

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

OAH No. 2013090933

Regina D.R.,

Claimant,

and

Westside Regional Center,

Service Agency.

DECISION

This matter was heard by Laurie Gorsline, Administrative Law Judge, Office of Administrative Hearings, State of California, on November 13, 2013, in Culver City, California. The Westside Regional Center (Service Agency) was represented by Lisa Basiri, Fair Hearing Coordinator. Claimant Regina D.R.¹ was represented by her mother, Esther A. (Mother). Spanish interpreter Victor Ramos translated the proceedings for Mother.

Evidence was received by documents and testimony. The record was closed and the matter was submitted for decision on November 13, 2013.

¹ Initials and family ties are used to protect the privacy of Claimant and her family.

ISSUE

Is Claimant eligible to receive services from the Service Agency?

EVIDENCE RELIED UPON

Documents: Service Agency's Exhibits 1 through 7 and 10

Testimony: Lisa Basiri; Ari S. Zeldin, M.D., F.A.A.P., F.A.A.N.; Esther A.; and Claudia A.

FACTUAL FINDINGS

1. Claimant was born in Mexico on March 12, 2008, and is currently five years old. Claimant lives with her Mother. She has been diagnosed with spina bifida, secondary to Arnold-Chiari malformation type II. The family moved from Mexico to the United States in April 2013. While living in Mexico, Claimant had numerous surgeries, including reconstructive surgery on her spinal cord and a shunt placed in her head. Claimant is not ambulatory and is wheelchair bound.

2. Claimant has applied to receive services from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act). In a letter and Notice of Proposed Action dated September 6, 2013, the Service Agency denied eligibility, asserting that Claimant did not have a condition that made her eligible for services. Claimant submitted a request for fair hearing on September 25, 2013, and this hearing ensued.

3. Claimant contends that she should be eligible for services from the Service Agency. For the reasons set forth below, Claimant's appeal is denied.

4. Ari S. Zeldin, M.D., F.A.A.P., F.A.A.N., served as a member of the eligibility team that determined Claimant was not eligible for regional center services. The other members of the team were Chief Psychologist Dr. Thompson Kelly, Ph.D. and Service Coordinator Florence Garcia. Dr. Zeldin is a board certified

pediatric neurologist at the Naval Medical Center in San Diego. He is also a consulting physician and Medical Services Supervisor for the Service Agency. As part of his clinical practice, Dr. Zeldin sees patients with epilepsy, migraines, cerebral palsy, spina bifida, and children with a host of other syndromes and developmental disabilities. As a consultant to the Service Agency, Dr. Zeldin participates in team reviews for determining eligibility for services from the Service Agency.

5. As part of the eligibility assessment, Dr. Zeldin recommended that Claimant be referred for a psychological evaluation to determine cognitive functioning. The psychological examination was conducted by licensed psychologist, Jessica Quevedo, Psy.D. Dr. Quevedo evaluated Claimant on June 27, 2013. As part of the evaluation, Dr. Quevedo administered the Stanford Binet, Fifth Edition (Binet-V) – Early Childhood, which is a test measuring intelligence and cognitive abilities. Only the non-verbal domain was attained due to Spanish being Claimant’s primary language and the test being administered in English. Claimant performed within the average range of abilities with a scaled score of 96. On the non-verbal domain, Claimant was able to solve simple matrices and count different objects. Claimant was also assessed in the area of mathematical calculations using the Wide Range Achievement Test-4 (WRAT-4), and performed within the average range.

6. Claimant was also assessed using the Vineland Behavior Scales-Second Edition (VABS-II), with her Mother serving as the informant. Claimant performed within the borderline range of abilities on the communication domain. With regard to receptive language skills, she performed at two years, five months. Claimant can point to at least five minor body parts when asked, is sometimes able to attend to a story for at least 15 minutes, and is sometimes able to follow instructions in the “if and then” form, but she is not able to follow instructions that

