

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

KEON P.,

Claimant,

OAH No. 2012050604

and

NORTH LOS ANGELES COUNTY REGIONAL
CENTER,

Service Agency.

DECISION

Administrative Law Judge Ralph B. Dash heard this matter in Lancaster, California on July 10, 2012.

Reynard P., adoptive father, represented Keon P. (Claimant).

Rhonda Campbell, Contract Officer, represented North Los Angeles County Regional Center (Regional Center).

The record was held open until September 7, 2012, for Claimant to submit additional documents regarding his diagnoses and for Regional Center to submit its reply. Claimant timely submitted his documents which were marked collectively as Exhibit A and admitted. Regional Center's reply was timely received, marked as Exhibit 20, and admitted. The matter was deemed submitted on September 7, 2012.

ISSUE

The issue in this matter is whether Claimant is eligible for services from the Regional Center.

FACTUAL FINDINGS

1. Claimant is 26 years old, date of birth March 18, 1986. In 2003 he was diagnosed by William H. Kroes, Ph.D., as having mild mental retardation (full scale IQ of 67 as measured by the Wechsler Intelligence Scale for Children-III (WISC-III)). His adaptive functioning, as measured by the Vineland Adaptive Behavior Scales (VABS)¹ was low with a composite score of 47 (more than three standard deviations below the norm.) He was referred to the Regional Center.

2. In 2004 Claimant applied for Regional Center services which were denied on March 15, 2004 (Exhibit 13). The denial was based on a Social Assessment by Regional Center staff on February 11, 2004 (Exhibit 10), and on a psychological assessment dated February 17, 2004, prepared by Ana Levi, Psy.D. and reviewed by Catherine L. Scarf, Ph.D, (Exhibit 11).

3. The Social Assessment found Claimant “can care for his self care skills” but concluded that he does have a deficit in this area. In describing Claimant’s self-care skills, the assessment states:

¹ VABS measures the personal and social skills of individuals. Adaptive behavior refers to the individual’s typical performance of day-to-day activities. These scales assess what a person actually does, as opposed to what he or she may be capable of doing. VABS covers adaptive behaviors in four different domains: communication, daily living skills, socialization and motor skills. It also provides for a composite score that summarizes the individual’s performance across all of these domains. Information for the VABS is typically gleaned from the person who best knows the subject. The norm is 100 with standard deviations of 15. More than two standard deviations below the norm indicate significant impairment.

He can wash his hands and face, shower and brush his own teeth. Keon can feed himself using all utensils. Keon chooses his own clothing to include buttons, zippers and snaps. He can also semi-tie his shoe laces. Keon can use a microwave and stove. [Mr. P.] reported that Keon is a very good cook and can make complete meals. Keon's chores include cleaning the kitchen, bathroom and washing. He will sometimes complete his chores completely. He reported that money is used for clothes and entertainment. He stated that 4 quarters equal one dollar, a nickel is 5 cents and a dime is 10 cents. He cannot tell time. He can only tell the hours on an analog clock. He can not count change. He can make simple purchases but would not be aware if he had the correct change. He can make telephone calls.

4. In describing Claimant's cognitive functioning, the assessment notes that Claimant could state his birthdate and age, and recognized colors, numbers and letters. Claimant has difficulty in math but can add three numbers together with prompting. He can read simple words and sentences, write his name and state his address and telephone number. With respect to Claimant's social skills and behavior, the assessment notes that Claimant has few friends and will not initiate conversations with others. When younger, he engaged in imaginative play and still prefers to be by himself. He had been aggressive with his peers but apparently was no longer aggressive. He did not show affection for his adoptive father. Claimant becomes withdrawn in public and does not engage in eye contact when speaking. With respect to communication, the assessment found Claimant to be verbal, not using hands or facial expressions when speaking. He speaks in sentences with clear articulation and pronunciation. He understands simple story plots.

