

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

CLAIMANT

and

SAN DIEGO REGIONAL CENTER,

Service Agency.

OAH No. 2015090151

DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on October 19, 2015.

Ronald R. House, Attorney at Law, represented the San Diego Regional Center (SDRC).

Claimant's daughter represented claimant.

The matter was submitted on October 19, 2015.

ISSUE

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

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a 72-year-old unconserved adult female. On July 30, 2015, SDRC

notified claimant that she was not eligible for regional center services.

2. On August 28, 2015, claimant's daughter filed a fair hearing request appealing that action. In her fair hearing request, daughter wrote that claimant was eligible for regional center services because, while locating medical records was impossible due to claimant's age, school records and evaluations proved that she was disabled before the age of 18.

SDRC'S EVALUATION

3. On July 8, 2015, Carolyn Crawford, SDRC Intake Social Work Counselor, interviewed claimant and daughter. Ms. Crawford conducted an interview that was received into evidence.

4. A clinical team at SDRC reviewed the social summary and a school record submitted by claimant. The team concluded that claimant did not have a developmental disability entitling her to SDRC services.

TESTIMONY OF DR. HARRY EISNER

5. Harry Eisner, Ph.D., SDRC Coordinator of Psychological Services, testified about the team's conclusions. Dr. Eisner received his Ph.D in 1978 and has worked at the SDRC as a clinical psychologist for the past 26 years. Dr. Eisner's testimony concerning whether claimant has a qualifying developmental disability is summarized as follows: At issue in this case is whether claimant has an intellectual disability or is entitled to regional center services under the so-called "Fifth Category."¹ Claimant does not have a qualifying

¹ The fifth category is a disabling condition closely related to intellectual disability or that requires treatment similar to that required for individuals with an intellectual disability. (Welf. & Inst. Code, § 4512, subd. (a).)

developmental disability because claimant's social and work history were not consistent with someone with an intellectual disability. Claimant's school record indicated that the school tested claimant several times between 1948 and 1958. She had I.Q. scores in the 70s, which are considered borderline. Claimant's poor grades indicated that she struggled in school. Claimant was also absent for a number of days during the year, which could help explain the low grades. Even if claimant was in special education, this would not establish that she had an intellectual disability because there could be several reasons, such as a learning disability or psychological issues that could prompt the school to place claimant in special education. Although her grades in school indicated that she had learning problems, there was not sufficient evidence to establish that this was caused by an intellectual disability or a similar disabling condition.

Additionally, claimant reported that she had several jobs, including work as a waitress, a hairdresser, and working for her husband's roofing company. This work history was not consistent with someone who has an intellectual disability. Claimant had extensive periods of homelessness, psychiatric hospitalizations, and a stroke, which could all affect her cognitive ability. Without evidence showing that claimant had a developmental disability originating prior to her turning 18 years old, she cannot be eligible for regional center service.

TESTIMONY OF CLAIMANT'S DAUGHTER

6. Daughter believes that the intake report prepared by SDRC contained many factual inaccuracies about claimant's history. Daughter's testimony is summarized as follows: In October 2014, claimant's doctor called daughter to inform her that claimant, who was living in Ohio, was homeless and living on the streets. During the time that daughter was preparing to move claimant to California, claimant suffered a stroke. Claimant now lives at home with her daughter and her daughter's wife.

7. Claimant was raised by an aunt and uncle. Claimant's biological mother

would periodically take her "to make nice to men" when the mother needed a place to stay. Claimant was married twice. On the wedding night, the first husband found out that claimant could not read and was extremely childlike in her behavior. He tried to send claimant back to her parents, but because of religious reasons, he made the marriage work. The two had three children together. Daughter is the third child. The second child, a son, died in infancy from a broken neck when he was under claimant's care. The father was given custody of the two remaining children. Claimant blamed the first child, who was 13 months old at the time, for the second child's death. Daughter had very little contact with claimant growing up. Visitation was sporadic and always supervised.

In 1970, claimant married her second husband, and they were married for 26 years. The second husband was a con-artist and extremely abusive. He used claimant to help con people. The two had a daughter whom claimant raised. This child has severe mental health issues.

Claimant was in and out of homelessness for years. Claimant always had a caregiver, mainly her youngest daughter. She never held a job for more than a couple months at a time. She did work with her second husband at his roofing business but only so that he could watch her. He was extremely jealous because claimant was flirtatious. He treated her like a child and disciplined her like a child. She called him "dad." Claimant did not perform the jobs she told the SDRC social worker she performed.

Claimant needs help with dressing and daily activities. Claimant communicates quite well, but she confuses movies, television, and prior conversations as reality. For example, events that she related to the social worker were not true, but rather confabulations.

Claimant was in special education but quit school after ninth grade. Although she claimed to have worked as a hairdresser, daughter believes that she was actually a "shampoo girl." None of claimant's other claimed work experience could be verified, as

daughter checked with the Social Security Administration and found no work history.

Claimant cannot read; she was able to get a driver's license by having another person read her the questions. She cannot take care of her own finances. She began receiving disability payments from Social Security in 1993 because of mental retardation.