contain three different steps. Claimant performed at three years, eleven months in the area of expressive skills. She is able to sometimes modulate her tone of voice, rhythm and volume and she is able to sometimes explain her ideas in more than one way. She can sustain a conversation for more than ten minutes, but she is not able to state her telephone number or complete address. Claimant performed at three years, five months with regard to writing skills. She is sometimes able to distinguish letters from numbers, and can sometimes copy her name, but is not able to copy at least three simple words. Claimant's score on the daily living skills domain fell within the mildly delayed range of abilities. She can sometimes drink from a cup and feed herself with a spoon without spilling. She is sometimes able to take off and put on clothing that opens in front. She is not able to urinate in the toilet due to her medical condition. She is not able to assist with many household chores because she is not ambulatory, but she can help with small things around the house. With regard to safety awareness, Claimant is able to demonstrate appropriate behavior while riding in the car. She understands the function of a clock and is sometimes able to state the day of the week when asked. Claimant's score on the socialization domain fell within the low average range. She demonstrates friendship-seeking behavior with others her age. She is able to use words to express her own emotions. She shows preference for certain friends and is able to act when someone needs a helping hand. She recognizes the likes and dislikes of others, and she is able to initiate conversations with those she knows, but she is not able to keep adequate distance between herself and others in social situations. She is able to engage in make-believe activities, seeks the company of others, can sometimes show good sportsmanship while playing a game, but she is not able to play games that require keeping score. As far as coping skills, Claimant is able to apologize for unintended mistakes, she can change her voice level

according to a situation, can sometimes accept suggestions or solutions from others, but she does not control her emotions when she does not get her way. Claimant functions within the moderately delayed range of functioning in the motor skills domain. She can catch and throw a ball, drag herself on her stomach, open doors by turning knobs, hold a pencil correctly and can sometimes unwrap small objects. Dr. Quevedo noted that Claimant's low scores may be attributed to her physical limitations as she is not ambulatory, hindering her ability to perform certain tasks.

7. Dr. Quevedo made several behavioral observations. During the evaluation, Claimant appeared to be very happy and constantly smiling. She engaged in appropriate eye contact and exhibited a full range of facial expressions. She was able to respond to questions posed and used complete sentences in conversation, although her articulation sometimes made her difficult to understand, indicative of a phonological disorder. She was able to incorporate nonverbal gestures into her communications, including pointing, shrugging, nodding and shaking her head. Dr. Quevedo's diagnostic impression was as follows:

Axis I: 315:39 Phonological Disorder

Axis II: V.71.09 No Diagnosis

Axis III: Arnold-Chiari type II.

8. Claimant's Mother provided the Service Agency with copies of Claimant's medical records from Mexico. All of Claimant's medical records are in Spanish.

9. Dr. Zeldin was the only healthcare professional who testified at the hearing. Dr. Zeldin is fluent in Spanish. He reviewed Dr. Quevedo's psychological evaluation and Claimant's medical records. Dr. Zeldin confirmed Claimant's diagnosis of spina bifida and Arnold-Chiari malformation type II. Dr. Zeldin

explained that spina bifida is a failure of the spinal cord to form correctly. Arnold-Chiari malformation type II is a significant displacement of the cerebellar tonsils down into the foramen magnum (the opening at the base of the skull). There is a high association of Arnold-Chiari malformation type II with the occurrence of spina bifida. The purpose of putting in a shunt in patients like Claimant is to alleviate inter-cranial pressure which can cause a blockage of the flow of cerebral spinal fluid due to the malformation with the herniation of the cerebellar tonsils. Dr. Zeldin opined that the nature of Claimant's disability is solely physical in nature and that Claimant has no diagnosis of autism, cerebral palsy, epilepsy, or mental retardation. Claimant's cognitive abilities are within the average range and nothing in Dr. Quevedo's evaluation indicates that Claimant has a cognitive impairment. Theoretically, Claimant's shunt could malfunction and later cause cognitive delays, but there is no present evidence of that occurring with regard to Claimant. According to Dr. Zeldin, many people with spina bifida with shunted hydrocephalus, aside from the motor deficits, never suffer cognitive decline and lead normal lives. Because Claimant's cognitive abilities tested within the average range she does not have a condition closely related to mental retardation. Dr. Zeldin concluded that the Claimant's treatment needs were medical in nature and she did not require treatment similar to treatment for mental retardation. The primary treatment required for people with spina bifida is medical treatment in the form of regular orthopedic and urology care, occasional neurology care, monitoring for shunt malfunction, physical therapy, podiatry, and equipment needs, and not necessarily treatment related to cognitive deficits. The type of treatment needed for people with mental retardation depends upon the age of the patient and can involve matters such as managing money, paying bills, managing a household, and obtaining supports within the community, but is not based solely on a physical

disability.

