

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER

Service Agency

OAH No. 2019070769

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on August 21, 2019, in San Bernardino, California.

Keri Neal, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Lisa Lester, Program Manager, Desert Arc Consumer Development, represented claimant, who was present.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on August 21, 2019.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act based on a substantial disability resulting from a condition closely related to an intellectual disability or that requires treatment similar to a person with an intellectual disability (fifth category)?

FACTUAL FINDINGS

Background

1. On June 26, 2019, IRC served claimant with a Notice of Proposed Action indicating that IRC decided no intake services could be provided because records provided did not show that claimant had a substantial disability resulting from epilepsy, cerebral palsy, intellectual disability, autism, or a condition closely related to an intellectual disability or that requires treatment similar to a person with an intellectual disability.

2. On July 11, 2019, claimant's mother filed a fair hearing request on claimant's behalf, seeking review of IRC's determination.

3. On July 31, 2019, representatives from IRC met with claimant and his mother to discuss claimant's fair hearing request. According to a letter drafted by IRC memorializing the meeting, claimant's mother explained that claimant had two brain surgeries in his youth, and had been diagnosed with a neurological condition.

Therefore, she believed claimant was eligible for regional center services. The letter also explained:

Claimant was diagnosed with brain cancer at the age of 2 and subsequently underwent surgery. At the age of 10, claimant had surgery again followed by a year of chemotherapy. At the age of 30, claimant had a brain aneurysm and once more had surgery. In 2009, claimant was referred to a neurologist who conducted multiple tests and found that claimant has scar tissue, so he was unable to treat claimant. At school, claimant received special education services under the category of learning disability. . . . Claimant had to repeat the third grade.

Regarding vocational skills, claimant has been unable to sustain employment, therefore he was referred to vocational rehabilitation services through the Department of Rehabilitation (DOR). DOR then referred claimant to Desert Arc to have a Situational Assessment conducted regarding claimant's vocational skills. Upon completion of the Situational Assessment, Desert Arc recommended that claimant apply for IRC services so that he can be employed in a group setting at Desert Arc.

Ms. Kelly explained that claimant has had lifelong balance issues which have prevented him from being hired at Goodwill in the past. Ms. Kelly further explained that claimant needs trained guidance and to be acclimated to

people outside the family home as his disability causes him to be dependent on her. . . .

[¶] . . . [¶]

At this time, IRC is standing by its decision that claimant is not eligible for regional center services. The records available indicate that claimant maintained average intelligence during the developmental period and received special education services due to a specific learning disability which is precluded as a regional center eligible condition. Additional records provided include assessments conducted after the developmental period that diagnosed claimant with Unspecified Neurocognitive Disorder, Learning Disorder, and Methamphetamine Use Disorder. Although the information provided indicates that claimant has a history of brain tumors during childhood there is no documentation to substantiate that he had significantly subaverage [sic] cognitive abilities prior to the age of 18.

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Applicable Diagnostic Criteria

INTELLECTUAL DISABILITY¹

4. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) contains the diagnostic criteria used for intellectual disability. The essential features of intellectual disability are deficits in general mental abilities and impairment in everyday adaptive functioning, as compared to an individual's age, gender, and socio-culturally matched peers. In order to have a DSM-5 diagnosis of intellectual disability, three diagnostic criteria must be met. First, deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, academic learning, and learning from experience), must be present. Second, deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility, must be present. Third, the onset of the cognitive and adaptive deficits must occur during the developmental period.

Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores in the 65-75 range.

¹ In this matter, claimant was not attempting to qualify for regional center services under the diagnosis of intellectual disability. However, given that analysis for eligibility under the fifth category requires a determination of whether claimant has a condition similar to an intellectual disability or that requires treatment similar to an intellectual disability, the diagnostic criteria for intellectual disability was included.

DIAGNOSTIC CRITERIA FOR FIFTH CATEGORY

5. Under the fifth category, the Lanterman Act provides assistance to individuals with disabling conditions closely related to an intellectual disability or that requires similar treatment as an individual with an intellectual disability but does not include other handicapping conditions that are "solely physical in nature." (Welf. & Inst. Code, § 4512, subd. (a).) A disability involving the fifth category must also have originated before an individual attained 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, the appellate court held that the fifth category condition must be very similar to intellectual disability, with many of the same, or close to the same, factors required in classifying a person as intellectually disabled. Another appellate decision has also suggested, when considering whether an individual is eligible for regional center services under the fifth category, that eligibility may be based largely on the established need for treatment similar to that provided for individuals with an intellectual disability, notwithstanding an individual's relatively high level of intellectual functioning. (*Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462.) In *Samantha C.*, the individual applying for regional center services did not meet the criteria for intellectual disability. The court understood and noted that the Association of Regional Center Agencies had guidelines (ARCA Guidelines) which recommended consideration of fifth category for those individuals whose "general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74)." (*Id.* at p. 1477.) However, the court confirmed that individuals may qualify for regional center services under the fifth category on either

of two independent bases, with one basis requiring only that an individual require treatment similar to that required for individuals with intellectual disability.

