

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Claimant,

v.

KERN
REGIONAL CENTER,

Service Agency.

OAH Case No. 2016070968

DECISION

John E. DeCure, Administrative Law Judge, Office of Administrative Hearings, heard this matter on September 9, 2016, in Delano, California.

Claimant¹ was present and assisted by a Spanish-English interpreter. Claimant represented herself, but requested assistance throughout the hearing from Ralph Pierro, an Assistant Program Manager for the Disability Association for the Developmentally Disabled (DADD), which is claimant's primary service provider.

Mark Meyer, Program Manager Specialist, represented Kern Regional Center (KRC, or the service agency).

Evidence was presented and argument was heard. The matter was submitted for decision on September 9, 2016.

¹ Claimant's name is withheld to protect her privacy rights.

ISSUES

Should KRC be required to fund 54 hours per month of supported living services related to personal safety issues?

Should KRC be required to fund 20 hours per month of supported living services related to health issues?

FACTUAL FINDINGS

BACKGROUND INFORMATION

1. Claimant is a 44-year-old non-conserved female and KRC consumer based on her diagnosis of mild intellectual disability and epilepsy. She lives with a paid roommate in an apartment in Delano, and she receives 184 hours per month of KRC-funded supported living services (SLS) from DADD staff. Spanish is her primary language but she understands and can speak some English. Claimant has a history of seizure disorder, experiencing three to five mild seizures per day. She has experienced grand mal seizures with far less frequency and has not experienced one in over a year. Claimant takes Tegretol, Dilantin, and Lamictal daily for her seizures. She complains of experiencing multiple unpleasant side-effects, including feeling tired and dizzy, from taking what she feels are too many medications. She sees her personal physician, Dr. Ramy Alnahhal, as-needed for seizures or other medical concerns. She visits a neurologist, Dr. Rolando Young, every other month. In 2015 claimant was diagnosed as suffering from advancing scoliosis.² She also suffers from upper-vertebral arthritis.

² Scoliosis is a medical condition involving an abnormal, sideways curvature of the spine.

SUPPORTED LIVING SERVICES RELATED TO PERSONAL SAFETY

2. Claimant has suffered physical injuries in the past from experiencing sudden seizures. She has burned herself while cooking and was badly bruised when she lost consciousness and fell down while taking a shower. As a result, she is fearful of doing chores or other daily activities alone. When claimant feels a potential small seizure coming on she experiences dizziness and grows tired and sleepy. Her seizure medications frequently make her feel "horrible" and lacking energy. (Claimant's testimony.) At one point while she was testifying at the administrative hearing, claimant became dizzy and appeared visibly unwell, requiring a recess. Claimant has not had a grand mal seizure in seven years. When she feels a seizure coming on, she rests on the couch and waits for the dizziness and discomfort to pass.

3. The evidence was indefinite as to how often claimant is alone in her apartment. KRC did not present evidence on this issue, but argued presumptively that because a paid roommate lives with claimant and DADD also provides substantial services to claimant weekly, claimant is in no danger of being left alone. DADD staff presently provides approximately 46 hours per week of SLS to claimant, or about six to seven hours per day. However, Claimant testified credibly that she is home alone between 12:00 p.m. and 4:00 p.m. daily. She is sometimes alone part of the day on Saturdays, although DADD staff usually visits on Saturdays. Claimant said she is always alone on Sundays. KRC did not challenge Claimant's testimony regarding when she is left alone in her apartment.

4. In an assessment report dated May 18, 2016, Isabel Hinojosa, the DADD Program manager for claimant's case, provided a description of the "personal safety" services currently funded by KRC at a rate of 13.5 hours per week as follows:

Recommendation: SLS/roommate will assist [claimant] on a daily basis so as to provide first aid or obtain medical

attention if injured while having a seizure, staff will work to make her environment less hazardous if possible to prevent injuries.

5. On May 19, 2016, the service agency's Supported Living Team reviewed DADD's May 18, 2016 assessment report and recommended that claimant's "personal safety" SLS hours be eliminated due to what they believed was insufficient documentation by DADD explaining the necessity of these service hours. However, they invited DADD staff to submit a revised assessment report which might provide a clearer explanation of why the "personal safety" hours were justified.

6. On August 5, 2016, Ms. Hinohosa submitted a second assessment report which reiterated the "personal safety" services recommendation from the May 18, 2016 assessment, as set forth above. However, the report provided additional information regarding claimant's health issues and problems, as follows:

[Claimant] was recently diagnosed with upper vertebral arthritis and advancing scoliosis. It can be anticipated that these conditions will continue, and perhaps be of even greater concern in the foreseeable future. There are necessarily more doctor appointments, MRIs, CAT scans, bone density evaluations, as well as . . . routine medications and picking up medications as follow-ups are needed to stabilize these conditions as . . . best as possible. [Claimant] was recently referred to a spine specialist and also a doctor specializing in pain management. The concern is that both of these conditions have the potential to [require] even more precautionary measures so as not to put her in a position

where her [self-care] is affected even more so. Though [claimant] was recently prescribed a back brace, to attempt to stabilize her spine, the medical professional offered no guarantees as to the potential for long term success, as it applies to [claimant's] back.

