

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

KERN REGIONAL CENTER,

Service Agency.

CASE No. 2016100873

DECISION

The hearing in the above-captioned matter was held on March 1, 2017, in Bakersfield, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings, presided. Claimant was represented by his mother (Mom).¹

Kern Regional Center (KRC or Service Agency) was represented by Mark Meyer, Program Manager.

Evidence was offered, the case was argued, and the matter was submitted for decision on March 1, 2017.

The ALJ hereby makes his factual findings, legal conclusions, and orders, as follows.

¹ Titles are used to protect the family's privacy.

ISSUE PRESENTED

May the Service Agency terminate services for Claimant on the grounds that his diagnosis that originally made him eligible for services was clearly erroneous?

FACTUAL FINDINGS

1. Claimant is a young man who will turn 19 years old in May 2017. He is currently receiving services from the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.² He is eligible for services based on a diagnosis, made in August 2006, of Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS). That diagnosis was made by Allison Little, MSW, Ph.D (Dr. Little). At that time she also diagnosed Claimant as suffering from Attention Deficit Hyperactive Disorder (ADHD) and Borderline Intellectual Disorder. (Ex. B1.)

2. (A) On October 5, 2016, the Service Agency issued a Notice of Proposed Action (NOPA) which stated, as the proposed action, "your son, [Claimant], was determined not eligible for Kern Regional Center services and Kern Regional Center will be closing his case." (Ex. A4.³)

(B) The NOPA stated a reason for the action, as follows:

² All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

³ The exhibit designation is taken from the document itself. The Service Agency's exhibit list, for the parts of exhibit A, does not conform to the documents, and will be corrected by the ALJ.

[Claimant] was evaluated by Dr. Michael Musacco, Clinical Psychologist, on July 14, 2016. The results of the current assessment do not support a diagnosis of either a *autism spectrum disorder* or evidence of an *intellectual disability, epilepsy, cerebral palsy* or a condition requiring treatment similar for that of an individuals (sic) with an intellectual disability. Due to the above mentioned reasons, [Claimant] is not eligible for Kern Regional Center services and his case will be closed.

(Ex. A4. Italics in original.)

(C) At the hearing, the Service Agency produced exhibit I, a Diagnostic Team for Eligibility Form. Mr. Meyer, the Service Agency's representative at the hearing, testified that after this proceeding commenced, he and Claimant's mother agreed that another assessment would be made by Dr. Little. After Dr. Little made her second assessment, and gave her opinion that Claimant suffered from Autism, the Service Agency's Eligibility Team determined that Claimant was not eligible because he is not substantially disabled from his autism. This constitutes a change in justification for the NOPA, as exhibit I shows that the "eligible diagnosis" is "Autism per Dr. Little." It also constitutes an admission that Claimant suffers from an eligible condition.⁴

3. Claimant served a Request for Fair Hearing, disputing the Service Agency's action, and this proceeding ensued. (Ex. A3.) A continuance of the original hearing date was granted, time having been waived by Claimant. All jurisdictional requirements have been met.

⁴ The document is dated February 9, 2017.

4. Prior to age three, Claimant was eligible for Early Start services.⁵ He was evaluated after age three, but not then found eligible for Lanterman Act services. Dr. Little conducted an evaluation in September 2002, but the eligibility team determined Claimant was not eligible. (Ex. B1, p. 1.) At that time Claimant was diagnosed with Borderline Intellectual Functioning, and AD-HD, Combined Type.

5. (A) Claimant was again assessed by Dr. Little, on August 4, 2006, when he was eight years, three months old. At that time his mother expressed several concerns, including the fact that Claimant did not understand consequences, and did not grasp cause and effect. He would go into rages and showed mood instability, poor socialization, and problems in the school setting. He was destructive of property. (Ex. B1, pp. 2-3.)

(B) Dr. Little used several test instruments in her assessment, including a Mental Status Examination, Vineland Adaptive Behavior Scales (Vineland), Childhood Autism Rating Scales (CARS), and the Autism Diagnostic Observation Schedule—Module 3 (ADOS).

