BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, and SAN DIEGO REGIONAL CENTER, Agency.	OAH No. 2014020967

DECISION

Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, State of California, heard this matter in San Diego California on June 30, 2014.

Ron House, Counsel for the San Diego Regional Center (SDRC or agency), represented SDRC.

Claimant's mother (mother) represented claimant.

The matter was submitted on June 30, 2014.

ISSUE

Is claimant eligible for agency services based on a diagnosis of either epilepsy or autistic disorder?

FACTUAL FINDINGS

JURISDICTION

1. Claimant is 16 years old.

2. Claimant originally applied for regional center services in 2004. On June 16, 2004, claimant, who was almost seven years old, attended a SDRC intake session. Claimant was accompanied by his mother. (Exh. 3-17 through 3-20) Subsequently, on

September 2, 2004, the SDRC intake assessment team concluded that claimant did not qualify for services because he did not have a substantially disabling developmental disability. (Exh. 3-6)

3. In 2013 claimant again applied for regional center services based on the results of some assessments that were done at Amen Clinics, Inc. (Exh. 3-11 through 3-15) On January 23, 2014, the SDRC intake assessment team again concluded that claimant did not qualify for regional center services. (Exh. 3-4) Subsequently, the SDRC intake assessment team reviewed claimant's eligibility and, on June 12, 2014, the team concluded, for the third time, that claimant was not eligible for services. (Exh. 3-3)

4. On February 26, 2014, after the second assessment, claimant filed a Fair Hearing Request and the instant hearing ensued. The hearing focused on two areas of eligibility, epilepsy and autistic disorder.

CLAIMANT'S EVIDENCE

5. One of claimant's family friends referred claimant and his mother to the Amen Clinic, Inc. so that claimant could be evaluated. Claimant underwent an evaluation on August 1, 2013. The evaluator was Dr. Garrett Halweg, M.D., a psychiatrist. Dr. Halweg noted that claimant's chief complaint upon presentation was ". . . displaying symptoms of ADD and depression and . . . struggling with his weight." (Exh. 5-11) Claimant had begun displaying symptoms of depression that appeared with no identifiable trigger. Mother discovered that claimant was smoking marijuana, and she believed this triggered his irritability and depression. As concerns epilepsy, Dr. Halweg noted the following: "At age five, a neurologist diagnosed [claimant] with epilepsy; however, his mother questions this diagnosis because he has suffered no seizures or symptoms of the illness." (Exh. 5-12)

Dr. Halweg took a medical history, a developmental history, a family history, and a social history. He conducted a mental status examination and had claimant's parents complete some questionnaires. Dr. Halweg conducted a "brain SPECT study."[1]

As a result of this evaluation, Dr. Halweg made the following psychiatric diagnoses:

Intellectual Disability, Moderate 318.0

Attention Deficit/Hyperactivity Disorder, Combined Type 314.01

Autistic Spectrum Disorder 299.00

Unspecified Depressive Disorder 311

Based on the evaluation, Dr. Halweg referred claimant to the "Regional Center for services or a program like College Internship Program." (Exh. 5-22)

6. Pursuant to stipulations from the parties, Dr. Halweg testified during the instant hearing via telephone. Dr. Halweg testified in conformity with the report he wrote concerning claimant's evaluation. Dr. Halweg's testimony revealed that his diagnoses resulted primarily from the SPECT study[2] results. The SPECT study led Dr.

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[1] A "SPECT study" is a brain imaging scan, also known as a neuroimaging scan.

[2] The "SPECT study" actually consisted of two neuroimaging scans. One scan when claimant was at rest (base-line scan) and one scan after claimant's brain was activated using a performance test (concentration scan).

