BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT vs. VALLEY MOUNTAIN REGIONAL CENTER, Service Agency.	OAH No. 2016070699

DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on April 13, 2017, in Stockton, California.

Anthony Hill, Attorney at Law, Assistant Director of Case Management, represented Valley Mountain Regional Center (VMRC).

Claimant was represented by his mother.

Documentary evidence and testimony were received, the record was closed and the matter was submitted for decision on April 13, 2017.

ISSUES

1. Is claimant eligible to receive regional center services and supports by reason of a diagnosis of epilepsy or intellectual disability?

2. If claimant is not eligible for regional center services under the categories of epilepsy or intellectual disability, is he eligible under the "fifth category" because he has a condition closely related to intellectual disability, or that requires treatment similar to that required for individuals with intellectual disability?

FACTUAL FINDINGS

BACKGROUND AND HISTORY

1. Claimant is a 28-year-old man. He has a seizure condition which began at age 13. His family initially sought regional center services for him in 2008, but his case was closed after it was determined that his seizures were well controlled by medications. In seeking regional center services again, claimant's family believes his current condition is best explained as being a developmental disability, whether caused by his seizures or other condition, that constitutes a substantial disability for him. Claimant continues to reside with his parents. His family believes he will benefit from professional services available through the service agency that will assist him to live independently, and prepare him for the time when his family will no longer be here to help him.

2. Claimant's mother and sister testified regarding his developmental history and present concerns, and submitted an evidence binder. School has always been complicated and stressful for claimant. He had behavioral and anger issues that caused him to act out or fight with other children. He also had concentration and learning problems that resulted in him performing poorly. He had very poor grades until he was transferred to a continuation school where he received good grades and graduated high school. He was not in special education. Claimant attempted but was unable to handle college level studies. He was briefly employed as a cashier at two fast food restaurants, and terminated from his last job in February 2007. He now stays at home, and has limited social engagement. He has been diagnosed with Depression, Social Phobia, and Attention Deficit Hyperactivity Disorder (ADHD). He takes Lamictal and Zoloft for his depression, and Tegritol for seizures.

Claimant's mother describes every day as being a struggle for him. Simple tasks frustrate him. Stress and anxiety make it difficult for him to be employed in any position. Claimant's mother needs to remind him to shower, clean his face, get dressed and

maintain good hygiene/grooming habits. He is forgetful. He gets lost in public places when they go out. If he is asked to make a purchase, they try to limit him to two items lest he forget. When given money to purchase specific items, claimant will purchase other items. He cannot manage money or pay bills. He is not allowed to cook because he will burn food. Claimant cannot take public transportation alone. He can drive a vehicle but has been unable to pass the California driver license examination. He gets frustrated easily and has acted out violently. On one occasion he became so frustrated that he choked his younger sister to such extent that they fell to the ground. Another time claimant kicked his sister in the chest.

3. Jennifer Copeland was the VMRC Intake Coordinator assigned to perform a social assessment for claimant. She was responsible for compiling claimant's educational, medical, behavioral health, testing and other relevant records in assessing his eligibility for regional center services. These were reviewed by VMRC's interdisciplinary assessment team.

Based upon the results of the assessments and other information available to the interdisciplinary team, claimant's request for regional center services was denied on June 22, 2016. Claimant and his mother now appeal from this decision. They contend that claimant is eligible for regional center services based either upon a diagnosis of epilepsy, intellectual disability, or his having a condition closely related to intellectual disability, or requiring treatment similar to that required by individuals with intellectual disability.

4. Under the Lanterman Act, VMRC accepts responsibility for persons with developmental disabilities. A developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely and that constitutes a substantial disability for the individual. Developmental disabilities include intellectual disability, cerebral palsy, epilepsy, autism, and what is commonly known as the "fifth

category" – a disabling condition 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).) Given the disjunctive definition – a condition closely related to intellectual disability or requiring similar treatment to that required for individuals with an intellectual disability – the fifth category encompasses two separate grounds for eligibility.

EPILEPSY

5. That claimant suffers from epilepsy is undisputed. He has been followed by neurologist Jinmei Woan, M.D., for seizure disorder since May 12, 2008. His seizures began when he was 13 years old. By letter dated July 25, 2016, Dr. Woan noted that claimant has always had an abnormal EEG, showing frequent electroencephalographic seizures. Claimant was recently seen by Dr. Woan on September 16, 2016. Dr. Woan assessed him at that time as follows: "Localization-related (focal) (partial) symptomatic epilepsy and epileptic syndromes with complex partial seizures, not intractable, with status epilepticus (G40.201)." Dr. Woan prescribed daily anticonvulsant medications Lamotrigine and Topiramate to manage this condition. Claimant's seizures are well controlled. He has suffered only a handful of seizures since his condition first manifested at age 13. Seizures may constitute a substantial disability to an individual when they become intractable, or uncontrolled, but that is not the case here. The medical record and all other evidence indicate that claimant's seizure episodes are well-controlled by his prescribed medications.

