

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

TANNER T.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2011090465

DECISION

The hearing in the above-captioned matter was held on October 11, 2011, before Janis S. Rovner, Administrative Law Judge, Office of Administrative Hearings, in Bakersfield, California.

Claimant Tanner T. (claimant) represented himself.¹ The Service Agency, Kern Regional Center (KRC, regional center or service agency) was represented by Jeffrey Popkin, Associate Director.

Evidence was received, the case argued, and the matter was submitted for decision on October 11, 2011.

The Administrative Law Judge issues her factual findings, legal conclusions, and order, as follows:

¹ Initials are used in the place of family surnames to protect the claimant's privacy.

ISSUE PRESENTED

Shall Kern Regional Center be required to repair and maintain or purchase a backup power wheelchair for claimant to be used if his new wheelchair breaks?

FACTUAL FINDINGS

Jurisdiction and Parties

1. Claimant is a twenty-eight-year-old man (born April 2, 1983) who is a consumer of services provided by the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act)² based on a diagnosis of cerebral palsy. Claimant lives independently in an apartment in Bakersfield, California. He is frequently outside during the day and uses a power wheelchair and public transportation as his primary means of mobility in the community. Recently, Medi-Cal purchased a new power wheelchair for claimant. The new wheelchair is an improvement over his previous wheelchair: it has a canopy, a bigger seat, and plug-in outlets to charge his cell phone and iPod. It is battery-powered.

2. On May 24, 2011, the service agency issued a notice of proposed action (NOPA) informing claimant that because Medi-Cal had recently purchased a new wheelchair for him, it had denied his request to have regional center repair and maintain his old power wheelchair. Regional center denied claimant's request because it is not responsible for maintaining used medical equipment.

3. On or about July 27, 2011, claimant filed a Fair Hearing Request, contesting the Service Agency's decision to deny his request to repair and maintain his old wheelchair. This hearing ensued. All jurisdictional requirements have been met.

Claimant's Current Status

4. On May 20, 2011, the planning team, including claimant, his supported living service supervisor, and his KRC service coordinator, met to formulate claimant's 2011 Individual Program Plan (IPP). The IPP's first objective was for claimant to live in the most appropriate home over the next year. He currently lives independently. The Regional Center provides case management services and funds 160 hours per month of supported living services (SLS) for Claimant both of which are aimed at helping him maintain his independence. He receives SLS for assistance with grocery shopping, menu planning, meal

² Welfare and Institutions Code section 4500 et seq. All statutory citations are to the Welfare and Institutions Code, unless otherwise noted.

preparation, laundry, housekeeping, medical and dental appointments, hygiene and maximizing his participation in community life. The SLS provider prepares quarterly reports of his progress. KRC also provides money management services to claimant.

5. The IPP's stated goals are for claimant to continue to fully utilize his electric wheelchair for independent mobility 95% of the time without assistance for the next 12 months. Currently, he is able to move his electric wheelchair unassisted with 90% accuracy. He requires assistance 10% of the time while he is at home. SLS also assists Claimant with consuming his food. His meals must be cut up or liquefied because he has a tendency to choke on certain food items on a regular basis. He has some trouble swallowing and takes medication to ease this problem. He also takes allergy medication. Claimant is otherwise in good health. He regularly sees his doctors and receives assistance getting to and from his medical appointments

6. Claimant enjoys spending time in the community and with his family and friends. He goes to the mall and movies and socializes with his friends. Big Lots employs him as a service representative at \$ 8.25 per hour. He likes his job and would prefer to work more hours. He uses public transportation to access the community and his job.

KRC's Purchase of Service Guidelines for Durable Equipment

7a. Approved by the KRC Board of Directors on December 1, 1998, KRC has purchase of service guidelines for durable equipment (POS guidelines). Durable equipment under the POS guidelines include "mechanical, assistive or adaptive devices, which are designed to sustain life or facilitate mobility, communication, community accesses [sic] or environmental control in order to promote increased independence." Wheelchairs are an example of durable equipment subject to the POS guidelines. The guidelines recognize that a consumer's needs for durable equipment must be met through generic resources, such as Medi-Cal, private insurance, and other funding sources, if available.

7b. The POS guidelines allow KRC to purchase durable equipment for adult clients only if all of the following criteria are met: (1) A KRC approved specialist has made an assessment, which indicates that the specific equipment to be purchased would enable the client to live a more independent and productive life in the community; (2) the need for the specific equipment is associated with, or has resulted from, a developmental disability; and (3) the equipment to be purchased has been denied by, or the client is not eligible for, a generic resource such as Medi-Cal, private insurance or any other third party payer. The POS guidelines do not address or specifically permit or require KRC to purchase, or repair and maintain, a back-up wheelchair for Claimant.