The ARCA Guidelines provide criteria to assist regional centers in determining whether a person qualifies for services under the fifth category. The ARCA Guidelines provide that the person must function in a manner similar to a person with an intellectual disability or who requires treatment similar to a person with an intellectual disability.

Functioning Similar to a Person with an Intellectual Disability

6. A person functions in a manner similar to a person with an intellectual disability if the person has significant sub-average general intellectual functioning that is accompanied by significant functional limitations in adaptive functioning. Intellectual functioning is determined by standardized tests. A person has significant sub-average intellectual functioning if the person has an IQ of 70 or below. Factors a regional center should consider include: the ability of an individual to solve problems with insight, to adapt to new situations, and to think abstractly and profit from experience. If a person's IQ is above 70, it becomes increasingly essential that the person demonstrate significant and substantial adaptive deficits and that the substantial deficits are related to the cognitive limitations, as opposed to a medical or some other problem. It is also important that, whatever deficits in intelligence are exhibited, the deficits show stability over time.

Significant deficits in adaptive functioning are established based on the clinical judgements supplemented by formal adaptive behavioral assessments administered by qualified personnel. Adaptive skill deficits are 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 judgement. Adaptive 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.

Treatment Similar to a Person with an Intellectual Disability

7. In determining whether a person requires treatment similar to a person with an intellectual disability, a regional center should consider the nature of training and intervention that is most appropriate for the individual who has global cognitive deficits. This includes consideration of the following: individuals demonstrating performance based deficits often need treatment to increase motivation rather than training to develop skills; 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 an intellectual disability; persons requiring habilitation may be eligible, but persons primarily requiring rehabilitation are not typically eligible as the term rehabilitation implies recovery; individuals who require long-term training with steps broken down into small, discrete units taught through repetition may be eligible; the type of educational supports needed to assist children with learning (generally, children with an intellectual disability need more supports, with modifications across many skill areas).

Substantial Disability

8. The ARCA Guidelines also refer to California Code of Regulations, title 17, sections 54000 and 54001 regarding whether a person has a substantial disability. This

means the person must have a significant functional limitation in three or more major life areas, as appropriate for the person's age, in the areas of: communication (must have significant deficits in both expressive and receptive language), learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency.

Evidence Presented At Hearing

CLAIMANT'S TESTIMONY

9. Claimant is 51 years old. He lives with his mother. Claimant testified at the hearing, with great difficulty. His testimony is summarized and paraphrased as follows: claimant wants to work and needs help finding work. He wants to "be positive" and said if he did not have his mother or Ms. Lester he would not know where to go or what to do. When asked if he ever had a problem what he would do, he stated he would ask his mother. When asked what he would need to be successful in employment, claimant said he would need someone present while he was working to ask questions and so he could be sure of himself.

Claimant appeared to understand what was being asked of him, however, he had extreme difficulty with his expressive speech. He spoke in very short limited sentences, followed by a brief period of silence as if he wanted to say more but could not get out the words. Claimant would look to his mother, who was seated to his right, or to Ms. Lester, who was seated to his left, for assistance.

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RECORDS FROM CLAIMANT'S YOUTH²

10. In September 1970, when claimant was only two years old, it was discovered that he had a brain tumor. The tumor was an astrocytoma, grade II. The surgery was successful at removing the parts of the tumor that could be removed (a partial resection of a third ventricular glioma), and claimant subsequently underwent chemotherapy.

11. An educational evaluation completed in 1976, when claimant was eight years old and in the third grade, noted significant "perceptual problems" that impacted claimant's ability to succeed. The examiner noted that claimant's coordination was very poor, and claimant was often unable to complete his work. Claimant was easily distracted and had extremely poor academic effort. The school administered several tests, including: the Peabody Picture Vocabulary Test (PVAT), the Bender Visual Motor Gestalt (Bender), the Wechsler Intelligence Scale for Children – Revised (WISC), the Slosson Oral Reading Test (SORT), and the Wide Range Achievement Test (WRAT).

