

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

Case No. 2014091048

DECISION

Administrative Law Judge Eileen Cohn heard this matter on December 3, 2014, in Alhambra, California.

Belinda Salinas, Supervisor, represented Eastern Los Angeles Regional Center (ELARC). Claimant was represented by his mother. Claimant's father also attended the hearing. (Titles are used to protect confidentiality.)

Evidence was presented and testimony heard. The record was closed and the matter submitted for decision on December 3, 2014.

ISSUE PRESENTED

The parties agree that the issue is whether ELARC should fund Claimant's request for parent training in the Masgutova Method at a conference scheduled for January 2015.

FACTUAL FINDINGS

Procedural Background

1. On September 10, 2014, ELARC denied the request of Claimant's parents for funding to attend a conference on the Masgutova Method to take place in January 2015. Claimant's mother submitted a fair hearing request dated September 18, 2014. By addendum dated September 30, 2014, ELARC notified Claimant that his request was denied

based on the additional ground set forth in Welfare and Institutions Code Section 4648, subdivision (a)(16), which prohibits regional centers from purchasing experimental services. ELARC had fully or partially funded Claimant's parents five times for the Masgutova Method training.

2. This appeal raises the same issue between Claimant and ELARC that was determined by Administrative Law Judge David Rosenman's Decision in OAH No. 2014020931 (R. 7), on April 18, 2014 (ALJ Rosenman's Decision). At Legal Conclusion 7, ALJ Rosenman denied Claimant's prior request for funding for parent training in the Masgutova Method at a conference scheduled for August 2014 "based on the lack of scientific evidence of the efficacy of the Masgutova Method generally, and the lack of objective evidence that it is a necessary service for Claimant."¹

3. Claimant did not appeal OAH No. 2014020931.

4. On September 18, 2014, five months after ALJ Rosenman's Decision, Claimant filed this appeal, once again seeking funding for Masgutova Method training for an identical conference scheduled for January 2015.

5. On October 22, 2014, ELARC filed a Motion to Dismiss the appeal on the grounds of "direct estoppel," presumably referring to the doctrines of *res judicata* and collateral estoppel. Claimant opposed the Motion to Dismiss on several grounds, including his lack of financial resources to appeal the ALJ Rosenman's Decision and his provision of new information to ELARC about the Masgutova Method.

6. On October 28, 2014, based upon Claimant's contention that there was new (unidentified) information to present that was provided to the ELARC after ALJ Rosenman's Decision, denied ELARC's Motion to Dismiss without prejudice, cautioning Claimant that it did not appear from the face of his fair hearing request, or his opposition to ELARC's motion, that there was information that would allow the hearing to proceed on the merits.

Fair Hearing

7. At hearing, ELARC withdrew its Motion to Dismiss. The ALJ advised the parties that regardless of ELARC's withdrawal, that unless evidence of a change in law or circumstances was provided, Claimant's appeal of ELARC's refusal to fund parent training of the Masgutova Method at the conference scheduled for January 2015 would be barred by the doctrine of *res judicata*. The parties were provided the opportunity to submit documentary and oral evidence, and did (C.1-C.34, and R.1-7, respectively).

8. Mother competently and credibly represented Claimant and testified about her appeal of ELARC's decision. Mother was honest, and admitted that she did not possess any

¹ Official notice is taken of ALJ Rosenman's Decision, OAH No. 2014020931. (Gov't Code, § 11515.)

new information that was not available prior to ALJ Rosenman's Decision. Much of the evidence admitted in this fair hearing was previously admitted as evidence by ALJ Rosenman and considered in his Decision. Other evidence was plainly available prior to ALJ Rosenman's Decision and was not presented, such as conference materials for the Masgutova Method. Additional evidence was available prior to ALJ Rosenman's Decision, but not prepared or submitted to ALJ Rosenman, such as one videotape of Claimant's assessment of February 2014, one videotape of Claimant working with the Masgutova Method, and a letter from another parent affirming the efficacy of the Masgutova Method. Mother admitted that she was unaware of and could not offer any evidence of the scientific efficacy of the Masgutova Method available after ALJ Rosenman's Decision.

9. Mother did not present evidence of any new circumstances that would require a determination of the necessity for the January 2015 Masgutova Method conference. Mother admitted that the January 2015 conference was identical to the August 2014 conference considered in ALJ Rosenman's Decision. Mother agreed that Claimant's needs and services reflected in the May 29, 2014, Individual Program Plan (IPP) meeting were the same needs and services in the previous IPP submitted to ALJ Rosenman and considered in his determination of the necessity of the Masgutova Method conference.

10. The governing law has not been repealed, amended, or modified in any way since ALJ Rosenman's Decision. Mother sought this appeal to reconsider the legal basis of ALJ Rosenman's Decision. Mother agreed that the Masgutova Method was experimental. According to Mother, whether the Masgutova Method was experimental was not the basis of her previous appeal. Instead, ALJ Rosenman should have determined that the Masgutova Method fit within the exception afforded by Welfare and Institutions Code, subdivision 4648 (a)(15).

