

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2015010124

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on June 16, 2016, in Bakersfield, California. Claimant was represented by his authorized representative, Alexandria Forester.¹ Kern Regional Center (KRC or Service Agency) was represented by Mark E. Meyer, Program Manager.

Oral and documentary evidence was received, and argument was heard. The record was left open to allow the parties to submit written closing argument. The briefing schedule was set on June 16, 2016, but the briefing schedule was extended on Claimant's later request in order to allow Claimant's counsel to obtain a hearing transcript prior to filing closing briefs. Claimant's Closing Brief was filed timely and marked as Claimant's Exhibit C-K. KRC's Closing Brief was timely filed and marked as Exhibit M. Claimant's Reply Brief was filed timely and marked as Claimant's Exhibit C-L. KRC's Closing Brief was timely filed and marked as Exhibit N. The record was closed, and

¹ Claimant's name is omitted to protect his privacy.

the matter was submitted for decision on August 26, 2016.

ISSUE

Does Claimant have a developmental disability entitling him to receive regional center services?

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EVIDENCE

Documentary: Service Agency exhibits A through N; Claimant Exhibits C-A through C-L.

Testimonial: Nicanor Garcia, Ph.D.; Martha Smith; Claimant.

FACTUAL FINDINGS

1. Claimant is a 59-year-old male, who was diagnosed with Autism Spectrum Disorder (ASD) for the first time in 2014. Claimant seeks eligibility for regional center services based on his diagnosis of ASD.

2. On December 4, 2014, KRC sent a Notice of Proposed Action to Claimant informing him that KRC had determined Claimant is not eligible for regional center services. The notice stated that although Claimant was diagnosed with Autism, "he does not appear to be substantially handicapped [in three areas of major life activity] due to an eligible condition." (Exhibit A.) Claimant requested a fair hearing.

3(a). Claimant moved to California around 2002. From that time through 2011, he lived in his aunt's garage in Chatsworth, and his aunt helped him with cooking and taking him to the doctor. However, that living arrangement is no longer available. Claimant currently lives alone in an apartment in Bakersfield, with no family nearby. He does not have any friends.

4. When Claimant was younger, he attended community college and began attending a university but discontinued due to his difficulty concentrating in “big classrooms . . . with anybody else around.” (Claimant’s testimony.) He was employed for 12 years as grocery produce clerk, mostly working in the back of the store since he is “not so good with the public.” Although it was “physically difficult [and involved] too many people,” Claimant remained with that job for a long time because it had union benefits. He later worked for various political groups designing computer databases. Claimant has never applied for public benefits. He was told he could apply for Social Security benefits, but he stated that he likes to work and “cannot just sit at home on Social Security.”

5. Since his move to California, Claimant has operated an online business from his apartment, selling programs he developed. Claimant does not typically interact with customers, who purchase and download his products on his website. However, his business had been dwindling, and the income is not sufficient to cover all of his expenses. Claimant is currently utilizing his savings to supplement his income. He has determined that he will eventually run out of savings by the end of this year or early next year, and he is worried about becoming homeless.

6. Claimant has a driver’s license and is able to drive himself around. He typically leaves his apartment only once per week, and does his grocery shopping every two weeks. He has no difficulty dressing himself; he has identical clothes for every day of the week. Claimant has “no sense of day and night,” and has no regular sleeping schedule. He sleeps 4.5 to 5 hours per night. Claimant has difficulty talking on the phone, likening it to “talking in the dark.” He does not have land line or cellular telephone service, and he seeks to avoid speaking to people on his Internet telephone service.

7. Claimant has had difficulty getting repairs done in his apartment due to his disability and difficulty communicating effectively. He noted that “a lot of people think [he is] mentally retarded and they take advantage [of him].” (Claimant’s testimony.) However, he is afraid that if he gives notice to leave his current apartment, he will not be able to find a new place to live. He noted that he needs help finding housing because, although he does drive, it is “very difficult to get around . . . and [he does] not know what to look for.”

8. Claimant has several health conditions which would require him to visit the doctor including hypertension and a recurrent bleeding abscess for which he was hospitalized in March 2016. Although Claimant has been prescribed medication for his hypertension, it is difficult for him to go to the doctor, both because he does not like to go (he dislikes being touched) and because it is difficult for him to leave the apartment and drive around. Claimant also noted that he needs help with medical emergencies. In March, when he suffered from a painful abscess which eventually prevented him from sitting, he ignored the problem and it grew beyond his control. Since he could not sit in his vehicle without pain, he did not go to the grocery store and ran out of food for seven days. He did not think about calling for help, nor did he know how to call 9-1-1 on his Internet telephone service (and he does not own a landline or cell phone). He finally walked to the nearest doctor, and he was eventually placed in an ambulance and taken to a hospital. At the hospital, he was unable to communicate to the staff that he was sensitive to certain food textures, and he hardly ate while he was there.

