

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

E.V.,

Claimant,

vs.

NORTH LOS ANGELES COUNTY REGIONAL
CENTER,

Service Agency.

OAH CASE No. 2013010474

DECISION

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on March 25, 2013, in Van Nuys, California.

S.H.,¹ Claimant's aunt and authorized representative, represented Claimant, who was present.

Ruth Janka, Contract Administrator, and Rhonda Campbell, Contract Officer, represented Service Agency.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

¹ Initials has been used in lieu of surnames to protect Claimant's and his family's confidentiality.

ISSUE

Whether Claimant is eligible for Service Agency services under the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq.

FACTUAL FINDINGS

1. Claimant is 22 years old and seeks eligibility for Service Agency services. He sought eligibility in 2011, and the matter came for hearing before Administrative Law Judge Julie Cabos-Owen on September 20, 2011. The same parties participated at the hearing and presented extensive evidence on the issue of eligibility for services under the Lanterman Act. Judge Cabos-Owen issued a decision on October 17, 2011, concluding that Claimant did not have a qualifying developmental disability.

2. Claimant filed a Fair Hearing Request on January 9, 2013. On February 28, 2013, Service Agency filed a Motion to Dismiss the Fair Hearing Request (Motion) on the grounds that the matter of Claimant's eligibility had already been litigated and that Claimant had not presented any material new evidence to warrant revisiting the issue. Ruling on the Motion was deferred until Claimant was given the opportunity to present new evidence, and the Motion is now before the Administrative Law Judge for ruling.

3. In addition to oral testimony regarding the issue of eligibility, Judge Cabos-Owen was presented with documentary evidence that included a Vocational Evaluation Report, prepared by JVS Disability and Assessment Services, a Social Assessment prepared by Service Agency, a Psychological Evaluation prepared by Ann L. Walker, Ph.D. for Service Agency, and a report from Katherine Barshay M.Ed.

4. Judge Cabos-Owen made the following pertinent legal conclusions:

"10. In this case, claimant alleges that he should be eligible for regional center

services under the qualifying disability of autism. According to the DSM-IV-TR [Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision], specific clinical criteria must be evident to diagnose Autistic Disorder. However, the evidence did not establish that claimant satisfied the required number of elements within the criteria of the DSM-IV-TR to diagnose him with Autistic Disorder. Using these criteria, Dr. Walker, a licensed psychologist who was found to be the more credible expert (see Factual Finding 12 (c)), specifically ruled out Autistic Disorder. While Claimant does manifest some varying social and communication impairments, the evidence did not establish that he presented with symptoms meeting DSM-IV-TR criteria for the diagnosis of Autistic Disorder. The evidence did not establish that Claimant exhibits 'qualitative impairment in social interaction,' 'qualitative impairments in communication,' and 'restricted repetitive and stereotyped patterns of behavior, interests and activities' as described in the DSM-IV-TR. Consequently, Claimant has not established that he is eligible for regional center services under the diagnosis of autism.

"11. Although claimant does demonstrate some deficits in adaptive functioning (including communication, daily living skills and social skills), the evidence did not demonstrate that he presents as a person suffering from a condition similar to Mental Retardation. Moreover, the evidence did not establish that claimant requires treatment similar to that required for mentally retarded individuals. Based on the foregoing, claimant has not met his burden of proof that he falls under the fifth category of eligibility.

"12. The weight of the evidence did not support a finding that claimant is eligible to receive regional center services." (Exhibit 2, pp. 31-32; emphasis in original.)

5. Claimant, his aunt, Anthony Sykes, MFT Intern (Sykes), and Francisco Villera (Villera) testified at the hearing in this matter. Claimant also presented the following

documents: a letter from S.H., school transcripts, a letter from Pierce College, a Department of Rehabilitation Disability Determination, a Psychiatric Medical Information progress note dated June 1, 2012, a letter from San Fernando Valley Community Mental Health Center, Inc. dated December 7, 2012, a letter from Sunland Christian School dated March 21, 2013, a report from Westview Services, Inc. (Westview) dated January 3, 2013, a letter confirming Claimant's eligibility for Supplemental Social Security Income, and a report from Luanna E. Cabrera, Ph.D. (Cabrera) dated February 22, 2013.

6. Claimant was raised by his parents until approximately age 15, when he was placed with his aunt and uncle. Claimant's life with his parents, who may have suffered from mental illness, was not very stable and he was often homeless. His mother recently died.

