

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

VALLEY MOUNTAIN REGIONAL CENTER,
Service Agency.

OAH No. 2015120498

DECISION

A fair hearing was held on July 12, 2016, August 8, 2016, and September 2, 2016, before Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, in Stockton, California.

Anthony Hill, Assistant Director of Case Management, represented Valley Mountain Regional Center (VMRC).

David E. Drivon, Attorney at Law, represented claimant, who was not present at hearing. Mr. Drivon was assisted by Ellen S. Schwarzenberg, Attorney at Law, claimant's criminal defense attorney.

The record was held open to allow the parties to file written closing briefs. On December 13, 2016, claimant filed his closing brief, which was marked for identification as Exhibit G. On January 23, 2017, VMRC filed its opposing brief, which was marked for identification as Exhibit 35. On January 27, 2017, claimant filed his reply brief, which was marked for identification as Exhibit H. The record closed and the matter was submitted for decision on January 27, 2017.

ISSUES

Does claimant qualify for services from VMRC under the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., because he is an individual with an intellectual disability, or because he has a disabling condition closely related to intellectual disability or which requires treatment similar to that required for individuals with an intellectual disability?

FACTUAL FINDINGS

1. Claimant was born in 1994, and is 22 years old. He is currently in custody at the San Joaquin County Jail – French Camp pending criminal charges against him. On October 23, 2014, the San Joaquin County Superior Court referred claimant to VMRC to determine whether he was eligible to receive VMRC supports and services.

2. By way of a Notice of Proposed Action, dated November 2, 2015, VMRC informed claimant that he was being denied eligibility for regional center services because his “condition [did] not meet the statutory definition of a developmental disability.” The Notice of Proposed Action also advised claimant of his right to appeal this determination. Claimant appealed from VMRC’s determination and requested a fair hearing on November 29, 2015.

3. Claimant has been the subject of numerous evaluations and assessments, primarily related to meeting his educational needs, over the last 15 years. Those evaluations and assessments are summarized below.

EVALUATIONS AND ASSESSMENTS OF CLAIMANT

4. Psychoeducational Evaluation – December 9, 2003. The earliest evaluation offered at hearing is a Psychoeducational Evaluation conducted by the Lodi Unified School District (Lodi) on December 9, 2003, when claimant was nine years and five months old and a student in the fourth grade. The evaluation specifies that the

assessment is a legally-mandated triennial reevaluation to assist in determining claimant's "continued eligibility for special education services and the appropriateness of his present placement."¹ The assessment was conducted by Lodi School Psychologist Malu Bellatin, with the assistance of a special education program Special Day Class (SDC) teacher.

5. The assessor noted that, although claimant's primary home language was Spanish, he had been primarily educated in English. For this reason, and because language proficiency testing suggested that claimant's dominant language was English, the assessor determined that it was "most appropriate" to conduct the evaluation using English and nonverbal measures. The assessor added the following advisory:

Although the measures utilized in this evaluation are considered fair and appropriate, they should be interpreted with caution because no tests are standardized on bilingual English language learners with the exact language and acculturation levels as [claimant]. Therefore, his IEP team will also consider other sources of data, such as work samples, observations, and teacher/parent input. Thus, for purposes of special education eligibility and placement, the procedures are to be considered valid.

¹ According to a Lodi Psychoeducational Evaluation, dated December 15, 2006, claimant was initially assessed and began receiving special education services due to speech and language impairment in 2000, while in kindergarten. The impairment later developed into a specific learning disability.

6. The Health and Development Background section of the evaluation described claimant's development from conception to that time as being normal, except for learning difficulties. Claimant's health and medical history indicated no significant events.

7. The assessor administered the following tests to claimant: The Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III Achievement), the Universal Nonverbal Intelligence Test (UNIT), Development Test of Visual-Motor Integration (VMI), Woodcock-Munoz Tests of Cognitive Ability Bateria-R, and the Comprehensive Test of Phonological Processing (CTOPP). In addition, claimant's mother and teacher completed the Connors' Rating Scale-Revised: Long Version questionnaire to evaluate their perceptions of claimant's behavioral and emotional functioning.

8. On the WJ-III Achievement test, claimant scored 57 (0.2 percentile ranking) in Math Calculation Skills; 60 (60 percentile ranking) in Math Applied Problems; 43 (less than 0.1 percentile ranking) in Broad Reading Skills; 46 (less than 0.1 percentile ranking) in Reading Comprehension; and 48 (less than 0.1 percentile ranking) in Written Expression. The assessor concluded that claimant was achieving at a first grade level in math and written language and at a kindergarten level in reading.

9. On the UNIT, claimant attained a Full Scale IQ of 66 (1st percentile – very delayed); a Memory Quotient IQ of 49 (less than 0.1 percentile – very delayed); a Reasoning Quotient score of 91 (27th percentile – average), a Symbolic Quotient score of 63 (0.7 percentile – very delayed); and a Nonsymbolic Quotient score of 77 (6th percentile – delayed). Claimant's VMI test score was 91 (27th percentile – average).

10. On the Woodcock-Munoz Cognitive test, claimant scored 76 (5th percentile) in Oral Language Ability (English), with scores of 68 (2nd percentile) in Picture Vocabulary and 88 (21st percentile) in Verbal Analogies, while claimant's Oral Language Ability (Spanish) score was 47 (less than 1st percentile) with scores of 25 (less

than 1st percentile) in Picture Vocabulary and 75 (5th percentile) in Verbal Analogies. CTOPP scores were 82 (below average) in Phonological Awareness; 76 (poor) in Phonological Memory; and 61 (very poor) in Rapid Naming. The assessor summarized claimant's cognitive test results, in part, as follows:

Current cognitive testing suggests that [claimant] has Nonverbal Reasoning ability within the Average range for his age, as evidenced by his UNIT Reasoning Quotient IQ of 91. Claimant's relative cognitive processing strengths appear to be in abstract nonverbal reasoning, processing; he performed in the average range on UNIT subtest, comprising the Reasoning Quotient Scale. These findings suggest that claimant's nonverbal reasoning ability is significantly better developed than his memory ability. In addition, current cognitive testing suggests that claimant's Verbal Reasoning Ability is Borderline for his age, as evidenced by his Woodcock – Munoz Cognitive Oral Language Ability standard score of 76. These findings suggest that claimant's ability to reason without using words is significantly better developed than his ability to reason utilizing language. Given the magnitude of the discrepancies, the UNIT Full-Scale IQ will not be interpreted, as it is rendered meaningless due to the discrepancy. It is felt that claimant's UNIT Reasoning Quotient of 91 provides the best estimate of claimant's true cognitive potential.

