BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER

Service Agency

OAH No. 2019101119

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on December 2, 2019, in San Bernardino, California.

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

There was no appearance by or on behalf of claimant.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on December 2, 2019.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act based on a diagnosis of Intellectual Disability?

FACTUAL FINDINGS

Background

1. Claimant is a 39-year-old man who applied for regional center services based on "cognitive delay."

2. On September 17, 2019, IRC sent claimant a Notice of Proposed Action stating that claimant did not qualify for regional center services under the Lanterman Act because the intake evaluation completed by IRC, which included a psychological assessment, did not show claimant had a substantial disability as a result of autism, intellectual disability, cerebral palsy, epilepsy, or a condition that is closely related to an intellectual disability or requires treatment similar to a person with an intellectual disability.

3. On October 15, 2019, claimant's authorized representative filed a Fair Hearing Request challenging IRC's eligibility determination.

4. OAH served claimant's authorized representative with a Notice of Hearing dated October 29, 2019, correctly identifying the date, time, and location of the hearing. IRC served claimant's authorized representatives with its hearing exhibits and list of witnesses on November 26, 2019, via certified mail. Notice of the hearing was therefore proper.

5. Neither claimant nor claimant's authorized representative requested a continuance or otherwise contacted OAH to advise that they would not be appearing for the hearing.

6. Given that there was not good cause to continue the hearing, the matter proceeded in claimant's absence.

Diagnostic Criteria for Intellectual Disability

7. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) contains the diagnostic criteria used for intellectual disability. Three diagnostic criteria must be met: deficits in intellectual functions, deficits in adaptive functioning, and the onset of these deficits during the developmental period. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have intelligent quotient (IQ) scores in the 65-75 range.

Evidence Presented at Hearing

8. Ruth Stacy, Psy.D., testified on behalf of IRC. Dr. Stacy is a staff psychologist at IRC. She has also held positions at IRC such as Senior Intake Counselor and Senior Consumer Services Coordinator. She has been involved in assessing individuals who desire to obtain IRC services for over 27 years. In addition to her doctorate degree in psychology, she also holds a Master of Arts in Counseling Psychology, a Master of Arts in Sociology, and a Bachelor of Arts in Psychology and Sociology. Dr. Stacy qualifies as an expert in the diagnosis of intellectual disability, and in the determination of eligibility for IRC services.

9. Dr. Stacy reviewed reports pertaining to claimant. Those reports included: an Individual Support Plan (ISP) by the Commonwealth of Pennsylvania dated December 16, 2018; a case review summary by the University of Colorado Health Sciences Center University Hospital dated August 4, 1986; an undated treatment summary completed by Dr. John R. Brown, Ph.D., for the time period between 1990 to 1993; medication management notes from Northeast Counseling Services dated between 2016 and 2018; various psychiatric evaluations conducted between March 22, 2001, and November 20, 2001; and medication management records dated December 7, 2017. Dr. Stacy also conducted her own psychological assessment on August 19, 2019. The following is a summary of the above-referenced reports, and Dr. Stacy's testimony at hearing.

UNIVERSITY OF COLORADO RECORDS

Regarding the University of Colorado Health Sciences Center University Hospital dated August 4, 1986, this document was completed when claimant was six years old. According to the report, claimant had gone to live with his grandmother at age four. Claimant began having problems with his behavior and his grandmother became concerned with his overall development. The report states that the Merrill Palmer Scale of Mental Health" and "Leiter International Performance Scale" showed claimant's performance was consistent with a 42-month old child. However, the report also stated that claimant's performance was compromised by "significant deficits in attention and concentration" and that claimant "presented as an emotionally disturbed boy." Consequently, the results must be viewed with caution, because the scores are likely an underestimation of claimant's actual cognitive abilities. Further, claimant had also been diagnosed with "atypical" pervasive development disorder (PDD) because although he showed severe problems but was too socially related to meet criteria for

PDD. Atypical PDD does not fall under the DSM-5. Finally, the report noted that claimant was born to a mother that engaged in drug use throughout her pregnancy, and claimant was subjected to chronic emotional neglect and physical abuse.