7. a. Claimant was home-schooled, although he sporadically attended Sunland Christian School. Grades submitted from the school for the tenth Grade show B grades in Bible Study and Physical Education, and Cs and Ds in all other subject matters. Terry Neven (Neven) wrote a letter which reads, in pertinent part, as follows:

"I am the principal of Sunland Christian School, and I have known [E.V.] since he was five years old. His parents enrolled him in Sunland [in] September 1995 into Kindergarten. [¶] Over the years I would interact with [E.V.] at school activities, photo day, graduation, Friday School and would see him each month at a parent meeting along with [his] mom and dad. [¶] [E.V.] was always kind, friendly and seemed to interact with others. I watched as he would play with other children his age, and though he behaved in a social [*sic*] appropriate manner, I had concerns about his mental and emotional development. His parents were unreceptive to the idea of having [E.V.] evaluated. . . ." (Exhibit G, at p. 1.)

b. Claimant graduated from Panorama High School on June 19, 2009, and passed the CAHSEE High School Exit Examination on February 3, 2009. He is attending

Pierce College, although he is having difficulties even with special education supports. On March 9, 2010, he was suspended from his English class due to inappropriate behavior.

8. a. Claimant has been diagnosed with Schizophrenia, Paranoid Type, and receives services from the Los Angeles County Department of Mental Health. A letter dated September 9, 2010, from Shirin Sharifa, Ph.D., was received at the prior hearing, which described his symptoms as including auditory and visual hallucinations, poor concentration, and grandiose delusions. He was prescribed Risperdal.

b. Claimant's new psychiatrist at the San Fernando Valley Community Mental Health Center, Inc., Sahib Khalsa, M.D., Ph.D. (Khalsa), submitted a letter dated December 7, 2012. Dr. Khalsa wrote: "This letter is in regards to patient [E.V.], whom I have been following since July 19th [sic], 2011 for psychiatric care. This letter is intended to verify his diagnosis of Autism spectrum. From my observations of [E.V.], he either meets criteria for high functioning autism or for Pervasive Development disorder and Anxiety NOS (social anxiety). It is difficult to distinguish which diagnosis best fits him as his developmental history is unknown. (He was taken from his biological parents at the age of 15 and has been cared for by his aunt and uncle. His aunt and uncle do not know his developmental history.)" (Exhibit F.)

c. Sykes, who works under the direct supervision of Dr. Khalsa, testified about his observations, which are consistent with those of Dr. Khalsa. According to Sykes, Claimant demonstrates limited insight, has poor social skills, responds inappropriately in social situations, has low intellectual functioning, and has problems with his identity and place in the world. Sykes has not observed any auditory hallucinations.

d. Sykes provides therapy, and Villera works with Claimant on controlling his behaviors and on appropriate social interaction. Villera described Claimant as volatile, not always following through on directions, anxious, and at times angry. He tends to repeat

certain phrases, even if not appropriate in conversation. Claimant does not make or maintain friendships.

9. Claimant was evaluated by Westview for services by the Department of Rehabilitation. The evaluation was conducted at a Petco retail store under working conditions. He was scheduled for observation for an 80-day period during the performance of clerk duties, which included stocking and cleaning tasks, in four to eight hour shifts, three to five days per week. Claimant's attendance was described by the evaluator as "imperfect." Claimant was unable to stay focused on his tasks and had difficulty following directions. Directions had to be constantly repeated. The evaluator concluded that Claimant would not be able to hold competitive employment without constant supervision, and recommended further training and behavior intervention.

10. Claimant has attempted to work at a Del Taco restaurant, but has been unable to follow directions. By his own account, the most he has worked on any given day has been 33 minutes. Claimant takes a bus to Pierce College and rides his bicycle to Del Taco.

11. a. The Department of Rehabilitation referred Claimant for a psychological evaluation, which was conducted by Dr. Cabrera. Dr. Cabrera administered various tests to ascertain Claimant's cognitive level and academic achievement. On the Wechsler Adult Intelligence Scale Intelligence Quotient equivalent test, Claimant scored 81, in the low end of the below average range. His scores were lower in abstract reasoning (76) and higher in vocabulary (88). As measured through the Wide Range Achievement Test, Revised, Claimant's reading pronunciation skills were at a 11.9 grade level, his spelling skills were at a 10.3 grade level, and his arithmetic skills were at a 6.5 grade level.

b. Dr. Cabrera concluded: "This individual appears ready for vocational planning. He definitely appears capable of further education and training. Working and

being trained in a highly structured, highly supervised work environment is suggested. Perhaps further evaluation concerning the appropriateness of training, and the type of employment, would be helpful for him. Continuing with his current psychiatric intervention is recommended. Requesting and reviewing records from his treating psychiatrist is also recommended to aid in his vocational planning. Referral to a day treatment program with socialization groups may also be appropriate. He needs realistic vocational planning, firm limits, positive reinforcement for appropriate choices and behaviors, support, encouragement and guidance.” (Exhibit I, at p. 4.)

