

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

SAN DIEGO REGIONAL CENTER,

Agency.

OAH No. 2014070482

DECISION

Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on September 16 and 17, 2014.

Counsel for the San Diego Regional Center (SDRC), Ron House, Esq., represented SDRC.

Claimant was represented by Wendy Dumlao, Esq.

The record remained open until 5:00 p.m. on October 3, 2014, so that the parties could submit written closing briefs/arguments. The written closing briefs/arguments were received, and the matter was deemed submitted on October 3, 2014.

ISSUE

Is claimant eligible for agency services based on a disabling condition closely

related to Intellectual Disability<sup>1</sup> (ID), or a disabling condition that requires treatment similar to that required for individuals with ID (commonly referred to as the “fifth category” for eligibility)?

## FACTUAL FINDINGS

### JURISDICTION

1. Claimant is 20 years old.
2. Claimant applied for SDRC services. On August 13, 2012, claimant, who was 18 years old, attended a SDRC intake interview. Claimant was accompanied by his adoptive parents. (SDRC<sup>2</sup> Exh. 2-5 through 2-9) On October 25, 2012, a SDRC intake assessment team concluded that claimant did not qualify for services because he did not have a qualifying, substantially disabling developmental disability. (SDRC Exh. 2-11) On June 23, 2014, a SDRC intake assessment team reviewed claimant’s eligibility status based on updated information. Again, the team concluded that claimant was not eligible for services. (SDRC Exh. 2-3)
3. On July 9, 2014, claimant filed a Fair Hearing Request, and the instant hearing ensued. The hearing focused on whether claimant is eligible for services under the “fifth category.”

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<sup>1</sup> The Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSM-5), uses the term Intellectual Disability or Intellectual Developmental Disorder in place of the formerly used term, “Mental Retardation.”

<sup>2</sup> “SDRC” refers to San Diego Regional Center’s exhibits.

## CLAIMANT'S DIAGNOSES

4. It is undisputed that claimant was born with Fetal Alcohol Syndrome (FAS) and has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). Additionally, claimant has a history of substance abuse and dependency problems.

## CLAIMANT'S EXPERT

5. Clark R. Clipson, Ph.D., a licensed psychologist, evaluated claimant on January 5 and 18, 2012. The two-day assessment was conducted due to a referral from claimant's probation officer.<sup>3</sup> Intellectual testing revealed that "it is likely that his level of intelligence lies between 78 and 87." (Exh. C<sup>4</sup>-2, pg. 12) In addressing the question of "what treatment would be helpful in reducing [claimant's] potential for engaging in future criminal behavior," Dr. Clipson opined:

Unfortunately, this most important question has few answers now that [claimant] is an adult. To my knowledge, there are no residential treatment facilities available for someone his age with his particular constellation of problems, although

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<sup>3</sup> Claimant was arrested at the age of 14 on charges of assault when he broke another student's nose. In 2008, he was arrested for tagging. In 2009, he was arrested for shoplifting and stealing another person's cellular phone. In 2010, claimant was arrested for trying to sell marijuana and his prescription medication. On August 25, 2011, a true finding was made on the charge of sexual battery. At the time of the instant hearing claimant was incarcerated.

<sup>4</sup> "C" refers to claimant's exhibits.

this would be an ideal treatment setting for him, as other evaluators have also opined. Outside of such a structured setting, [claimant] is at high risk to become involved in law-breaking behaviors because of his cognitive problems with problem-solving and self-control. This risk level is likely to increase significantly once he is no longer living with his parents, who provide a great deal of structure and support for him.

