

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Claimant,

and

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency.

OAH Case No. 2014110552

DECISION

This matter was heard by Irina Tentser, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on March 11, 2015.

Pat Huth, Attorney at Law, represented Frank D. Lanterman Regional Center (Regional Center or Service Agency).

Claimant's mother, P.W.¹, represented Claimant.

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

ISSUE

Is Claimant eligible for Regional Center services by reason of a developmental disability within the meaning of the Lanterman Developmental Disabilities Services Act,

¹ Initials have been used to protect the privacy of Claimant and his family.

Welfare and Institutions Code² section 4500 et seq. (Lanterman Act)?

FINDINGS OF FACT

1. Claimant is 38 years old, and resides with his mother. Claimant has an older sister. He is separated from his wife and has two teenage children. Claimant's mother was granted limited conservatorship of Claimant on March 3, 2015. (Exh. B.)

2. a. Claimant experienced no major developmental delays as a child. He began speaking at the expected age, but speech was delayed in pace and subtlety of expression. Claimant received speech therapy from age four to six and the articulation issue was corrected. (Exh. 6 at pg. 2; Exh. 5 at pg. 3.) Claimant demonstrated academic achievement and school performance through the fourth grade. (Exh. D. at pg. 2.) Beginning in fifth grade, Claimant's academic test scores and school performance began to decline. (Exh. D. at pgs. 1-3.) At hearing, Claimant's mother testified that no assessment was conducted to evaluate Claimant's cognitive and/or social ability during grades one through six.

b. Claimant began to skip school in junior high school. His school grades continued to decline to mainly D's and F's. Claimant "frequently inhaled nail polish fumes" and entered a residential psychiatric hospital or treatment facility for approximately two months while an adolescent. (Exh. 6 at pg. 2.) He started using marijuana and methamphetamines as an adolescent and continued to use drugs through at least 2014. (Exh. 5 at pg. 8; Exh. 6 at pg.)

c. In May 1990, when Claimant was fourteen years old, Claimant's school academic testing results were in the third percentile for math, the seventeenth percentile for reading, the forty-fourth percentile for spelling, the tenth percentile for

² All further statutory references are to the Welfare and Institutions Code.

language, the sixteenth percentile for science, and the eight percentile for social studies. (Exh. 7 at pg. 2.)³ An Individual Education Plan (IEP) was established in February 1993 based on Claimant's mother's inquiry regarding his low grades. (Exh. 7 at pg. 2.) Except for the fact that Claimant attended special education classes, no other specific details are known about the IEP. Claimant did not graduate from high school.

d. As an adult, Claimant abused alcohol and methamphetamines. (Exh. 6 at pg. 3; Exh. 5 at pg. 1.) Claimant did not work consistently during adulthood. He was incarcerated on burglary and robbery convictions. (Exh. 5 at pg. 3; Exh. 6 at pg. 3.) In 2012, Claimant was issued a DUI citation. He was married until ten years ago when he separated from his wife for unknown reasons. He sees his children from the marriage approximately once a week.

e. Claimant was hospitalized in 2013, following drug use and concerns about his mental health. (Exh. A at pg. 2; Exh. 5 at pg. 2; Exh. 6 at pg. 3.) Claimant's mother was told by Dr. Moore at "Prototypes" drug treatment rehabilitation center that Claimant had experienced "significant cognitive loss." (Exh. 6 at pg. 3; Exh. 5 at pg. 2.) Based on Claimant's increasing problems with daily functioning, Claimant's mother sought evaluation of Claimant by mental health professionals and resources.