[¶] . . . [¶]

Claimant's cognitive processing weaknesses appear to be in memory processing; he performed in the very delayed range on UNIT subtest, comprising the visual memory quotient. Claimant also demonstrated cognitive processing weaknesses in auditory processing; he performed in the poor and very poor on the CTOPP subtests comprising the auditory processing and auditory memory quotient. These findings suggest that claimant's visual and auditory memory, as well as auditory processing, are delayed.

(Underline in original.)

11. The assessor's Conclusions and Recommendations included the following information:

Claimant appears to continue to meet eligibility criteria for special education services as an individual with exceptional needs under the Specific Learning Disability Test findings suggest that his academic achievement: reading, math, and written language standard scores [of] 43 to 57 appear to be significantly discrepant (more than 22.5+/- 4 points below) from his intellectual ability (as evidenced by his UNIT nonverbal reasoning scale IQ [of] 91). **Disorders in the basic psychological processes of auditory processing and visual and auditory memory appeared to be the primary explanation for the obtained discrepancy.** It is this Evaluator's opinion that claimant's ability – achievement discrepancy cannot be corrected within the general

education program and appears to require special education services.

It is this Evaluator's opinion based on the psychoeducational evaluation that the degree of claimant's impairment may require continued special education and related services.

(Bolding added.)

12. The assessor recommended the following strategies to address claimant's auditory processing and memory weaknesses:

- (a) Repetition and practice/drill; and
 - (b) Make notes and drawings to reinforce learning, when appropriate . . .
- [¶] . . . [¶]

13. Psychoeducational Evaluation – November and December 2006. Lodi conducted another Psychoeducational Evaluation of claimant on November 30, and December 5, 2006, when claimant was twelve years and nine months old and in the seventh grade. The assessment was a triennial evaluation related to special education services he received as part of the special day class for the learning disabled at one of Lodi's middle schools. The assessor was Lodi School Psychologist Terry Herink.

14. The assessor interviewed claimant and claimant's teachers, reviewed records, and administered the following tests: The UNIT test; the Naglieri Nonverbal Ability Test (NNAT); the VMI; the Test of Visual Perceptual Skills Upper Level-Revised (TVPSUL-R), the CTOPP, the Test of Word Reading Efficiency (TOWRE); and the Adaptive Behavior Evaluation Scale – Revised School Version (ABES-R SV).

15. Claimant attained a standard score of 68 (2nd percentile) on the NNAT, which indicated his level of nonverbal functioning fell in the deficient range. On the UNIT, claimant attained a Full Scale IQ of 67; a Memory Quotient score of 58; a

Reasoning Quotient score of 84; a Symbolic Quotient score of 72; and a Nonsymbolic Quotient score of 69. The assessor summarized claimant's cognitive test results, in part, as follows:

[redacted] . . . [redacted]

[Claimant's] Full Scale IQ of 67 (1st percentile) suggests his present level of intellectual functioning falls in the very delayed range.

[Claimant's] ability to analyze, synthesize or reorganize visual material is better developed than the ability to comprehend and reproduce visual stimuli. [Claimant] may best learn new material when presented through the use of relationships, comparisons, and discovery learning. Memory of information may be facilitated by understanding relationships.

[redacted] . . . [redacted]

16. On the VMI, claimant scored 69 (2nd percentile), which suggested a delay in his ability to integrate visual perception with a fine-motor response. TVPSUL-R test results indicated that claimant had strength in his ability to see a form and find it even when altered in some manner, but also suggested weaknesses in his ability to perceive a form visually and find it when hidden in a conglomerated ground of matter. CTOPP testing indicated that claimant had an overall delay in the use of phonological information, especially the sound structure of oral language, in processing written language, and in reading. Adaptive behavior testing indicated that claimant possessed average self-care skills, but fell in the delayed range for communication, home living,

social, community use, self-direction, health and safety, functional academics, leisure, and work.

17. Claimant's test scores on the TOWRE subtests were both below the 1st percentile and indicated that he had significant difficulty in his ability to efficiently read words or pronounce phonemically correct non-words. Claimant's WJ-III scores also reflected that all academic skills were delayed.

18. The assessor's Summary and Educational Implications included the following information:

[¶] . . . [¶]

The obtained estimate of [claimant's] present level of cognitive functioning suggests low average to deficient ability.

Behavioral data suggests delays in all areas of adaptive behavior, except self-care, which falls in the average range.

Academic testing . . . indicates all areas to be delayed.

[Claimant] appears to meet eligibility criteria as an individual with exceptional needs There is an educationally significant discrepancy between his ability and achievement test scores. This suggests that he is currently not working up to his potential. **Disorders in the following basic psychological process[es] would appear to offer an explanation for the obtained ability/achievement discrepancy:**

(i) **Visual memory**

(ii) Auditory memory

(iii) Sensory-motor skills

(iv) Cognitive Abilities

(Bolding added.)

19. The assessor recommended the following strategies to address claimant's stated deficiencies:

- 1) Use a multi-modality approach in teaching [claimant] whenever possible.
- 2) Encourage claimant to record assignments in a daily planner.
- 3) Participation in a highly language based reading program that involves constant repetition of the phonological aspects of English.
- 4) Continual reinforcement of new information learned due to memory deficits.
- 5) Teaching claimant basic knowledge (e.g., full birth date, address, etc.) will aid him as he becomes more independent.
- 6) Take advantage of intervention and tutorial services offered by the school and school district.

20. December 2006 IEP. Claimant's December 18, 2006 IEP identifies his primary disability as a non-severe specific learning disability. Claimant's secondary disability is identified as "None." On standards testing for English/Language Arts and Math, claimant was assessed as "Far Below Basic." With respect to Adaptive Living/Daily Living Skills, the IEP reflects that claimant's self-care skills are appropriate for his age, and that "psych testing indicates [claimant's] adaptive behavior skills are all delayed except in the area of self-care. Comments related to claimant's "Preacademic/Academic/Functional Skills" included the following:

Comprehension very low. Working in a 1 – 2 grade spelling book. Can write a sentence by following a model. He can

alphabetize by first letter. In math, he can do addition and subtraction up to three digit numbers using a number line for reinforcement. He can regroup. Math application skills are low in time and money.

21. December 2007 IEP. Lodi prepared an annual review IEP for claimant on December 6, 2007, when he was 13 years old and in the eighth grade. Again, the IEP identifies claimant's primary disability as a non-severe specific learning disability and claimant's secondary disability is identified as "None." On standards testing for English/Language Arts, claimant was again assessed as "Far Below Basic," and as "Below Basic" in Math. The 2007 IEP contains the identical comments regarding claimant's Adaptive/Daily Living Skills as specified in the 2006 IEP.

