligon v. State Personnel*

Rulemaking or ARR begins at Government Code section 11340, et seq. Accordingly, when the court in *Tidewater Marine Western* references the APA it is understood to mean the ARR.

Bd. (1981) 123 Cal.App.3d 583, 588 [176 Cal.Rptr. 717] (*Ligon*). The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation.

13. The *Tidewater* court emphasized the broad scope of the rule against underground regulations. At page 570, the court said:

The APA provides that “[*n*]o *state agency* shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation . . . unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.” (Gov. Code, § 11340.5, subd. (a), italics added.) The APA applies “to the exercise of *any quasi-legislative power* conferred by *any statute* heretofore or hereafter enacted,” and the APA’s provisions “shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.” (Gov. Code, § 11346, italics added.)

14. The *Tidewater* court emphasized the breadth of the ARR definition of “regulation.” At page 570, the court said:

The APA, however, defines “regulation” very broadly to include “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency.” (Gov. Code, § 11342, subd. (g).) A regulation subject to the APA thus has two principal identifying characteristics. (See *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497 [272 Cal.Rptr. 886] [describing two-part test of the Office of Administrative Law].) First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. (*Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630 [167 Cal.Rptr. 552].) Second, the rule must “implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency’s] procedure.” (Gov. Code, § 11342, subd. (g).)

15. Interpretations that arise in the course of case-specific adjudication are not regulations, and agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the ARR. Thus, if an agency prepares a policy manual that is no more than a restatement or summary of the agency’s prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations.

(*Tidewater, supra*, 14 Cal.4th at p. 571.)

16. The SDRC policy, generated from the DDS memorandums, has not been promulgated as a regulations and therefore should not control the determination and eligibility for SPP benefits for regional center consumers.

17. Additionally, SDRC's determination that this policy requires that SDRC consumers must not live with a family member in order to be eligible for SPP benefits directly contradicts the eligibility criteria of SSA. When calculating SSI benefits, the SSA does not deny eligibility based solely on whether a family member lives with a disabled individual. Instead, SSA takes into consideration whether the disabled individual pays rent or contributes pro rata to household expenses. Welfare and Institutions Code section 12102 dictates that state administration of the state supplementary payment program shall not provide for any difference in administration of, or eligibility for, the state supplementary program than if such program were directly administered by SSA. Also, Welfare and Institutions Code section 12004 states the Burton-Moscone-Bagley Citizen's Income Security Act for Aged, Blind and Disabled Californians should be liberally construed in favor of disabled recipients.

18. Claimant should not have been excluded from receiving SSP restoration benefits from May 1, 2013, to June 1, 2015, because he lived with his family and paid for his rent liability and utilities during that time. SDRC should have funded SSP benefits for claimant during this time frame upon his demonstration of his payment of rent liability and household contribution.

ORDER

Claimant's appeal is granted. San Diego Regional Center shall pay claimant the SSP benefits he should have received from May 1, 2013, to June 1, 2015.

DATED: May 3, 2016.

_____/s/_____
DEBRA D. NYE-PERKINS
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 ninety days.