LEGAL CONCLUSIONS

Based upon the foregoing factual findings, the Administrative Law Judges makes the following legal conclusions:

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)² An administrative "fair hearing" to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Proper jurisdiction was established by virtue of ELARC's denial of the request for funding and the Fair Hearing Request on behalf of Claimant.

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) The burden of proof is on the person whose request for government benefits or services

² All further statutory references are to the Welfare and Institutions Code.

has been denied. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) Claimant has the burden of proof on the merits of this matter.

3 In denying funding on Claimant's appeal before ALJ Rosenman in OAH Case No. 2014020931, and in this appeal, ELARC relied on section 4648, subdivision (a)(16), which states in pertinent part: "Notwithstanding any other provision of law or regulation to the contrary, effective July 1, 2009, regional centers shall not purchase experimental treatments, therapeutic services, or devices that have not been clinically determined or scientifically proven to be effective or safe or for which risks and complications are unknown." This law was not been repealed, amended, or modified in any way since ALJ Rosenman's Decision.

4. Claimant contends that section 4648, subdivision (a)(15) was not considered by ALJ Rosenman, and affords an exception to the prohibition against funding experimental treatments. Section 4548, subdivision (a)(15) states in pertinent part: "Other services and supports may be provided as set forth in sections 4685, 4686, 4687, 4688, and 4689, when necessary." This statutory provision was in effect at the time of ALJ Rosenman's Decision and has not been repealed, amended or modified in any way since.

5. Claimant cannot reach the merits of this matter because this appeal is subject to ALJ Rosenman's Decision which constituted a final determination on the merits of the Masgutova Method conference under the same circumstances and law governing this appeal. Based upon Mother's admissions and the documentary evidence, the doctrines of *res judicata* and collateral estoppel are applicable to this administrative proceeding. (*People v. Sims* (1982) 32 Cal. 3d 468, 486.)

"*Res judicata*' describes the preclusive effect of a final judgment on the merits. *Res judicata*, or claim preclusion, prevents re-litigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, "precludes re-litigation of issues argued and decided in prior proceedings." (*Mycogen Corp. v. Monsanto Co.*, (2002) 28 Cal. 4th 888, 896-97, citing *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

"Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from re-litigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with the party to the former proceeding. (*Sims, supra*, 32 Cal.3d at p. 484; *People v. Taylor* (1974) 12 Cal.3d 686, 691.)

Here, the requirements of *res judicata* have been met. The parties and issue litigated are identical, and ALJ Rosenman's Decision was a final determination on the merits as Claimant failed to appeal the matter within the required time period. (See *Sims, supra*, 32 Cal.3d at p. 486.) Further, the equities of the doctrine were served as Claimant had a full opportunity to present evidence and witnesses to ALJ Rosenman. (*Sims, supra*, 32 Cal.3d at pp. 481–482.) Mother admitted that she omitted evidence, including videotapes and the conference program, but this evidence was available to her at the time, and her election not to introduce relevant evidence, but itself, is not a basis for re-litigating the same issue. (*Sims, supra*, 32 Cal. 3d at p. 481, citing, *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.*, (1962) 58 Cal.2d 601.)

6. Claimant cannot reach the merits of this appeal because the circumstances and governing law have not changed since ALJ Rosenman's Decision. Where there are changed circumstances or a change in the law, *res judicata* does not apply. (See, e.g., *California Hosp. Assn v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 572 [the pertinent provision of law in the prior case was no longer applicable to the situation before the court]; *United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 617-618 [the prior issue was decided under the law of another state]; *Powers v. Floersheim* (1967) 256 Cal.App.2d 223, 230 [the statute under which the prior action was filed was substantially changed after the former action concluded].) Here, Mother admitted --and the documentary evidence confirms--that the circumstances have not changed. On the contrary, excepting the changed date of the Masgutova Method conference, the circumstances as of the December 3, 2014, hearing were identical to the circumstances existing and considered by ALJ Rosenman at the time of his Decision, including Claimant's identified IPP needs and services. Mother's contention that ALJ Rosenman ignored the exceptions to the statutory bar against experimental treatments and services, was an appropriate ground for appeal, but does not constitute a change in the law, justifying a new appeal.

7. The persistence of Claimants' parents in pursuing funding for the January 2015 Masgutova Method conference is understandable in view of ELARC's previous full and partial funding of five Masgutova Method conferences. Claimant had an opportunity to appeal ALJ Rosenman's Decision but did not because they could not finance the appeal. The rules of appellate procedure, not equity, control, and Claimant, no matter what the reason, cannot file a new claim to re-litigate the same matter in order to circumvent appellate rules. Here, the parties, issue, circumstances and law have not changed since ALJ Rosenman's Decision. As such, ALJ Rosenman's Decision is a final determination on the merits of Claimant's request for funding for parent training in the Masgutova Method at the January 2015 conference.

8. ELARC's decision to deny funding for parent training in the Masgutova Method at a conference scheduled for January 2015 is confirmed on the ground that Claimant's appeal is subject to the doctrine of *res judicata*.

ORDER

ELARC is not obligated to fund parent training in the Masgutova Method at a conference scheduled for January 2015.

DATED: December 10, 2014



EILEEN COHN
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 90 days.