22. Claimant's "Preadademic/Academic/Functional Skills" were described as follows:

READING: In the classroom [claimant] is reading at a 1st grade level. He is able to decode CVC words. He needs visual context clues for comprehension. LANGUAGE ARTS: He is working in a 2nd grade speller. He can alphabetize by first letter. He can use a dictionary and write a sentence. MATH: can add and subtract with regrouping. He can multiply with single-digits using a times chart.²

(Capitalization in original.)

² "CVC words" are short one syllable words that begin with a consonant, followed by a short vowel, ending with a consonant.

23. The 2007 IEP included the following information regarding claimant's UNIT scores:

Using the UNIT, Reasoning Quotient is classified in the low average range, Symbolic Quotient falls in the borderline range, Nonsymbolic Quotient falls in the upper limits of the deficient range and Memory Quotient falls in the very delayed range. Difficulties with memory, sensory-motor skills and cognitive.

24. December 2008 IEP. On December 4, 2008, Lodi prepared an annual review IEP for claimant. He was 14 years old and in the ninth grade. The IEP confirmed his primary disability as an individual with a specific learning disability, and described his secondary disability as "None." On standards testing for English/Language Arts, claimant was again assessed as "Far Below Basic," and as "Below Basic" in Math. Comments regarding claimant's "Preacademic/Academic/Functional Skills remained the same as specified in the 2007 IEP. The Adaptive/Daily Living Skills comments are also the same specified in the previous IEP, with the additional note that claimant comes to class on time and is prepared, dresses appropriately, and is well groomed.

25. Psychoeducational Re-Evaluation Report– November 2009. Lodi School Psychologist Huong Vo prepared a Psychoeducational Re-Evaluation Report on November 16, 2009, when claimant was 15 years and 9 months old and in the tenth grade. Claimant was not subjected to any additional assessments at that time. His triennial psychoeducational evaluation was waived. The assessor did, however, review claimant's prior assessments and history and summarized the appropriateness of his special education placement.

26. The assessor summarized claimant's initial evaluation in October 2000, which led to his placement in the special education program. The summary includes the following pertinent information:

[T]he best estimate of [claimant's] present level of cognitive functioning suggested quite varied reasoning and problem solving; ranging from the upper limit of the Low Average range on nonverbal reasoning tasks, to the Borderline range on nonsymbolic tasks, and within the Delayed range on symbolic and verbal tasks in English and Spanish. The best estimate of his potential is suggested to fall in the Low Average range. Ability scores were likely depressed due to severe language and learning disabilities, strengths were found in reasoning/analysis/synthesis/evaluation . . . [claimant's] visual-motor integration skills fell in the Low Average range. In contrast, weaknesses were found in Spanish and English oral language skills, comprehension-knowledge, short term visual auditory memory skills, auditory visual processing, and long-term retrieval skills. . . . [Claimant] is eligible as an individual with exceptional needs due to a [Specific Learning Disability]. A severe discrepancy was found between his nonverbal reasoning ability (Unit: SS = 68) and math achievement (SS = 47) with processing deficits in auditory (Bateria-R: SS = 52) and visual processing (Bateria-R: SS = 61), and short-term (Bateria-R: SS = 42) and long-term memory (Bateria-R: SS =

61). He also met eligibility under a severe delays found in English and Spanish expression and receptive language skills.

27. After reviewing claimant's prior assessments, the assessor summarized her conclusions, as follows:

[Claimant] has been assessed in [sic] multiple occasions and found to have a discrepancy between ability and achievement in all academic areas. He appears to be appropriately placed within the education setting of the SDC-LH [Learning Handicapped] classroom. . . . [Claimant] continues to qualify for special education services

28. December 2009 IEP. Lodi prepared a triennial assessment IEP for claimant on December 6, 2007, when he was 15 years old and in the tenth grade. In this IEP, claimant's primary disability is identified as a severe specific learning disability. Claimant's secondary disability is identified as "None." This IEP reflects that there was a severe discrepancy between claimant's measure of intellectual ability and multiple areas of achievement, including written expression, math calculation, math reasoning, basic reading skills, and reading comprehension. It further specifies that **the discrepancy was directly related to a processing disorder in sensory motor skills, visual processing, auditory processing, and cognitive abilities, including association, conceptualization and expression . . . [and was] not due primarily to mental retardation or emotional disturbance; visual, hearing, or motor disability; limited school experience or poor attendance; or was a result of environmental, cultural difference.** The IEP describes the basis and method for identifying the severe discrepancy between ability and achievement, as follows:

Using the UNIT, Reasoning Quotient is classified in the low average range. All other areas fell in the borderline to very delayed range. Due to the significant scatter on the UNIT, it is felt that the Reasoning Quotient is the best indication of [claimant's] cognitive ability.

(Bolding added.)

29. December 2011 IEP. On December 20, 2011, Lodi prepared an annual review IEP for claimant. He was 17 years old and in the twelfth grade. The IEP, which confirmed his primary disability as a specific learning disability, and described his secondary disability as "None." There are no legible indications on the IEP that identify claimant's performance on standards testing for English/Language Arts or Math. The "Preacademic/Academic/ Functional Skills reflects that claimant was receiving an "A" in Advanced Auto, Study Skills, and Personal Management. Claimant was also enrolled in English, Math, and Weight Training at the time, but no performance indicators were provided. The Adaptive/Daily Living Skills comments are identical to those provided in his previous IEP.

30. Incarceration – October 2014. In October 2014 claimant was incarcerated pending charges of three violations of Penal Code section 288, subdivision (b)(1) (forcible lewd acts upon a child). According to the history specified in claimant's evaluations, it is alleged that he raped his younger sister five times over the course of a two-year period when he was 14 and his sister was 13.

31. VMRC Court Intake Assessment – November 2014. A VMRC Court Intake Assessment form, dated November 7, 2014, reflects that a VMRC intake coordinator completed an intake assessment of claimant in response to a court referral. Through the intake assessment process, the regional center can collect foundational information

about an applicant in key areas for consideration. Claimant's intake assessment includes the following information:

- (a) Health History – [claimant] reported that he is a healthy person [who] used to visit a physician for minor ailments or physical evaluations. He has no seizures . . . his hearing and vision are both normal. He also has no allergies.
- (b) Employment History – [claimant] reported that has worked several places. However, could only remember the two most recent places he worked. He indicated that he worked for a company that pulls trunks off cherry trees . . . [and also] worked for about 5 – 6 months [at a ranch] cleaning horse stables.
- (c) Self-Help Skills/Daily Living Skills – [claimant] reported that he is able to bathe, dress, groom, and complete his personal and dental hygiene independently. He is also able to prepare and cook food. . . . [Claimant] reported that he is able to drive a vehicle but does not have a driver's license. [Claimant] also reported that he is able to tell the different denominations of money . . . make purchase and obtain change. He used to have a checking account but it is now closed due to inactivity.