Claimant's performance on the PPVT indicated that he had average language reception skills, but his percentile rank was only at 56.

Claimant's performance on the Bender test showed visual perception difficulties.

Claimant's performance on the WISC indicated that he was functioning in the low-average to average range of ability. The report noted that claimant's greatest

² The medical information was obtained from the medical records claimant provided at the hearing.

weaknesses lied in his overall psychomotor ability, speed, accuracy, dexterity, and qualitative levels or reasoning.

Claimant's performance on the SORT indicated he was performing at least at his grade level, although, this test did not indicate his abilities in reading comprehension. Claimant's comprehension of paragraphs and retention ability were noted to be "quite short."

On the WRAT, claimant's percentile ranks were 45th in reading, 13th in spelling, and 19th in arithmetic.

12. In 1978, when claimant was 10 years old, claimant began having headaches, vomiting, and pain. Doctors correctly suspected that the brain tumor had returned. Claimant was re-admitted to the hospital as his intracranial pressure increased. A brain scan revealed a distinct lesion in the third ventricular area of the brain with increasing hydrocephalus (fluid). Claimant again had brain surgery, and underwent an "extensive resection of the tumor." Post-operative notes indicated that a "large amount" of the tumor was removed, but not the whole tumor. Claimant again underwent chemotherapy.

13. Results from a 1984 school achievement test, when claimant was 15 years old and in the ninth grade, showed claimant was performing below his grade level in every area tested (vocabulary, reading comprehension, grammar expression, mathematics computation, and math concepts/applications) except grammar mechanics, where he performed above his grade level. Claimant's scores placed him in the "slightly below average" range. His percentile ranks, relative to other students being tested, placed him in the extremely low range (ranging from the 20th to 40th percentile in every category), except in grammar mechanics where he performed in the

55th percentile. According to the results, a percentile rank of 50 means claimant scored below half of the students taking the test. The results specifically noted that claimant was reading at a sixth grade level.

RECORDS CONCERNING CLAIMANT AFTER THE AGE OF 18

14. On May 15, 1995, when claimant was 26 years old, Charles Jackson, Ph.D., conducted a psychological evaluation of claimant. Tests conducted included the Bender Visual Motor Gestalt Test (Bender), the Wechsler Adult Intelligence Scale-Revised (WAIS), and the Wechsler Memory Scale (WISC). Regarding the Bender test, claimant showed mild difficulty with angulation changes, which correlated with "organic mental dysfunction." Regarding the WAIS, Dr. Jackson found that claimant had difficulty processing information, but overall, had an IQ of approximately 80. This placed him in the borderline area of intellectual functioning. On the WISC, Dr. Jackson found that claimant was in the deficient range of memory functioning. Regarding his prognosis, Dr. Jackson said that claimant might be able to perform tasks that were repetitive in nature but did not require a great deal of memorization and formal cognitive processing. Dr. Jackson referred claimant to the Department of Rehabilitation (DOR). Dr. Jackson found claimant was "not competent to handle his own financial affairs due to compromised judgement."

15. On October 2, 1995, when claimant was 27 years old, Dr. Jackson conducted another psychological evaluation. Dr. Jackson conducted the Bender test, the WAIS, the WRAT, and the Minnesota Multiphasic Personality Inventory 2 (MMPI). Dr. Jackson found that claimant was pleasant and cooperative during the evaluation, but on the WAIS, displayed below normal intelligence and had moderate "cognitive inefficiency." Claimant's full-scale IQ was 76, with substantial sub-scatter about the various 11 sub-categories. On the WRAT, claimant performed at the eighth grade level

in reading and sixth grade level in arithmetic. On the MMPI, claimant's test was found to be invalid, due to his memory problems.

Overall, claimant was found to be in the borderline area of intellectual functioning, and unlikely to be able to function in a job because of his memory problems.

16. On October 8, 1996, when claimant was 28 years old, Morton Kurland, M.D., wrote a letter entitled, "confidential psychiatric report." The letter was addressed to DOR, and appeared to be an evaluation in connection with claimant's attempt to seek DOR's assistance in exploring employment opportunities.

In the letter, Dr. Kurland details claimant's medical and psychological history, and explained that claimant's history demonstrated he suffers from an "organic brain disorder" which was clearly brought about by the brain tumor found when claimant was 2 years old and subsequent brain surgeries claimant had undergone.

