

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application of:

FRANKLIN GREEN,

Respondent.

Case No. 9714

OAH No. 20120061257

PROPOSED DECISION

Administrative Law Judge Amy C. Yerkey, Office of Administrative Hearings, State of California, heard this matter on November 1, 2012, in Los Angeles.

Rory J. Coffey, Senior Staff Counsel, represented Petitioner, Kathy Donneson, Chief of the Office of Health Plan Administration of the California Public Employees' Retirement System (CalPERS).

Franklin Green (Respondent) represented himself.

The matter was submitted on November 1, 2012.

FACTUAL FINDINGS

1. CalPERS is the State agency responsible for providing health benefits to its members pursuant to the California Public Employees' Medical and Hospital Care Act (PEMHCA), found at Government Code section 22750 et seq.
2. Petitioner filed the Statement of Issues in her official capacity.
3. At all times relevant, Respondent was eligible to apply for coverage under CalPERS' Long-Term Care Program (Program). At the time of this matter, the Program was administered by Univita Health (Univita).
4. Respondent applied for coverage under the Program's Comprehensive Lifetime with Inflation Protection Plan (Plan). Respondent's application was approved and he was enrolled in the plan effective September 1, 1997.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED December 5 2012
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5. On August 8, 2007, Respondent was approved to receive benefits under the Plan. Following an assessment, the Plan determined that Respondent needed assistance performing activities of daily living.

6. Between October 2007 and June 2008, Respondent received services provided by an Independent Provider (IP) under the Alternative Care Payment Provision (ACPP). Respondent chose Daryle LaRose (LaRose) to be his IP.

7. In June 2008, the Program informed Respondent that although he continued to qualify to receive benefits, the Program determined that LaRose did not meet the requirements under the ACPP for continued approval as Respondent's IP. Accordingly, the Program would not reimburse Respondent for any services provided by LaRose after June 2008.

8. Respondent disputed the Program's decision and asked for reconsideration on multiple occasions. After review of additional information, CalPERS maintained its original decision. This appeal followed.

9. The parties agree that the sole issue in this matter is whether CalPERS was correct in its determination that LaRose did not meet the requirements to be an IP under the ACPP.

10. The CalPERS Plan Evidence of Coverage (EOC) booklet describes the benefits available to plan enrollees, and contains the requirements to obtain the benefits as well as the exclusions from coverage. Regarding the ACPP, it states, in pertinent part:

We reserve the right to authorize benefits for providers, treatments, or services not otherwise specified in the Evidence of Coverage, or when conditions specified in this Agreement are not otherwise met, if We determine that it:

- is cost-effective;
- is appropriate to Your needs;
- is consistent with general standards of care;
- provides You with an equal or greater quality of care; and
- meets all requirements for "qualified long-term care services" under federal law.

11. Angela Forsell (Forsell), Vice President of Clinical Services for Univita, testified at the hearing. Univita is the third-party administrator for the Program, and for approximately 30 other similar programs. Forsell reviewed Respondent's appeal in this matter. She explained that under the ACPP, certain criteria must be met to receive approval of an IP, and that the Program has the discretion to approve or revoke its approval of an IP. Forsell cited three reasons for the Program withdrawing its approval of LaRose as

Respondent's IP: first, because LaRose's timesheets were incomplete and inaccurate; second, because LaRose was receiving disability benefits; third, because LaRose had not demonstrated that he could give equal or greater quality of care than Respondent would receive from a provider within the EOC. With regard to LaRose's timesheets, Forsell claimed that LaRose reported he worked 24 hours per day, 7 days per week, and there was no consistency in the amount of wages paid. With regard to LaRose's receiving disability benefits, Forsell admitted that she had no information about what kind of a disability LaRose had, but claimed that the fact that he received SSI benefits alone was reason enough for the Program to reject him as an IP. Regarding the third reason, Forsell explained that Respondent had a rodent infestation and that LaRose did not report his unsanitary living conditions to the appropriate authorities, as a licensed caregiver would be required to. In addition, Forsell discovered after the Program revoked its approval of LaRose that he had a criminal history. Forsell explained that as an administrator, she must be satisfied that the IP can provide equal or greater quality of care than what the Program could provide, and to ensure that Respondent would not be subject to financial or other victimization. Forsell stated that a person with a criminal history does not meet that standard. Forsell noted that if LaRose was working for an agency, then CalPERS would reconsider its approval of him.

