

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2015050992

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 8, 2015, in San Bernardino, California.

Leigh-Ann Pierce, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's sister and sister-in-law represented claimant, who was present during the hearing.

The matter was submitted on July 8, 2015.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act based on, intellectual disability, epilepsy, or a disabling condition closely related to intellectual disability or that requires treatment similar to that required for individuals with intellectual disability?¹

¹ The third one of these categories is referred to as the "fifth category."

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a 43-year-old unconserved adult. He graduated from high school and received a Bachelor of Arts Degree from California Polytechnic University in San Luis Obispo after he received an Associate Degree from Pasadena City College. He receives Supplemental Security Income benefits.

2. Claimant sought regional center services based on intellectual disability, a condition closely related to intellectual disability, or epilepsy. On April 16, 2015, IRC advised claimant that it reviewed his records and determined that he did not have a developmental disability as defined by the Lanterman Act and was not eligible for regional center services.

3. On May 14, 2015, claimant's sister-in-law signed a Fair Hearing Request appealing IRC's decision and requesting a hearing.

PSYCHOLOGICAL RECORDS AND TESTING RESULTS

Records From Scripps Clinic

4. On November 5, 2007, and January 4, 2008, when claimant was 36 years old, he was evaluated for seizures and memory problems at Scripps Clinic by neurologist Maung Aung, M.D. According to Dr. Aung's consultation report, in 1996 claimant had his first seizure. This corresponded to an incident that occurred when he was 23 or 24 and suffered a significant concussion at a football camp for aspiring professional football players. According to a CT scan of his brain, claimant had a large defect, essentially spinal fluid, in the left hemisphere of the brain. He was started on Dilantin and was switched to Tegretol, two medications that treat seizures. Claimant said he had two other seizures after that, one in 2003 and one in 2005. Claimant reported that he has a long history of memory problems and has found it hard to remember things. He felt

that his condition was deteriorating. He told Dr. Aung that he was working at Home Depot and did not have any major difficulties doing that job.

Neuropsychological Evaluation Report Of John R. Mantague, Ph.D.

5. In 2008, claimant's neurologist at the time, Mary Kalafut, M.D., referred him to psychologist John Montague, Ph.D., to assess his cognitive status. Dr. Montague administered a series of psychological assessments, including the Wechsler Adult Intelligence Scale III, and wrote a report dated May 25, 2008.² Dr. Montague concluded from this testing that claimant had a full scale IQ in the low average range, which is a level better than 12 percent of the general population; claimant's reading skills were at the 7th percentile level; and his spelling skills were at the 13th percentile level. Dr. Montague noted that claimant's immediate attention span, vocabulary and verbal fluency were only mildly to moderately deficient. At the same time, he found a number of significant cognitive deficits in claimant's ability to learn and retain information and in his capacity to stay focused and process information "more deeply." Dr. Montague said he agreed with Dr. Kalafut's diagnoses of Congenital Porencephaly; Congenital Hydrocephaly; and Seizure Disorder, Congenital Type.

6. Dr. Montague did not offer an opinion as to whether claimant's cognitive deficits originated before he turned 18 years old.

² Dr. Montague wrote a report dated March 4, 2010, and a report dated April 17, 2010, for a law firm representing claimant on his application for Social Security disability benefits. Dr. Montague summarized his conclusions from his May 25, 2008 report relative to claimant's cognitive deficiency due to his "disability status" for the foreseeable future.

Neuropsychological Report Of Tracey E. Smith, Ph.D.

7. Claimant's brother and sister-in-law initiated an evaluation of claimant's cognitive capabilities through licensed educational psychologist Tracey E. Smith, Ph.D. They wanted Dr. Smith to assess claimant's cognitive status to determine if claimant demonstrated a progressive deterioration of his neuro-cognitive and behavioral functioning relevant to his ability to live independently. On December 17, and 18, 2011, and January 2, 2012, Dr. Smith performed a series of psychological assessments of claimant, including the Woodcock-Johnson Test of Cognitive Abilities-III. In her evaluation, Dr. Smith summarized claimant's history consistent with the history reported to Dr. Aung and Dr. Montague.

Dr. Smith found that claimant displayed average range levels in tasks that measured non-motor visual spatial skills and visuo construction designs. Dr. Smith added, however, that claimant's visual and verbal memories were significantly delayed and within the severely impaired range of functioning for a person his age. Claimant's working memory varied from the borderline range to the deficit range. Dr. Smith added that claimant experienced problems with problem solving, abstract reasoning, and attention/concentration.

8. Dr. Smith did not offer an opinion as to whether the cognitive deficits she found originated before claimant turned 18 years of age.

Neuropsychological Outpatient Testing Report From Randolph Kado, Ph.D.