7. At the administrative hearing, KRC did not present direct evidence establishing why claimant's services related to personal safety should have been reduced. KRC argued that DADD should have substantiated that they provided more dynamic personal-safety services than that described in their written assessments.

SUPPORTED LIVING SERVICES RELATED TO HEALTH ISSUES

8. Claimant requires verbal assistance setting medical appointments due to her inability to speak fluent English. Although she can set appointments with Spanish-speaking office assistants, she cannot remember the date or time of the scheduled appointment, and she becomes confused if she is asked too many questions. She is nervous about calling in prescriptions for herself, needs assistance ordering refills, and forgets to pick up her medications. During doctor visits, she needs help in understanding what the doctor is saying and later forgets what he has recommended. At home, she sometimes forgets to take her medications altogether, forgets the proper dosage, or forgets how frequently she is required to take her medications.

9. On May 19, 2016, the service agency's Supported Living Team reviewed DADD's May 18, 2016 assessment and recommended that claimant's "health issues" SLS hours be reduced due from 20 hours per month to 10 hours per month, due to what they believed was insufficient documentation by DADD explaining the necessity of these service hours. At the administrative hearing, KRC did not present direct evidence establishing why claimant's services related to health issues should have been reduced.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. and Inst. Code, § 4500 et seq.)³ An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established.

THE STANDARD AND BURDEN OF PROOF

2(a). The standard of proof in this case is the preponderance of the evidence, because no law or statute requires otherwise. (Evid. Code, § 115.)

2(b). When one seeks government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) In this case, Claimant seeks to maintain service-funding through KRC which was previously in place, while KRC seeks a change in services. Where a change in services is sought, the party seeking the change has the burden of proving that a change in services is necessary to meet the consumer's needs. (See Evid. Code, §§ 115 and 500.) Thus, the service agency bears the burden of proving, by a preponderance of the evidence, that it is entitled to reduce the level of funding for claimant's supported living services by 64 hours per month.

APPLICABLE STATUTORY LAW AND ANALYSIS

3(a). Welfare and Institutions Code section 4646 states in part:

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

(a) It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

(b) The individual program plan is developed through a process of individualized needs determination. The individual with developmental disabilities and, where appropriate, his or her parents . . . shall have the opportunity to actively participate in the development of the plan. [¶] . . . [¶]

(d) Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer's individual program plan and purchased by the regional center or obtained from

generic agencies shall be made by agreement between the regional center representative and the consumer or, where appropriate, the parents . . . at the program plan meeting.

3(b). Welfare and Institutions Code section 4646.4 states in part:

(a) Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5 . . . the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following: [¶] . . . [¶]

(c) Final decisions regarding the consumer's individual program plan shall be made pursuant to Section 4646.

3(c). Welfare and Institutions Code section 4646.5 states in part:

(a) Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services,

including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.

(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer. [¶] . . . [¶]

3(d). Welfare and Institutions Code section 4659 states in part:

(a) Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program. [¶] . . . [¶]

c) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall not purchase any service that would otherwise be available from Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, In-Home Support Services,

California Children's Services, private insurance, or a health care service plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage. If, on July 1, 2009, a regional center is purchasing that service as part of a consumer's individual program plan (IPP), the prohibition shall take effect on October 1, 2009. [¶] . . . [¶]

4(a). KRC did not provide evidence to substantiate why claimant's supported living services for personal safety should be reduced from 54 hours per month to none, nor did they provide evidence justifying a reduction in supported living services related to health issues from 20 hours per month to 10 hours per month, as follows.

4(b). Claimant's testimony that she was alone in her apartment several hours per day on weekdays and on Sundays was not disputed. Her medical condition and prescribed-medication regimen makes her feel tired and dizzy, and she guards against three to five small seizures per day. Due to past seizures which caused her injuries, she is justifiably fearful of being left alone to deal with these problems. She complained of such symptoms during the administrative hearing and appeared unwell, necessitating a recess. KRC's desire for more dynamic personal safety services is not in itself unreasonable, but it undervalues the essential simplicity of these services, which is to provide constant companionship for claimant in the face of an unpredictable disability.

4(c). Claimant's need for health-related services was well-documented by DADD, and her recent scoliosis diagnosis and referral to a pain-management specialist will only intensify her need for assistance in dealing with medical appointments, doctors' recommendations, filling prescriptions, adhering to a medication schedule, and so on. If anything, claimant's requirements for health-related services appear to be increasing rather than diminishing.

4(d). In sum, the evidence showed no reductions in services were warranted.

5. The service agency did not meet its burden of establishing by a preponderance of the evidence that cause exists to reduce the level of funding for claimant for supported living services related to personal safety by 54 hours per month, as set forth in Factual Findings 1-7, and Legal Conclusion 4.

6. The service agency did not meet its burden of establishing by a preponderance of the evidence that cause exists to reduce the level of funding for claimant for supported living services related to health issues by 10 hours per month, as set forth in Factual Findings 1-6, 8 and 9, and Legal Conclusion 4.

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ORDER

Claimant's appeal is granted. The service agency shall not reduce claimant's supported living services related to personal safety, and living services related to health issues, until such time as circumstances warrant a change as reflected in claimant's IPP.

Dated: September 20, 2016

JOHN E. DeCURE

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. This Decision binds both parties. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.