3. On May 21, 2014, Christopher Michael, Ph.D., QME, (Dr. Michael), a

³ School percentiles are utilized to describe academic scores and are one of the factors considered in evaluating the presence of a developmental disability. School percentiles based on academic testing are interpreted based on the following guidelines: from the second percentile and below is the range of intellectual disability; the fourth through the eighth percentile is the borderline range; the ninth through the twenty-fifth percentile is the low average range; and the twenty-fifth through the sixty-fifth is the average range. (Testimony of Dr. Collister.)

psychologist, diagnosed Claimant with autism spectrum disorder, with accompanying intellectual impairment and accompanying language impairment (especially receptive), severity level 1 ("requiring support")⁴; mild intellectual disability; mild alcohol use disorder, in sustained remission, in a controlled environment; stimulant use disorder (methamphetamine), moderate, in sustained remission, in a controlled environment.⁵ Dr. Michael also diagnosed Claimant with autistic disorder, mild; alcohol dependence, mild, in sustained remission, in a controlled environment; amphetamine dependence, moderate, in sustained remission, in a controlled environment; mild mental retardation; chronic developmental/cognitive/daily functioning deficits; and a Global Assessment of Functioning (GAF)⁶ score of 35.⁷ (Exh. 6 at pg. 10.) Dr. Michael described behaviors associated with autism spectrum disorder and autistic disorder in his psychological report, but did not use any test instrument with Claimant to substantiate the diagnoses.

⁴ Dr. Michael made his autism spectrum diagnosis utilizing both the current and prior versions of the diagnostic manuals.

⁵ The foregoing diagnoses were based on the criteria established by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DMS-5).

⁶ A GAF score of 35 indicates some impairment in reality testing or communication or major impairment in several areas, such as work or school, family relations, judgment, thinking or mood. (See Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DMS-IV-TR) at p. 34.)

⁷ The foregoing diagnoses were based on the criteria established by the DMS-IV-TR.

Dr. Michael also did not set forth an analysis of the applicable diagnostic criteria either by DSM-IV-TR or DSM-IV when diagnosing Claimant with autism spectrum disorder or autistic disorder. (Exh. 5 at pg. 2.)

4. a. Dr. Michael measured Claimant's cognitive ability and mental status by administering the Mental Status Exam (Montreal Cognitive Assessment; MoCA), the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV), and the Wechsler Memory Scale – Fourth Edition (WMS-IV). Claimant's overall cognitive functioning, as measured by the WAIS-IV, was "extremely low," with significantly higher nonverbal reasoning ability than verbal reasoning ability and auditory attention-concentration capacity. The WMS-IV scores were also extremely low with a congruent result to the WAIS-IV verbal versus nonverbal reasoning discrepancy in that his nonverbal memory was "slightly better" than his verbal memory. (Exh. 6 at pgs. 5-7.) The MoCA exam results "appeared to be within normal limits," but was "somewhat impeded." (Exh. 6 at pgs. 5-7.) In discussing the results, Dr. Michael stated, ". . . "[Claimant] is often distracted by internal stimuli (repeated obsessive thoughts, thoughts about his next stimulating activity, and unusual or preoccupying ideation)." (Exh. 6 at pgs. 5-7.)

b. In order to assess social and behavioral issues, the Vineland Adaptive Behavior Scales – Second Edition (VABS-II) was administered, based on Claimant's mother report. (Exh. 10, at p. 11.) The scores were in the low adaptive range for a man of his then age. His communication skills were noted to be "compromised." (Exh. 6 at pg. 9.) Dr. Michael concluded that, based on his VABS-II scores, "he needs significant assistance for personal affairs, shopping, cooking, and paying bills." (Exh. 6 at pg. 9.) In addition, Claimant's scores indicated that he needs "at least some assistance with using transportation or public transportation, maintaining a clean and organized home, and care for grooming and hygiene." (Exh. 6 at pg. 9.)

c. Dr. Michael noted that "the time frames for the development of the

[Claimant's] disorders are only partially clear. He showed some signs of difficulty in these areas from an early age, but early on his mother was not fully able to recognize or admit them. Furthermore, his mother reported some noticeable decrement in his social outlook and interest following some drug use as an adult." (Exh. 6 at pg. 9.) Claimant's past school records were not available and, therefore, were not considered as part of Dr. Michael's diagnoses. (Exh. 6 at pg. 1.)