9. Claimant applied for regional center services because he has problems communicating effectively and he does not believe he can obtain and move into a new apartment or take care of his medical needs and emergencies by himself. He also has difficulty leaving the apartment and driving around. Claimant noted that his savings is becoming depleted and he does not have his aunt to bring him to the doctor anymore.

10(a). On May 15, 22, and 28, 2014, Licensed Clinical Psychologist, Nicanor Garcia, Ph.D., performed a psychological evaluation of Claimant, including administration of Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV), the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2) Module 4, and the Social Responsiveness Scale, Second Edition (SRS-2) Self Report. Dr. Garcia diagnosed Claimant with ASD.

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10(b). In reaching his diagnosis, Dr. Garcia noted the following:

[Claimant] rarely ever offered information spontaneously. He was able to respond appropriately to this examiner's comments and his thoughts, however [he] did not spontaneously inquire about them. He appeared to be rather prompt dependent when reporting events. He demonstrated little reciprocal conversation and also, had difficulties using spontaneous gestures. ... [¶] . . . [Claimant] demonstrated poorly modulated eye contact to initiate, terminate and regulate social interactions....

[¶] . . . [¶]

[Claimant] had difficulties being able to have a to and fro conversation. He demonstrated difficulties being able to demonstrate appropriate eye contact. [Claimant] also demonstrated few minimal gestures and also appeared to be

somewhat repetitive in his speech. His voice was somewhat stilted at times, and he spoke in a monotone manner.

[Claimant] further appears to have difficulties with regards to being able to make and maintain social relationships. He noted that he has no friends at this time and knows no one in Bakersfield, California despite the fact that he has been here for three years. He does not have much of a desire to create friends. He appears to have difficulties with regards to changes in his routine. He appears to have very narrow interests and is involved in very few activities.

[Claimant] further appears to have significant difficulties that appear to negatively impact his day-to-day functioning as well.

(Exhibit G, pp. 5-8.)

10(c). Dr. Garcia recommended, among other things, that: Claimant seek an evaluation from KRC "given his current diagnosis and the significant adaptive and social difficulties" (Exhibit G, p. 9.); Claimant participate in a support group that would help him his difficulties in social interactions with others; Claimant seek to be evaluated by Social Security to determine his eligibility for Social Security benefits; Claimant seek assistance from the Department of Rehabilitation for job readiness skills; and Claimant meet with a speech and language pathologist to assists him with his pragmatic use of language.

11. Dr. Garcia testified credibly at the fair hearing that Claimant demonstrates significant functional limitations in the following areas:

(a). Receptive and expressive language: Claimant is significantly functionally limited with nonverbal language and spontaneous verbal communication, and his anxiety becomes heightened in those situations. He is more comfortable with a keypad and computer and has no problem with written, scripted information which he has ample time to think through.

(b). Self-care: Claimant's difficulty with communication can impact his self-care. Given what happened with Claimant's abscess, he demonstrated difficulty maintaining a regimen of care and with seeking and obtaining help.

(c). Mobility: Although physically he may be able to move about, Claimant does not leave his apartment very often except to buy food. He is extremely uncomfortable approaching neighbors, and he demonstrates significant avoidance behaviors which limit his ability to become a part of the community.

(d). Self-direction: Claimant's problem-solving ability is concrete and not fluid which significantly limits his ability in self-direction. He has maintains a strict routine and has difficulty deviating from routine. He had one hobby (watching Fox news), which was very regimented. Initiating activities is problematic for him.

(e). Capacity for independent living: As with self-care, this area of functioning can be significantly impacted by Claimant's disability. If he does not have supports in place which help him with his communication (e.g., regarding medical issues, dealing with clients), he would not have the means to take care of himself independently both from a medical and business standpoint.

(f). Economic self-sufficiency: If Claimant was able to maintain his current profession, where he has carved out a niche for himself, economic self-sufficiency would not be as limited. However, that business has been declining. Claimant would have difficulty obtaining and holding a job in another environment. Interacting with co-

workers would be a struggle for him. Additionally, his deficits interfere with his ability to concentrate on more than one task at a time or his ability to take a break from a task to respond to a colleague.

12. KRC presented no testimony from any psychologist which contradicted Dr. Garcia's testimony.

13. KRC Assessment Coordinator, Martha Smith, testified that she conducted a intake interview with Claimant, and he was able to answer questions and provide information. She did not check to determine if the information he provided was accurate.

14(a). On August 25, 2014, Claimant underwent a psychological evaluation by psychological assistant, Lizet Gonzalez, Psy.D., under the supervision of clinical psychologist, Thomas P. Middleton, Ph.D., to determine Claimant's eligibility for KRC services. Claimant was again diagnosed with ASD.