32. Forensic Psychology Report – Competency to Stand Trial Evaluation – November 2014. On November 9 and 15, 2014, Wendy Weiss, Ph.D., a Clinical and Forensic Psychologist, conducted an evaluation to determine if claimant was competent to stand trial. The evaluation consisted of an interview and mental status examination of claimant, application of the Revised Competency Assessment Instrument (R-CAI), and a review of a San Joaquin County Sheriff's Report, dated October 6, 2014. Dr. Weiss did not have access to any records regarding claimant's intellectual abilities as measured by VMRC or Lodi. As set forth in her November 22, 2014 evaluation report, Dr. Weiss estimated that claimant was functioning "at a lower than average level of intellectual abilities," and found he met the Diagnostic and Statistical Manual- Fifth Edition (DSM-5)

criteria for Unspecified Developmental Disorder (provisional) and Unspecified Neurodevelopmental Disorder (provisional). Dr. Weiss also found claimant incompetent to stand trial, in part, because he demonstrated limited motivation to help himself in the legal process and was limited in terms of his understanding and ability to plan legal strategies.

33. VMRC Initial Eligibility Review – December 2014. A VMRC Eligibility Review form, dated December 1, 2014, reflects that an initial eligibility determination was completed by a VMRC eligibility review team in early December. The team was comprised of Valentine Chukwueloka, M.A., M.H.A, Barbara Johnson, Psy.D., and Stanley G. Morrison, M.D. The team reviewed claimant’s Intake Assessment, claimant’s Adaptive Behavior/Developmental Assessment, claimant’s psychoeducational assessments, and claimant’s school and court records. The team determined that claimant was not eligible for regional center services. Within the form, Dr. Morrison noted that there was no evidence of “CP [cerebral palsy] or epilepsy” in the materials reviewed. Dr. Johnson added that the academic records were unremarkable other than a “well-documented significant learning disability and possible ADHD, inattentive type Moreover, developmental delay suggestive of either ID [intellectual disability] or a condition [similar to] ID was not established prior to the age of 18. Records do not further suggest concerns specific to ASD . . . [claimant] is not eligible for regional center services.”

34. Psychiatric Evaluation – Competency to Stand Trial Evaluation – December 2014. On December 24, 2014, Kent E. Rogerson, M.D., a psychiatrist, conducted an evaluation to determine if claimant was competent to stand trial. The evaluation included an in-person assessment of claimant, a review of documents related to claimant’s incarceration, the report from Dr. Weiss, dated November 22, 2014, and the VMRC Eligibility Review form, dated December 1, 2014, and signed by Dr. Johnson. Dr. Rogerson diagnosed claimant with Unspecified Intellectual Disability and Specific

Learning Disorder, reading and writing. He concluded that claimant was not competent to stand trial because he was unable to know and understand the nature and purpose of the proceedings taken against him and was unable to rationally assist counsel in presenting his defense.

35. Neuropsychological Consultation – Competency to Stand Trial Evaluation – March 2015 and Addendum – July 2015. On March 21, 2015, Paul Lebby, Ph.D., conducted a neuropsychological evaluation and consultation to assess claimant's cognitive capacity and ultimately his competency to stand trial. He prepared a nine-page report reflecting the assessment results and his findings. On July 24, 2015, Dr. Lebby prepared an Addendum to the initial report based on the same testing. The Addendum more fully interprets and applies the assessment data to determine whether claimant is developmentally disabled and, therefore, eligible for regional center services. The evaluation consisted of a review of court records, medical records, psychological and educational records, an interview with claimant and formal neurocognitive assessment. Dr. Lebby administered the following tests: The Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV); the Wechsler Abbreviated Scale of Intelligence – Second Edition (WASI-II); the Wechsler Memory Scale – Fourth Edition (WMS-IV); the Rey-Osterrieth Complex Figure Test (RCFT); the Wide Range Achievement Test – Fourth Edition (WRAT-4); Boston Naming Test (BNT); the Hooper Visual Organization Test (HVOT); the NEPSY – Second Edition (NEPSY-II); the Token Test For Children; the Test of Memory Malingering (TOMM); and the Rey-15 Item Test of Malingering.

36. Based on the test results obtained during the assessment, Dr. Lebby concluded that claimant's general intellect was impaired for his age at the first percentile. On the WASI-II, claimant attained a Full Scale IQ score of 66. On the WAIS-IV, claimant attained a prorated Full Scale IQ Score of 63. When comparing claimant's test scores with his educational records, Dr. Lebby concluded that claimant exhibited

“remarkable . . . clear and consistent deficits in cognitive functioning from the 4th grade or earlier continuing through the 12th grade.” Dr. Leby found that the consistency of cognitive impairments suggested static encephalopathy, because claimant had not shown significant gains in several domains of deficient cognition, even with extensive intervention provided over most of his life. He diagnosed claimant with Static Encephalopathy, Unspecified (348.3); Developmental Disorder, NOS (315.9); and Cognitive Disorder (294.9).³

37. Dr. Leby’s evaluation report reflects his diagnostic impressions, as follows:

[Claimant] has clear and consistent neurocognitive deficits, with his difficulties being evident for what appears to be his entire life and during the period of neural development, and current adulthood. His deficits are of a magnitude to result in substantial disability for him within multiple functional domains. Although he presents with some functioning within the normal range, this appears to be within a narrow cognitive sphere related almost entirely to visual processing and spatial analysis. The presence of intact abilities within a narrow range of cognition should not be used to minimize the detrimental effects of disrupted functioning within almost all other cognitive domains. This is especially true when the areas of impaired functioning are critical to

³ Initially, Dr. Leby also diagnosed claimant with Dyslexia (784.61), and Mathematics Disorder (315.1). However, those diagnoses were not specified in the supplemental revised Neuropsychological Consultation Competency to Stand Trial evaluation report, prepared on July 24, 2015, based on the same evaluation.

activities of daily living involving problem-solving and intellectual processing, memory and attention, and executive functioning, etc. In the same way that narrow “islands of ability” seen in persons with autism are not used to negate the overall deficit seen in the person, claimant’s intact visual processing skills should not be used to negate the severity of functional deficits resulting from his marked impairment in almost all other areas of cognitive functioning.