5. Following Dr. Michael's diagnoses, Claimant was referred by his mother to become a Regional Center client. Ms. Maria Tapia-Montes performed a psychosocial assessment of Claimant on June 13, 2014. (Exh. 4.) Based on her recommendation, Claimant was referred for psychological evaluation and assessed for eligibility determination. (Testimony of Maria Tapia-Montes; Exh. 4 at pg. 7.)

6. a. On June 5, 2014, July 3, 2014, and August 7, 2014, Timothy D. Collister, Ph.D. (Dr. Collister), performed an evaluation for Regional Center to assist in the determination of eligibility. In addition to his record review, clinical observations and mental status examination of Claimant, and interview with Claimant's mother, Dr. Collister administered the 15 Item Memory Test, the Dot Counting Test (Lezak), the Dot Counting Test (Western Psych Assc.) (DCT), the Wechsler Adult Intelligence Scale - IV (WAIS-IV), the Wide Range Achievement Test – Revision 4, the Beery Developmental Test of Visual-Motor Integration, the Gilliam Autism Rating Scale-2nd Edition (GARS-2), and the VABS-II. (Exh. 5 at pg. 9.)

b. The Dot Counting Test and DCT were administered by Dr. Collister to evaluate whether Claimant "odd responding" to innocuous tasks was based on "suspect efforts." (Exh. 5 at pgs. 12-13.) The results indicated, however, that "there are no indicators for suspect efforts by specific analysis of motivation through tests designed to discover feigned efforts." (Exh. 5 at pgs. 12-13.)

c. The WAIS-IV provides two verbal and two nonverbal index scores.

Compiling the four index scores provides a “numeric for general cognitive function.” (Exh. 5 at pgs. 13-14.) Claimant obtained a full scale score of 67 in the WAIS-IV, which placed him in the mild range of intellectual disability. (Exh. 5 at pg. 14.) On the nonverbal perceptual reasoning index, Claimant placed in the upper end of the borderline range at the sixth percentile with a score of 77. (Exh. 5 at pg. 13.) Verbal working memory was in the middle of the borderline range at the fourth percentile with a score of 74. (Exh. 5 at pg. 13.) Verbal comprehension dropped to the upper end of the mild range of intellectual disability at the second percentile with a score of 70. (Exh. 5 at pg. 13.) Claimant’s nonverbal processing speed score placed him in the sixth percentile, which is at the with a score of 68. (Exh. 5 at pgs. 13-14.)

d. Analyzing Claimant’s relatively higher subtest block design score on the WAIS-IV, Dr. Collister opined that the results “may provide one of the better indicators for premorbid intellectual function before decline. This is at the lower end of the average scale, just above the 25th percentile. The subtest scored on the academic achievement, to be discussed below for word reading and spelling, were both in the middle of the low average range. Thus, those may provide the best indicators for premorbid function before decline, essentially in the middle of the low average range around the 16 percentile to the lower end of the average range, around the 25th percentile. It is recalled the mother indicated that he had performed well up to the 7th grade with adequate grades without behavioral difficulties, then apparently at the same time beginning to use marijuana and also methamphetamines as well as “huffing” inhalants.” (Exh. 5 at pg. 14.)

e. Dr. Collister administered GARS-2 in two ways to screen for autism spectrum disorder, based on information by Claimant’s mother. For Claimant’s presentation at the sixth grade, the results on the autism index were the lowest possible, at the normative range, in the range of the probability of autism being unlikely. With

regards to Claimant's current presentation, the results on the autism index were 72, which was just above the lowest end of the range of probability of autism being possible, "only a couple points above it still being unlikely." (Exh. 5 at pg. 15.) The Asperger's Syndrome Diagnostic Scale was completed based on information by Claimant's mother. With a score of 63, Claimant's overall Asperger's Syndrome Quotient was determined to be in the range "suggesting the probability of Asperger's Disorder to be very unlikely." (Exh. 5 at pg. 15.) Based on the foregoing results, his overall evaluation, and the fact that diagnostic criteria for autism spectrum disorder were not met, there was insufficient basis to diagnose Claimant with autism, autism spectrum disorder, and/or asperger's syndrome in Dr. Collister's opinion. (Exh. 5 at pgs. 17-18.)

