

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2014090759

DECISION

Amy Yerkey, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on November 6, 2014, in Culver City, California.

Carmen Carley, Parent Advocate, represented Claimant.¹

Lisa Basiri, Fair Hearing Specialist, represented the Westside Regional Center (WRC or Service Agency).

The matter was submitted on November 6, 2014.

ISSUE

The question in this matter is whether Claimant is eligible for regional center services.

¹ Claimant and his family members will be referred to by title only to protect their privacy.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-14; Claimant's exhibits A-N.

Testimonial: Thompson J. Kelly, Ph.D.; Mary Large, Ph.D.; Claimant's mother.

FACTUAL FINDINGS

1. Claimant is a four-year-old male. Claimant's qualifying diagnosis is autism spectrum disorder. Claimant's diagnosis is not in dispute.

2. By letter dated August 18, 2014, WRC informed Claimant that although he has a diagnosis of autism spectrum disorder, he is not eligible for regional center services because his diagnosis is not a substantial disability in three or more major life areas.

3. Claimant timely filed a fair hearing request.

4. Thompson J. Kelly (Kelly), Ph.D., WRC Chief Psychologist and Manager of Intake and Eligibility, testified at the hearing. He explained that to determine eligibility, WRC looks at two questions: whether an individual meets the diagnostic criteria for a developmental disability, and whether the disability is a substantial disability as defined in Welfare and Institutions Code 4512. Specifically, there are seven categories considered: self-care, receptive and expressive language, mobility, self-direction, capacity for independent living, and economic self-sufficiency. Kelly recently co-chaired a task force where these terms were defined to develop guidelines. (Exhibit 4.) The task force's position with regard to the category "capacity for independent living" was that it only applied to individuals' ages six and up. Thus, WRC did not consider Claimant's capacity for independent living when determining his eligibility. When questioned why the task force took that approach, Kelly explained that they gleaned information from other disability laws outside the Lanterman Act.

5. Dr. Kelly did not formally evaluate Claimant, but observed him in mid-July 2014. He did not see mobility, communication or learning as areas of impairment for Claimant. Dr. Kelly noted that Claimant has a substantial impairment in self-direction, but not in any other category. The WRC eligibility team determined that Claimant has a substantial disability in only one area and therefore does not meet the criteria for regional center eligibility.

6. Claimant underwent multiple assessments by several independent providers.² Dr. Kelly reviewed and agreed with the majority of the written materials, but maintained his opinion about Claimant's eligibility. WRC's position was that there is a difference between having the ability to do a task and not wanting to; e.g., Claimant has the innate capacity to use the toilet, but he has self-direction issues which impede toileting. Thus, he did not consider Claimant's toileting issues to be substantial disabilities in the categories of self-care or capacity for independent learning. Similarly, Dr. Kelly opined that Claimant's social communication and interaction deficits falls under the category of self-direction under the eligibility analysis.

7. Dr. Kelly reviewed and considered the most recent and extensive evaluation of Claimant by psychologist Mary Large (Large), Ph.D. (Exhibit D.) Dr. Large found that Claimant is substantially disabled in four of the enumerated categories. Dr. Kelly recently reviewed Dr. Large's report and opined that nothing in the report changed his opinion. For example, Dr. Large's references to self-regulation fall under the category of self-direction. Dr. Kelly also opined that Dr. Large's determination that Claimant has impaired social pragmatics should be categorized as a deficit in self-direction. He opined the same was true for Claimant's deficits in socialization and social intent; that is,

² The findings in Claimant's assessments will only be discussed below to the extent that they are in dispute.

they are all deficits in the self-direction category. Dr. Kelly noted that some of Dr. Large's test scores were lower than what WRC observed and stated that it did introduce new information that WRC did not have and gave them a broader picture of Claimant's abilities. But overall her report was consistent with the information WRC had already considered. In sum, even though WRC had more information, they came to the same conclusion that they had already formed, which was that Claimant was not eligible for regional center services.

8. Dr. Large testified at the hearing. She is a licensed Neuropsychologist. She observed Claimant on multiple occasions and in various settings. She gave a summary of her report. On the positive side, Claimant has a number of strengths; he is not intellectually impaired, and his disability will not impact his learning. In a lot of areas he appears to be functioning at age level or close to it. On the other hand, Claimant has significant deficits in fine motor control and coordination. He has fine motor difficulties; for example, he grasps a writing instrument with two hands, or uses awkward grip. Dr. Large had concerns about Claimant's functional language. She noted that he knows a lot of words but has trouble putting them together. He is not using words functionally and to engage with peers, even though his test scores indicate his receptive and expressive language is at age level. Claimant is disengaged from his peers; other children his age engaged with each other. Claimant is not engaging in reciprocal play. He is not able to put his skills to functional use. He is highly routine-bound. Dr. Large is concerned with Claimant's executive functioning, but she noted that tests do not capture this at his age. Dr. Large was also quite concerned with Claimant's aggression toward his younger brother. She noted that Claimant has safety issues; for example, he darted across the street to get to a traffic cone. Claimant also has an obsessive interest in strange men; he will circle an unknown man and loiter. Dr. Large is concerned with Claimant's repetitive behaviors, self-stimulating behaviors, and level of social engagement. Finally, Claimant

has significant deficits in self-care. For example, toileting is a big issue. Claimant actively withholds urine and feces, and avoids and resists toileting. At Claimant's age, he should be able to pull up elastic waist pants or pull on an open jacket, but he cannot. Claimant is also adverse to water on his face or hair, and he refuses to brush his teeth or wash his hair. Notably, there is no progression toward self care.