[Claimant] meets the diagnostic criteria for being developmentally disabled. His disability began prior to the age of 18; is expected to continue indefinitely; constitutes a substantial handicap for him within multiple domains of functioning; and his condition requires treatment similar to that required for mentally retarded individuals; and does not include other handicapping conditions that are solely physical in nature. Further, his substantial disability consists of 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 he presents with the existence of significant functional limitations, in three or more areas of major life activity

38. Dr. Lebby concluded that claimant had significant functional limitations resulting in substantial disability for him in almost all domains, with more significant

deficits in certain critical areas. In his July 2015 Addendum, he detailed the more significant deficits in critical areas as follows:

(a) Receptive and expressive language:

Claimant presented with clear and consistent deficits involving receptive and expressive language functioning, verbal – linguistic reasoning, and verbal/auditory attention.

Receptive Language

- NEPSY-II Comp. Instructions: Age-Equivalency was 4 to 4.5 years
- Token Test for Children: Age-Equivalency was 3.5 to 4.5 years

Expressive Language

- Boston Naming Test: Age-Equivalency was 5.5 to 6.5 years

Verbal Intelligence

- WAIS-IV and WASI-II: Age-Equivalency equal to or less than 6:2 years to 7:6 years. Scaled/Standard scores were Vocabulary = 2, Similarities = 2, Information = 3, VCI = 54, 0.1st percentile.⁴

It is important to understand the critical nature of language processing on most aspects of daily functioning, including but not restricted to: reciprocal communication, verbal – linguistic and even most non-verbal problem-solving, conceptualization of information, attentional functioning, memory consolidation and retrieval, executive functioning,

⁴ "VCI" stands for Verbal Comprehension Index.

organization, thoughts, and judgment, the evaluation of social situations and environmental safety hazards, ability to understand forms, contracts and legal agreements, etc.

(b) Learning:

Claimant presented with clear and consistent deficits involving learning, even with the extensive educational intervention for most of his life. Deficits were clearly evident within, but not restricted to the following domains.

Verbal Memory and Learning

- WMS-IV Logical Memory I and II: Scaled scores of 1, 0.1st percentile for immediate and delayed recall, with recognition memory at chance.
- CMS Stories Immediate and Delayed: Age-Equivalency equal to or less than 5 years.

[Claimant] produced a number of confabulatory intrusions, something that is not unusual in a person with severe anterograde memory disruption in addition to disrupted frontal executive processes, as evident in [Claimant].

Reading Ability

- WRAT4 Word Reading was 55, 0.1st percentile, Grade Equivalency was 1.3
- WRAT4 Sentence Comprehension was 55, 0.1st percentile, Grade Equivalency equal to or less than kindergarten.
- WRAT4 Reading Composite was 55, 0.1st percentile

Spelling Ability

- WRAT4 Spelling was 59, 0.3rd percentile, Grade Equivalency was 1.8

Mathematics Ability

- WRAT4 Math Computation was 64, 1st percentile, Grade Equivalency was 3.2

Verbal/Auditory Attention

- WAIS-IV WMI was 53, 0.1st percentile; CMS Age-Equivalency equal to or less than 5 years.

(c) Self-care:

Executive Functioning

Deficits were evident within all domains of executive functioning, or the ability to function within a complex environment requiring mental flexibility, multitasking, complex and divided attention, and efficient switching of mental strategies or concepts, etc.

Given [claimant's] severe deficits involving executive functioning, receptive and expressive language functioning, verbal intelligence and problem solving, memory and learning, and basic academic skills relating to reading, reading comprehension, written language and mathematics, it is clear that he lacks basic skills necessary to ensure adequate self-care. For example, he is unable to read labels on products, safety warnings or written directions, he is

unable to communicate at a level above that of a young child, and was demonstrated to lack ability to care for his own legal needs. He is unable to enter into legal contracts, comprehend documents and forms such as those used in job applications, rental agreements, purchase agreements, bank loans, etc.

[¶] . . . [¶]

(d) Self-direction:

General Intellectual Ability

- WAIS-IV prorated Full Scale IQ was 63, WASI-II Full Scale IQ was 66
- General intellectual ability is significantly impaired and his Full-Scale IQ scores over – represent his ability levels as they were increased due to intact visual spatial ability.

[Claimant's] verbal intelligence is more representative of his deficits and functioning due to intellectual impairments, as most problem-solving, strategy formation, planning and self-direction is conducted with in the verbal – linguistic domain.

- WAIS-IV and WASI-II: Age-Equivalency equal to or less than 6:2 years to 7:6 years. Scaled/Standard scores were as follows: Vocabulary 2, Similarities 2, Information 3, VCI 54, 0.1st percentile.

Impaired executive functioning also results in deficient self-direction, use of strategy planning and self-direction for [claimant].

(e) Capacity for independent living:

[Claimant's] deficits in cognition place him at significant risk of harm, and result in him being incapable of independent functioning due to, but not restricted to, the following:

- i. An inability to comprehend warning signs due to impaired reading skills.
 - Word Reading Grade Equivalency was 1.3
 - Sentence Comprehension Grade Equivalency equal to or less than kindergarten.
- ii. An inability to comprehend and follow complex directions provided by others, or protect himself from manipulation, coercion or abuse by others regarding his medical, legal or financial affairs.
 - Receptive Language Age-Equivalency was 3.5 to 4.5 years.
 - Expressive Language Age – Equivalency was 5.5 to 6.5 years.
 - Verbal intelligence Age – Equivalency equal to or less than 6:2 years to 7:6 years
- iii. An inability to remember critical information pertinent to his self-care such as appointments, instructions, etc.
 - Verbal/auditory memory scores 0.1st percentile for immediate and delayed recall, with recognition memory at chance.
 - Immediate and delayed recall of passages: Age – Equivalency equal to or less than 5 years
- iv. An inability to care for his financial needs.
 - Math Computation score was 64, 1st percentile, with a grade equivalency 3.2