17. On January 29, 2019, when claimant was 50 years old, claimant underwent a psychological evaluation conducted by Clifford Taylor, Ph.D. Dr. Taylor noted in the report, that claimant does help with household chores but is directed and supervised by his mother. Claimant required prompts with self-care and personal hygiene. Claimant's mother manages his funds.

Dr. Taylor administered the WAIS, the Wechsler Memory Scale (WMS), the WRAT, and conducted interviews. On the WAIS, Dr. Taylor found claimant demonstrated "cognitive deficits across multiple areas" and that claimant scored in the extremely low range of intellectual functioning (in memory and processing) and borderline area of intellectual functioning (verbal comprehension and perceptual

reasoning). Overall, claimant was determined to have extremely low cognitive functioning.

On the WRAT, claimant's scores varied widely. Claimant scored within the average range for reading. However, claimant's spelling was at the fourth grade level, his sentence comprehension was below a second grade level, and his math computation was at approximately a third grade level. Dr. Tylor noted claimant had significant deficiencies in mathematical calculations and in reading comprehension.

Dr. Taylor diagnosed claimant with Unspecified Neurocognitive Disorder, Learning Disorder, and Methamphetamine Use Disorder (in long-term sustained remission). Dr. Taylor further concluded:

Claimant presented as a 50-year-old male. He was referred by the Department of Vocational Rehabilitation for a psychological evaluation to assess his functional abilities and capacities.

He attained overall IQ test scores in the "extremely low" range. There was evidence of variability in cognitive abilities with marked deficits in sustained concentration and attention, working memory, and processing speed. He would have difficulty participating in an education-based program due to level of cognitive functioning. He demonstrated relative strength in word reading. However, his reading comprehension was assessed to be at the 1st grade . . . level. There is report by family of multiple brain surgeries. The family noted that these surgeries occurred at

age 2 years and 10 years, and he has had cognitive deficiency consistently throughout his life since the brain surgery

18. In March 2019, claimant underwent a Situational Assessment at Desert Arc. The purpose of the Assessment was to determine claimant's work interests and ability to be placed for employment. The Situational Assessment concluded the following:

Claimant is a very polite individual who is eager to work. Throughout the assessment he expressed an interest to be employed at Desert ARC in a group setting. Based upon this assessment, his most significant identified barriers are health issues, stamina, and self-confidence. He has no difficulty adapting to a variety of work settings, relates well to direction, accepts constructive criticism, and has a positive attitude. He will need additional training to build upon his work skills and level of confidence. At this time, we do not believe claimant is ready for an independent placement. We recommend that he apply to the Inland Regional Center so that he may be approved for group placement.

19. In March 2019, claimant applied for and was denied services from the DOR. The reason DOR gave for denying his application was because "there is clear and convincing evidence . . . that [claimant] cannot benefit from [vocational rehabilitation] services in terms of an employment outcome due to the severity of [his] disability."

TESTIMONY OF SANDRA BROOKS, PH.D.

20. Dr. Brooks is a staff psychologist at IRC. Dr. Brooks obtained her Ph.D. in clinical psychology in 2006 from Loma Linda University. She also has a Bachelor of Arts in English and Psychology and a Master of Science in Experimental Psychology. Dr. Brooks has been a staff psychologist at IRC since 2010, where she assists in the assessment and diagnosis of persons for the purpose of determining eligibility for regional center services. Prior to that, she served as a psychological assistant at IRC from 2007 to 2009. Prior to that, she served in multiple positions across the country. She has been involved with many professional presentations in the field of psychology, and attended trainings and workshops in her field. Dr. Brooks testified at the hearing. The following is a summary of her testimony.

Dr. Brooks reviewed the reports detailed above. Dr. Brooks explained that during claimant's developmental years, claimant had average cognitive abilities and received special education services under the category of specific learning disability. Nothing in claimant's early years demonstrated he had sub-average intellectual functioning or deficits in adaptive skills. The latter reports also did not show significant sub-average intellectual abilities, and even if they did, the cognitive decline occurred after the age of 18. Claimant also suffered a brain aneurism at age 30, which could have contributed to his cognitive decline later in life. Claimant also showed variability across tested domains, which is not consistent with intellectual disability. Today, claimant functions in the borderline intellectual range and according to the report by Dr. Taylor, claimant has the ability to function in his daily life.

Accordingly, claimant does not meet the requirements to become eligible for IRC services under the fifth category.