f. Adaptive skills were scored in the severe range of delay in the daily living skills and socialization domains of the Vineland, based on Claimant's mother's report. Dr. Collister noted, however, that the results reported by Claimant's mother did not correspond to Claimant's presentation, reported socialization, and WAIS-IV verbal scores. (Exh. 5 at pg. 16.)

g. Dr. Collister diagnosed Claimant with Substance-Induced Major Neurocognitive Disorder (primarily methamphetamine and alcohol, also marijuana), Polysubstance Abuse (principally methamphetamines over the years, in the distant past substantial inhalants, in the more recent past; marijuana until reportedly five years ago); and (Rule Out) Antisocial Personality Behavior. (Exh. 5 at pg. 16.) Dr. Collister did not consider Claimant's past school records in arriving at his diagnosis. (Testimony of Dr. Collister.)

h. Dr. Collister opined that Claimant's history and relative high scores in some tests suggested a higher range of premorbid function and concluded that the current mild range of intellectual disability was not based on a developmental disability in accordance with DSM-V requirements. The basis of Dr. Collister's ruling out a

developmental disability was “principally because there is no suggestion of developmental disability before the history of heavy substance abuse with inhalants, marijuana, alcohol and methamphetamines began in his mid-teens.” In Dr. Collister’s evaluation, “[I]t stands out that there are a substantial indicators at this point for frontal-subcortical cerebral system dysfunction, which would underlie substantial memory difficulty and impulsivity. That would most likely relate to a history of heavy substance abuse beginning in adolescence with inhalants.” (Exh. 5 at pg. 17.)

i. None of Dr. Collister’s diagnoses of Claimant are qualifying conditions for regional center services.

7. On October 7, 2014, Regional Center issued a Notice of Action, informing Claimant that he was not eligible for services under the Lanterman Act. Claimant’s mother filed a Fair Hearing Request on October 31, 2014.

8. Claimant’s mother and sister testified that Dr. Collister’s report contained factual historical inaccuracies based on Claimant’s tendency to provide false information. As part of their testimony, mother and sister challenged the prevalence of Claimant’s past drug use and alcohol history. In addition, Claimant’s mother pointed to the absence of evidence that Dr. Collister considered Claimant’s low test scores and grades from elementary and middle school, the fact that Claimant had an IEP and attended special education classes, and that his kindergarten teacher wrote “lacks self-motivation. Quietly tearful much of the time” in his elementary school records, to challenge Dr. Collister’s diagnoses and to support the presence of a developmental disability. (Testimony of P.W. and Claimant’s sister.)

9. After considering Claimant’s elementary school records,⁸ and cumulative

⁸ After reviewing the elementary school records, Dr. Collister noted that Claimant’s academic testing results were at or above grade level through fourth grade

junior and senior high school records at hearing, Dr. Collister's testified that it was "impossible to consider him [Claimant] as developmentally disabled or intellectually disabled at that time." As such, the academic test records, according to Dr. Collister, supported his finding that Claimant was exhibiting intellectual function above that required for a developmental disability. With regards to the assertion that Claimant did not provide an accurate chronology, Dr. Collister testified that regardless of the accuracy of Claimant's statements to him, the test scores confirmed that Claimant was exhibiting higher intellectual function until he began to deteriorate. However, Dr. Collister noted that he believed that Claimant's statements to him regarding his drug and alcohol abuse history were accurate based on the consistent statements regarding drug and alcohol abuse provided by Claimant's mother to him during their interview(s) and attributed to Claimant's mother in Dr. Michael's report, based on Claimant's DUI, and based on Claimant's prior drug dependence treatment history.