(C) The Vineland showed an Adaptive Behavior Composite of 58, placing Claimant in the .3 percentile, with an age equivalent of five years, two months. (Ex. B1, p. 4.) His score for Daily Living Skills was 60, placing him in the .4 percentile, and his socialization score was 52, in the .1 percentile. Only his communication score exceeded

⁵ The California Early Intervention Services Act, Government Code section 95000, et seq., is commonly known as the Early Start Program. With wider eligibility criteria than the Lanterman Act, Early Start provides services to infants and toddlers with special needs.

70, the point that is two standard deviations below the mean.⁶ His score was 74, placing his communication at the fourth percentile. (*Id.*)

(D) Utilizing the ADOS, Dr. Little found that Claimant's Communication and Social Interaction score was eight, above the Autism Spectrum cutoff score, but below the Autism cut off. Dr. Little noted that Claimant exhibited deficits in communication and reciprocal social interaction, and below age-level imagination and creativity. But, he did not engage in stereotypical behaviors or restricted interests throughout the evaluation. Regarding communication, Claimant did not reveal any interest in Dr. Little's ideas and experiences, and he demonstrated little reciprocal conversation, though he gestured appropriately. (Ex. B1, p. 5.)

(E) Ultimately, Dr. Little diagnosed Claimant with PDD-NOS, ADHD—Combined Type, and Borderline Intellectual Functioning. (Ex. B1, p. 6.)

6. Dr. Little noted that another professional had diagnosed Claimant as suffering from PDD-NOS, Disruptive Behavior Disorder, Not Otherwise Specified, and Stuttering. Those diagnoses were made in September 2005. (Ex. B1, p. 6.)

7. After receiving Dr. Little's August 2006 report, the Service Agency made Respondent eligible for services under the Lanterman Act.

8. Meanwhile, Claimant had been receiving special education services from his school district. He remained in special education as of the hearing date. The most recent eligibility for special education services is Emotional Disturbance, as well as Autism. (Ex. B4, p. 2.)⁷

⁶ The Vineland has a mean score of 100, with each standard deviation being 15. A score of 70 would place the person being evaluated in the second percentile.

⁷ According to Dr. Little's record review, set out in the report of her December 2016 assessment of Claimant, his school district had, during September 2016,

9. (A) After Mom sought conservatorship over Claimant, the court sought input from the Service Agency. According to Mr. Meyer's testimony, this led the Service Agency to conduct an assessment of Claimant. The Service Agency sought an evaluation from Kern Psychological Services, Inc., by Michael Musacco, Ph.D. By coincidence, Dr. Musacco is married to Dr. Little; they operate Kern Psychological Services, Inc.

(B) Dr. Musacco's evaluation took place on July 14, 2016, when Claimant was 18 years old. Dr. Musacco utilized the Wechsler Abbreviated Scale of Intelligence, Second Edition (Wechsler), and the Vineland, Second Edition (Vineland II). He did not use the ADOS, or other instrument for assessing Autism Spectrum Disorder, such as the Autism Diagnostic Interview, Revised (ADI-R).. (Ex. B3, p.2.)

(C) On the Wechsler, Claimant's full scale IQ was an 80. The subtests were scored as follows: Verbal Comprehension, 89; Perceptual Reasoning, 92; Working Memory, 83; and Processing Speed, 68. The first three sets of subtest scores were in the 23rd, 30th, and 13th percentiles, respectively. Claimant's Processing Speed was in the 2nd percentile. (Ex. B3, p. 3.)

(D) Consistent with the 2006 assessment, Claimant's Vineland scores were significantly low. In the communication domain, Claimant's score was 62, or first percentile. Daily Living Skills were in the second percentile, with a score of 69. Claimant's socialization score was 61, or less than the first percentile. Only Motor Skills were in the average range, with a score of 99. The composite score was 62, in the first percentile. (Ex. B3, pp. 3-4.)