Given these limitations, a referral to Regional Center may be most appropriate. Even though [claimant] does not meet their requirements in terms of his measured level of intellectual functioning, his level of adaptive functioning does lie in the range appropriate to this level of service. If this option is unavailable, perhaps the most appropriate community resource available would be the Conditional Release Program (CONREP). . . . (Exh. C-2, pg. 20)

6. On January 21 and 23, 2014, Dr. Clipson again evaluated claimant. In the "reason for referral" section of his February 5, 2014, report, Dr. Clipson wrote:

[Claimant] has a documented diagnosis of Fetal Alcohol Syndrome (FAS) and attention-deficit/hyperactivity disorder (ADHD) that adversely interfere with his cognitive, emotional, and interpersonal functioning. The patient's mother reports that he has difficulty living independently and that he needs structure and supervision in order to meet basic living requirements. The family would like the patient to be

accepted into the San Diego Regional Center based on the program's eligibility criteria. [Claimant] is referred for an evaluation of his current level of cognitive and personality functioning to demonstrate his eligibility for Regional Center Services. (Exh. C-3, pg. 1)

Dr. Clipson reached the following diagnostic impressions: FAS; "Major Neurocognitive Disorder due to FAS, with behavioral disturbance"; "Attention-deficit/hyperactivity disorder, combined type, severe"; "other specified neurodevelopmental disorder: Auditory processing deficit"; "Alcohol use disorder, moderate"; "Cannabis use disorder, moderate"; and "Opioid use disorder, moderate, in early remission." (Exh. C-3, pg. 15) Dr. Clipson summarized his findings and conclusions as follows:

[Claimant] is a 20 year-old man of low average intelligence. He demonstrates significant deficits in several areas of cognitive functioning, including processing speed, attention, memory functioning, language functioning, and executive functions. Although previous evaluations during his adolescence demonstrated average intellectual functioning, this has not been observed in later evaluations over the past three to four years. The reason for this significant reduction in his measured level of intellectual ability is unclear, as there is no evidence of a lack of effort on his part on the cognitive measures during the current or past assessments. One possibility is that without the structured environment of a school setting in which his cognitive skills are being

exercised on a regular basis, his overall functioning has returned to his baseline skill set. In addition, his current use of drugs is also likely to affect his overall functioning.

The patient meets the diagnostic criteria for a major neurocognitive disorder secondary to fetal alcohol syndrome because of his significant deficits in all areas of cognitive functioning, particularly in the areas of attention, processing speed, memory functioning, reasoning and problem-solving and social cognition. These deficits contribute to significant difficulties in his adaptive functioning and are accompanied by behavioral difficulties that are common in individuals with FAS. In the patient's case, his problems with impulsivity have not only led to legal difficulty, but he continues to make poor decisions regarding drug use and his peer group. He is also easily influenced by his peer group, which likely exacerbates his poor choices. As previous evaluations have recommended, he is most likely to benefit from a highly structured environment where he is provided with support, supervision, and frequent reminders of appropriate and goal-oriented behaviors. He has the capacity to work in a highly structured and supportive environment with appropriate supervision as well.

Furthermore, [claimant] demonstrates additional disabilities in the form of an auditory processing deficit as well as the combined type of ADHD. Both of these disorders are likely to

significantly impact many areas of his daily functioning. (Exh. C-3, pgs. 15-16)

Dr. Clipson then applied his interpretation of the SDRC eligibility requirements and concluded:

According to the eligibility requirements, [claimant] meets the criteria for inclusion in the Regional Center under the other conditions similar to intellectual disability. His condition developed prior to the age of 18; his condition is unlikely to improve; and it constitutes a substantial disability in communication, economic self-sufficiency (he cannot work without significant supervision and guidance), learning, self-care (he cannot complete activities of daily living without significant supervision as evidenced by his odor [sic] during the evaluation as well as his mother's and other evaluator's reports), self-direction, and capacity for independent living. These disabilities have been consistently documented throughout his life as well as in the current evaluation. (Exh. C-3, pg. 16)

7. Dr. Clipson testified in conformity with the contents of his reports.

#### SDRC'S EXPERTS

8. Thomas Montgomery, M.D., the physician consultant with SDRC, who diagnoses neurologically based developmental disabilities, reviewed all of the records concerning claimant, including Dr. Clipson's reports. Additionally, Dr. Montgomery was present for Dr. Clipson's testimony.

### Dr. Montgomery's Testimony

9. Dr. Montgomery testified that claimant does not have a condition closely related to ID. Claimant has brain injury due to pre-natal alcohol exposure; FAS. His brain injury seems to be functional as opposed to structural. He exhibits many behaviors of a brain injured individual. Claimant has historically received extensive treatment for mental disorders; however, he has not received treatment similar to that received by individuals with ID; nor has any such treatment(s) been recommended. All recommended treatments have been similar to treatments recommended for individuals with mental health problems. Dr. Montgomery disagreed with Dr. Clipson's conclusion that claimant suffered from a condition similar to ID and that he could benefit from treatments similar to treatments used to treat ID.