- v. An inability to read, comprehend and make well-reasoned and rational decisions regarding legal contracts, forms required for everyday activities such as job applications, rental agreements, purchase agreements, bank loans, etc.
 - Word Reading was 55, 0.1st percentile, Grade Equivalency was 1.3
 - Sentence Comprehension was 55, 0.1st percentile, Grade Equivalency equal to or less than kindergarten.
 - Reading Composite was 55, 0.1st percentile
- vi. An inability to efficiently write information down as a compensatory strategy due to deficient written language skills.
 - Spelling was 59, 0.3rd percentile, Grade Equivalency was 1.8
- (f) Economic self-sufficiency:
 - vii. Given [claimant's] severe deficits with mathematics, care for his financial state is notably compromised, and he will struggle with money concepts involving basic calculations or mathematics concepts. [Claimant] is also unable to read, comprehend and understand financial documents and contracts, enter into financial agreements, negotiate financial terms, or understand economic issues necessary for independent economic self – sufficiency. Further, he lacks adequate attentional functioning to maintain focus on complex economic/financial data, is unable to mentally process and manipulate financial values, is unable to remember details of economic agreements, or form appropriate strategies for economic or budgetary self – sufficiency.
 - Math Computation score was 64, 1st percentile, Grade Equivalency 3.2
 - Word Reading score was 55, 0.1st percentile, Grade Equivalency was 1.3
 - Sentence Comprehension score was 55, 0.1st percentile, Grade Equivalency equal to or less than K.
 - Reading Composite score was 55, 0.1st percentile

- Verbal/auditory memory scores were 0.1st percentile for immediate and delayed recall, with recognition memory at chance.
- Immediate and delayed recall of passages: Age – Equivalency equal to or less than 5 years
- Complex attention, 0.1st percentile; Age-Equivalency equal to or less than 5 years.
- Receptive Language Age-Equivalency was 3.5 to 4.5 years.
- Expressive Language Age – Equivalency was 5.5 to 6.5 years.
- Verbal Intelligence Age – Equivalency equal to or less than 6:2 years to 7:6 years

39. Dr. Lebby concluded his evaluation report by emphasizing that claimant’s limited intact abilities within “one narrow sphere of functioning (e.g. visual processing)” should not be used to minimize the detrimental effects of disrupted functioning within all other domains of functioning and major life activities, identified during his evaluation. He also provided the following opinion:

Based on all of the evidence available to me, including review of educational records, previous examination results, my clinical interview in addition to formal and informal examination findings, and based on more than two decades of professional experience assessing functioning in those with known or suspected developmental disabilities, it is my clinical opinion that [claimant] meets the criteria outlined by the State of California Penal Code 1370.1(a)(1)(H) and Title 17, Section 54001, CCR, for recognition as having a developmental disability, and as such, he is eligible for

services through the Regional Center for Developmental Disabilities.

TESTIMONY OF DR. LEBBY

40. Dr. Leby testified at hearing. He has been a clinical neuropsychologist for more than 20 years and currently has a professional practice in Fresno, California. The parties stipulated that Dr. Leby is an expert in neuropsychology. Dr. Leby's testimony at hearing essentially reiterated the findings and conclusions specified in his initial and evaluation report and its addendum.

41. Dr. Leby described his evaluation of claimant. He felt there was a profound advantage to conducting an in-person evaluation rather than performing an evaluation based on records, because he obtained information from the interaction that may not be reflected in test scores. He stated this was significant because during the evaluation he observed that claimant behaved more like a young child of six or seven years old and sometimes a teenager, rather than a young man of 21 years of age.

42. While reviewing claimant's records, Dr. Leby noticed a "clear consistency" in the findings of the Lodi assessors throughout claimant's early life and his own findings, many years later. He stated that the records reflect that claimant received special education services from approximately kindergarten through the 12th grade and did not demonstrated significant gains in capacity in his deficits during that time. Dr. Leby opined that the records indicate that claimant had static encephalopathy, which he described as "an abnormal development of the brain."

43. Dr. Leby opined that although claimant was never assessed as intellectually disabled before the age of 18 that does not mean that claimant's performance during that time was inconsistent with that diagnosis. He stated that "the problem" is that school psychoeducational evaluations are completed solely for the purpose of determining eligibility for special education services and are not designed to

diagnose or determine whether a student had intellectual disability. He added that, considering the strict definition, claimant actually meets the criteria for intellectual disability because he has IQ scores below 70 and adaptive functioning scores below 70, which reflect deficits that originated before claimant turned 18, are expected to continue indefinitely and have resulted in a substantial impairment in multiple areas of major life activities.

44. Dr. Lebbly explained that "there is controversy in the field" with respect to diagnosing an intellectual disability. If an individual has significant deficits in overall intellectual functioning and overall adaptive functioning, which began during their developmental period, they meet the criteria for intellectual disability. However, some professionals believe that if those same individual assessment results reflect narrow outliers, or "islands of ability" that fall within the normal range of functioning, that individual is disqualified from being considered intellectually disabled. He opined that professionals who disqualify an individual from being classified as intellectually disabled for these reasons are incorrect. In Dr. Lebbly's opinion, the Fifth Category definition of developmental disability was created due to this controversy, because professionals in the field were reluctant to give a diagnosis of intellectual disability unless every assessment score reflected significant deficits of two standard deviations below the mean.

45. Dr. Lebbly testified that correctly diagnosing claimant is difficult, in part, because his global scores demonstrate a significant discrepancy between his purported ability or intelligence (IQ) scores and his academic skills. Use of this "discrepancy model" dictates a finding of learning disability whenever there is a significant discrepancy between an individual's assumed ability and his achievement or performance. Dr. Lebbly pointed out that claimant's ability scores are actually below the range of normal functioning; however, his academic scores are much more significantly impaired. In Dr.

Lebby's opinion, an individual can have assessment scores which can evidence both an intellectual disability (significant deficits of more than two standard deviations below the mean in overall intellectual and adaptive functioning) and a learning disability (significant discrepancy between ability and achievement scores). Simply put, he opined that these diagnoses are not mutually exclusive.

46. Dr. Lebby criticized the use of the UNIT to measure overall intellectual functioning as incomplete, because it does not evaluate any intellectual functioning other than nonverbal functioning. He characterized Lodi's method for determining claimant's UNIT Reasoning Quotient scores as the best estimate of his true cognitive potential as "cherry picking." He described the process as being equivalent to taking a child with a very narrow strength, ignoring all of the child's weaknesses and deficits, assessing only in the narrow area of strength, and then asserting that child's test results in this narrow area of strength represent his overall functioning.

47. Dr. Lebby reiterated that based on his evaluation, and all the records he reviewed, it is his opinion that claimant has an intellectual disability, which manifested prior to the age of 18, due to significant deficits in overall intellectual and adaptive functioning. He described the cause of the intellectual disability as a neuropsychological pathology that causes or prevents claimant from overcoming his deficiencies.

TESTIMONY OF CLINTON J. LUKEROTH, ED.D.