12. LaRose testified at the hearing. He has known the Respondent for more than 30 years, since he was a teenager. LaRose has significant experience in caring for the elderly and disabled. LaRose's older brother is a paraplegic and LaRose has been caring for him since LaRose was 12 year old or younger. LaRose's mother was unable to lift his brother, and so LaRose was responsible for all of his care including bathing, dressing and feeding. LaRose also cared for Respondent's elderly mother. LaRose acknowledged that many years ago he had a drug problem and served prison time, but he been rehabilitated for a substantial amount of time. LaRose attended a drug rehabilitation program, and the last time he was charged with a crime was more than 15 years ago. LaRose is currently employed as a Home Care Provider for ResCare, Inc. He is married and has a newborn daughter, for whom he provides complete care while his wife is recovering from a brain aneurism. LaRose explained in detail the care that he provided for Respondent, and that he continued to care for Respondent for several months without compensation.

13. Respondent testified at the hearing. Respondent spoke very highly of LaRose and the care that LaRose provided both for him and previously for his mother. Respondent trusts LaRose implicitly. Respondent acknowledged that LaRose had a criminal past, but found him to be trustworthy, more so than licensed workers from certified agencies. Respondent was extremely satisfied with the quality of care that LaRose provided for him.

14. In response to the reasons that Forsell articulated for denying LaRose as Respondent's IP, Respondent explained that LaRose at one time received Supplemental Security Income (SSI benefits) because he was under psychiatric care. However, the Program never indicated that this was an issue when it initially approved LaRose as Respondent's IP. Saliiently, LaRose ceased receiving SSI two months after he started working for Respondent as an IP. LaRose paid back to SSI the entire two months of income

that he received while working for Respondent. Thus, LaRose was not receiving SSI throughout the majority of the time that he worked as Respondent's IP. The evidence did not establish that LaRose suffered from a disability in 2007, when LaRose first started working as Respondent's IP, or that LaRose currently suffers from a disability. Moreover, even if LaRose was disabled, there was no evidence that his disability prevented him from administering proper care to Respondent.

With regard to the timesheet issue, Respondent explained that he asked the Program for assistance on how to properly complete the timesheets on multiple occasions, and he was given conflicting information. For example, the Program advised him to use the term "24/7" and then six months later, they questioned why he used it. This is noted in the record; i.e., the Program acknowledged its unclear communication and apologized for its confusing instructions. (See Exh. 18.) Also, Respondent explained that there were two versions of the timesheets. On the older version, there was no place for LaRose to explain what specific tasks he performed, and how many hours he spent on each task. On the newer version of the timesheet, LaRose gave more complete information because there was space to do so. Respondent submitted multiple copies of LaRose's timesheets as evidence at the hearing. Contrary to Forsell's testimony, the timesheets show a consistent hourly rate paid and a total amount of hours worked. Although the earlier timesheets do not indicate "Time-In" and "Time-Out," Respondent explained that LaRose lived with him and thus had no official start or end time, he provided continuous care. Once Respondent and LaRose were aware that the Program required a specific start and end time, LaRose complied and indicated specific start and end times, as evidenced in his August and September 2008 timesheets. (Exh. B.)

