BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, v. INLAND REGIONAL CENTER, Service Agency.	OAH No. 2016080952

REVISED DECISION[1]

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on October 3, 2016.

Stephanie Zermeño, Consumer Services Representative, Fair Hearings and Legal Appeals, represented Inland Regional Center (IRC).

David Namazi, Licensed Advocate, represented claimant, who was not present.

The matter was submitted on October 3, 2016.

ISSUES

Is claimant eligible for regional center services under the Lanterman Act as a result of a condition closely related to an intellectual disability or requiring treatment similar to that required for an intellectually disabled individual?

[1] The decision has been edited to reflect the correct name for the Consumer Services Representative who represented IRC at the hearing. The decision remains the same in all other respects as the decision issued on October 13, 2016.

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On July 26, 2016, IRC notified claimant that he was not eligible for regional center services because the records provided by claimant did not establish that he had a substantial disability as a result of an intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment needs as an individual with an intellectual disability.

2. On August 17, 2016, claimant filed a Fair Hearing Request appealing IRC's determination; this hearing ensued.

CLAIMANT'S BACKGROUND

3. Claimant is a 28-year-old male who had a heart transplant at the age of seven. His father also passed away at that time. Two years later, at the age of nine, claimant was diagnosed with Friedreich's Ataxia, a degenerative condition that causes nervous system damage. The condition causes spinal cord, peripheral nerves, and parts of the brain that control balance to degenerate over time leading to movement difficulties. The disease is slowly progressive resulting in weakness of the extremities, diminished sense of balance, sensory dysfunction, and ultimately progresses to heart failure. According to the National Institute of Neurological Disorders and Stroke, the disorder does not affect cognitive functions. Claimant started losing his motor skills around seventh grade, and was confined to a wheelchair a year later. When claimant turned 15 years old, he started to exhibit behavioral problems and experience severe depression.

Claimant was served under special education most of his life. An Individualized Education Program (IEP) dated March 17, 2005, when claimant was almost 18 years old,

showed claimant was served under the primary qualifying condition of emotional disturbance and a secondary qualifying condition of orthopedic impairment and "other" health impairment.

Claimant currently lives in a skilled nursing facility. Claimant's mother was recently appointed his conservator.

THE "FIFTH CATEGORY" AND DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

4. Under the "fifth category," the Lanterman Act provides assistance to individuals with disabling conditions found to be closely related to intellectual disabilities[2] or to require treatment similar to that required for intellectually disabled individuals but does not include other handicapping conditions that are solely physical in nature. Along with the other four qualifying conditions (cerebral palsy, epilepsy, autism, and mental retardation), a disability involving the fifth category must originate before an individual attains age 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

[2] The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5) also contains the diagnostic criteria used for intellectual disability. Three diagnostic criteria must be met: deficits in intellectual functions, deficits in adaptive functioning, and the onset of these deficits during the developmental period. An individual must have a DSM-5 diagnosis of intellectual disability to qualify for regional center services under the eligibility criterion of intellectual disability. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores in the 65-75 range.

EVIDENCE PRESENTED BY IRC

5. Sandra Brooks, Ph.D., testified on behalf of IRC. Dr. Brooks is a licensed clinical psychologist and regularly performs assessments to determine whether a claimant is eligible for services under the Lanterman Act.

6. Dr. Brooks reviewed claimant's file, which contained his most recent IEP from 2005, various medical and psychological assessments, and neurological reports dated June 17, 2014, and July 20, 2016.

7. Dr. Brooks testified that claimant's condition, Friedreich's Ataxia, is not associated with cognitive impairment and opined that as his condition worsened over time, it affected his ability to perform well on some of the assessments. She also opined that claimant's increasing depression as a result of his condition, which was well documented in his medical and psychological records, also affected his ability to perform well on the intelligence and adaptive skills tests.

Dr. Brooks noted that at age eight, just after claimant had his heart transplant but before he was diagnosed with Friedrich's Ataxia, he had a full scale intelligent quotient (IQ) score of 106. He had an IQ of 91 on the verbal portion of the test and a score of 123 on the performance part of the test. Dr. Brooks stated that claimant's overall scores showed claimant had average intellectual abilities.