7c. Claimant's request does not meet the requirements of the POS guidelines. An approved specialist has not made an assessment that he needs regional center to repair and maintain a backup wheelchair for his use in order to live a more independent and productive

life. Nor does his developmental disability require him to have a backup wheelchair at his disposal at all times. In addition, while Medi-Cal purchased his new wheelchair; it denied claimant's request to repair his old wheelchair.

7d. Regional center will provide him with a loaner wheelchair on an emergency basis during periods when his new wheelchair is broken and will not operate. They have done so in the past and will do so again. This may mean regional center has to rent a wheelchair should his new wheelchair malfunction. KRC is prepared to do so, as necessary.

Claimant's and Regional Center's Perspectives

8. Before regional center sent claimant the NOPA denying his request to repair and maintain his old wheelchair, regional center's representative and claimant held an informal meeting on September 12, 2011, to discuss the request. After the meeting, a regional center representative wrote a letter dated September 14, 2011, to claimant acknowledging his request and the reasons for his request: that the older chair is more versatile because it has a longer battery life and it should be available as a backup in case of unusual and extraordinary need. Regional center also stated it was willing to fund "for a reasonable cost to repair the chair," but needed to see what the cost would be before committing to repair the chair. After obtaining the cost estimate of \$ 4,000 to \$ 5,000, the regional center decided that amount was too much to pay. The cost of repairing the chair would be about the same as purchasing a new one. The person who prepared the repair estimate also opined that claimant's old wheelchair was in such disrepair that it was not worth repairing.

9. Regional center declined to repair claimant's old wheelchair because he has a new wheelchair and has no need for a backup wheelchair. It is also concerned about whether claimant's previous chair can be safely repaired and maintained because of its state of disrepair, and about the cost associated with repairing his old chair. If ordered to maintain a second chair as a backup chair, regional center would rather purchase a new chair for claimant because of its safety concerns about his old chair. A new fully-equipped chair would cost approximately \$12,000.

10. Claimant believes he needs a backup wheelchair in case his new wheelchair becomes inoperable. His new chair also requires the battery to be charged more frequently than his older chair, and he must return to his apartment in the middle of the day to recharge the battery on his new chair. This takes time, decreases his mobility and independence, and is impractical for him. The battery charge on the older chair usually lasted most of the day and it was not necessary for him to return to his apartment to charge it in the middle of the day.

11. Regional center is willing to look into alternatives for claimant, including a portable charger for the new wheelchair he is now using, a battery with more capacity, or any other feasible and cost-effective alternatives. Claimant believes that his old chair could be adequately repaired, but the evidence points to the opposite conclusion.

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. (§ 4500 et seq.) An administrative “fair hearing” to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal regional center’s denial of his request on approximately July 27, 2011. Jurisdiction exists to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 3.

2. The standard of proof in this case is the preponderance of the evidence. (Evid. Code, § 115.)

3. In seeking government benefits, the burden of proof is on the person asking for the benefits. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) In this case, Claimant bears the burden of proof because he is requesting a new benefit in asking regional center to repair and maintain his old wheelchair as a backup or purchase a new backup wheelchair in the event his primary chair is not operable or practical for use.

4. In enacting the Lanterman Act, the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals, and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (§ 4501.)

5. The Lanterman Act is a comprehensive scheme to provide “[a]n array of services and supports . . . sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community.” (§ 4501.) The purposes of the scheme are twofold: (1) to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (§§ 4501, 4509, 4685) and (2) to enable developmentally disabled persons to approximate the pattern of living of non-disabled persons of the same age and to lead more independent and productive lives in the community.” (§§ 4501, 4571, and 4750; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

6. Services and supports are to be provided in conformity with the IPP. (§ 4646.) The process “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.” (§ 4646, subd. (a).) Prepared by a planning team, the formulation of the IPP is a collaborative process with consumer choice as one consideration in formulating the IPP. (See §§ 4512, subd. (b) and 4646.) The planning team, which determines the content of the IPP and the services and supports to be purchased in furtherance of it, is made up of the individual consumer, or his or her 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) and 4646, subd. (d).) When the parties cannot agree on the terms and conditions of the IPP, a fair hearing decision may, in essence, establish the terms. (See § 4710.5, subd. (a).)