Finally, with respect to the rodent infestation issue, Respondent explained that he personally complained to the Los Angeles Housing Department on multiple occasions, and he provided documentary evidence in support. (Exh. C.) Respondent exhausted all avenues to address his living conditions with the city, and he told LaRose that he had handled everything and didn't want LaRose to do anything else. Respondent noted that most of the issues with his housing had occurred prior to LaRose's employment. This is also supported by the documentation. (Exh. C.)

15. Respondent has since found another IP to provide care for him. The evidence did not establish whether Respondent will continue to work with his current IP, or whether Respondent would consider switching back to LaRose. Given LaRose's responsibilities to his own family, it is unclear whether he is willing to return to work for Respondent. In any event, Respondent seeks a decision on whether CalPER's determination to withdraw approval of LaRose was correct.

LEGAL CONCLUSIONS

1. The standard of proof in this matter is the preponderance of evidence. Generally, the standard of proof in administrative matters such as this case is the preponderance of evidence, unless otherwise provided by law requires otherwise. (Evid. Code, § 115.)

2. The parties dispute who bears the burden of proof. CalPERS contends that the burden should be on Respondent, because Respondent seeks to gain approval of a specific provider. CalPERS' argument is misplaced. The party seeking to change the status quo generally bears the burden of proof. In this case, CalPERS originally approved LaRose as Respondent's IP; and thereafter, it rescinded its approval, thus seeking to change the status quo. Accordingly, CalPERS bears the burden of proof.

3. The contract between Respondent and CalPERS, the EOC, governs the benefits payable. Under the terms of the EOC, the IP must meet with the Program's approval in order to receive reimbursement for an IP. According to the ACPP, coverage is approved only if the Program determines that the proposed IP is cost effective, is appropriate to meet the stated needs, provides equal or greater standard of care, and meets all requirements under federal law and general standards of care.

4. The evidence did not support Petitioner's decision to deny coverage for LaRose as an IP. Respondent is correct that the Program has discretion to approve or deny an IP. However, the Program is also bound to the terms of the contract. Where the Program's articulated reasons were not supported by the evidence, its decision cannot stand. The first of the Program's primary reasons for revoking its approval of LaRose, that he received SSI benefits, is not a valid reason for denying approval. Discrimination against a person on the basis of a disability in employment runs afoul of the Americans with Disabilities Act, especially because there was no evidence that LaRose had a disability which would interfere with his providing care for Respondent. In addition, LaRose stopped receiving SSI benefits, and repaid any that he received while working for Respondent. By the time that the Program determined that it was rescinding its approval of LaRose, he was no longer an SSI recipient, so there was no basis for the Program's decision on those grounds. The issues with LaRose's timesheets were primarily created by CalPER's misdirection and ineffective communication with Respondent. The evidence showed that Respondent and LaRose made all efforts possible to comply with CalPER's directions regarding the timesheets, and thus was not a valid basis for the Program's determination. Likewise, the record showed that LaRose provided care to Respondent that was equal to, or arguably greater than he would have received from a licensed or certified provider. LaRose had experience equivalent to a licensed care provider, and Respondent had the added comfort of knowing LaRose for many years. Although LaRose had a criminal history, the evidence showed that he is rehabilitated and has been for a significant period of time. Thus, the Program's concerns that LaRose might take advantage of Respondent were unfounded. The

evidence also established that LaRose did not fail to address the rodent problem, and that Respondent himself had pursued resolution of the issue. In sum, every reason articulated by the Program as to why it withdrew its approval of LaRose was not supported by the evidence.

5. Given the foregoing, CalPERS' decision to revoke its approval of Daryle LaRose as Respondent's Independent Provider was not supported by the preponderance of evidence, by reason of factual finding numbers 1 through 14 and legal conclusion numbers 1 through 4.

ORDER

Respondent's appeal is granted. CalPERS was incorrect in its determination to rescind approval of Daryle LaRose as Respondent's Independent Provider under the Long-Term Care Program.

DATED: November 30, 2012



AMY C. YERKEY
Administrative Law Judge
Office of Administrative Hearings