

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2015110509

DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 26, 2016, in San Bernardino, California.

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

Claimant's sister-in-law represented claimant, who was present during the hearing. Claimant's mother, five of his seven siblings, a sister-in-law, a brother-in-law, and a childhood friend were also present during the hearing.

The matter was submitted on April 26, 2016.

ISSUES

1. Is claimant eligible for regional center services on the basis of intellectual disability under the Lanterman Developmental Disabilities Services Act (Lanterman Act)?
2. Is claimant eligible under the fifth category on the basis that he has a

condition closely related to an intellectual disability or that requires treatment similar to that required for individuals with an intellectual disability?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a fifty-four year-old man who lives with his brother and sister-in-law.

2. Through his representative, claimant sought regional center services based upon a claim that he had an intellectual disability and/or a disability that was closely related to an intellectual disability or that required treatment similar to that required for individuals with intellectual disabilities.

3. By letter dated October 30, 2015, IRC advised claimant that it reviewed his records and determined that “no ‘intake’ services” would be provided because he did not have a substantial disability as defined by the Lanterman Act. For this reason, IRC found that claimant was not eligible to receive regional center services.

4. On November 7, 2015, claimant signed a Fair Hearing Request appealing IRC’s decision. In his hearing request, claimant disagreed with IRC because he believed he was eligible for regional center services based upon his having an intellectual disability or a condition closely related to an intellectual disability.

5. On November 19, 2015, claimant’s sister-in-law and IRC staff met to discuss claimant’s request for a fair hearing. By letter dated December 15, 2015, Ms. Pierce summarized the meeting and IRC’s decision that claimant was not eligible for regional center services. Ms. Pierce said that claimant’s school records showed that, before he was 18 years old, claimant had received special education services “for a

speech and language disability which does not qualify for regional center services.” Based on an analysis of claimant’s records, IRC could not offer claimant services.

BACKGROUND AND EDUCATION

6. Claimant is the sixth child of eight. He was born premature, but there were no postnatal complications. It was reported that claimant did not walk until he was 22 months old and did not speak until he was about 4 years old. He had spinal meningitis at 4 years of age and seizures that lasted until he was 11 years old.

7. Claimant received school-provided special education services throughout his public school education until he graduated from high school.¹ School records from June 15, 1976, when claimant was 14 years old, found him eligible for the “educationally handicapped program.” In April 1977, the school district again found claimant eligible for the “educationally handicapped program” for three periods; the remainder he was to be in “regular classes.”

8. An Individualized Education Program (IEP) prepared by claimant’s school district dated May 1978, when claimant was 16 years old, shows that claimant was receiving services based on a classification of learning disability and “speech.” The school district had an option to mark his classification as “EMR,” an abbreviation for a formerly used classification of Educable Mentally Retarded, or “TMR” an abbreviation for a formerly used classification of Trainable Mentally Retarded, but did not do so. An

¹ Some records indicated claimant first received special education services in the 4th grade. For purposes of this decision, it is considered that he received services from the age of 5. Given claimant’s age, much of his early educational records were not available and many of those that were available were illegible.

IEP dated April 1979, when claimant was 17 years old, showed he was continuing to receive special education services for a learning disability/speech. An IEP from December 1980, when claimant was 18, confirmed he was still receiving services for a learning disability. Claimant's high school transcript showed he graduated 113th of 336 in the class with a grade point average of 2.68. Most of claimant's academic classes were designated for learning disabled students.

1995 IRC EVALUATION

9. In 1995, when claimant was 33 years old and living with his parents, he sought services from IRC. On May 3, 1995, in response to claimant's request, R. Richard Banks, Ph.D. performed a psychological assessment. Dr. Banks administered several tests, including the Wechsler Adult Intelligence Scale-Revised (WAIS-R) and the Wide Range Achievement Test Revised (WRAT-R). In the WAIS-R, claimant's full scale intelligence quotient (IQ) was measured at 73; he obtained a Verbal IQ score of 71 and a performance IQ score of 77. In the WRAT-R, claimant's scores showed his reading and spelling to be at the third grade level and his arithmetic to be at a seventh grade level. Claimant's adaptive functioning was determined to be at the 16.5-year-old level. He was found to have "all of his self help skills accomplished and the ability to do minor routine household tasks. He is able to go about his home town freely and unsupervised and he buys and takes care of his own clothing."

Dr. Banks's report indicated that claimant worked for eight years in a "sheltered situation" after high school. For two years after that, he worked at a feed store. For a time, claimant worked in a Jack in the Box, but he lost that job after a couple months.

Dr. Banks noted that claimant's scores showed "considerable variability between subtests" He also stated that claimant academic functioning as shown by the

WRAT-R was “considerably below what would be anticipated from his overall intelligence.” Dr. Banks concluded that claimant was “functioning in the borderline range of intelligence and as such would not be eligible for Regional Center services on the basis of mental retardation.” Dr. Banks did not address fifth category eligibility.

