

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CLAIMANT

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2016010274

DECISION

Thomas Y. Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 28, 2016, in Alhambra, California.

Mother and father represented claimant (family members' names are omitted to preserve confidentiality).

Eastern Los Angeles Regional Center, the service agency, was represented by Gerard Torres, Supervisor of the service agency's Consumer Services Unit.

Oral and documentary evidence was received. The record was left open until April 12, 2016, to allow claimant to present further documentary evidence relating to his Individualized Education Program (IEP) and health care providers' recommendations of aquatic therapy.

On April 7, 2016, claimant timely submitted three documents. An April 4, 2016 letter from claimant's occupational therapist was marked Exhibit E. An April 4, 2016 letter from claimant's treating physician was marked Exhibit F. Portions of claimant's IEP as updated in 2016 were marked collectively Exhibit G. On April 12, 2016, the service agency submitted its timely response, marked Exhibit 9 for identification, making no objection to the documents submitted by claimant. Exhibits E, F, and G were admitted into evidence.

The record was deemed closed and the matter was submitted for decision on April 12, 2016.

ISSUE

Whether the service agency should fund aquatic therapy for claimant.

FACTUAL FINDINGS

1. Claimant, who will be six years old in May 2016, is a consumer of the service agency based on cerebral palsy. (Welf. & Inst. Code, § 4512, subd. (a).) He lives with his mother and older brother in Los Angeles, California. His father is involved in decisions relating to claimant, and provides assistance, including transporting claimant at times to therapy sessions, but does not live with the family.

2. Claimant has been diagnosed with several conditions in addition to cerebral palsy. He has a rare genetic disorder, Pitt-Hopkins Syndrome, “a condition characterized by intellectual disability and developmental delay, breathing problems, recurrent seizures (epilepsy), and distinctive facial features.” (Exhibit A.) He has mild intellectual disability. He has a muscle disorder which has not yet been medically specified. He has also been diagnosed with Optic Atrophy with astigmatism. (Exhibit 7.)

3. Aquatic therapy is supervised exercise in a swimming pool. Claimant’s request that the service agency fund aquatic therapy was denied. The service agency’s December 11, 2015 Notice of Proposed Action (NOPA) stated the therapy would duplicate the occupational therapy and physical therapy currently provided claimant. The NOPA added that aquatic therapy would not be a primary means of ameliorating claimant’s condition. (Exhibit 1.) Claimant timely sought a fair hearing.

4. In a May 28, 2015 letter, Virginia Cheng, MSPT, claimant’s pediatric physical therapist at Glendale Adventist Medical Center – Play to Learn Pediatric Therapy Center, in Glendale, California, wrote that claimant’s participating in an aquatic therapy program would be “an excellent adjunct to the therapy services he is receiving at this clinic.” She wrote further:

The benefits of an aquatic program include:

- Improved cardiovascular, respiratory, and musculoskeletal effects due to the body’s response to immersion
- Improved range of motion, muscle tone, flexibility and strength
- Improved awareness of body movements, balance, and coordination
- Increased body awareness, attention span, and sensory motor integration
- Because of the calming and proprioceptive effects of water, this environment encourages risk taking and experimentation required for the learning and practice of functional skills under the watchful eye of a trained therapist
- Carryover of learned functional skills in multiple environments

- Increased opportunity for success and building of self-esteem, confidence, and empowerment
- Exercise in an aquatic environment can lead to lifelong opportunity for fitness and community integration
- Increased feeling of being “mainstreamed” in a community environment
- Increased motivation to exercise and strengthen muscles in a fun environment [Exhibit 4.]

Ms. Cheng recommended aquatic therapy for claimant and cited the same benefits in an updated letter dated March 24, 2014. (Exhibit B.)

5. Claimant is under the care of Stanley F. Nelson, M.D., a doctor of Pediatric Genetics, a Professor of Human Genetics, and a Co-Director of the Center for Duchenne Muscular Dystrophy and Clinical Genomics at the David Geffen School of Medicine at the University of California, Los Angeles. In a June 8, 2015 letter, Dr. Nelson stated that: “Aquatic therapy is medically necessary at this point and should positively impact both Speech/Language and gross motor skills. The Aqua therapy, if performed routinely, will allow [claimant] to work on motor planning skills and build upper body strength. In addition, a goal of the aqua therapy should be to learn breath holding skills which is reasonable to expect will positively impact his ability to vocalize.” (Exhibit 4.) As indicated in Finding 10, Dr. Nelson recently expanded on his recommendation.