TREATMENT SUMMARY 1990-1993

Regarding the treatment summary completed by Dr. John R. Brown, Ph.D., for the time period between 1990 to 1993, it showed that claimant moved from Colorado to Pennsylvania when he was 13 years old. This document was written as a summary to whomever would be caring for claimant in Pennsylvania so as to provide continuity of care. The summary reported that claimant was born drug exposed and was even possibly given drugs while living with his mother. At some point during the time frame indicated, the Wechsler Intelligence Scale for Children, Third Edition, was administered to claimant. His scores were relatively low, but scattered among the different subsets of the test. For example, claimant's verbal scores were low and within the intellectually disabled range, but claimant's performance scores were scattered from borderline to average. In a person with intellectual disability under the DSM-5, the scores would not be scattered.

More important, the report explained that claimant had marked attention problems that contributed to his test taking ability. Dr. Brown wrote that claimant understands much more than the scores indicate and that claimant exhibited "a lot of repressed anger."

MEDICATION MANAGEMENT NOTES 2016 TO 2018

Regarding the medication management notes from Northeast Counseling Services dated between 2016 and 2018, they did not show any DSM-5 diagnosis for intellectual disability. In fact, there is no mention of intellectual disability at all. Rather,

the voluminous notes contain diagnoses of schizoaffective disorder – bipolar type, paranoid personality disorder, obsessive compulsive disorder, and others. The notes do not provide any testing data or other information that would bear on whether claimant is intellectually disabled. The notes also show claimant was taking medications typically given to persons with mental health problems, like Abilify and Depakote. Most important, the notes indicated that claimant's intelligence was observed to be within the normal range.

2001 PSYCHIATRIC EVALUATION

Regarding the 2001 psychiatric evaluation of claimant that was conducted over several days, it showed that claimant had diagnoses of schizoaffective disorder, paranoid personality disorder, and obsessive compulsive disorder. The evaluation showed claimant was taking multiple medications to manage his mental health conditions, such as Zypreza and Lithium. During the last day of the evaluation, claimant was uncooperative, irritable, and hostile. Claimant became paranoid and angry. Claimant told the evaluator that he did not want to take medications anymore, but at the moment, said he would continue to take them.

The evaluators were all medical doctors, not licensed clinical psychologists. No intelligence testing was administered; in fact, no objective psychological testing was conducted. There is nothing in the entire evaluation that shows limited cognitive delay or a DSM-5 diagnosis of intellectual disability.

DECEMBER 7, 2017 MEDICATION MANAGEMENT RECORD

The record indicated that claimant had come to the counseling center on December 7, 2017, on an emergency basis because he was at work and observed to be paranoid. He had been cursing at other staff and talking to himself. The doctor who

wrote the one-page document recommended claimant take a different psychiatric medication and return in two weeks.

There was nothing remarkable in this one-page document, except that it contained a diagnosis of "unspecified intellectual disability." The document contained no testing data and no information about where this diagnosis was obtained. None of the prior records submitted by claimant contained any testing data to support this diagnosis.

CLAIMANT'S 2018 ISP

Regarding claimant's December 16, 2018 ISP, it showed he was receiving services from some type of social agency in Pennsylvania for "moderate intellectual disability." However, the report does not state where that diagnosis was obtained or if it was a DSM-5 diagnosis. The report does show that claimant was intellectually delayed as per the Merrill Palmer Scale, which is not an IQ test. Rather, it is merely a measure to identify learning and developmental disabilities in children, and which is used mostly by school districts. The ISP also describes many things incompatible with intellectual disability. It states that claimant can independently perform many activities of daily living, go out into the community independently, can be left alone unsupervised, and can essentially be self-sufficient. This is not typical of anyone with a moderate intellectual disability under the DSM-5. Moderate intellectual disability is typically characterized as an IQ between 30 and 50, which would leave a person substantially impacted in all areas of life. For example, a person who was moderately intellectually disabled, as per the DSM-5, would never be able to be unsupervised, could not walk around community, could not drive, and could not be independent.