Daughter explained that she was present when the SDRC social worker interviewed claimant. She did not correct claimant's lies or intervene because claimant becomes very angry and combative when her credibility is challenged. Therefore, daughter did not notify the social worker when claimant said something that was not true. Daughter described living with claimant like having a three-year-old in the house. Claimant has been thrown out of several assisted living facilities.

8. Daughter was unable to get any additional records than what she obtained. Daughter submitted three additional documents that were apparently not considered by SDRC in their initial evaluation, despite daughter having provided them to SDRC. The following were received into evidence without objection:

A statement from the Social Security Administration stated that claimant started receiving social security benefits in 1993, with mental retardation listed as the disability.

A psychological evaluation report dated February 8, 2015, was prepared to aid in discriminating between psychiatric and cognitive symptoms; to determine what treatment or supports may aid claimant's functioning; and to establish a baseline for cognitive functioning. The report concluded that claimant had intellectual and cognitive deficits, as well as deficits in adaptive functioning. The report diagnosed claimant with mild intellectual disability. The report was signed by "Dr. Jackson, Ph.D."

An "After Visit Summary," signed by Thomas Hemmen, M.D., stated: "We find no clear explanation for your low IQ. You have mental retardation from birth. The mental retardation is not related to your stroke. At this stage it is not possible to clearly determine the cause." Daughter testified that claimant was seen by Dr. Hemmen after claimant had

another stroke.

SDRC'S REBUTTAL

9. Dr. Eisner reviewed the documents daughter submitted at hearing. Dr. Eisner recognized that claimant began receiving social security disability in 1993 based on a diagnosis of mental retardation, but Dr. Eisner noted that claimant was in her 50s at that time, and the document did not reflect her mental functioning prior to her turning 18. Without supporting documentation as to how the assessment was established, Dr. Eisner believed that Social Security's determination had little probative value.

As for the discharge instructions, Dr. Eisner noted that the statement that claimant had mental retardation was conclusory, and there was no supportive information establishing how Dr. Hemmen arrived at his conclusion.

Regarding Dr. Jackson's psychological assessment, Dr. Eisner did not believe that an evaluator could render a diagnosis of intellectual disability without having retrospective information regarding the disability prior to age 18. Dr. Eisner believed that a learning disability would be a reasonable competing explanation for claimant's low cognitive functioning.

In conclusion, the newly considered documents and daughter's testimony did not alter Dr. Eisner's opinion that claimant does not have a developmental disability that originated prior to claimant turning 18 years of age.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish that he or she has a qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.)

2. 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

3. 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.)

4. An applicant is eligible for services under the Lanterman Act if he or she can establish that 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 intellectually disabled individuals. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

5. California Code of Regulations, title 17, section 54000, also 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:

- (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.

6. 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 to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

7. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act.

EVALUATION

8. Daughter believed claimant was eligible for regional center services because of an intellectual disability. The Lanterman Act and applicable regulations specify the criteria an individual must meet in order to qualify for regional center services. Dr. Eisner provided a thorough and detailed explanation for why claimant did not qualify for regional center services. His testimony demonstrated that he performed a careful analysis of claimant's social history and documentation. Dr. Eisner evaluated the documents daughter submitted at the hearing and concluded that they did not alter his opinion. Dr. Eisner offered alternative reasons for claimant's cognitive deficits, including learning disability, psychological issues, prolonged homelessness, and stroke.

9. The weight of the evidence submitted by daughter was not sufficient to contradict Dr. Eisner's assessment that claimant is ineligible for regional center services. The report by Dr. Hemmen consisted of a single sentence stating that claimant has had mental retardation since birth. There was no additional information to evaluate the basis for Dr. Hemmen's conclusion. Likewise, the psychological report diagnosed claimant with mild intellectual disability but provided no information on the diagnostic criteria the evaluator used. Moreover, there was no information received as to either the evaluator's credentials or background. Finally, although claimant received social security payments for mental retardation, there was no evidence as to how it was determined that she was mentally retarded.

10. Even assuming that claimant has an intellectual disability, claimant must establish that the disability originated prior to her turning 18 years old. Her education

report is the only evidence relating to her abilities as a child. Although the report indicated that she had a borderline IQ, had poor grades, and may have been in special education; the report does not establish by a preponderance of evidence that this was caused by an intellectual disability, as opposed to another factor such as learning disabilities.

11. Daughter was sincere, her testimony heartfelt, and her frustration palpable. She was clearly motivated by her desire to help her mother and obtain services that she believes are necessary to help her function; she undoubtedly has her mother's best interest at heart. However, claimant bears the burden of establishing eligibility for services under the Lanterman Act based upon a disability that originated prior to claimant turning 18 years of age. Claimant presented insufficient evidence to establish by a preponderance of evidence that she is entitled to regional center services.

ORDER

Claimant's appeal from SDRC's determination that she is not eligible for regional center services and supports is denied.

DATED: November 2, 2015

_____/s/____

ADAM L. BERG

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.