TESTIMONY OF CLAIMANT'S MOTHER

21. Claimant's mother's testimony is summarized as follows: claimant requires constant verbal prompts for his self-care activities. Claimant chooses inappropriate clothing for the environment. Claimant's tumor is located in his pituitary gland, which affects his feelings of hunger. Thus, claimant has weight fluctuations because it can make him feel hungry all the time. Claimant's articulation is not always clear and although claimant tries to express himself, he often does not know how to answer questions.

Claimant's memory is problematic. Claimant's mother must go to the doctor with him because claimant cannot organize his thoughts and express himself. Claimant thinks everyone is his friend and cannot differentiate between a friend and someone who might take advantage of him. Claimant's mother said claimant used to give away money because he wanted friends. He is susceptible to the influence of outsiders.

Claimant tried to live alone at one point in his life but he is a danger to himself because he needs supervision. He is child-like. He cannot handle his finances; claimant's mother is the payee.

Aside from the two brain surgeries claimant had at age 2 and age 10, claimant started getting very sick again in his 30s. In 1998, it was discovered that he had a brain aneurism. The aneurism was fixed by placing five metal clips in claimant's brain.

In 2009, claimant began to experience a drooping face and his tongue was pointing to one side. It was determined that the tumor had again begun to grow, however, because of all the scar tissue present from claimant's two brain surgeries, claimant was not a candidate for surgery.

Claimant's mother hopes to have claimant placed at Desert Arc where he can become employed in a group setting. She hopes that claimant qualifies for regional center services because she will not always be around and is trying to plan ahead.

TESTIMONY OF CLAIMANT'S BROTHER

22. Claimant's brother's testimony is summarized as follows: he is two and a half years younger than claimant. As children, claimant was always picked on because he was slow. Claimant tried to engage in physical activities but did not have the coordination. Claimant's self-care skills were not good. Claimant's mother always had to tell claimant what to do. Claimant cannot fend for himself. Claimant was able to obtain a driver license, but probably should not be driving. Claimant used to drive a golf cart, but he ran into many things when doing so. Claimant is a very happy person and very friendly person. Claimant's brother was emotional at times during his testimony and very sincere. He appeared to be very concerned about claimant and his testimony was heartfelt.

LEGAL CONCLUSIONS

Applicable Law

1. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: To prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the

pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

2. The department is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.)

3. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq. 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. (*Ibid.*)

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

(a) “Developmental Disability” means a disability that is attributable to intellectual disability³, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability.

(b) The Developmental Disability shall:

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.

- (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 intellectual disability, 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 are not

associated with a neurological impairment that results in a need for treatment similar to that required for intellectual disability.”

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.

Conclusion

7. Claimant met his burden in establishing eligibility for regional center services under the fifth category. Claimant has a condition similar to an intellectual disability.

Eligibility under the fifth category requires a determination as to whether an individual functions in a manner that is similar to that of a person with an intellectual disability or requires treatment similar to a person with an intellectual disability. No evidence was presented regarding whether claimant requires treatment similar to a

person with an intellectual disability, so that method of qualifying for eligibility was not established.

However, the records prior to claimant turning 18 show that, while claimant's IQ score may have shown average intelligence, claimant functioned substantially below his grade level in almost all areas throughout his academic life. Although claimant's school district served claimant under the category of learning disability, the fact that the school identified claimant's sub-par academic functioning as a learning disability is not conclusive. Claimant needed special assistance, and did not meet the criteria at any time for intellectual disability, so the school could not classify him in that category. There is no "fifth category" in special education setting. Thus, because of claimant's sub-par academic performance, he was placed in special education under the category of learning disability. Consequently, because there is no "fifth category" equivalent for special education, the fact that claimant was served under learning disability tends to show he functioned like a person with an intellectual disability, without actually meeting the intellectual disability diagnostic criteria.

It is also important to note that, although the ARCA Guidelines set forth criteria to aid in the determination of whether a person meets the criteria for the fifth category, which include IQ tests, they are just that – guidelines. They are neither statutory or regulatory requirements that are dispositive of whether a person qualifies for regional center services under the fifth category. Even the ARCA Guidelines recognize their limitations, as they provide for a person to qualify under the fifth category even if they have a higher cognitive ability. Specifically, the ARCA Guidelines point out that the closer someone's IQ is to average functioning, the more important it is to show adaptive deficits that are related to the person's cognitive limitations.

Accordingly, a person with an average cognitive ability who has adaptive deficits may qualify under the fifth category.