### Dr. Eisner's Testimony

10. Harry Eisner, Ph.D., the clinical psychologist who coordinates psychological services for SDRC clients, reviewed all of claimant's records and was also present during Dr. Clipson's testimony. Dr. Eisner's testimony concerning whether claimant qualifies for SDRC services under the fifth category is summarized as follows: not all individuals with FAS and brain injury qualify for services under the fifth category; claimant does not have a condition "closely related" to ID; many individuals have conditions "similar" to ID, but there are distinct differences between "similar" conditions and "closely related" conditions; claimant has above-average I.Q.;<sup>5</sup> one would expect to see even functioning

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<sup>5</sup> I.Q. testing when claimant was 14 years old revealed that his I.Q. scores were as follows: verbal=98; non-verbal=108; and overall I.Q. was 104. (SDRC Exh. 5-65) I.Q. testing when claimant was 17 years old revealed that his I.Q. scores were as follows: verbal=93; non-verbal=74; and overall I.Q. was 81. (SDRC Exh. 6-11)



across all skill levels in someone with ID, however, claimant's functioning varies depending on the skill; when claimant was 17 years old, he exhibited average to above average reading, written expression and mathematical abilities; claimant's special education school supports were not similar to those of someone with ID; claimant's treatments over time consisted of medications, self-monitoring training, conflict resolution training, drug rehabilitation, and safety training; the focus of claimant's past treatments was on impulse control issues; benefitting from a structured living environment is not exclusive to individuals with ID, many individuals could benefit from structured living and work environments; when all of the data concerning claimant is evaluated, there is nothing to suggest that he needs treatment similar to someone with ID.

#### Dr. Gregory's Testimony

11. Dr. Lynne Gregory is the Director of Clinical Services at SDRC. Her testimony is paraphrased as follows: she reviewed all of the reports and evaluations concerning claimant; claimant's developmental history indicated that his early developmental milestones were met within the "typical" range; he has been diagnosed with FAS, ADHD, and ODD behaviors; he had an Individual Education Plan and was classified for special education services under the category of "ADHD, other health impaired" and "emotionally disturbed"; his treatments and treatment goals over time were not the types one would expect for treating ID, for example, he was treated with mental health supports, medications, and for chemical and alcohol dependency; he is not eligible for SDRC services under the fifth category.

#### LEGAL CONCLUSIONS

1. California Welfare and Institutions Code section 4512 defines a "Developmental Disability" as a disability which originates before an individual attains

age 18, continues, or can be expected to continue, indefinitely....” California Code of Regulations, title 17, section 54000 further defines “Developmental Disability” as follows:

- (a) ‘Developmental Disability’ means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely 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. (Emphasis added.)

2. Dr. Clipson's reports and testimony indicated that he was not confident that claimant would qualify for SDRC services under the fifth category. He had a good faith belief that claimant may qualify but he was not positive so, he referred claimant to SDRC for an intake assessment. The full intake review, by highly qualified SDRC experts, resulted in the determination that claimant did not, and does not, qualify for services under fifth category because, he does not have a disabling condition closely related to ID, or a condition that requires treatment similar to that required for individuals with ID.

3. The facts, considered as a whole, reveal that claimant does not qualify for services under the fifth category. The burden rests on claimant to establish that he suffers from a qualifying "Developmental Disability" and, in this case, claimant failed to establish his eligibility by a preponderance of the evidence. (See Evid. Code, § 115.)

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## ORDER

SDRC's conclusion that claimant is not eligible for agency services under the fifth category is affirmed.

DATED: October , 2014.

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ROY W. HEWITT

Administrative Law Judge

Office of Administrative Hearings

## NOTICE:

**This is a final administrative decision pursuant to Welfare and Institutions Code section 4712.5(b)(2). Both parties are bound hereby. Either party may appeal this decision to a court of competent jurisdiction within 90 days.**