48. Dr. Lukeroth testified at hearing. He is an Educational Psychologist who provides assessment services for schools, community agencies, and individuals. He has conducted thousands of educational assessments for schools to determine whether a particular student qualifies for special education services. As a component of those assessments, Dr. Lukeroth analyzes whether a student is eligible for special education services due to a learning disability, an intellectual disability, or some other condition. He has also regularly served as an expert witness in court cases in these same areas. Dr.

Lukeroth was deemed an expert in educational psychology. He provided no expert testimony regarding eligibility for regional center benefits.

49. Dr. Lukeroth was retained by VMRC to provide consultation regarding claimant's prior special education assessments and determinations. As claimant was over 18 years of age when VMRC received the eligibility referral, no new assessments were needed. Dr. Lukeroth reviewed each of the assessments described above, as well as claimant's IEPs. After reviewing the records, Dr. Lukeroth opined that claimant's participation in special education classes was appropriate for his level of academic need. He addressed the large discrepancy between claimant's Reasoning and Memory Quotient scores on the UNIT test. He explained that the tested instruments reflected that claimant had markedly ineffective memory skills, which compromised test results related to intellectual functioning based on memory scores. For these reasons, Dr. Lukeroth opined that the best representation of claimant's intellectual capacity, as reflected in the UNIT tests, would be his Reasoning Quotient scores of 91 and 84, for the 2003 and 2006 evaluations, respectively. He noted that his conclusion is consistent with that of the many evaluators who performed claimant's pre-adulthood psychoeducational evaluations.

DR. JOHNSON'S TESTIMONY REGARDING CLAIMANT'S EVALUATIONS AND ASSESSMENTS

50. Barbara Johnson, Psy.D., is a Clinical Psychologist. She is also a licensed Marriage and Family Therapist. She has been employed as a Clinical Psychologist at VMRC since 2010. Prior to working at VMRC, she worked for the Stanislaus County Department of Mental Health for 17 years, performing duties that included evaluating inmates for intellectual disabilities.

51. At the hearing, Dr. Johnson reviewed and analyzed the evaluations and assessments described above in detail. She opined that the records, both before and

after claimant turned 18, clearly indicate that claimant's deficits in cognitive functioning are solely the result of his long-diagnosed learning disability. She concluded that, when the claimant's learning disability is factored into his assessments, the historical test findings indicate that his ability is above the range of someone with an intellectual disability.

52. To support her conclusions, Dr. Johnson pointed out that Lodi consistently identified claimant as qualifying for special education services due to a diagnosis of specific learning disability, and not an intellectual disability, since he was six years old. She noted that each available psychoeducational evaluation performed on claimant prior to the age of 18 concluded that his academic achievement in reading, math, and written language were significantly discrepant from his intellectual ability due to disorders in the basic psychological processes of auditory processing and visual and auditory memory.

53. Dr. Johnson also noted that the evaluation performed by Dr. Weiss (Factual Finding 32), in which claimant was diagnosed with an unspecified developmental disability, was not performed to determine regional center services. There was no evidence that Dr. Weiss conducted any testing for intellectual functioning or had reviewed any assessment or educational records prior to claimant reaching the age of 18. She was similarly critical of the significance of Dr. Rogerson's December 2014 evaluation (Factual Finding 34), because it was conducted to determine claimant's competency to stand trial and does not reflect that any testing of claimant's cognitive functioning was performed or that any records were reviewed which existed prior to claimant turning 18.

54. Dr. Johnson also challenged the conclusions Dr. Leiby drew from assessment data. While Dr. Leiby claims that claimant's consistent cognitive impairments "suggests static encephalopathy" and that "he has not shown significant

gains in several domains of deficient cognition, even with extensive intervention provided over most of his life," Dr. Johnson noted that this description is actually consistent with "textbook" characteristics of a specific learning disability. She also noted that, while Dr. Lebbly concluded that claimant had impaired general intellect at the first percentile for his age, as reflected in his WASI-II Full Scale IQ score of 66 and WAIS – IV prorated Full Scale IQ score of 63, those conclusions failed to consider whether the Full Scale IQ scores are actually interpretable. Considering claimant's long-diagnosed specific learning disability, Dr. Johnson indicated further interpretation is necessary, such as looking at index or subtest scores. Dr. Johnson felt that, due to claimant's specific learning disability, his Visual Reasoning subtest scores of 81 and 84 on the WASI-II and WAIS – IV, respectively, were more indicative of his intellectual ability and consistent with his test findings before he was 18 years old than his Full Scale IQ scores. Dr. Johnson emphasized that claimant has been assessed using three different assessment tools over time: the UNIT, which was administered to him twice prior to age 18, and the WASI-II and WAIS-IV which were administered to him after age 18. Each of these assessments reflect that claimant's scores are above the range of intellectual disability or Fifth category.

55. Dr. Johnson also questioned whether the reference in Dr. Lebbly's report to "executive functioning" as a component of self-care to determine substantial disability was appropriate. She stated that self-care to determine substantial disability is about hygiene and grooming, rather than executive functioning. Similarly, she felt Dr. Lebbly's references to communication and learning test scores as indicative of claimant's capacity for independent living were irrelevant to regional center eligibility. Instead, she noted that when assessing eligibility for regional center services the eligibility review team looks at actual abilities for independent living, such as doing chores at home, managing finances, or being capable of being left at home alone.

56. Dr. Johnson opined that claimant is not intellectually disabled because his assessments reflect that he attained scores that exceeded the acceptable range of scores to support that diagnosis. She noted that, although some of claimant's scores were well within the acceptable range, "it is clear that his scores were impacted by a specific learning disability." Dr. Johnson suggested that considering the scores that were affected by his specific learning disability would "be tantamount to asking someone without vision to complete a test that required sight; the test scores would be correspondingly low. [Claimant's low Full Scale IQ] scores are a direct reflection of his speech language impairment and not his true cognitive capacity."

57. Dr. Johnson concluded that claimant does not meet the definition of developmentally disabled under the fifth category, because his deficits are solely due to a specific learning disability. She stated that multiple assessments over a significant period of time have found that claimant has a specific learning disability. This was initially identified in kindergarten as a speech language impairment and was diagnosed as a specific learning disability around the fourth grade.

58. Although claimant was diagnosed, after age 18, with encephalopathy and cognitive disorder, in Dr. Johnson's opinion there was no evidence to support that these conditions or any other general medical condition caused claimant's performance deficits. She opined that claimant's limitations were also not substantial, and instead appeared to be mild or moderate. Dr. Johnson based this opinion on claimant's records, which reflect that he has held multiple jobs, participates in house cleaning at home, is able to bathe, groom, and dress himself, can prepare and cook food, had a checking account, and can drive a car.