The 1976 educational evaluation, which included the WAIS, noted claimant's deficits in areas such as his overall psychomotor ability, speed, accuracy, dexterity, and qualitative levels of reasoning. These are both cognitive and adaptive limitations. Claimant was also observed to have very poor visual perception. On the WRAT, claimant's percentile ranks were 45th in reading, 13th in spelling, and 19th in arithmetic – meaning he functioned, collectively, well below virtually all students who took the various tests.

Results from claimant's 1984 school achievement test, when claimant was 15 years old and in the ninth grade, showed claimant was performing below his grade level in every area tested except grammar. Claimant's scores placed him in the "slightly below average" range. His percentile ranks, relative to other students being tested, placed him in the extremely low range (ranging from the 20th to 40th percentile in every category), except in grammar mechanics where he performed in the 55th percentile. According to the results, a percentile rank of 50 means claimant scored below half of the students taking the test. The results specifically noted that claimant was reading at a sixth grade level. These academic tests are designed to be objective, and although not formal psychological assessments, are important indicators of a person's intellectual abilities. Claimant's consistent difficulties academically show he was significantly sub-average in his cognitive abilities, relative to his same-aged peers.

Following the age of 18, claimant had several assessments that continued to show not only his cognitive deficits, but noted his adaptive deficits. Claimant's abilities appeared to be declining in his 20s, and even more so following his brain aneurism in his 30s. Dr. Taylor specifically attributed this cognitive difficulty to Unspecified

Neurocognitive Disorder, caused by claimant's brain tumor and surgeries at the age of 2 and 10.

Claimant continues to have cognitive difficulties that place him closer to functioning like a person with an intellectual disability than a person who has average cognitive functioning. In 2019, Dr. Taylor administered the WAIS, the WMS, the WRAT, and conducted interviews. On the WAIS, Dr. Taylor found claimant demonstrated "cognitive deficits across multiple areas" and that claimant scored in the extremely low range of intellectual functioning (in memory and processing) and borderline area of intellectual functioning (verbal comprehension and perceptual reasoning). Overall, claimant was determined to have extremely low cognitive functioning.

Claimant's lifelong difficulties, which continue to get worse, are attributable to the brain tumor he has suffered from since the age of two years old. Today, claimant is substantially disabled. Even DOR has deemed his disability too severe to render employment help. Claimant has extreme difficulty with his expressive language, self-care, and self-direction. He is not able to be financially independent, and needs to be prompted in self-care and self-direction by his mother. As such, he is not capable of living independently. Claimant has a long and well-documented history of difficulty with memory and retention of information, which is why he has been unable to be self-sufficient. Claimant's present substantial disabilities in three or more areas of major life activities relate to his brain tumor, and subsequent two surgeries, which occurred during his developmental years.

Evidence presented by IRC appeared to focus almost exclusively on claimant's IQ scores prior to the age of 18. However, for the reasons discussed above, the IQ score is just one part of the equation. The Lanterman Act is to be construed liberally, and the fifth category was specifically designed to reach those individuals in need of

services and supports but who otherwise did not meet diagnostic criteria under other traditional categories. IRC acknowledged that claimant's cognitive decline appeared to worsen following age 18, and although sympathetic, took the position that his current cognitive decline does not render him eligible for regional center services because it did not occur prior to the age of 18. The fact that he has declined cognitively in the present day, however, does not mean he is ineligible. As long as the disabling condition responsible for his cognitive decline *occurred before the age of 18*, which it did, claimant may be found eligible.⁴

On this record, a preponderance of the evidence established that claimant has a condition similar to an intellectual disability and that the condition occurred prior to the age of 18. Claimant is also substantially disabled. Accordingly, claimant is eligible for regional center services.

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⁴ Interestingly, the informal meeting letter memorializing the meeting between IRC representatives, claimant, and claimant's mother, indicated that claimant did not have significantly sub-average cognitive abilities prior to the age of 18, which would preclude claimant from eligibility under intellectual disability. However, claimant was not seeking IRC services based on intellectual disability. The letter also did not explain why claimant was not eligible for regional center services under the fifth category, which has two independent bases for eligibility, and does not require a person have significantly sub-average intellectual ability. To the contrary, a person with higher cognitive abilities may still qualify for regional center services under the fifth category if their adaptive skills show substantial deficits, among other things.

ORDER

Claimant's appeal from Inland Regional Center's determination that he is not eligible for regional center services under the fifth category is granted. Claimant is eligible for regional center services and supports under the fifth category as set forth in the Lanterman Act. Within 15 days from the date of this decision, the parties are ordered to convene an Interdisciplinary Team meeting to provide for services and supports.

DATE: September 5, 2019

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 90 days.