c. Dr. Cabrera diagnosed “Autistic Disorder (provisional)” and “Tic Disorder NOS (provisional),” noting in this regard, “This individual was given Autistic Disorder and Tic Disorder (provisional) as these diagnoses are to be made in early childhood. Requesting and reviewing records from his treating psychiatrist as well as his high school is recommended to verify or rule out these diagnoses.” (Exhibit I, at p. 4.) Dr. Cabrera did not conduct any autism screening tests and did not articulate in her report how she arrived at the autism diagnosis. Her diagnosis, therefore, is unsupported and given no weight.

12. Heike Ballmaier, Psy.D. (Ballmaier), testified on behalf of Service Agency. Dr. Ballmaier reviewed the evidence presented by Claimant, as well as that received at the prior hearing, and is of the opinion that Claimant is not developmentally disabled. He has graduated from high school and passed a standardized exit examination, which is indicative of cognitive functioning above mental retardation levels. Dr. Cabrera’s testing shows that Claimant’s intelligence and skills are at borderline levels or higher, which is not consistent with an individual suffering from mental retardation or requiring treatment similar to that required by someone with mental retardation. Dr. Ballmaier opined that neither Dr. Khalsa nor Dr. Cabrera issued a qualifying autism disorder diagnosis consistent with the DSM-IV, and Claimant’s reported behavior at Sunland Christian School is not

consistent with that of a person with autism. Dr. Cabrera did not report any observations consistent with autism. If anything, Claimant's statements to Dr. Cabrera, in Dr. Ballmaier's opinion, are more consistent with those of an individual suffering from depression.

LEGAL CONCLUSIONS

1. The California Supreme Court has described the related doctrines of collateral estoppel and *res judicata* as follows: "As generally understood, '[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy.' (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, §280, p. 820.) The doctrine 'has a double aspect.' (*Todhunter v. Smith* (1934) 219 Cal. 690, 695.) 'In its primary aspect,' commonly known as claim preclusion, it 'operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]' (*Clark v. Leshner* (1956) 46 Cal.2d 874, 880.) 'In its secondary aspect,' commonly known as collateral estoppel, '[t]he prior judgment . . . operates' in a 'second suit . . . based on a different cause of action . . . as an estoppel or conclusive adjudication as to the issues in the second action as were litigated and determined in the first action. [Citation.]' (*Ibid.*) 'The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceedings. [Citations.]' (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 556.)" (*People v. Barragan* (2004) 32 Cal.4th 236, 252-253.) Decisions resulting from administrative hearings can have preclusive effect. (*People v. Sims* (1982) 32 Cal.3d 468.)

2. All elements of collateral estoppel have been met. The issue of Claimant's

eligibility was litigated before Judge Cabos-Owen by the same parties, and a decision resolving the issue was issued. Therefore, Claimant may not relitigate the issue of eligibility absent changed circumstances. Claimant did present new evidence at the hearing, but this evidence was insufficient to establish changed circumstances.

3. In order to be eligible to receive services from a regional center, a claimant must have a developmental disability, which is defined as “a disability that originates before an individual attains age 18 years, 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 mental retardation, 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.” (Welf. & Inst. Code, § 4512, subd. (a).)

No evidence was presented to establish that Claimant has an eligible condition. No evidence was presented, nor a contention made, that Claimant suffers from cerebral palsy or epilepsy. Claimant’s cognitive functioning is higher than that of an individual with mental retardation or with a condition similar to mental retardation or requiring treatment similar to that required by an individual with such condition, and Claimant has not been diagnosed with mental retardation. Dr. Khalsa issued alternative diagnoses on the autism spectrum, but did not formally diagnose autism disorder. Dr. Cabrera did issue a diagnosis of autism, but it was provisional and was not supported by clinical observations or testing results. Neither Dr. Khalsa nor Dr. Cabrera articulated a diagnosis of Autism Disorder utilizing the diagnostic criteria of the DSM-IV. Rather, as Dr. Ballmaier persuasively opined, the new evidence, such as Neven’s observations of Claimant’s behavior as a young child

and the evidence of his academic accomplishments, is inconsistent with a developmental disability.

4. Accordingly, it was not established that Claimant has a developmental disability, and, therefore, he is not eligible for Service Agency services under the Lanterman Act.

ORDER

Claimant's appeal is denied.

Dated: _____

/s/

Samuel D. Reyes

Administrative Law Judge

Office of Administrative Hearings

NOTICE

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