10. Allowing for the unlikely possibility that, contrary to the weight of the evidence, that no drug abuse was involved in Claimant's case, Dr. Collister testified that, while his diagnosis would have most likely been "unspecified neurocognitive disorder," he would have come to the same assessment that the Claimant's current mild intellectual disability was not based on a developmental disability based on the undisputed facts that Claimant had performed at a higher academic and social levels while a minor. In sum, Dr. Collister testified, the "reality of the school achievement scores are in line with the academic achievement scores that I have which rule out an intellectual disability. . . simple as that." (Testimony of Dr. Collister.)

and began to decline in the fifth grade, rather than the seventh grade, as had previously been reported by Claimant's mother.

LEGAL CONCLUSIONS

1. Claimant does not have a developmental disability entitling him to regional center services by reason of factual findings 6, 7, 9 and 10 and legal conclusions 2 through 9.

2. Claimant bore the burden of proof in this case. The standard of proof is a preponderance of the evidence. Claimant failed to sustain his burden of proof.

3. In order to be eligible to receive services from a regional center, a claimant must have a developmental disability, which is specifically 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 intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability, but shall not include other handicapping conditions that are solely physical in nature." (§ 4512, subd. (a).)

4. California Code of Regulations, title 17, section 54000 defines "developmental disability" as a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism or other conditions similar to mental retardation that require treatment similar to that required by individuals with mental retardation. The developmental disability shall: 1) originate before age 18; 2) be likely to continue indefinitely; and 3) constitute a substantial disability for the individual.

5. Under California Code of Regulations, title 17, section 54001, a "substantial disability" is defined as 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. It also requires “significant functional limitations” in three or more of the following areas of major life activity: (a) receptive and expressive language; (b) learning; (c) self-care; (d) mobility; (e) self-direction; (f) capacity for independent living; and (g) economic self-sufficiency. (Cal. Code Regs., tit. 17, § 54001, subdivision (a)(2).)

6. In this case, no evidence was presented to establish that Claimant has cerebral palsy or epilepsy, and there is no contention that he has either condition.

7. Claimant’s mother reported some behaviors consistent with Autism Disorder, but these were not deemed sufficient by Dr. Collister to lead to a diagnosis of Autism. Dr. Michael provided a diagnosis of autism spectrum disorder, but did not substantiate his diagnosis with any test instrument, did not set forth his analysis of the applicable the diagnostic criteria of any of the diagnostic manuals, and/or opine regarding whether the conditions present a substantial disability for Claimant. Dr. Collister, on the other hand, administered accepted screening tests and evaluated Claimant, ruling out diagnoses on the autism spectrum. Dr. Michael’s diagnosis, in the existing circumstances, is insufficient to establish that Claimant has Autism or to warrant rejection of Dr. Collister’s contrary opinion.

8. It is undisputed that the reports of both Dr. Collister and Dr. Michael have established that Claimant has IQ scores that fall in the intellectual disability range and that he has significant adaptive skills deficits in daily living skills as of the date(s) of their evaluations. However, in light of Claimant’s early academic performance, his subsequent substance abuse, the variability of his recent measurements of cognitive ability, Dr. Collister’s explanation for the adaptive deficits and his other opinions about Claimant’s presentation, it cannot be concluded that Claimant’s has intellectual disability, a condition related to intellectual disability, or a condition requiring treatment similar to that required by individuals with intellectual disability. Moreover, Claimant has failed to

establish that his condition originated before the age of 18 or that it constituted a substantial disability for him. Accordingly, there is insufficient evidence to establish eligibility under the categories of intellectual disability and/or having conditions similar to intellectual disability or requiring treatment similar to that required by intellectually disabled individuals, as required by section 4512, subdivision (a). Instead, the weight of the evidence indicates that drug abuse was a significant factor in Claimant's intellectual decline.

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9. By reason of the foregoing factual findings and legal conclusions, Claimant did not establish that he has a developmental disability that makes him eligible for services under the Lanterman Act. While Claimant is not eligible for Regional Center services, he may be eligible for services from other agencies in federal, state, county, or local governments.

ORDER

Claimant's appeal is denied.

DATED: March 24, 2015

/s/

Irina Tentser

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.