5. In the psychological assessment, Dr. Levi noted some of Claimant's scores from Dr. Kroes' testing, including that Claimant had reading skills with the age equivalency of a 32 year-old. This test result closely corresponded with the reading score of 114 (almost one standard deviation above the norm) Claimant achieved when Dr. Levy administered the Wide Range Achievement Test-3 which measures basic skills in reading, arithmetic, and spelling. Dr. Levy also administered the Wechsler Adult Intelligence Scale-Third Edition (WISC-III), the Autism Diagnostic Observation Schedule-Generic, Module 4 (ADOS-G) and the Adaptive Behavior Assessment System (ABAS), a diagnostic tool similar to the more widely used VABS.

6. On the WISC-III, Claimant achieved a full scale IQ of 80 which, on the WAIS-III rating scale, is at the bottom end (80 to 90) of "low-average" intelligence. The sub-test scores showed "scatter" from borderline intelligence on two tests ("perceptual organization" and "practical judgment") to average intelligence ("non-verbal reasoning") to above average intelligence ("immediate recall of auditory number information"). Claimant's ADOS-G scores² "did not demonstrate characteristics of Autistic Disorder or Autism-Spectrum Disorder." As with the VABS, Claimant's score on the ABAS showed Claimant has an adaptive skills deficit. Based on all test scores Dr. Levi concluded, "From a psychological standpoint, Keon does not appear to be eligible for Regional Center Services. He is not mentally retarded. He does not have the Autistic Disorder."

² There are four parts to the ADOS-G: communication, reciprocal social interaction, imagination/creativity, and stereotyped behaviors/restricted interests. Claimant's scores on each subtest were all below the autism and autism spectrum disorder cut-off.

7. Claimant re-applied for Regional Center services this year. However, he provided no new information³ except for a letter dated May 21, 2007, from the Department of Rehabilitation stating that he was eligible for vocational rehabilitation services (Exhibit 14) based on his "functional capacity" deficits in "work skills" and "work tolerance." On May 20, 2012, Regional Center again denied eligibility based on all of the documents and information it already had in its files.

8. The only new information Claimant's adoptive father referenced at the hearing of this matter was a Social Security Administration evaluation that Claimant was eligible for benefits from that agency which, according to the adoptive father, was based on a diagnosis of autism. Claimant's adoptive father stated that he had attempted to get a copy of the evaluation but was unable to do so. The record was left open, as noted above, to give him additional time to secure a copy of the evaluation and for Regional Center's psychologist to review and comment on the same. Thereafter, the only documents he provided were a 2010 notice that Claimant was eligible for Supplemental Security Income (no diagnosis stated) and an undated, but clearly very old, "case plan update" from the Department of Children and Family Services which noted that Claimant was in the fourth grade and was classified as "mildly mentally retarded" (Exhibit A).

9. Regional Center's expert witness at hearing, Heike Ballmaier, Psy.D.,

³ Claimant's adoptive father provided Regional Center with many documents, including two school Individualized Education Plans, a medication log, a psychiatric evaluation and a termination summary from the Child and Family Guidance Center (Exhibits 3 through 8), all of which pre-dated Regional Center's 2004 denial of eligibility.

reviewed Exhibit A and responded thereto in writing (Exhibit 20). After her review of Exhibit A, as well as the exhibits Regional Center produced at hearing, Dr. Ballmaier concluded:

One psychological assessment by Dr. Kroes dated February of 2003 indicated a diagnosis of Mild Mental Retardation however Keon is described as depressed and belligerent and the potential effect of lack of effort and motivation on intellectual test results are not well explained or basically ignored in the diagnostic formulation of this evaluation. In February 2004 when Keon was 17 years 11 months old he was assessed by Dr. Levi and tested in the low average range of intellectual functioning. It is not possible for an individual to obtain scores in the mild deficit range and be [diagnosed as] mentally retarded, only to be re-assessed and obtain scores in the low average range. If Keon was mentally retarded he would not be able to make such progress upon re-assessment, especially with a different [IQ test] instrument. Available records thus do not indicate that Keon is mentally retarded, or meets criteria for Category Five, or has Autistic Disorder.