9. Regarding qualification for regional center, Dr. Large opined that Claimant is substantially disabled in self-direction, self-care, receptive and expressive language, and capacity for independent living. With respect to Claimant's language abilities, Dr. Large stated that on the surface Claimant does not appear to have a substantial disability, but a closer look reveals that his functional use of language and his pragmatic and social language are substantially disabled. Claimant is not communicating with peers, and Dr. Large considers this to be a communicative function under expressive and receptive language. She noted that Claimant is especially deficit in the social pragmatics of expressive language; that is, using language to capture someone else's attention and then engage them in an activity. Claimant can label objects and define things, but when a child said, "look at me," Claimant completely ignored him and did not respond. Dr. Large stated that is a receptive language deficiency. When other children asked Claimant what he was doing and he did not respond, that is an expressive language deficit. With respect to Claimant's capacity for independent living, Dr. Large opined that Claimant is substantially disabled in this area he has issues with safety; for example, darting into street and stranger awareness. Also, Claimant's independence with peers is impacted. Finally, Claimant's inability to play with other children is related to his capacity for independence because someone his age should be engaging in play and not just self stimulatory behaviors. Considering the length of time spent in reaching her conclusions, and when viewed under the rubric of the Lanterman Act as discussed below, Dr. Large's opinion is credited over the WRC eligibility team's opinion.

10. Claimant's mother described the long and tedious journey of seeking assistance for her son. She took him to WRC in February 2013, and he was found not eligible for Early Start. (Exhibit K) Although Claimant's mother chose not to appeal the decision, she made that decision based on information which she believed was misleading. When Claimant started preschool in March 2013, his mother observed several warning signals. She was present during school all of the time, and she saw other children who did not behave like Claimant. It was the first time that she knew that his behavior was not typical for his age. After WRC denied Early Start, Claimant's mother took him to his pediatrician, who sent him to the Boone Fetter Clinic (Exhibit C). They recommended behavioral intervention services and that Claimant receive regional center services. Mom contacted WRC again in October 2013, and Claimant was then evaluated by Carol Kelly, Ph.D., who determined he had a diagnosis of autism spectrum disorder. (Exhibit 5.) Claimant's mother also sought an independent behavior assessment from Holding Pediatric Therapy and Diagnostics. (Exhibit G) They recommended 25 hours of behavior intervention. (*Id.*) Claimant began receiving intervention services in January 2014 with First Steps, funded by private insurance with Claimant's family paying the copayments. (Exhibit H.) Claimant made significant progress, but his family had to stop the treatment because they were unable to afford the copayments, which ranged from approximately \$700 to \$800 per month. (Exhibit M.)

11. Claimant's mother gave specific examples of how Claimant is substantially disabled in at least three major life activities. For example, at the park, Claimant talks into the air, and his behavior alienates other children. He has been targeted at school because of his behavior. His classmates do not want to play with him and they tell other children not to play with him. Claimant has responded by screaming in their faces, which exacerbates the situation. Claimant's mother noted that her two-year-old son is more independent than Claimant. Finally, she thought the observation of Claimant by WRC

staff was not conducted properly, and that may have contributed to its erroneous determination.

LEGAL CONCLUSIONS

1. Cause exists to grant Claimant's request for regional center services, as set forth in Factual Findings 1 through 11, and Legal Conclusions 2 through 8.

2. Claimant bears the burden of proving, by a preponderance of evidence, that he is eligible for government benefits or services. (*See* Evid. Code, § 115; *see also Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161-162.)

3. The Lanterman Developmental Disabilities Services Act ("Lanterman Act") governs this case. (Welf. & Inst. Code, § 4500 et seq.) To establish eligibility for regional center services under the Lanterman Act, Claimant must show that he suffers from a developmental disability that "originates before an individual attains 18 years, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual." (Welf. & Inst. Code, § 4512, subd. (a).)

4. "Developmental disability" is defined to include mental retardation, cerebral palsy, epilepsy, autism, and "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." (*Id.*)

5. "Substantial disability" is defined as "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" in the following categories: (1) self-care; (2) receptive and expressive language; (3) learning; (4) mobility; (5) self-direction; (6) capacity for independent living; and (7) economic self-sufficiency. (Welf. & Inst. Code, § 4512, subd. (l).)

6. California Code of Regulations, title 17, section 540001, subdivision (a), also defines substantial disability as "(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."

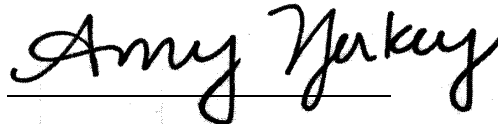
7. Notably, both the Lanterman Act and the regulation direct an evaluating party to consider a person's age when evaluating the categories of major life activity to determine eligibility. Neither the Lanterman Act nor the accompanying regulations state that "capacity for independent living" should be omitted from the analysis when an individual is under age six. Thus, WRC's omission of this category from its analysis is erroneous. The recently developed guidelines that assist regional centers in assessing substantial disability are incorrect to the extent that they suggest ignoring an entire category for persons under six years old. In any event, the guidelines are references and do not supersede the law.

8. Given this criteria, Claimant proved, by a preponderance of the evidence, that he has a developmental disability that constitutes a substantial disability and is likely to continue indefinitely. Claimant presented evidence from multiple sources, including independent evaluations, which indicated that he is substantially disabled in at least three areas of major life activity. In sum, Claimant is eligible for regional center services under the Lanterman Act because he meets the specified criteria.

ORDER

Claimant's appeal is granted. Westside Regional Center's decision denying Claimant's eligibility for regional center services is reversed.

DATED: November 20, 2014

A handwritten signature in black ink that reads "Amy Yerkey". The signature is written in a cursive style and is positioned above a horizontal line.

AMY YERKEY

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.