In 1999 when claimant was 12 years old, claimant took, among other tests, the Kaufman Brief Intelligence Test (K-BIT). Claimant's results on the K-BIT showed claimant scored well within the average range for cognitive abilities. Dr. Brooks described the K-BIT as a good test to measure someone's intellectual abilities and stated that the K-BIT did not require any physical manipulation of objects. Most of claimant's scores on other tests were within the average range.

Claimant's scores on intelligence tests dropped significantly around age 15, when claimant lost mobility and became confined to a wheelchair. Dr. Brooks noted that

claimant's scores on the Wechsler Intelligence Scale for Children, Third Edition (WISC-3), contained in a January 15, 2003, assessment, were a verbal IQ of 69, a performance IQ of 69, and a full scale IQ of 66. These scores placed claimant in the moderately deficient range for cognitive abilities. Dr. Brooks explained that it would be unusual for a person's IQ scores to drop as dramatically as they did from claimant's previous high scores. However, in the report, the test administrator explained that the drop could be due to his muscular degeneration that resulted from his Freidereich's Ataxia. The report further documented claimant's frustrations with his condition, which reflected that claimant was "not a happy person," "often sad," "worr[ied] a lot," and was "jealous of other people who [could] walk . . . ." Claimant also told the administrator that he gave up easily when taking tests.

A March 24, 2003, admissions report from the Loma Linda University Medical Center, just a few months after the above-referenced assessment, showed claimant's admitting diagnosis as "Depression, NOS (not otherwise specified)." The report indicated claimant was receiving A's, B's, and C's in school. Claimant's discharge summary contained a diagnosis of depression due to his medical condition and a recommendation that major depressive disorder be ruled out. Neither the admissions report nor the discharge report indicated that claimant had an intellectual disability or condition similar to an intellectual disability. Dr. Brooks also pointed out that the reports documented claimant's marijuana use, significant anger issues attributable to his medical condition, and increasing conflict with his stepfather.

IRC Staff Psychologist Edward Pflaumer, Ph.D., assessed claimant on May 20, 2003, shortly after his release from the Loma Linda University Medical Center. Dr. Pflaumer conducted diagnostic interviews, clinical interviews, a parent interview, and administered the WISC-3 and Wide Range Achievement Test (WRAT-3). Claimant's scores actually improved from the previous WISC-3 assessment. On this occasion,

claimant scored a verbal IQ of 74, a performance IQ of 81, and a full scale IQ of 76. These results placed claimant in the borderline intelligence range. During the assessment, claimant told Dr. Pflaumer that he was depressed, that "life was not worth living," and he felt like dying because he could not do anything. Dr. Pflaumer's diagnostic impression was that claimant had depressive disorder and borderline intellectual functioning, and concluded that claimant was not eligible for regional center services.

Approximately one year later, on May 14, 2004, claimant's school psychologist assessed claimant for the purpose of re-evaluating his special education placement and conducting a pre-expulsion assessment. Claimant was 16 years old at the time of the assessment. The report detailed claimant's increasing behavioral problems, drug use, suicidal thoughts, and anger issues attributable to his frustration over his medical condition. Claimant admitted to using a lot of marijuana. The school psychologist administered the verbal portion of the WISC-III and claimant's scores improved from when Dr. Pflaumer administered the test in 2003. Claimant's scores were in the upper end of borderline and low average (verbal IQ of 79). The school psychologist acknowledged claimant's cognitive decline since his first assessment in third grade, when he tested in the superior range, but noted claimant's overall ability seemed to be in the low, but average range. The school psychologist confirmed claimant's eligibility for special education because of his continued health and orthopedic conditions, and also recommended the IEP team consider emotional disturbance as a qualifying factor.