Claimant's ISP also notes that claimant had diagnoses of Attention Deficit Disorder (ADD), paranoid schizophrenia, atypical pervasive developmental disorder, and Tourette's Syndrome. For those disorders, claimant had been an in-patient at a psychiatric center in 1998. However, claimant stopped seeing a therapist in 2007 and has since been on medication management for his psychiatric conditions.

DR. STACY'S EVALUATION

Dr. Stacy conducted an assessment on August 16, 2019. She spoke with claimant and claimant's grandmother. Claimant, who had moved to California to live with his mother, was being taken advantage of by his mother and ended up a client of adult protective services. Claimant stopped taking his psychotropic medications once he moved with his mother as well. Claimant's grandmother confirmed that during claimant's developmental years, claimant was in general education classes, purchased his own clothes, and was able to stay at her home unsupervised. Dr. Stacy said a person with moderate intellectual disability, under the DSM-5, could not do these things. Claimant's grandmother also told her that claimant attended a day program in Pennsylvania for people with intellectual disability, but claimant did not like attending with "those people." In Dr. Stacy's opinion, that was because claimant was like a "fish out of water" since he does not have an intellectual disability.

Dr. Stacy administered the Kaufmann Brief Intelligence Test, Second Edition (KBIT). Claimant scored in the below average range for intelligence. However, Dr. Stacy felt that his scores were an underestimation of his true intellectual abilities because of claimant's attention problems – claimant would often start answering before Dr. Stacy finished the question. Once she would finish the question and provide additional information, claimant would stick with his same answer despite having been given the additional information. Claimant appeared to be not giving his full attention during

the test and pointing to things rather than considering all the available answers so he could just be done with testing.

On the Street Survival Skills Questionnaire claimant's scores across the different subsets included scores in the following ranges: average, low average, borderline, and extremely low. A person with intellectual disability would have more consistent scores across subsets; not scattered scores. Overall, even with the scattered scores, claimant was still solidly within the borderline range.

Based on her assessment and the above-referenced documents, Dr. Stacy concluded claimant was not eligible for regional center services. An IRC eligibility team concurred with Dr. Stacy's conclusion.

LEGAL CONCLUSIONS

Applicable Law

1. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: To prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions

Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

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

3. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq. Welfare and Institutions Code section 4501 provides:

> The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors, and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance.
>
> The complexities of providing services and supports to persons with developmental disabilities requires the coordination of services of many state departments and community agencies to ensure that no gaps occur in communication or provision of services and supports. A consumer of services and supports, and where appropriate, his or her parents, legal guardian, or conservator, shall have a leadership role in service design.

> An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

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

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

> (a) "Developmental Disability" means a disability that is attributable to mental retardation[1], cerebral palsy, epilepsy, autism, or disabling conditions found to be closely

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

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."

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.

6. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on the claimant to establish by a

preponderance of the evidence that he or she meets the proper criteria. (Evid. Code, §§ 115; 500.)

Evaluation

7. A preponderance of the evidence did not establish that claimant is eligible for regional center services under any qualifying category. No evidence was presented that claimant met the diagnostic criteria for autism, cerebral palsy, epilepsy, or the fifth category. The only expert who testified was Dr. Stacy. Based on the records provided, Dr. Stacy's uncontested expert opinion was that claimant does not meet the DSM-5 diagnostic criteria for intellectual disability. While it is clear that claimant had challenges growing up, the records provided did not show claimant had a DSM-5 diagnosis of intellectual disability prior to the age of 18. Similarly, Dr. Stacy's evaluation, did not show claimant meets the DSM-5 diagnostic criteria for intellectual disability.

Claimant has a documented history of schizoaffective disorder (bipolar type), paranoid personality disorder, and obsessive compulsive disorder, all of which are mental health diagnoses that do not qualify a person for regional center services under the Lanterman Act. Further, those afflictions could play a role in claimant's ability to perform on cognitive testing, thus resulting in a lower score that is not indicative of claimant's true cognitive abilities. Finally, claimant's cognitive abilities varied over time, and typically, a person with a DSM-5 diagnosis of intellectual disability will have consistent cognitive delays, beginning early in their developmental period and continuing throughout their adult life.

Accordingly, claimant is not eligible for regional center services.

ORDER

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

DATE: December 13, 2019

KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.