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LEGAL CONCLUSIONS

1. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *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 government benefits or

services. (See Evid. Code, § 115.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it.(citations omitted) . . . The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) In meeting the burden of proof by a preponderance of the evidence, Claimant "must produce substantial evidence, contradicted or uncontradicted, which supports the finding." (*In re Shelley J.* (1998) 68 Cal.App.4th 322 at p. 329.)

2. Claimant has not established that he suffers from a developmental disability entitling him to Regional Center services. (Factual Findings 1 through 9.)

3. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Regional Center's decision. Where a claimant seeks to establish eligibility for services, the burden is on the appealing claimant to demonstrate that the regional center's decision is incorrect. Claimant has not met his burden of proof in this case.

4. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a) defines "developmental disability" as:

a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual, and includes mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to mental retardation or to

require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

5(a). To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that he has a "substantial disability."

5(b). California Code of Regulations, title 17, section 54001 states, in pertinent part:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

6(a). In addition to proving a "substantial disability," a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare

and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism and cerebral palsy. The fifth and last category of eligibility is listed as "Disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512.) This category is not further defined by statute or regulation.

6(b). Whereas the first four categories of eligibility are very specific, the disabling conditions under this residual, fifth category are intentionally broad to encompass unspecified conditions and disorders. However, this broad language is not intended to be a catchall, requiring unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average functioning and impaired adaptive behavior; under the Lanterman Act, the Regional Center does not have a duty to serve all of them.

6(c). While the Legislature did not define the fifth category, it did require that the qualifying condition be "closely related" (Welf. & Inst. Code, § 4512, subd. (a)) or "similar" (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or "require treatment similar to that required for mentally retarded individuals." (Welf. & Inst. Code, § 4512, subd. (a).) The definitive characteristics of mental retardation include a significant degree of cognitive and adaptive deficits. Thus, to be "closely related" or "similar" to mental retardation, there must be a manifestation of cognitive and/or adaptive deficits which render that individual's disability like that of a person with mental retardation. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to mental retardation (e.g., reliance on IQ scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the

quality of a claimant's cognitive and adaptive functioning and a determination of whether the effect on his performance renders him like a person with mental retardation. Furthermore, determining whether a claimant's condition "requires treatment similar to that required for mentally retarded individuals" is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone's condition requires such treatment. No evidence was presented in this matter that Claimant has a condition to mental retardation (more fully discussed below) or requires such treatment. In any event, he is receiving vocational training from the Department of Rehabilitation (Finding 7).

7. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revised (DSM-IV-TR) is a well respected and widely used classification system of mental disorders, explaining the criteria necessary to establish that one does, or does not, have a particular disorder. The DSM-IV-TR describes mental retardation as follows:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final

common pathway of various pathological processes that affect the functioning of the central nervous system.

General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children—Revised, Stanford-Binet, Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. . . .

8. The only evidence of Claimant's IQ are the two intelligence tests administered one year apart (Findings 1 and 6) which show Claimant's IQ to be either 67 or 80. Accounting for the five point potential margin of error referenced in the DSM-IV TR shows Claimant potentially has an IQ as low as 62 or as high as 85. Dr. Ballmaier's statement, quoted in Finding 9, reconciles the inconsistencies in the test results. Claimant simply could not have an IQ score of 80 if he was mentally retarded. Supporting that determination is the fact that both psychologists who examined and tested Claimant found that he had above average reading skills.

9. Claimant has not produced sufficient evidence that he has a substantial disability that qualifies him for Regional Center services. He does not have Autism (Finding 6), nor is he mentally retarded (Findings 6 and 9), nor did he provide evidence that he falls into the "Fifth Category." Accordingly, his appeal of Regional Center's denial of services (Finding 7) must be denied.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The Regional Center's determination that Claimant is not eligible for regional center services is sustained, and Claimant's appeal of that determination is denied.

DATED: September 13, 2012

/s/

RALPH B. DASH

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.