The juvenile court of San Bernardino County ordered claimant to undergo a psychological assessment in 2004. In the ensuing report, Edward Ryan, Ph.D., noted claimant stated he did not care about school and was not optimistic about the future. Claimant admitted using marijuana. Dr. Ryan administered, among other things, the Wechsler Intelligence Scale, Fourth Edition (WISC-4). Claimant scored verbal IQ of 89, a

perceptual reasoning score of 77, and a working memory score of 71. Overall, claimant's scores on the WISC-4 and other examinations placed him in the borderline range for intellectual functioning. Dr. Ryan's overall diagnostic impression was Depressive Disorder, NOS.

On May 10, 2005, Dr. Pflaumer conducted a second assessment to ascertain if claimant was eligible for regional center services. Dr. Pflaumer administered the WISC-III. Claimant's verbal IQ was 74, his performance IQ was 81, and his overall full scale IQ was 76. These results, along with other assessments and the clinical interview administered by Dr. Pflaumer, placed claimant in the borderline to low average range for intelligence. Dr. Pflaumer's diagnostic impression was Depressive Disorder, NOS.

Dr. Brooks reviewed a follow-up report by Murray Brandstater, M.D., Ph.D., that stated claimant had characteristic clinical features of intellectual disability. However, the report did not indicate how Dr. Brandstater reached that conclusion, or what assessments, if any, he performed. As such, Dr. Brooks could not give the report much weight in helping her arrive at her conclusions.

Based on a comprehensive review of the above-referenced records, Dr. Brooks concluded claimant was not intellectually disabled nor did he have a condition similar to an intellectual disability. Dr. Brooks stated that claimant's IQ scores were high early in his life, and declined over time with the death of his father, the worsening of his medical condition and also his drug use. Dr. Brooks pointed out that claimant's IQ scores fluctuated over time, as well, although they remained in the borderline and low average range, and one would not expect to see fluctuations if a person had an intellectual disability. Dr. Brooks therefore opined that claimant was not eligible for regional center services.

EVIDENCE PRESENTED BY CLAIMANT

8. Claimant's mother testified at the hearing. She detailed claimant's medical history, and stated that his behavioral issues did not arise until he turned 15 years old and lost the use of his legs. Claimant also became very depressed due to his medical condition. Claimant's mother stated claimant cannot take care of himself and she cannot care of him. Therefore, claimant is currently living in a skilled nursing facility. Claimant's mother stated that, although the doctors have all said that claimant's cognitive problems are not due to his condition, she believes his cognitive delays are due to his medical condition because his brain has degenerated over time. As a result, claimant cannot make his own decisions and is not self-sufficient. She was recently appointed claimant's conservator because claimant cannot care for himself. She is looking for any services available that may help her son.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

STATUTORY AUTHORITY

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

3. Welfare and Institutions Code section 4501 provides:

> The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of

> children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .
>
> An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

4. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability as a disability that "originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. A developmental disability includes "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (*Ibid.*) Handicapping conditions that are "solely physical in nature" do not qualify as developmental disabilities under the Lanterman Act.

5. California Code of Regulations, title 17, section 54000 provides:

(a) "Developmental Disability" means a disability that is attributable to mental retardation[3], cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which

[3] Although the Lanterman Act has been amended to eliminate the term "mental retardation" and replace it with "intellectual disability," the California Code of Regulations has not been amended to reflect the currently used terms.

are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

6. California Code of Regulations, title 17, section 54001 provides:

(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.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client

representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

APPELLATE DECISIONS AND THE ASSOCIATION OF REGIONAL CENTER AGENCIES GUIDELINES

7. The published decisional law addressing eligibility for Lanterman Act services and supports under the fifth category is primarily embodied in *Mason v. Office of Administrative Hearings* (2001) 89 Cal. App. 4th 1119. In *Mason*, the Court of Appeal upheld an Administrative Law Judge's determination that evidence offered at an administrative hearing failed to establish the eligibility of an applicant, who experienced a grand mal seizure within hours of his birth and who continued to have seizures up to three years after birth, for regional center services under the fifth category. (*Id*. at pp. 1130-1138.) The competent, reliable evidence of testing results and expert conclusions and testimony established that the applicant did not have "generalized significantly sub-average intellectual functioning." (*Id*. at p. 1134.) The applicant's documented learning deficits were attributed to hyperactivity and impulsivity rather than to cognitive limitations. The credible evidence established that the applicant's adaptability skills were not within the close range of intellectual disability, and even if they were, his scores were impacted by his ADHD (which does not qualify as a developmental disability). (*Id*. at p. 1137.) Testing of the applicant's adaptability skills yielded a disparate scatter of scores. (*Id* at p. 1135.) There was "no reliable evidence establishing that [applicant] required treatment similar to that required by [intellectually disabled] individuals." (*Ibid*.) In affirming the Administrative Law Judge's determination, the Court of Appeal underscored that, structurally, the Lanterman Act and its regulations are deferential to

regional center professionals requiring flexibility when making difficult, complex eligibility determinations because developmental disabilities are widely differing and difficult to define with precision. (*Id.* at pp. 1127-1130.)

In response to *Mason*, the Association of Regional Center Agencies Guidelines (ARCA Guidelines)[4] were adopted to assist regional center professionals in making difficult, complex determinations regarding whether a disabling condition was closely related to the diagnostic characteristics of an intellectually disabled individual or whether a disabling condition required treatment similar to that treatment required for individuals with the diagnostic characteristics of intellectual disability. In *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, the court cited with approval the ARCA Guidelines for use in making fifth category determinations. (*Id.* at p. 1477.) The ARCA Guidelines listed the following factors to be considered when determining eligibility under the fifth category:

I. Does the individual function in a manner that is similar to that of a person with [intellectual disability]?

> [Intellectual disability] is defined in the DSM-IV[5] as "significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning. . ."

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[4] The ARCA guidelines have not gone through the formal scrutiny required to become a regulation and were written before the DSM-5 was in effect.

[5] The DSM-5 was created after the creation of the ARCA Guidelines. However, the definition of an intellectual disability remains the same.

General intellectual functioning is measured by assessment with one or more standardized tests. Significantly sub-average intellectual functioning is defined as an intelligence quotient (IQ) of 70 or below.

An individual can be considered to be functioning in a manner that is similar to a person with [an intellectual disability] if:

A. The general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74). Factors that the eligibility team should consider include:

1. Cognitive skills as defined in the California Code of regulations, Title 17 Section 54002: ". . . the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience."
2. The higher an individual's IQ is above 70, then the less similar to a person with [intellectual disability] is the individual likely to appear. For example, an individual with an IQ of 79 is more similar to a person with a low average intelligence and more dissimilar to a person with mild [intellectual disability].
3. As an individual's intelligence quotient rises above 70, it becomes increasingly essential for the eligibility team to demonstrate that:

(a) there are substantial adaptive deficits; and

(b) such substantial adaptive deficits are clearly related to cognitive limitations.

4. Occasionally, an individual's Full Scale IQ is in the low borderline range (IQ 70-74) but there is a significant difference between cognitive skills. For example, the Verbal IQ may be significantly different than the Performance IQ. When the higher of these scores is in the low average range (IQ 85 or above), it is

more difficult to describe the individual's general intellectual functioning as being similar to that of a person with [intellectual disability]. In some cases, these individuals may be considered to function more like persons with learning disabilities than persons with [intellectual disability].

5. Borderline intellectual functioning needs to show stability over time. Young children may not yet demonstrate consistent rates and patterns of development. For this reason, eligibility for young children in the 5th category should be viewed with great caution.

B. In addition to sub-average intellectual functioning, the person must also demonstrate significant deficits in Adaptive skills, including, but not limited to, communication, learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency. Factors that the eligibility team should consider include:

1. Adaptive behavior deficits as established on the basis of clinical judgments supplemented by formal Adaptive Behavior Scales (e.g., Vineland ABS, AAMR-ABS) when necessary.
2. Adaptive deficits are skill deficits related to intellectual limitations that are expressed by an inability to perform essential tasks within adaptive domains or by an inability to perform those tasks with adequate judgment.
3. Skill deficits are not performance deficits due to factors such as physical limitations, psychiatric conditions, socio-cultural deprivation, poor motivation, substance abuse, or limited experience.