6. Claimant receives mental health treatment through San Joaquin County Behavioral Health Services, La Familia Clinic. He has been under the care of psychiatrist Jane Fernandez, M.D., since September 15, 2010, at La Familia Clinic. By letter to VMRC dated August 23, 2016, Dr. Fernandez described multiple instances when claimant demonstrated a lack of problem solving skills that she believes cannot be explained

solely by his IQ. For example, she noted that claimant typically can get to a single destination, but if he has to travel to multiple destinations he will get lost. Dr. Fernandez explained that such basic problem solving skills are required for one to live independently, and that claimant shows a "disabling lack of executive function that is often seen in patients with epilepsy." She further noted:

> While there are many people with [claimant's] IQ who are able to live independently, he cannot, which is likely related to an executive function disorder. Also, it is possible that his IQ has dropped lower than when it was last tested, which at times can happen in people who suffer from epilepsy. In my medical opinion, it is not only his psychiatric illnesses that contribute to his disability, but also, and more substantially, his cognitive handicaps.

7. Janwyn Funamura, M.D., is a pediatrician and medical consultant employed by VMRC. She has participated in VMRC eligibility determinations over the past four plus years, and did so in this case. She relied principally on her review of Dr. Woan's medical records in finding that claimant had epilepsy, and that such condition was well-controlled by prescribed medications. She also reviewed and considered the August 23, 2016 letter from Dr. Fernandez. Dr. Funamura indicated that she has reviewed medical literature on epilepsy in children and has found nothing to support Dr. Fernandez's suggestion that epilepsy can lead to a disabling lack of executive function. Dr. Funamura does agree that there may be a causal connection between epilepsy and decreases in IQ. Dr. Funamura is unaware of the prescribed anticonvulsant medications having side effects leading to either a disabling lack of executive function or diminished IQ.

8. Dr. Fernandez did not testify at hearing. She made only general reference to a disabling lack of executive function being "often seen in patients with epilepsy." Whether this is based upon her own observation or upon published medical research is unknown. Even if correct, it is not clear whether such correlation is directly caused by epilepsy or some other process or agent unrelated to epilepsy. In the absence of more specific information and competent medical evidence it was not demonstrated in this case that claimant's epilepsy constitutes a substantial disability to him. Accordingly, claimant is not eligible for VMRC services based upon his diagnosis of epilepsy.

INTELLECTUAL DISABILITY

9. Preliminarily, it is noted that the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM-V), discusses intellectual disability in pertinent part as follows:

> Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following 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 sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or

more activities of 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 essential features of intellectual disability (intellectual developmental disorder) are deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual's age-, gender-, and socioculturally matched peers (Criterion B). Onset is during the developmental period (Criterion C). The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions. Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Critical components include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy. Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. 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). Clinical training and judgment are required to interpret test results and assess intellectual performance.

10. No cognitive testing/psychological assessments were performed on claimant prior to age 18. His first cognitive testing was performed on August 13, 2008, by Jacklyn Chandler, Ph.D., Registered Psychological Assistant, as part of a psychological disability evaluation. Dr. Chandler administered the Wechsler Adult Intelligence Scale-III (WAIS-III), Wechsler Memory Scale-III (WMS-III), Trail-Making Test, Parts A and B, and Bender-Gestalt Test-II. On the WAIS-III, claimant obtained a Verbal Scale IQ of 85, Performance Scale IQ of 84, and a Full Scale IQ of 84. Dr. Chandler determined that the test results obtained were valid, and interpreted the above test results as follows:

> On the WAIS-III, the claimant produced Verbal, Performance, and Full Scale IQ scores that fell within the low average range. There was no significant difference between the VIQ and PIQ scores. Clinical observation and the claimant's pattern of performance suggest current overall functioning ability within the low average to average range, with mildly to moderately decreased attention and concentration and mildly decreased pace.
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> On the WMS-III, the Auditory Immediate and Delayed Index scores fell within the average range. The Visual Immediate and Delayed Index scores fell within the average range. The

claimant's performance suggests adequate memory functioning.

On Part A of the Trail-Making Test, the claimant completed the task in 44 seconds with 0 errors, resulting in a score that was within the mildly impaired range. On Part B the claimant completed the task in 101 seconds with 0 errors, resulting in a score that was within the mildly impaired range. The claimant's difficulties on this test appeared to be due to his decreased attention, concentration, and pace.

