

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

and,

THE INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2013070830

DECISION

Roy W. Hewitt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino California on November 18, 2013.

Leigh-Ann Pierce, Consumer Services Representative, Fair Hearings and Legal Affairs, represented the Inland Regional Center (IRC).

Matthew M. Pope, Esq. represented Claimant. Claimant and his authorized representative, his mother, were present with counsel throughout the hearing.

The matter was submitted on November 18, 2013.

ISSUE

Should claimant's Licensed Vocational Nurse (LVN) respite hours be cut from the current level of 125 hours per month to 48 hours per month?

FACTUAL FINDINGS

1. Claimant is a 24-year-old male who qualifies for, and is receiving, IRC services due to a primary diagnosis of profound mental retardation. Claimant has also been diagnosed with cerebral palsy, and epilepsy. Claimant is quadriplegic and legally blind. He requires complete care. Claimant's caregiver's daily schedule is as follows:

1:30 a.m.: turn off feeding pump; turn claimant.

3:45 a.m.: prepare medications.

4:00 a.m.: administer four medications and fluids.

6:00 a.m.: turn claimant.

6:45 a.m.: prepare medications and the nebulizer.

7:00 a.m.: administer Pulmicort and normal saline.

7:15 a.m.: oral care, apply moisturizer to lips and prepare additional medications.

7:30 a.m.: administer Reglan.

8:00 a.m.: turn claimant; feed claimant; administer medications.

8:30 a.m.: change dressing on claimant's G-tube site.

9:00 a.m.: "Cough Assist."

9:45 a.m.: prepare medications.

10:00 a.m.: give claimant water or juice and administer medication.

10:30 a.m.: get claimant into his wheelchair; apply leg braces and wrist splints.

10:45 a.m.: prepare nebulizer.

11:00 a.m.: "breathing treatment Xopenex/Normal Saline."

11:15 a.m.: oral care.

11:30 a.m.: prepare medications.

12:00 p.m.: feed claimant, and administer medications.

12:30 p.m.: put claimant back in bed and check/change his diaper.

1:00 p.m.: work on claimant's range of motion.

1:30 p.m.: read to claimant.

2:00 p.m.: give claimant water or juice.

2:30 p.m.: turn claimant.

2:45 p.m.: prepare the nebulizer.

3:00 p.m.: breathing treatment with Xopenex and normal saline.

3:15 p.m.: oral care, and put moisturizer on claimant's lips.

3:30 p.m.: prepare medications.

3:45 p.m.: administer Reglan.

4:00 p.m.: feed and administer numerous medications.

4:30 p.m.: place claimant in a chair.

5:00 p.m.: bathe claimant in a "bed bath" and change the dressing on his G-tube site.

5:30 p.m.: apply lotion on claimant; massage claimant and work on his range of motion.

6:00 p.m.: give claimant water or juice.

6:15 p.m.: "Cough assist."

6:45 p.m.: prepare nebulizer.

7:00 p.m.: administer Pulmicort and normal saline.

7:15 p.m.: oral care, and apply moisturizer on claimant's lips.

7:30 p.m.: prepare medications.

7:45 p.m.: administer Reglan.

8:00 p.m.: prepare claimant's feeding pump, and administer medications.

8:30 p.m.: read to claimant.

9:45 p.m.: prepare medications.

10:00 p.m.: administer medications.

11:30 p.m.: prepare medication.

12:00 a.m.: administer medication. (Exh. E)

2. The parties agree that claimant qualifies for a respite exemption pursuant to Welfare and Institutions Code section 4686.5. In fact, in August or September of 2010, claimant began receiving 120 hours of LVN respite services. He was re-evaluated for his level of respite services in 2011 and began receiving 125 hours per month. At the time that his LVN respite was increased from 120 hours per month to 125 hours per month, claimant was also receiving 262.5 hours per month of In Home Supportive Services (IHSS). Additionally, until claimant turned 21 years old he was receiving 170 hours per month of EPSDT.¹ However, in 2010, when claimant turned 21, his 170 hours per month of EPSDT was eliminated, and he began receiving 40 hours per month of In Home Operation (IHO) services instead.

3. Claimant's Consumer Services Coordinator (CSC) testified that claimant's current authorization for LVN respite was reviewed on June 30, 2013, and it was determined that his LVN respite hours should be reduced from the current 125 hour per month level to 48 hours per month. According to the CSC, she has never seen any consumer with 125 hours per month of respite. Most consumers only receive 30 hours per month; therefore, she believes 125 hours per month is excessive. The CSC could not explain what changes had occurred in claimant's situation to warrant a change in his LVN respite service level.

4. The IRC Program Manager (PM) who supervises claimant's CSC testified that she believes that claimant needs only 48 hours per month of LVN respite because there is a day program available for claimant² and, if claimant gets 48 hours per month of LVN respite he would have a total of 360 hours of paid support per month (262 hours of IHSS, 40 hours of IHO, and 48 hours of LVN respite). Since there are only 722 hours per month, claimant's service levels only leave 362 "uncovered" hours per month, or 82 hours per week. These hours do not include sleeping hours.

5. Claimant's mother (mother) testified that she researched the day program IRC had suggested and discovered that the program could not, or would not, accept claimant. Additionally, mother testified that although she is the approved provider for claimant's 262 hours per month of respite, she has never been paid for the IHSS hours. In other words, even though claimant is authorized to receive 262 hours per month of IHSS hours, in reality, he has not been receiving those hours. Mother also testified that there have been changes in claimant's condition. Claimant now has a bone protruding in his lower back. Claimant also

¹ The parties did not know the exact meaning of this acronym.

² IRC personnel have not actually talked to the day program provider, nor did they assess the costs involved in preparing claimant to be transported to and from the day program site. Consequently, IRC does not know if the day care program will accept claimant or if it would be more cost effective to have claimant in the day care program, as opposed to providing the current level of LVN respite services.

suffers from sleep apnea. He does not sleep through the night due to his sleep apnea and needs to be constantly repositioned.

LEGAL CONCLUSIONS

1. In administrative proceedings, as in ordinary civil actions, the party asserting the affirmative generally has the burden of proof, including the burden of persuasion by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.) In this case, the burden rests with IRC to prove by a preponderance of the evidence that claimant's LVN respite hours should be decreased from the current 125 hour per month level to 48 hours per month.

2. IRC failed to meet its burden in this case. The Factual Findings established that claimant needs 125 hours of LVN respite per month, and there is no cost-effective alternative for those hours.

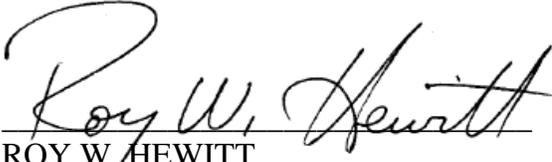
ORDER

Claimant's appeal is granted. His level of LVN respite services shall remain at 125 hours per month.

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.

DATED: December 5, 2013



ROY W. HEWITT

Administrative Law Judge
Office of Administrative Hearings