14(b). In reaching that diagnosis, Drs. Gonzalez and Middleton noted that Claimant demonstrated persistent deficits in social communication and social interactions including deficits in social-emotional reciprocity, nonverbal communication behaviors, and developing, maintaining and understanding relationships. He also demonstrated restricted and repetitive patterns of behavior, interests or activities including stereotyped or repetitive motor movements, an insistence on sameness, an inflexible adherence to routines and rituals, highly restricted fixated interests, and hypersensitivity associated with sounds, smells and taste. All of these symptoms caused clinically significant impairment which required support.

14(c). Drs. Gonzalez and Middleton also noted:

[Claimant] showed severely impaired gross motor skills, interpersonal relationship, receptive language, coping skills and fine motor skills. Below Average/borderline adaptive

behaviors included expressive language, personal skills, community skills, and play and leisure. Only written language was in the Average range. Domestic skills were borderline. *He, thus, appeared to show three or more areas that were significantly impacted in terms of his adaptive functioning.* (Emphasis added.) (Ex. F, pp. 7-8.)

15. The totality of the evidence established that Claimant suffers from ASD.

16. Dr. Garcia's uncontroverted testimony established that Claimant demonstrates significant limitations in his expressive and receptive language (specifically with nonverbal language and spontaneous verbal communication), his self-care (specifically health care and medical emergencies), his mobility (specifically his avoidance behaviors which hinder his ability to venture out of his apartment into the community), his self-direction (specifically his difficulty deviating from strict routine and problems initiating activities), capacity for independent living (again specifically regarding health care and medical emergencies, as well as the ability to seek employment). Drs. Gonzalez and Middleton also confirmed that Claimant has three or more areas of adaptive functioning which are significantly impacted, including severely impaired gross motor and fine motor skills, receptive language, and coping skills. Given the foregoing the totality of the evidence established that Claimant has significant functional limitations in three or more areas of major life activity. (See also, Legal Conclusions 5 and 6.)

LEGAL CONCLUSIONS

1. Claimant established that he suffers from a developmental disability which constitutes a substantial disability for him, thus entitling him to regional center services. (Factual Findings 1 through 16; Legal Conclusions 2 through 7.)

2. 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 eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has met his burden of proof in this case.

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. As applicable to this case, Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . This [includes] intellectual disability, cerebral palsy, epilepsy and autism. [It also includes] disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

4. In order to establish a qualifying "developmental disability," a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. Claimant's disability, ASD, fits into the category of autism.

5(a). Additionally, to prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that

his disability constitutes a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (j):

(1) "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:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

(2) A reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

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5(b). Additionally, 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.

5(c). The totality of the evidence established that Claimant has significant functional limitations in three or more areas of major life activity, as set forth in Welfare and Institutions Code section 4512, subdivision (j), and California Code of Regulations, title 17, section 54001.

6(a). In its reply brief, KRC argues that in analyzing eligibility, the statutory modifier “originates before an individual attains age 18” is applied to when the disabling condition (in this case ASD) should originate and is also applied to the words “substantial disability,” such that the substantial disability in three or more areas of major life activity must have originated prior to age 18 as well. KRC argued that there was no evidence presented that Claimant was “substantially disabled” in three or more areas of major life activity prior to age 18. This argument was illogical and not persuasive.

6(b). The language of Welfare and Institutions Code section 4512, subdivision (a), does not use the words “originates before an individual attains age 18” to modify the words “substantial disability.” Instead, that statute defines “developmental disability” as “a disability [such as ASD] which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, *and* constitutes a substantial disability for that individual.” (Emphasis added.) The words “constitutes a substantial disability for that individual,” do not have any age-related modifier and is a separate criterion from the requirement that the disability must originate prior to age 18. There is no statutory requirement that a claimant must produce evidence that his substantial disability in three or more areas of major life activity originated prior to age 18. This is apparent by the language of Welfare and Institutions Code section 4512, subdivision (j), and California Code of Regulations, title 17, section 54001, which define “substantial disability” as “the existence of significant functional limitations in three or more [listed]

areas of major life activity . . . *as appropriate to the age of the person.*" (Emphasis added.) This suggests that the functional limitations are analyzed at the time of the eligibility evaluation. Indeed, Welfare and Institutions Code section 4512, subdivision (1)(2), indicates that the functional limitations are assessed at the time of eligibility and that they may be reassessed subsequently to determine continuing eligibility. Moreover, the categories listed in Welfare and Institutions Code section 4512, subdivision (1), and California Code of Regulations, title 17, section 54001 anticipate changes in functional limitation "as appropriate to the age of the person," since some functioning may not apply at various ages prior to age 18 (e.g., capacity for independent living and economic self-sufficiency). Consequently, Claimant was not required to produce evidence of his functional limitations in three or more areas of major life activity prior to age 18.

7. The preponderance of the evidence established that Claimant is eligible to receive regional center services.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The Service Agency's determination that Claimant is not eligible for regional center services is overruled, and Claimant's appeal of that determination is granted. The Service Agency shall accept Claimant as a consumer forthwith.

DATED: September 2, 2016

JULIE CABOS-OWEN

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.