FEBRUARY 2015 EVALUATION BY DR. GUNN

10. On February 3, 2015, Timothy Gunn, Psy.D., a licensed clinical psychologist, evaluated claimant and performed a neuropsychological assessment. Dr. Gunn obtained information from several family members and administered multiple assessment tests, including the WAIS-IV and the Woodcock-Johnson, Third Edition (WJ-III). In the WAIS-IV, claimant’s full scale score was measured to be 66, which is considered impaired. His range of scores on that test was from 77 to 61. His academic skills as measured by the WJ –III were all in the Borderline to low average range. All of the adaptive functioning scores obtained were in the impaired range, which were determined through observer-report checklists.

Dr. Gunn opined that claimant was “functioning in the borderline impaired to impaired range of intellectual functioning. He showed some variability amongst his scores with highest scores in the area of nonverbal intelligence and lowest scores in the area of verbal intelligence. [Claimant’s] academic functioning is somewhat higher than would be expected given that he obtained some scores in the low average range. However he also showed intermittent delays in several areas of academic functioning . . .” Dr. Gunn concluded that claimant met the criteria for intellectual disability.

DR. VERONICA RAMIREZ’S TESTIMONY

11. Veronica A. Ramirez, Psy.D. is a licensed clinical psychologist. She has been employed by IRC as a staff psychologist for one year. She served as a

psychological assistant at IRC for one year prior to that. She was a school-based mental health therapist for two and one-half years before working for IRC. Her duties as a staff psychologist and psychological assistant include reviewing records and documentation to assist IRC in determining whether a prospective consumer is eligible for IRC services because he or she is intellectually disabled, has autism or an autism spectrum disorder, or falls within the fifth category. She stated that, to be eligible for regional center services under the intellectually disabled category, a consumer must show sub-average intellectual functioning, usually determined through IQ testing, and have substantial deficits in daily living skills. The disabling condition must exist before the consumer is 18 years old.

12. Dr. Ramirez reviewed claimant's records. She noted that although claimant was provided special education services from an early age, those services were based upon a diagnosis of learning disability, not intellectual disability. She noted that the earliest records of psychological testing were those of Dr. Banks, who evaluated claimant in 1995 when claimant was 33 years old. Further, in those tests, claimant was found to have a full scale IQ score of 73, which does not signify an intellectual disability. Dr. Banks found that claimant did not qualify for regional center services.

Dr. Ramirez acknowledged that claimant's school records demonstrated he had some academic deficiencies. She stated that claimant's learning disability, as determined by claimant's school district, could account for the discrepancy between his IQ and academic achievement. In relation to Dr. Gunn's assessment, Dr. Ramirez noted that IQ scores can decrease over time due to other factors.

Dr. Ramirez also addressed claimant's request for services based on eligibility under the Fifth Category. She testified that he was not eligible for services under fifth

category criteria primarily because there was no evidence that he had a substantial disability before the age of 18. She stated that none of the information contained in the records, in documents presented by claimant at the hearing, or in the testimony of witnesses, indicated to her that claimant has a qualifying disability that would entitle him to IRC services.

EVIDENCE PRESENTED ON CLAIMANT'S BEHALF

13. Claimant's mother, four siblings, a childhood friend and claimant's sister-in-law testified at the hearing. Claimant's mother said when claimant was young, he struggled to learn new things. She noticed that he was slower than other children his age; he walked at 22 months and did not have speech until he was about four years old. She wrote in claimant's baby book that even "[a]t age 7 we still have difficulty understanding some of [claimant's] words."

14. Claimant's siblings and a childhood friend testified about their observations growing up with claimant; his sister-in-law testified about her observations from when she first met claimant in 2002. Witnesses said they could see that claimant struggled with homework and that it was harder for him to learn things. They noticed he tended to prefer to be around younger children. Several spoke about claimant's lack of care for his personal hygiene. Some discussed how they observed others react to claimant; some called him names, including "retarded," and others avoided him because he was different. Several witnesses saw claimant engage in obsessive behaviors, including watching Disney movies over and over and sorting and re-sorting objects in his room. One brother testified that he wanted to take claimant to Disneyland because he knew claimant would never get there on his own.

15. Testimony was offered that claimant could be easily manipulated. A

younger sister testified that, when they were children, she could convince claimant to give her more valuable tokens in exchange for tokens of a lesser value. In adulthood, claimant disappeared for six weeks. When his family found him they learned that he had been taken advantage of by persons who made purchases in his name and convinced him to give them his money by pretending to be his friend.

DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

16. Intellectual disability is addressed in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, (DSM-V). The DSM-V 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-V notes that, with regard to Criterion A, "individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally ± 5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65 - 75

(70 ± 5).” The DSM-V cautions that IQ tests must be interpreted in conjunction with considerations of adaptive function. It states that “a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person’s actual functioning is comparable to that of individuals with a lower IQ score.”

With regard to Criterion B, the DSM-V provides that “Criterion B is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community.”

FIFTH CATEGORY ELIGIBILITY

17. 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 individuals with an intellectual disability.” (Welf. & Inst. Code, § 4512, subd. (a).) This is known as the “fifth category.” Eligibility however, may not be based on “other handicapping conditions” that are solely resulting from learning disabilities. (Cal. Code. Regs., tit. 17 § 54000, subd. (c)(2)). Like the other four qualifying conditions (cerebral palsy, epilepsy, autism, and intellectual disability), the fifth category condition must originate before an individual attains age 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

The fifth category is not a diagnosis 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 [intellectual disability], with many of the same, or close to the same, factors required in classifying a person as [intellectually disabled]. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well."

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 developmental disability. 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 is suffering from a substantial developmental disability 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 individuals with an intellectual disability. (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. Welfare & Institutions Code section 4512, subdivision (l)(1), provides:

“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.

6. 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).)

7. 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 retardation², 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.

² The regulations have not been amended to replace “mental retardation” with “intellectual disability.”

[¶] . . . [¶]

8. 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 his integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

EVALUATION

9. To be eligible for regional center services, claimant must prove that he has a substantial disability that is attributable to a developmental disability recognized under the Lanterman Act that originated before the age of 18. In his Fair Hearing Request, claimant asserted he was eligible for regional center services based upon an intellectual disability, or under the fifth category for a disabling condition closely related to intellectual disability or that requires treatment similar to that required for individuals with an intellectual disability. Claimant bears the burden of proof in showing that a preponderance of the evidence supports his claims. Claimant did not meet his burden.

Claimant Is Not Eligible For Services Based on Intellectual Disability

10. No evidence was presented at the hearing of any psychological testing administered to claimant prior to Dr. Banks's evaluation in 1995 when claimant was 33 years old. At that time, claimant's full scale IQ score was 73 (verbal score 71 and performance score 77). His adaptive functioning was deemed to be the equivalent of a person 16 years and 6 months old. Dr. Banks determined that claimant was not eligible for regional center services because his IQ score was in the borderline range and his adaptive skills were good.

No evidence was presented that claimant was identified as having a developmental disability during his youth. He received special education services from his school district because of a learning disability. None of the available school records indicated that claimant was ever provided special education services for the equivalent of an intellectual disability ("EMR" or "TMR") or that any teacher, psychologist or psychiatrist suggested that claimant should or might be classified as intellectually disabled. Deficits resulting solely from learning disabilities are specifically exempted from the definition of developmental disability under the Lanterman Act. Based on this record, claimant has not shown that he is eligible for regional center services on the basis of on intellectual disability.

Claimant is Not Eligible For Services Based On the "Fifth Category"

11. Claimant contended that he is eligible to receive services and supports from IRC based upon the fifth category. Such eligibility may be established through evidence that claimant has a disabling condition closely related to an intellectual disability or that requires treatment similar to that required by an individual who has an intellectual disability. (*Samantha C. v. Department of Developmental Services* (2010) 185 Cal.App.4th 1462). Establishing eligibility based on the fifth category cannot be based upon handicapping conditions that are solely learning disabilities. (Cal. Code Regs., tit. 17 § 54000, subd. (c)(2).) For the same reasons stated above, claimant has not met his burden to prove that he is entitled to regional center services under the fifth category. He has not proved a disabling condition closely related to an intellectual disability or that required treatment similar to that required by those with an intellectual disability; that originated before the age of 18; and that was not solely a learning disability.

12. IRC's eligibility team reviewed the available documentation and determined that claimant was not eligible for services. These determinations have been described as difficult and complex, particularly as they relate to the fifth category of eligibility. (*See, Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129.) The language of the Lanterman Act and the implementing regulations "clearly defer to the expertise of the [Department of Developmental Services] and the [regional center] professionals and their determination as to whether an individual is developmentally disabled." (*Id.*, at p. 1129.) The evidence does not support overturning IRC's determination that claimant is ineligible for IRC supports and services.

ORDER

1. Claimant's appeal from Inland Regional Center's determination that claimant was not eligible for services based upon claimant having an intellectual disability is denied.

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2. Claimant's appeal from Inland Regional Center's determination that claimant was not eligible for services based upon claimant having a disabling condition closely related to intellectual disability or one that requires treatment similar to that required for individuals with intellectual disabilities is denied.

DATED: May 9, 2016

_____/s/____

SUSAN J. BOYLE

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.