7. The services and supports 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, 4640.7, subd. (a), 4646, subd. (a) & (b), 4648, subd. (a)(1) & (a)(2).) Otherwise, no IPP would have to be undertaken. A priority is assigned to maximizing the client's participation in the community. (§§ 4646.5, subd. (a)(2); 4648, subd. (a)(1) & (2).)

8. Section 4512, subdivision (b), of the Lanterman Act defines the services and supports that may be funded, and sets forth the process through which they are identified, namely, the IPP process, a collaborative process involving consumer and service agency representatives:

“Services and supports for persons 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 for each consumer 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 where appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan and the cost-effectiveness of each option

9. Section 4512, subdivision (b), generally defines services and supports that can be funded by regional centers as being those that are “specialized . . . or special adaptations of generic services and supports directed toward the alleviation of a developmental disability . . . or toward the achievement and maintenance of independent, productive, normal lives” Pursuant to that same provision, such services and supports may include “adaptive equipment and supplies.”

10. While regional centers have a duty to provide a wide array of services to implement the goals and objectives of the IPP, they are also directed by the Legislature to provide the services in a cost-effective manner. (§§ 4512, subd. (b), 4640.7, subd. (b), and 4646, subd. (a).)

11. In 2008, the Legislature enacted section 4646.4. Effective September 1, 2008, that section requires regional centers to establish an “internal process” to be applied at the time of development, scheduled review, or modification of a consumer’s IPP. The “internal process” must adhere to “federal and state law and regulation, and when purchasing services and supports,” must ensure (1) conformance with purchase of service policies, as approved by the Department of Developmental Services; (2) utilization of generic services and supports when appropriate; and (3) utilization of other services and sources of funding as contained in section 4659.

12. A purchase of service policy established by a regional center to govern the provision of services may not take precedence over the established individual needs of the consumer. (*Association of Retarded Citizens v. Department of Developmental Services, supra*, 38 Cal.3d at pp. 390-393.) Section 4646.4 was also added to the Lanterman Act in 2009 as a cost-containment measure in response to the current state budget crisis. In particular, section 4646.4, subdivision (a), requires regional centers to ensure that a consumer’s IPP adheres to federal and state law and regulation, and when purchasing supports and services “[c]onform[s] with the regional center’s purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.” Section 4434, subdivision (d), requires the department to review any new or amended purchase of service policies prior to implementation by a regional center. These provisions allow regional centers to adopt reasonable purchase of service policies so long as they comply with the law.

13. Claimant has a new wheelchair that Medi-Cal purchased for him. He seeks to have regional center bear the cost of repairing and maintaining his older chair as a backup chair. Primarily, claimant prefers the older chair in some instances because the battery did not have to be re-charged as often as the battery for the new chair. (Factual Finding 10.) When using his new chair, claimant must sometimes return to his home in the middle of the day to charge the battery. The person who gave the regional center an estimate for repairing older chair stated that it had so many damaged parts that it was not worth the \$ 4,000 to \$ 5,000 it would cost to repair it. Regional center is concerned about the safety of the chair and would prefer, if ordered, to buy a new chair to serve as a backup, rather than repair the old chair.

14. Although the POS guidelines do not have the same binding force as do regulations or statutes under the Lanterman Act, they should not be ignored and deserve a level of deference. KRC’s POS guidelines do not require it to repair and maintain a backup chair or purchase a new chair for claimant. (Factual Findings 7a. through 7d. and Legal Conclusions 11 and 12.)

15. According to claimant, the need to re-charge his new wheelchair’s battery at times in the middle of the day limits his mobility and independence. Supporting his mobility and independence are important goals of his IPP. However, Regional center has agreed to search for a battery with a larger capacity for the new chair or a more portable means of re-charging the battery. As it has done before, regional center will provide a backup wheelchair in the event claimant’s new wheelchair breaks. Claimant must also minimize use of the other plug-in outlets on his new wheelchair to avoid draining the battery more quickly. Considering

all of the evidence in this matter, including claimant's unique needs, it would not be cost effective for regional center to purchase, or repair and maintain, another wheelchair for claimant in addition to his new chair.

16. In light of Factual Findings 1 through 11 and Legal Conclusions 1 through 15, KRC's decision not to repair and maintain his old wheelchair, or purchase a new backup wheelchair for claimant, is upheld.

ORDER

Claimant's appeal is denied, and the regional center's action is upheld.

DATED: _____

JANIS S. ROVNER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is a final administrative decision. Both parties are bound by the decision and either party may appeal the decision to a court of competent jurisdiction within 90 days.