(E) Dr. Musacco noted that Claimant had two psychiatric hospitalizations, in 2013, and 2003. One followed an incident where Claimant set his mother's house on

administered the ADOS-2, with scores falling at the Autism Spectrum Disorder range. (Ex. B4, p. 7.)

fire. Dr. Musacco noted that a mental status exam from one of the hospitalizations showed Claimant was overly focused on fishing and reptiles. (Ex. B3, p. 4.) He had a history of sexually acting out and sexual offense behaviors. (*Id.*, p. 5.)

(F) Dr. Musacco diagnosed Respondent with Unspecified Depressive Disorder. He did not believe that Claimant suffered from Borderline Intellectual Disorder given his Full Scale IQ of 80, and with Verbal Comprehension and Perceptual Reasoning scores in the low average range (89 and 92).

10. From Mr. Meyer's statements at the hearing, it appears that Dr. Musacco's report was the reason that the Service Agency issued the NOPA, which stated, essentially, that Claimant did not suffer from an eligible condition. (Ex. A4.)

11. (A) As noted in Factual Finding 2(C), the parties agreed that Claimant would again be assessed by Dr. Little. She did so on December 5, and December 12, 2016. Her report is exhibit B4. In making her 2016 assessment, Dr. Little utilized the Wechsler Adult intelligence Scale-IV (WAIS-IV), the ADOS, Schedule 2, Module 4 (ADOS-2), and the Vineland II.

(B) Claimant's full scale IQ score was a 77, placing him in the sixth percentile. His processing speed appeared better in this testing than it had when he was tested by Dr. Musacco, as the score was 79, placing him in the eighth percentile. On the other hand, his working memory score was 71, or third percentile. (Ex. B4, p.4.) This was down from the score of 83 obtained in the July 2016 testing. (See Factual Finding 9 (C).)

(C) The results of the Vineland-II showed substantial deficits in adaptive behavior, as had prior testing. The Adaptive Behavior Composite score was 60, less than the first percentile. Communication domain scored at 62, Daily Living Skills 65, and Socialization 58. These scores were at or below the first percentile. (Ex. B4, p. 5.)

(D) The ADOS-2 showed scores below the cut-offs for Autism Spectrum Disorder and Autism. Dr. Little noted that overall spoken language was appropriate, in

that Claimant did not use stereotyped words or phrases, but she did note minimal give-and-take in terms of social communication. (Ex. B4, p. 4.) Dr. Little found that overall, Claimant's social overtures were age appropriate, though reciprocal verbal communication was limited. Claimant did not demonstrate unusual sensory interests or unusual interests in play materials. However, he did show an excessive interest highly specific topics. (*Id.*, p. 5.)

(E) Dr. Little noted that in 2006 she had diagnosed Claimant with PDD-NOS, and she stated the reasons for that, including his impaired reciprocal communication, problems in initiating and maintaining appropriate peer relationships, deficits in social-emotional reciprocity, and restrictive and repetitive interests. (Ex. B4, p. 8.) Noting his special education status as autistic, she cited the Diagnostic and Statistical Manual 5 (DSM-5), which states that if there is a well-established diagnosis of PDD-NOS under the DSM-IV, then a diagnosis of Autism Spectrum Disorder, which diagnostic category was first recognized in the DSM-5, should be given. She also diagnosed Claimant with Unspecified Depressive Disorder. (*Id.*, p. 8.)

12. The Service Agency did not offer any testimony aside from Mr. Meyer's, which was not related to the diagnostic issues. Mom testified. Claimant, who was present, did not testify.

13. (A) Mom provided testimony about Claimant's condition and situation. He lives with her, her fiancé, and a younger brother, who is 16. Mom explained that Claimant still does not understand consequences. He has no social skills. He will act out in public if he doesn't get his way. When asked if he had friends, Mom testified that he does not, very much because he only wants to do what he wants to do, which typically is to talk about electronics, or fish. His younger brother's friends tried to befriend Claimant, but his limited interests and lack of reciprocity doomed their efforts.