On the Bender-Gestalt Test-II the Copy score was in the high average range, suggesting good visuoconstruction ability.

11. Dr. Chandler noted claimant's reported history of learning difficulties and ADHD. She opined based upon her clinical observation and claimant's cognitive testing that his "pattern of performance suggest current overall functioning ability within the low average to average range, with mildly to moderately decreased attention and concentration and mildly decreased pace." Dr. Chandler assessed claimant as meeting criteria for a DSM-IV-TR diagnosis of "Attention-Deficit/Hyperactivity Disorder, Predominantly Inattentive Type." Based upon claimant's reported history of depression and anxiety when he is in social situations, she further assessed him as meeting criteria for DSM-IV-TR diagnoses of "Depressive Disorder, NOS and Social Phobia."

12. Claimant does not meet DSM criteria for intellectual disability. He does not meet Criterion A - significantly subaverage general intellectual functioning. This is the essential feature of intellectual disability. Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below. Claimant's cognitive testing produced a Full Scale IQ of 84, a pattern of performance suggesting current overall

functioning ability within the low average to average range. For this reason claimant is not eligible for regional center services based upon intellectual disability.

FIFTH CATEGORY

13. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, the appellate court held that "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." (*Id.* at p. 1129.) It is therefore important to track factors required for a diagnosis of intellectual disability when considering fifth category eligibility. The DSM-V provides that the "essential feature" of intellectual disability is significantly subaverage general intellectual functioning. And it must be accompanied by impairment in everyday adaptive functioning, in comparison to an individual's age-, gender-, and socioculturally matched peers (Criterion B).

Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below – approximately two standard deviations below the mean. As noted in Finding 12, claimant's general intellectual functioning is not significantly subaverage. He does not show borderline intellectual functioning, nor anything near subaverage intellectual functioning. He tested in the low average to average range of intellectual functioning.

14. Barbara A. Johnson, LMFT, Psy.D., is a licensed clinical psychologist employed by VMRC. Among her regional center responsibilities is making recommendations regarding eligibility, and diagnosis and determination of further psychological assessments as needed. She engaged in a comprehensive review of claimant's psychological, behavioral health, educational and other records in this case, and testified at hearing. Dr. Johnson found no evidence in the record to support claimant having either intellectual disability, or a condition similar to intellectual

disability. She noted that his Full Scale IQ score of 84 places him in the low average range of intellectual functioning, and this alone precludes consideration of him having a condition similar to intellectual disability. She noted that claimant was not in special education and that he graduated from high school. To the extent that he struggled in high school, had difficulties holding down a job, or continues to demonstrate functional limitations in major life activities, Dr. Johnson opined that such are more likely due to his psychiatric disorders including ADHD, Depression, Generalized Anxiety and Social Phobia.

15. Claimant may seek eligibility based upon his condition being closely related to intellectual disability, with a primary focus upon his impairments in adaptive functioning. Under the DSM-V, "deficits in adaptive functioning (Criterion B) refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background. Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical." The DSM-V provides with regard to diagnostic features of intellectual disability:

> 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. To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A.

The well-documented record demonstrated that claimant is not effectively coping with common life demands and that he does not meet standards of personal independence expected of a young man in his community.

16. VMRC has suggested that its review of claimant's records disclosed no significant concerns in any of seven major life activities assessed. It looked for but found no significant functional limitations in claimant's capacity for: 1) self-care; 2) receptive and expressive language; 3) learning; 4) mobility; 5) self-direction; 6) capacity for independent living; and 7) economic self-sufficiency. (Welf. & Inst. Code, § 4512, subd. (l).) The evidence, however, is decidedly mixed. His family reported significant limitations in claimant's capacity for self-care, capacity for independent living and economic self-sufficiency. (Finding 2.) In contrast, Dr. Chandler reported in 2008 the following regarding claimant's activities of daily living:

> The claimant is able to independently complete most of the following activities of daily living, with restrictions related to depression and anxiety. He is unable to take a bus by himself. He is able to drive a car, but does not have a current driver's license. He is able to do simple household chores such as washing dishes, doing laundry, and preparing simple meals. He is able to go grocery shopping unattended. He is able to dress and groom himself.

17. There appears to be strong agreement among the two evaluating psychologists that claimant's limitations are related to his depression and anxiety, and not to any cognitive deficits. Dr. Chandler stated that claimant's restrictions all relate to his depression and anxiety. Dr. Johnson acknowledged the reported limitations in claimant's functioning but opined that such are better and well explained by his other

diagnosed psychiatric disorders. Dr. Johnson noted, for example, that it is not uncommon to hear the same concerns expressed about individuals suffering from depression. These include the need to be directed and motivated in their work or activities of daily living. Individuals with learning disabilities also manifest frustration in performing single tasks, or inability to recall matters. Such factors have no relationship to deficits in one's general cognitive ability. Importantly, the treatment modalities for those with mental health issues are very different from those needed for those with intellectual disabilities.