10. Claimant's Mother believes her daughter's condition of Arnold-Chiari malformation type II could be "generating" "mental damages." Mother believes Claimant is eligible for services from the Service Agency because her daughter's damages are progressive and she does not want them to become worse.

LEGAL CONCLUSIONS

1. Claimant has not established that she suffers from a developmental disability entitling her to Service Agency's services.

2. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.)

3. An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (Welf. & Inst. Code, §§ 4700-4716.) Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his/her eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has not met her burden of proof in this case.

4. The Lanterman Act is a comprehensive statutory scheme to provide "[a]n array of services and supports . . . 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." (Welf. & Inst. Code, § 4501.) The services and supports should "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (*Id.*)

5. In enacting the Lanterman Act, the Legislature codified the state's responsibility to provide for the needs of developmentally disabled individuals and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. A regional center is required to provide services and supports for eligible consumers in accordance with the Lanterman Act. (Welf. & Inst. Code, § 4500 et seq.)

6. To be eligible for regional center services, a claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" 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. . . . [T]his 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.

7. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that he/she has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (l):

“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.

8. California Code of Regulations, title 17, section 54001 states, in pertinent part:

- (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.

9. In addition to proving a "substantial disability," a claimant must show that his/her disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism² and cerebral palsy. The fifth and last category of eligibility is listed as "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512, subd. (a).)

10. The Legislature did not define the fifth category, requiring only that the qualifying condition be "closely related" (Welf. & Inst. Code, § 4512, subd. (a).) or "similar" (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or that it "require treatment similar to that required for mentally retarded individuals." (Welf. & Inst. Code, § 4512, subd. (a).) In a recent case, the appellate court decided eligibility in the fifth category may be based on the established need for treatment similar to that provided for individuals with mental retardation, notwithstanding an individual's relatively high level of intellectual functioning. (*Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462.) The court

² The plain language of the Lanterman Act's eligibility categories includes "autism" or Autistic Disorder, but it does not include the other PDD diagnoses in the DSM-IV-TR (Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and PDD-NOS). The Lanterman Act has not been revised since the publication of the DSM-5 to reflect the current terminology of Autism Spectrum Disorder, and Intellectual Disability (in place of Mental Retardation).

confirmed that individuals may qualify for regional center services under the fifth category on either of two independent bases, with one basis requiring only that an individual require treatment similar to that required for individuals with mental retardation.

11. In order to establish eligibility, a claimant's substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of "developmental disability" (Welf. & Inst. Code, § 4512 and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are solely physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are solely psychiatric disorders or solely learning disabilities. Therefore, impaired intellectual or social functioning which originated as a result of a psychiatric disorder, if it was the individual's sole disorder, would not be considered a developmental disability. Nor would an individual be considered developmentally disabled whose only condition was a learning disability. A learning disability is "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." (Cal. Code Regs, tit.17, § 54000.)

12. The term "cognitive" is defined as "the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience." (Cal. Code Regs, tit.17, § 54002.)

13. Claimant has not established she suffers from a development disability entitling her to Service Agency's services. Claimant made no direct assertions of a particular basis of eligibility and offered no evidence that she had mental retardation, cerebral palsy, epilepsy, autism or a disabling condition found to be closely related to mental retardation or to require treatment similar to that


required for individuals with mental retardation. It is undisputed that Claimant has a diagnosis of spina bifida and Arnold-Chiari malformation type II. Dr. Zeldin testified that the nature of Claimant's disability is solely physical in nature. While Mother expressed concerns about Claimant's "mental damages" as a result of Arnold-Chiari malformation type II, the uncontradicted evidence established that because Claimant had no cognitive impairment she did not have a qualifying condition closely related to mental retardation.

14. Claimant has not established that she had a "disabling condition . . . [that] require[ed] treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512, subd. (a).) The only evidence as to what treatment is required for individuals with mental retardation came from Dr. Zeldin. He testified, without contradiction, that Claimant's treatment needs were medical in nature and that she did not require treatment similar to treatment for mental retardation. While Claimant had some low scores in adaptive functioning as measured using the VABS-II, Claimant offered no evidence that as a result of her particular deficits she would require treatment similar to that required for individuals with mental retardation.

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant's appeal is denied.

DATED: November 22, 2013

A handwritten signature in black ink, appearing to read 'Laurie Gorsline', written over a horizontal line.

LAURIE GORSLINE

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.