9. On March 23, 2015, claimant was referred to psychologist Randolph Kado, Ph.D., to evaluate claimant's cognitive functioning. Dr. Kado performed a series of psychological assessments and wrote a report. Dr. Kado diagnosed claimant with a moderate to severe neurocognitive disorder secondary to hydrocephalus, porencephaly, traumatic brain injury and seizure disorder; learning disorder with impairment in reading comprehension by his history; and anxiety disorder and mood disorder due to medical

disorder previously diagnosed.

Reports of Thang Van Pham, D.O. and Michael B. Lee, M.D.

10. Thang Van Pham, D.O., claimant's primary care doctor, wrote on June 30, 2015, that claimant has moderate to severe congenital hydrocephalus, porencephaly, traumatic brain injury and seizure disorder. Dr. Pham noted that claimant cannot function independently and depends on his family for support.

11. Michael B. Lee, M.D., claimant's neurologist, wrote on June 29, 2015, that claimant has porencephaly due to a congenital hydrocephalus causing a severe neurocognitive disorder, epilepsy, with impaired learning, attention and memory. Dr. Lee felt that claimant is unable to care for his own activities of daily living.

TESTIMONY OF PAUL GREENWALD, PH.D.

12. Paul Greenwald, Ph.D., received a doctorate in clinical psychology from the California School of Professional Psychology in 1987. He has been licensed in California as a clinical psychologist since 2001 and has served as a staff psychologist for IRC since 2008. He has extensive experience assessing, evaluating, and developing treatment plans for persons diagnosed with, or identified as being at risk for, autism, mental retardation and psychological disorders. For this hearing, Dr. Greenwald reviewed claimant's records.

Dr. Greenwald testified that none of the records showed that claimant had an intellectual disability, consistent with the DSM-5 criteria, that originated before he turned 18 years old, and, further, none of the information he reviewed, including Dr. Montague and Dr. Smith's reports, indicated claimant has a disability that would entitle him to IRC services based upon intellectual disability or fifth category.

Dr. Greenwald noted that the scores on subtests of the Wechsler Adult Intelligence Scale that Dr. Montague performed were inconsistent with an intellectual

disability diagnosis because these scores did not reflect global deficits in intellectual functioning. These scores showed that claimant's concentration was in the borderline range and that his visual performance range was normal. He added that claimant's performance scale scores, in general, were high. Similarly, Dr. Greenwald believed that the scores from the Woodcock Johnson Test of Cognitive Abilities that Dr. Smith performed showed cognitive functioning in the low average range with "spotty areas" of significant deficits in the area of working memory. These scores were also not consistent with an intellectual disability diagnosis according to Dr. Greenwald.

Dr. Greenwald also opined that claimant did not have a condition that manifested itself in a way similar to intellectual disability to qualify claimant for regional center services under the fifth category.

TESTIMONY OF LINH TIEU, D.O.

13. Linh Tieu, D.O., Medical Consultant for IRC, reviewed the medical records, reports, and diagnostic testing that was offered into the record. Dr. Tieu is board certified in pediatrics and adult care and is affiliated with Loma Linda Medical Center.

Dr. Tieu testified that claimant was not eligible for regional center services under the epilepsy category based on the records she reviewed. Dr. Tieu noted that claimant's first seizure was recorded in 1996, well after he turned 18. She added that claimant's diagnoses of congenital hydrophelus and porencephaly did not mean that he had seizures before he turned 18 but that he was at risk of having seizures.³ Dr. Tieu added

³ Porencephaly is a rare congenital disorder that results in cystic degeneration and the formation of porencephalic cysts. According to a definition of this condition that claimant provided, "persons with porencephalic cysts range from asymptomatic, to profoundly impaired." These cysts can be small or can create skull expansion, or hydrocephalus.

that porencephaly can be asymptomatic.

Dr. Tieu also testified that claimant did not have a neurological condition that resulted in a need for treatment similar to that required for intellectual disability, consistent with California Code of Regulations, title 17, section 54000, subdivision (c),(3).⁴ She noted that, "even now" claimant does not have an intellectual disability.

TESTIMONY OF CLAIMANT'S SISTER, SISTER-IN-LAW, AND CLAIMANT, AND LETTER FROM CLAIMANT'S OTHER SISTER

14. Claimant's sister testified at the hearing. She said that claimant has struggled greatly over the years, from the time he was born, due to severe comprehension issues. While he attended and completed college, he did so through the disabled student services programs. She noted that he sleeps a lot because he takes a number of seizure and anxiety medications. She acknowledged that there is an absence of records to document his problems before he turned 18 years of age.