Halweg to the following findings:

1. Increased tracer activity in the anterior cingulate gyrus and lateral prefrontal cortices seen on both studies, more intense at rest.
2. Increased left and right basal ganglia and insular tracer activity seen on both studies, more intense at rest.
3. Decreased temporal lobe tracer activity seen on both studies, more severe at rest, and increased right temporal lobe tracer activity seen on both studies, more intense with concentration.
4. Increased focal thalamic tracer activity seen on both studies, more intense with concentration.
5. Increased left and right parietal lobe tracer activity seen on both studies, more intense at rest.
6. Patchy increased tracer activity seen at rest, and diamond pattern of limbic activity seen with concentration.
7. Very mild scalloping seen on both studies.
8. Brain trauma. A combination of findings suggests past brain trauma . . . . (Exh. 5-60 through 5-61)

Dr. Halweg testified that the scan results indicated that claimant's brain's executive function (empathy, planning, etc.) was impaired. This would impair claimant's ability to function well in a job setting and in a social setting, and it would impair his ability to learn. According to Dr. Halweg, this finding "requires further investigation."

Dr. Halweg testified that the neuroimaging results do not "neatly correlate" with the Diagnostic and Statistical Manual, fifth edition (DSM-5) diagnostic criteria. Dr. Halweg then testified that claimant's diagnoses "could be described as autistic spectrum disorder, intellectual disability, PDD, or ADD." Dr. Halweg believes that claimant could

benefit from regional center assistance with seeking and maintaining gainful employment and in gaining "social success."

SDRC EVIDENCE

7. On January 1, 2014, claimant was evaluated by Beatriz E. C. Netter, Ph.D., a clinical psychologist. The reason for the evaluation was: "[Claimant] was referred for a psychological evaluation to assist in the determination of eligibility for services due to suspicion of autism. He was recently evaluated at the Amen Clinic where he was diagnosed with autism spectrum disorder and intellectual disability." (Exh. 5-101) Dr. Netter's evaluation consisted of reviewing past records, including the SPECT scan results; a clinical interview; observations of claimant's interactions with the examiner; and the results obtained from the Wechsler Adult Intelligence Scale-IV (WAIS-IV), the Vineland Adaptive Behavior Scales, Second Edition, and the Autism Diagnostic Observation Schedule-2 (ADOS2)[3]. Based on this comprehensive assessment, Dr. Netter reached the following diagnostic impressions:

> It is this examiner's impression that [claimant] does not meet the criteria for autism spectrum disorder in that he does not demonstrate the marked impairment in social communication nor the repetitive or stereotyped behaviors or restricted interests that are indicative of the disorder. He demonstrates good integration of non-verbal and verbal communication, the ability to engage in reciprocal conversation with adequate verbalizations, adding

[3] The ADOS2 is considered to be the gold standard for diagnosing autism.

> spontaneous information and responding to the other person's leads; he is also able to identify different emotions and the contexts in which they occur in addition to understanding typical social relationships. His IEPs and school evaluations did not raise any social concerns nor indicate the presence of any odd or repetitive behaviors.
>
> Although [claimant] has mild deficits in all areas of adaptive functioning, he does not meet criteria for an intellectual disability as his cognitive skills are in the low-average to average range. (Exh. 5-110)

8. Thomas Montgomery, M.D., the physician consultant with SDRC, who typically diagnoses neurologically-based developmental disabilities, reviewed all of the records concerning claimant, including the Dr. Halweg's SPECT scan results. Additionally, Dr. Montgomery was present for Dr. Halweg's testimony.

Dr. Montgomery's Testimony Concerning Epilepsy

Dr. Montgomery testified that a March 30, 2004, EEG report concerning claimant noted: "Abnormal EEG due to the presence of independent bifrontal sharp waves potentiated by sleep. Such findings give evidence to support a clinical diagnosis of epilepsy. Clinical correlation is advised." Dr. Montgomery further noted that clinical information obtained by Rayburn R. Skoglund, M.D., did not support a diagnosis of epilepsy. In Dr. Skoglund's report, dated January 30, 2004, Dr. Skoglund noted the following: "He [claimant] has daydreams and spaces out to the point where they really cannot attract his attention, but has had no overt seizures." (Exh. 6-18) This information is consistent with Dr. Halweg's August 1, 2013, note that, "At age five, a neurologist

diagnosed [claimant] with epilepsy; however, his mother questions this diagnosis because he has suffered no seizures or symptoms of the illness." (Exh. 5-12)

Dr. Montgomery testified that one cannot diagnose epilepsy in the absence of observed seizures; therefore, claimant's records and his mother's observations prove that claimant does not, and never did, have epilepsy.