18. There is no evidence that the deficits in claimant's adaptive functioning are related to any cognitive deficits. In this respect, it does not parallel traditional fifth category analysis that looks for subaverage intellectual functioning "accompanied by" significant limitations in adaptive functioning. Nor is it consistent with the DSM-V diagnostic criteria for intellectual disability which state "the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A." Dr. Johnson's thinking on this matter is persuasive. If claimant's adaptive deficits indeed derive from his mental health diagnoses, such is inconsistent with a finding that his condition is closely related to intellectual disability. Assuming Dr. Johnson's assessment is accurate, claimant's deficits in adaptive functioning are better addressed by medications or programs focused on issues related to his executive functioning.

19. Here, claimant is receiving treatment for underlying psychiatric conditions, which is clearly not for the purpose of addressing developmental disabilities. This is proper. The medical and psychological record and evidence in this case do not support a finding that claimant suffers from a condition closely related to intellectual disability or

requiring similar treatment to that required for individuals with an intellectual disability.[1] For this reason claimant is not eligible for regional center services under the fifth category.

DETERMINATION

20. It was not established that claimant is eligible to receive regional center services and supports by reason of epilepsy, intellectual disability, or a condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability. Claimant has deficits in adaptive functioning. However, these limitations do not result from any deficits in general cognitive ability, or from his epilepsy. They likely result from difficulties with attention and impulsivity characteristic of ADHD, which may be exacerbated by Depressive Disorder and Social Phobia. These are psychiatric disorders requiring mental health

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[1] The second prong of fifth category eligibility must be based upon an individual requiring "treatment" similar to that required by individuals with intellectual disability. The wide range of services and supports listed under Welfare and Institutions Code section 4512, subdivision (b), are not specific to intellectual disability. One would not need to suffer from intellectual disability, or any developmental disability, to benefit from the broad array services and supports provided by VMRC to individuals with intellectual disability. They could be helpful for individuals with other developmental disabilities, or for individuals with mental health disorders, or individuals with no disorders at all. The Legislature clearly intended that an individual would have a condition similar to intellectual disability, or would require treatment that is specifically required by individuals with intellectual disability, and not any other condition, in order to be found eligible.

treatment very different from that provided for individuals with intellectual disability. As such, they are not developmental disabilities as defined under the Lanterman Act. Consequently, claimant does not qualify for services through VMRC.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act, the State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. (Welf. & Inst. Code, § 4501.) As defined in the Act a developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely and that constitutes a substantial disability for the individual. Developmental disabilities include intellectual disability, cerebral palsy, epilepsy, autism, and what is commonly known as the "fifth category" – a disabling condition found to be closely related to intellectual disability or requiring treatment similar to that required for individuals with intellectual disability. (Welf. & Inst. Code, § 4512, subd. (a).)

Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act. (Cal. Code Regs., tit. 17, § 54000, subd. (c).)

2. "Substantial handicap" is defined by regulations to mean "a condition which results in major impairment of cognitive and/or social functioning." (Cal. Code Regs., tit. 17, § 54001, subd. (a).) Because an individual's cognitive and/or social functioning is multifaceted, regulations provide that the existence of a major impairment shall be determined through an assessment that addresses aspects of functioning including, but not limited to: 1) communication skills, 2) learning, 3) self-care, 4) mobility, 5) self-direction, 6) capacity for independent living and 7) economic self-sufficiency. (Cal. Code Regs., tit. 17, § 54001, subd. (b).)

3. It was not established that claimant has a developmental disability that originated before age 18 and that continues, and that constitutes a substantial disability for him.

a. Claimant does have epilepsy. However, this condition is well-controlled by medications and it does not constitute a substantial disability for him. (Findings 5 through 8.)

b. Claimant does not have intellectual disability. (Findings 9 through 12.)

c. Claimant does not have a disabling condition closely related to intellectual disability or requiring treatment similar to that required for individuals with intellectual disability. (Findings 13 through 19.)

4. It was not established that claimant otherwise suffers from any other qualifying developmental disability. Claimant is therefore not eligible to receive services through Valley Mountain Regional Center.

ORDER

Claimant's appeal from the Valley Mountain Regional Center's denial of services is denied. Claimant is not eligible for services under the Lanterman Act.

DATED: April 20, 2017

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JONATHAN LEW

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within ninety (90) days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)