(B) When asked if Claimant would be able to hold down a basic job, such as delivering pizzas, she said he could not, in part because he wouldn't understand why he had to turn the money over to the store manager or owner. In a related vein, he doesn't understand the concept of money.

(C) Mom described how a young man who is nearly 19, has to be prodded to take a shower or brush his teeth; every day she finds herself explaining it to him. She feels fortunate if he takes a shower three times per week.

(D) Claimant has trouble in public, in that he will have a tantrum if he doesn't get his way. He is now learning how to greet people he meets.

(E) Claimant has expressed a desire to have his own place to live, but Mom testified that such an idea is totally impractical. He couldn't handle finances, his issues with hygiene would be an impediment, and she labelled him a fire hazard, a function of his lack of appreciation of consequences. He also crosses the street without looking about one-half of the time.

(F) Claimant's interest in electronics has allowed him to repair some electronic devices; Mom's description gave him an almost savant-like ability. However, the devices are hardly fire safe, but he insists on plugging them in anyway.

14. The record establishes that Claimant has significant functional limitations in the areas of self-care, self-direction, capacity for independent living and economic self-sufficiency, relative to his age.

15. Dr. Little's diagnosis of 2006, that Claimant suffered from PDD-NOS was not clearly erroneous. The weight of the evidence establishes that Claimant suffers from Autism Spectrum Disorder, even if he has other maladies.

LEGAL CONCLUSIONS

1 Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 3.

2. (A) The Service Agency bears the burden of proving that the initial determination that Claimant was eligible for services under the Lanterman Act was “clearly erroneous.” (§ 4643.5, subd. (b); Evid. Code, § 500.)

(B) When reassessing for continuing eligibility where a determination of whether or not consumer is substantially disabled is performed, the criteria that existed at the time of the original determination shall be utilized. (§ 4512, subd. (l).)

3. The Lanterman Act, at section 4512, subdivision (a), defined developmental disabilities as follows:

“Developmental disability” means a disability which 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. . . . this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

This latter category is commonly known as “the fifth category.” However, given the disjunctive definition—a condition closely related to mental retardation *or* requiring similar treatment, it might be said that the fifth category really encompasses two grounds for eligibility.

4. Section 4512, subdivision (l), provides:

“Substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

5. California Code of Regulations (CCR), title 17, section 54001, subdivision (a), expands on the statutory definition, providing that

“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) Communication skills;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.”

6. By the time of the hearing, the Service Agency had, essentially, ceded the point that Claimant suffers from a developmental disability within the meaning of section 4512, subdivision (a). (Factual Finding 2.) The finding of “autism” is supported not only by Dr. Little’s 2016 assessment, but by the school district’s assessment, which was based in part on the ADOS-2. (Fn. 7.) While the special education law has had a broader and more inclusive criteria for finding autism, basing the assessment on the ADOS-2 brings the findings of the school district closer to the standard used under the Lanterman Act. In any event, the Service Agency’s case has morphed into a claim that Claimant was not substantially disabled.⁸

⁸ The Service Agency has previously treated PDD-NOS as an eligible condition in other cases. (*Jonathan C.-O. v. Kern Regional Center*, OAH No. 2009050358.) The condition is now subsumed into Autism Spectrum Disorder.

7. Based on this record, it must be found that Claimant is substantially disabled within the meaning of the law. (Factual Findings 5(A) through (C), 9(D), 11 (A) through (C), 13, 14.) His Vineland scores in the areas of communication and daily living skills alone support a finding that he has significant functional limitations in communication and capacity for independent living, as well as for economic self-sufficiency. His mother's testimony also supports such findings and conclusions. At the same time, the Service Agency provided no evidence to support the eligibility team's findings that Claimant was not substantially disabled in these areas.

8. Based on all the foregoing, Claimant's appeal must be granted.

ORDER

Claimant's appeal is granted and he shall remain eligible for services from the regional center.

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter, and both parties are bound by it. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days of this decision.