6. On June 8, 2015, claimant submitted a request for physical and aquatic therapies at the Kaiser Permanente Bellflower Medical Center, Pediatrics, in Bellflower, California. In a July 9, 2015 letter, Kaiser Permanente, claimant’s medical insurance carrier, stated it had submitted the request to three health plan physician reviewers in Pediatrics. It denied the request, stating that “aqua therapy . . . is not medically indicated.” (Exhibit 5.)

7. Kaiser Permanente reversed its denial of physical therapy but not aquatic therapy. Claimant currently receives physical therapy, occupational therapy, and speech therapy funded by Kaiser Permanente. The service agency funds co-pay amounts for these services. (Exhibit 6.)

8. Angela Espinoza Puopolo, OTR/L, SWC, CLC, a licensed occupational therapist consulted by the service agency, considered the letters from Ms. Cheng and Dr. Nelson quoted above. Her November 20, 2015 opinion was that claimant’s physical and occupational therapies were

addressing [claimant’s] assessed areas of needs and goals [Claimant] has two agencies providing the needed services and he is eligible for CCS [California Children’s Services, from the California Department of Health Care Services] service as well.

I do not see a reason for an exemption as Aquatic therapy would not be primary in ameliorating his condition. It would be duplicative using a

different medium (water vs land/gravity) with the same goals. [Exhibit 2.]

9. Claimant's occupational therapist is Steven T. Bates, M.A., OTR/L. He provides claimant clinic-based occupational therapy services at the same clinic where Ms. Cheng treats claimant, the Glendale Adventist Medical Center – Play to Learn Pediatric Therapy Center. Mr. Bates explained in his April 4, 2016 letter, Exhibit E:

I do not provide any form of aquatic therapy for [claimant], but I feel he would benefit a great deal from such an intervention. [Claimant] has significant delays in gross motor skills, postural control, balance, and strength. With close 1:1 supervision for safety, I feel the pool would be an excellent environment for him to make progress in these areas of need.

[Claimant] has been diagnosed with a rare genetic disorder called "Pitt Hopkins Syndrome." His delays in gross motor skills are profound; for example, he is almost 6 years old and only recently learned to walk independently for longer distances. I feel aquatic therapy would be especially relevant for [claimant], because he has low muscle tone, and the buoyancy of the water provides a perfect 'low impact' environment, and the water also provides resistance to strengthen his muscles. Furthermore, [claimant] has poor balance/postural control; he tends to fall when these skills are challenged. The pool would challenge these areas, but also prevent injuries from falls (as long as he has close supervision to keep his head above water). Due to [claimant's] significant level of motor impairment, it is the opinion of this therapist that he needs an instructor who is trained and experienced in helping children with special needs – especially in how to help such children make progress toward goals and to keep them safe in the water.

10. Dr. Nelson wrote an April 4, 2016 letter, Exhibit F, expanding his recommendation for aquatic therapy:

[Claimant] is under my care with a diagnosis of Pitt Hopkins Syndrome. . . . All children with Pitt Hopkins have substantial developmental delay, and most do not speak or walk. The profound nature of the disease does not mean that intervention is futile, however, and we are still learning much about the impact of intensive behavioral and physical training in Pitt Hopkins. In the specific instance of Aqua Therapy for [claimant], swimming allows a safe and low impact environment for exercise with his poor coordination, but needs to be performed under continuous instructor guidance. He needs substantial work on motor planning and with repetitive attention to the same movements he is likely to be able to walk better and use his hands better for activities of daily living. There are not any published studies in the use of aqua therapy to improve speech. However, in regard to his breathing, working on breath holding which is best accomplished in the pool, should allow [claimant] to learn how to control his voluntary breathing and diaphragm function in a

manner that is reasonably likely to improve his ability to control breath for vocalization as well.

11. Mother and father testified at the hearing consistently with previous communications to the service agency. Among such communications is a December 14, 2015 email from mother, noted in the service agency's consumer Interdisciplinary Notes. She emphasized that aquatic therapy would not duplicate other therapies, such as occupational therapy. It would develop different skills in claimant, to help with the developmental goal of living independently. She wrote that aquatic therapy is not recreational. To consider it recreational is to disregard the medical opinion of Dr. Nelson, claimant's treating physician. (Exhibit 6.)