II. Does the person require treatment similar to that required by an individual who has [intellectual disability]?

> In determining whether an individual requires 'treatment similar to that required for [intellectually disabled] individuals,' the team should consider the nature of training and intervention that is most appropriate for the individual who has global cognitive deficits. The eligibility team should consider the following to determine whether the individual requires treatment similar to that required by an individual who has [an intellectual disability].

A. Individuals demonstrating performance based deficits often need treatment to increase motivation rather than training to develop skills.
B. Individuals with skill deficits secondary to socio-cultural deprivation but not secondary to intellectual limitations need short term, remedial training, which is not similar to that required by persons with [intellectual disability].
C. Persons requiring habilitation may be eligible, but persons requiring rehabilitation are not typically eligible as the term rehabilitation implies recovery of previously acquired skills; however, persons requiring rehabilitation may be eligible if the disease is acquired before age 18 and is a result of traumatic brain injury or disease.
D. Individuals who require long term training with steps broken down into small discrete units taught through repetition may be eligible.
E. The eligibility team may consider the intensity and type of educational supports needed to assist children with learning. Generally, children with [intellectual disabilities] need more supports, with modifications across many skill areas.

III. Is the individual substantially handicapped based upon the statewide definition of Substantial Disability/Handicapped?

The W&I Code (Section 4512) defines Developmental Disability as a disability which originates before an individual attains the age of 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. The CCR, Title 17 (Section 54001) defines substantial handicap as:

a) Substantial handicap means a condition which results in major impairment of cognitive and/or social functioning. Moreover, a substantial handicap represents a condition of sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential.
b) Since an individual's cognitive and/or social functioning is many-faceted, the existence of a major impairment shall be determined through an assessment which shall address aspects of functioning including, but not limited to:

1) Communication skills;
2) Learning;
3) Self-care;
4) Mobility;
5) Self-direction;
6) Capacity for independent living;
7) Economic self-sufficiency.

c) The assessment shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies serving the potential consumer. The group shall include as a minimum, a program coordinator, a physician, and a psychologist.

d) The Regional Center professional group shall consult the potential consumer, parents, guardians, conservators, educators, advocates, and other consumer representatives to the extent that they are willing and available to participate in its deliberation and to the extent that the appropriate consent is obtained.

> Regional Centers should use criteria of three or more limitations in the seven major life activities as used in the federal definition for Developmental Disability . . . .

IV. Did the disability originate before age 18 and is it likely to continue indefinitely?

> The eligibility team should provide an opinion regarding the person's degree of impairment in the adaptive functioning domains, identifying skill deficits due to cognitive limitations and considering performance deficits due to factors such as physical limitations, psychiatric conditions, socio-cultural deprivation, poor motivation, substance abuse, or limited experience. Additional information, such as that obtained by a home visit, school or day program observation, or additional testing may be required to make this determination.

EVALUATION

8. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. The ARCA Guidelines assist in the determination of whether a person qualifies for regional center services under the fifth category. None of the documents or evidence introduced in this hearing demonstrated that claimant has a substantial disability as a result a disabling condition closely related to an intellectual disability or condition that requires similar treatment needs as an individual with an intellectual disability. Claimant's IQ scores ranged from superior to borderline/low average over time. However, the evidence showed that claimant's IQ scores and adaptive skills decreased over time as his medical condition worsened, and he became more depressed. In other words, claimant's cognitive decline appeared more linked to his depression over his worsening medical condition and not because of a disabling condition closely related to an intellectual disability.

Accordingly, in consideration of applicable law and the ARCA Guidelines, claimant is not eligible for regional center services.

ORDER

Claimant's appeal from the Inland Regional Center's determination that he is not eligible for regional center services is denied.

DATED: October 20, 2016

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KIMBERLY J. BELVEDERE

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 ninety days.