59. Dr. Johnson noted that all of claimant's test findings, both prior to age 18 and as reflected in Dr. Leby's more recent evaluation, demonstrate that there is a significant discrepancy between claimant's ability and achievement. These same scores

also demonstrate that claimant's ability is above the range of an intellectual disability and that he has clear deficits in adaptive functioning, which is the definition of a specific learning disability. Dr. Johnson concluded her testimony by stating the following:

No matter how you dice this up . . . whether you say it's due to neurological deficit, static encephalopathy . . . or cognitive disorder . . . it still falls under the umbrella of a specific learning disability [because the result is a significant discrepancy between achievement and ability . . .]

DISCUSSION

60. Regional centers provide services to individuals who have a "developmental disability" as defined in the Lanterman Act. The developmental disabilities described in the Lanterman Act include intellectual disability and a disabling condition that is closely related to intellectual disability or requires treatment similar to that required for individuals with an intellectual disability (generally referred to as the "fifth category"). (Welf. & Inst. Code, § 4512, subd. (a).) But individuals whose intellectual impairments are solely the result of learning disabilities are excluded from receiving services from regional centers. (Cal. Code Regs., tit. 17, § 54000, subd. (c)(2).)

61. There was both oral and written argument regarding whether a diagnosis of developmental disability can be based on assessments performed after claimant reaches 18 years of age, and whether being diagnosed with a learning disability prohibits or excludes a simultaneous diagnosis of developmental disability. A developmental disability "must originate before an individual attains 18 years of age." (Welf. & Inst. Code, § 4512 subd. (a).) This does not prohibit a diagnosis of developmental disability based on assessment performed after an individual turns 18 years old.

62. Being diagnosed with a specific learning disorder, does not, in and of itself, preclude a diagnosis of developmental disability. The exclusion occurs only when “the handicapping conditions are . . . solely learning disabilities.” (Cal. Code Regs., tit. 17, § 5400 subd. (c)(2)) (See also, *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, 1491 [the word “solely” in the regulations does not deny services to those persons with a qualifying condition under the Lanterman Act, but who also may have a learning disability or psychiatric disorder. The regulations therefore do not preclude mental health services to those persons with a qualifying developmental disability under section 4512(a).].)

63. When all the evidence is considered, the testimony of Dr. Johnson that claimant’s intellectual impairments are solely the result of his specific learning disorder is persuasive. Her explanation and interpretation of the assessment data, both before and after claimant turned 18, was well-reasoned and consistent with the testimony of Dr. Lukeroth, the conclusions of three Lodi assessors, and each of claimant’s IEP Teams. The school district assessments and IEP materials that Dr. Johnson relied upon in reaching her conclusions are thorough, well-reasoned, and consistent throughout claimant’s K through 12 education. Those records demonstrate that, since claimant was six years old, he was the subject of regular annual reviews or triennial assessments that tested his level of academic achievement, cognitive abilities, and adaptive functioning. None of the assessors identified claimant as a child with an intellectual disability. Instead, they found that claimant had a specific learning disability because his test scores demonstrated a significant discrepancy between his ability and achievement due to disorders related to visual memory, auditory memory, sensory-motor skills and cognitive abilities.

64. In contrast, evidence claimant has an intellectual disability is less convincing. The impression reached by Dr. Weiss, that claimant has an unspecified

developmental disability, is given little weight because the evaluation was not performed to determine regional center services and there was no evidence that Dr. Weiss conducted any testing for intellectual functioning or that any assessment or educational records prior to claimant reaching the age of 18 were reviewed. Similarly, the impression reached by Dr. Rogerson in his December 2014 evaluation report, that claimant had an intellectual disability, is also given little weight because it was conducted to determine claimant's competency to stand trial and does not reflect that any testing of claimant's cognitive functioning was performed or that any records were review which existed prior to claimant turning 18 years old.

65. While Dr. Lebby testified in a very competent fashion, his testimony was less persuasive than that of Dr. Johnson. He described the method for determining claimant's cognitive potential, as identified in psychoeducational evaluations and IEPs completed before claimant was 18 years old, as "cherry picking." However, he provided no reliable evidence to support that his method for determining cognitive potential is a more accurate method than that adopted by no less than three school psychologist during claimant's primary and secondary education, and endorsed by Drs. Lukeroth and Johnson. He also testified that "there is controversy in the field" about diagnosing an intellectual disability; specifically, about whether assessment scores can simultaneously reflect both a learning disability and intellectual disability. He declared his opinion that those who believe they cannot are wrong. However, he provided no evidence to support his conclusion beyond comparative reasoning. Even assuming Dr. Lebby's position on the comorbidity of intellectual disability and learning disability is correct, he provided no evidence to support how claimant's claimed intellectual disability occurred. He testified that claimant's claimed intellectual disability is due to static encephalopathy, which he described as "an abnormal development of the brain," but provided no evidence that claimant suffered any form of brain injury or any other traumatic circumstance to

support this conclusion. Claimant's medical history, as specified in the available records, indicates that he had no significant medical issues during the developmental period. There were no signs of trauma at birth, and no history of seizures or other health issues. Without some evidence that claimant's performance deficits are not solely due to a specific learning disability, he cannot be considered developmentally disabled.

66. When all the evidence is considered, claimant did not establish that he is an individual with an intellectual disability, or that he has a disabling condition closely related to intellectual disability or which requires treatment similar to that required for individuals with an intellectual disability. The evidence persuasively established that claimant's impaired intellectual functioning was solely the result of his specific learning disability. Consequently, his request for services from VMRC must be denied.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, regional centers provide services to individuals with developmental disabilities. As defined in Welfare and Institutions Code section 4512, subdivision (a), a "developmental disability" is:

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. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but

shall not include other handicapping conditions that are solely physical in nature.

2. California Code of Regulations, title 17, section 54000, subdivision (c)(2), provides as follows:

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

[¶] . . . [¶]

(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 psychological deprivation, psychiatric disorder, or sensory loss.

3. As set forth in the Findings, the evidence presented at hearing showed that claimant's impaired intellectual functioning was solely the result of a specific learning disability. Consequently, under California Code of Regulations, title 17, section 54000, subdivision (c)(2), claimant is excluded from receiving services from VMRC. Claimant's appeal must therefore be denied.

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ORDER

Claimant's appeal is DENIED. Valley Mountain Regional Center's denial of services to claimant under the Lanterman Act is SUSTAINED.

DATED: February 15, 2017

ED WASHINGTON

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)