LEGAL CONCLUSIONS

1. Cause exists to grant claimant's request that the service agency fund aquatic therapy. (Findings 1 through 11.)

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that he is eligible for governmental benefits or services. (Evid. Code, § 115.)

3. Welfare and Institutions Code section 4512, subdivision (b), provides in pertinent part:

"Services and supports for persons with developmental disabilities" means specialized services and supports or special adaptations of generic services and supports Services and supports . . . may include, but are not limited to . . . physical, occupational, and speech therapy, . . . [and] adaptive equipment and supplies

4. Welfare and Institutions Code section 4646.4 provides in pertinent part that a service agency must ensure, among other things:

(1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.

(2) Utilization of generic services and supports when appropriate.

(3) Utilization of other services and sources of funding as contained in Section 4659.

5. Welfare and Institutions Code section 4648.5 provides in pertinent part:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, . . . regional centers' [*sic*] authority to purchase the following services shall be suspended . . . : [¶] . . . [¶]

(4) Nonmedical therapies, including, but not limited to, specialized recreation

6. Welfare and Institutions Code section 4659, subdivision (c), provides: “[N]otwithstanding any other provision of law or regulation to the contrary, regional centers shall not purchase any service that would otherwise be available from . . . private insurance”

7. The physical and occupational therapies claimant already receives are generic services within the meaning of Welfare and Institutions Code section 4512. Under the statute, aquatic therapy may be considered a special adaptation of such generic services using adaptive equipment, a swimming pool. The service or therapy as adapted may be funded by the service agency without violating Welfare and Institutions Code section 4512.

8. Claimant’s physical and occupational therapies are medical in nature, in that they are designed to mitigate medical conditions secondary to Pitt Hopkins Syndrome. The initial decision by Kaiser Permanente against funding physical therapy, and the associated decision that aquatic therapy is not medically indicated (Finding 6), should be discounted. Pitt Hopkins Syndrome’s rarity, and uncertainty about how to treat it, make the decisions by Kaiser Permanente and its reviewing physicians unreliable. Because aquatic therapy is an adaptation of other medical therapies, it is properly considered a medical therapy. Dr. Nelson’s opinion that aquatic therapy is a medical therapy is properly accepted. The service agency may fund aquatic therapy without violating the prohibition in Welfare and Institutions Code section 4648.5 against nonmedical therapies.

9. Dr. Nelson’s opinion is that aquatic therapy is medically necessary. He explains that it “allows a safe and low impact environment,” which is especially desirable for a person like claimant with “poor coordination” and one whose control of breathing and diaphragm function needs improvement. (Finding 10, Exhibit F.) Aquatic therapy will adapt and supplement physical and occupational therapy in safer or more convenient ways because it is low-impact. Beyond this, however, based on Dr. Nelson’s’ opinion, it will mitigate or counteract the effects of a disease, Pitt Hopkins Syndrome, that is not well understood, including with respect to how it should be treated or how its effects should be counteracted.

10. The service agency may not fund aquatic therapy if it duplicates other services already provided claimant. (Welf. & Inst. Code, §§ 4646.4, 4659.) Claimant has sought funding for aquatic therapy from sources other than the service agency without success. That aquatic therapy is an adaptation of other therapy does not make it duplicative. An adaptation may supplement or even replace that from which it was adapted. For instance, in a different context, a person’s lack of mobility may be mitigated or counteracted by a prosthetic limb, or a wheelchair, or walking devices like canes, or a combination of all of these. Though all help

with mobility, they are not considered duplicative. So here, claimant's lack of mobility and breathing difficulties may be mitigated in various ways without duplication of the other resources he receives.

11. Dr. Nelson and other health care providers who have provided claimant treatment and therapies are aware of the different services he receives, including physical therapy, of which aquatic therapy may be considered an adaptation. They do not consider aquatic therapy duplicative of these other services, but describe different ways in which aquatic therapy is likely to mitigate claimant's condition, supplementing or strengthening the treatment he already receives. Aquatic therapy is not in these circumstances duplicative of other types of therapy.

ORDER

Claimant's appeal is granted. The service agency shall fund aquatic therapy for claimant.

DATED: April 26, 2016

THOMAS Y. LUCERO
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.