Claimant's sister-in-law testified that claimant wanted to play football professionally. He went to community college and then to California Polytechnic University. She also noted his struggles as a student and that it has been difficult to obtain records before he turned 18 years of age. She feared that due to his problems, and due to his age, claimant will end up homeless unless he obtains regional center

⁴ California Code of Regulation, title 17, section 54000, subdivision (c)(3), reads in part, that "Developmental Disability shall not include handicapping conditions that are "(s)olely physical in nature" except for conditions that are "associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation." (While Welfare and Institutions Code section 4512 has been amended to refer to "intellectual disability," the regulation still refers to "mental retardation.")

services.

Claimant testified that he was not sure whether he had seizures before he turned 18 years of age. He said that, before he turned 18, he found himself staring and not really comprehending. But, he was not able to state that this meant he was having seizures.

In addition to the testimony of claimant, claimant's sister, and sister-in-law, claimant submitted a letter from another sister. This sister wrote that in 2013 claimant's neurologist, Dr. Lee, showed claimant's family a CT scan that showed fluid on his brain. Dr. Lee said that, had claimant been diagnosed as a child with fluid on the brain, he would have been tracked at school as a student with special needs. Instead, she noted, claimant struggled tremendously at school. Nevertheless, with the help of a tutor, he avoided being held back, except in one grade. She added that, as he has gotten older, he has been in need of increasing help and resources in order to maintain a safe and healthy life.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on the claimant to establish that he or she has a qualifying diagnosis. The standard of proof is preponderance of the evidence. (Evid. Code, § 115.) A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

THE LANTERMAN ACT

2. The State of California accepts responsibility for persons with

developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

3. An applicant is eligible for services under the Lanterman Act if he or she is suffering from a substantial disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectual disabled individuals. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

4. California Code of Regulations, title 17, section 54000, defines “developmental disability” and the nature of the disability that must be present before an individual is found eligible for regional center services. It states:

- (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:

[¶] . . . [¶]

(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.

5. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through a regional center, accepts responsibility for providing services and supports to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

6. "Services and supports" for a person with a developmental disability can include diagnosis and evaluation. (Welf. & Inst. Code, § 4512, subd. (b).)

7. A regional center is required to perform initial intake and assessment services for "any person believed to have a developmental disability." (Welf. & Inst. Code, § 4642.) "Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs" (Welf. & Inst. Code, § 4643, subd. (a).) To determine if an individual has a qualifying developmental disability, "the regional center may consider evaluations and tests . . . that have been performed by, and are available from, other sources." (Welf. & Inst. Code, § 4643, subd. (b).)

ELIGIBILITY BASED UPON INTELLECTUAL DISABILITY

8. The DSM-5 contains the diagnostic criteria used for intellectual disability. It provides that three criteria must be met:

- A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
- B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities or daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
- C. Onset of intellectual and adaptive deficits during the developmental period.

The DSM-5 further notes that the “levels of severity of intellectual disability are defined on the basis of adaptive functioning, and not IQ scores, because it is the adaptive functioning that determines the level of supports required.” According to a chart of expected characteristics of an individual with mild mental retardation, children and adults would have “difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations.” Additionally, communication and social judgment are immature and the individual may be easily manipulated by others. Mild intellectually disabled individuals “need some support with complex daily living tasks In adulthood, supports typically involve grocery shopping, transportation, home . . . organizing, nutritious food preparation, and banking and money management.”

ELIGIBILITY BASED UPON THE "FIFTH CATEGORY"

9. Under the "fifth category," the Lanterman Act provides for assistance to individuals with "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for intellectually disabled individuals" but does "not include other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code § 4512, subd. (a) (emphasis added).) Like the other four qualifying conditions (cerebral palsy, epilepsy, autism, and intellectual disability), a disability involving the fifth category must originate before an individual attains age 18, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

10. The fifth category is not defined in the DSM-V. In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129, the California Court of Appeal held that the fifth category was not unconstitutionally vague and set down a general standard: "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well."

EVALUATION

11. A preponderance of the evidence did not establish that claimant is eligible for regional center services under the intellectual disability, fifth category, or epilepsy categories.

The evidence shows that claimant does not presently meet the DSM-5 criteria for an intellectual disability, and he did not have an intellectual disability before he turned 18 years old. Further, the evidence shows that claimant does not have a condition closely related to intellectual disability, or that requires treatment similar to that

required for intellectual disability.

In addition, the evidence also shows that claimant did not have epilepsy that originated before he turned 18 years old. Claimant had his first seizure when he was 23 or 24 years old, and his porencephaly was asymptomatic until his first seizure.

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ORDER

Claimant's appeal from Inland Regional Center's decision not to find him eligible for regional center services is denied.

DATED: July 22, 2015

_____/s/____

ABRAHAM M. LEVY

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 ninety days.