Dr. Montgomery's Testimony Concerning Dr. Halweg's SPECT Scan/Neuroimaging Results

SPECT scans are not recognized, nor accepted in the medical community as a means for diagnosing disabilities. SPECT scans are currently being used in research and are "not established as appropriate for diagnostic purposes." In support of this opinion, Dr. Montgomery provided some literature from the National Institute of Mental Health (NIMH). An NIMH article, entitled "Neuroimaging and Mental Illness: A Window Into the Brain," states:

> Brain imaging scans, also called neuroimaging scans, are being used more and more to help detect and diagnose a number of medical disorders and illnesses. Currently, the main use of brain scans for mental disorders is in research studies to learn more about the disorders. Brain scans alone cannot be used to diagnose a mental disorder, such as autism, anxiety, depression, schizophrenia, or bipolar disorder. (Exh. 9-6)

According to Dr. Montgomery, a review of all of the information concerning claimant revealed that "there is no clinical evidence to support a diagnosis of autism."

Dr. Harry Eisner's Testimony

9. Harry Eisner, Ph.D., the clinical psychologist who coordinates psychological services for SDRC clients, reviewed all of claimant's records and was also present during Dr. Halweg's testimony. Dr. Eisner's testimony concerning whether claimant has autism is summarized as follows: If claimant had autism, he would have exhibited behaviors consistent with an autism diagnosis in the early years of his life, from ages three to five. A review of claimant's school records, including detailed Individualized Education Program (IEP) notes, and a Children's Hospital developmental evaluation, dated May 14, 2003, reveal that from 2002 until now, claimant has not exhibited signs or symptoms of autism. Historically, claimant has had no social goals noted in his IEPs, and there are no reports of "unexpected behaviors;" claimant's IEPs indicate claimant qualified for limited educational supports based on "other health impaired," not autism. Socially, claimant was getting along well in school, and academically he was earning B's and C's. Claimant did display learning disability patterns; however, when he turned 16, it appears he began developing emotional problems (depression) due to marijuana use and bullying. As a result of emotional problems and learning disabilities, claimant began failing classes instead of earning B's and C's. SPECT scan results are not the standard of care for diagnosing autism; and, based on claimant's documented developmental history in conjunction with Dr. Netter's comprehensive evaluation (which did meet the standard of care for diagnosing autism), Dr. Eisner concluded that claimant does not suffer from any autism spectrum disorders.

LEGAL CONCLUSIONS

1. California Welfare and Institutions Code section 4512 defines a "Developmental Disability" as a disability which originates before an individual attains

age 18, continues, or can be expected to continue, indefinitely . . . ." California Code of Regulations, title 17, section 54000 further defines "Developmental Disability" as follows:

(a) 'Developmental Disability' means a disability that is attributable to mental retardation, 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 are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

2. 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.

3. The facts, considered as a whole, reveal that claimant does not have epilepsy, autism, or any other qualifying "Developmental Disability" that results in "substantial disability." The burden rests on claimant to establish that he suffers from a qualifying, "substantial," "Developmental Disability" and, in this case, claimant failed to establish his eligibility by a preponderance of the evidence. (Evid. Code, § 115.)

4. Claimant was fully psychologically evaluated by Dr. Netter on January 1, 2014, only five months prior to the instant hearing, and Drs. Montgomery and Eisner recently performed a complete review of claimant's medical history. The only indications (mentions of epilepsy and autism) that claimant may have a qualifying condition were considered by all three experts and were ruled out. All three experts, Dr. Netter, Dr. Montgomery, and Dr. Eisner, concluded that claimant does not qualify for SDRC services.

ORDER

SDRC's conclusion that claimant is not eligible for regional center services is affirmed.

DATED: July 14, 2014.

_____/s/_____

ROY W. HEWITT

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is a final administrative decision pursuant to Welfare and Institutions Code section 4712.5(b)(2). Both parties are bound hereby. Either party may appeal this decision to a court of competent jurisdiction within 90 days.