BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. WESTSIDE REGIONAL CENTER, Service Agency.	OAH No. 2017031441

DECISION

This matter was heard by Administrative Law Judge (ALJ) Cindy F. Forman of the Office of Administrative Hearings on July 26, and August 9, 2017, in Culver City, California.

Jeffrey Gottlieb, Attorney at Law, represented Claimant.[1] Claimant was not present at the hearing. Lisa Basiri, Fair Hearing Coordinator, represented the Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received. The record was kept open until September 11, 2017, for submission of closing briefs. Claimant's closing brief was marked as Exhibit G; WRC's brief was marked as Exhibit 15. The matter was submitted for decision on September 11, 2017.

ISSUE

[1] Claimant and her family will be referred to by title to protect their privacy.

Does Claimant have a developmental disability (autism) that would make her eligible for regional center services under the Lanterman Developmental Disability Services Act (Lanterman Act; Welfare and Institutions Code section 4500 et seq.)?

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FACTUAL FINDINGS

1. Claimant is a 35 year old female, who was diagnosed with autism as early as 2004. She recently was re-evaluated and diagnosed with Autism Spectrum Disorder (ASD) under the fifth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5), issued in 2013.[2] Claimant seeks eligibility for regional center services based on her diagnosis of ASD.

2. On March 3, 2017, WRC sent a Notice of Proposed Action to Claimant informing her of its determination that she was not eligible for regional center services because she was not substantially handicapped by mental retardation, cerebral palsy, epilepsy, autism, or other condition similar to mental retardation. (Exhibit 2.) Claimant requested a fair hearing.

CLAIMANT'S GENERAL BACKGROUND

3. Claimant lived with her mother and two adult siblings at her mother's home until her mother passed away on December 12, 2016. Claimant's mother was her conservator. She has no contact with her father. No evidence was introduced as to with whom or where Claimant currently resides.

[2] As noted in more detail below, in 2013 a change was made in the psychiatric community from referring to a diagnosis of autism or autistic disorder, to a diagnosis of Autism Spectrum Disorder.

4. Claimant does not work and does not attend school. She rarely leaves her home. She has qualified for Supplemental Security Insurance assistance.

5. Claimant has a family history of psychological and developmental disorders. Her half-brother has been diagnosed with autism and currently receives regional center services. Her half-sister has been diagnosed with bipolar disorder and has been in and out of psychiatric hospitals. Both her maternal great-grandmother and her maternal grandmother exhibited extreme social isolation when they were alive.

6. Claimant has been described as moody, irritable and easy to anger. She does not talk to her half-sister. She has no friends and prefers to spend time alone. She does not drive. She has never held a job and did not continue her education after high school. She tends to wear the same clothes and colors, and she restricts her diet to certain foods. She currently spends most of her time on the internet.

7. Claimant was sexually and physically abused when she was five years old, but did not disclose the abuse until she was 17 years old. She first began treatment with a therapist when she was approximately 14 years old (some reports indicate when she was 12 or 13 years old) because her mother was concerned about her inability to interact with her peers. Claimant also had exhibited facial grimacing and avoidant behavior.

8. Claimant has been under the care of a psychiatrist, Dr. Isabel Puri, since October 2014. In a letter dated November 14, 2016, Dr. Puri stated that Claimant has been diagnosed with ASD based on ongoing observation and clinical evaluation. (Exhibit 5.) She also noted that Claimant exhibits symptoms of Obsessive Compulsive Disorder (OCD). Dr. Puri has found no evidence of posttraumatic stress syndrome (PTSD) or schizophrenia. Dr. Puri has prescribed Saphris and Prozac to help with Claimant's mood and sleep. She has previously prescribed anti-anxiety drugs to Claimant.

9. Claimant is seeking regional center services so she can learn to live independently and hold a job.

10. Claimant's mother did not become aware that Claimant might be suffering from some form of autism until Claimant's younger brother was diagnosed as autistic. Claimant therefore did not apply for regional center services until she was 21 years old. Her first application to South Central Los Angeles Regional Center (SCLARC) in May of 2003 was denied. Claimant then re-applied for services to SCLARC another three times over the course of 10 years, and each time was found ineligible; SCLARC's last denial was in April 2013.[3] During this period, Claimant also sought and received multiple assessments from a wide variety of independent professionals, including psychiatrists, psychologists, speech therapists, and a marriage and family therapist.[4] While all of Claimant's independent evaluators, including Dr. B.J. Freeman of UCLA Neuropsychiatric Hospital, diagnosed Claimant with some form of autistic disorder and recommended regional center services, three of the four SCLARC contract psychologists rejected that diagnosis outright while the fourth found evidence that Claimant suffered from Asperger's Disorder. The SCLARC psychologists attributed Claimant's difficulties to either PTSD and/or OCD. The SCLARC diagnoses were based on criteria set forth in an earlier edition of the Diagnostic and Statistical Manual of Mental Disorders, issued in 2000 (DSM-IV-TR).

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[3] Three of the four assessments conducted by SCLARC contract psychologists were admitted into evidence as Exhibits 8, 10 and 12. WRC declined to introduce the fourth assessment.

[4] The assessments conducted by independent evaluators were admitted into evidence as Exhibits 9, 11, and 13 as well as Exhibits A through D.

2013 ELIGIBILITY DECISION

11. On May 15, 2013, Claimant appealed SCLARC's April 2013 denial, alleging she was eligible for regional center services based on the diagnoses of autism she had received from the UCLA Neuropsychiatric Hospital and others. On September 19, 2013, ALJ Carla L. Garrett of the Office of Administrative Hearings, in OAH case number 2013050712, denied Claimant's appeal. ALJ Garrett found that Claimant was substantially disabled, given her significant functional limitations in self-direction, lack of capacity for independent living, and lack of economic self-sufficiency. However, ALJ Garrett found that Claimant had failed to prove by a preponderance of evidence that her substantial disability emanated from autism, as diagnosed under the criteria for autism set forth in the DSM-IV-TR. (Exhibit 7.)

12. In reaching her decision, ALJ Garrett reviewed the multiple assessments noted in Factual Finding 10. Acknowledging the conflicting observations and conclusions of those assessments, ALJ Garrett based her decision in large part on the fact that the regional center's evidence was presented by a licensed psychologist, who also had conducted the most recent assessment of Claimant, while Claimant's only expert at the hearing was a marriage and family therapist who was not as well trained in evaluative techniques. Because of the difference in qualifications, ALJ Garrett found more credible the testimony by the SCLARC psychologist who asserted that Claimant did not have autism. (*Id.* at pp. 17-20.)

13. At the time of Claimant's appeal of the April 2013 SCLARC denial, the American Psychiatric Association issued DSM-5, a new, fifth edition of the DSM, which included new diagnostic criteria and a discussion of the disability now titled ASD.[5] None

[5] Among other differences, the DSM-5 no longer recognizes a specific diagnosis of autistic disorder. It establishes a diagnosis of ASD which encompasses

of the psychiatric evaluations and assessments of Claimant considered by ALJ Garrett were conducted under the DSM-5 criteria. Nor, at the time of the hearing, had SCLARC received authorization to use the DSM-5 in its evaluations. However, because Claimant asserted that she would meet the criteria set forth in the DSM-5 for ASD, ALJ Garrett made her ruling without prejudice should Claimant wish to reapply for regional center services under DSM-5. (*Id.* at p. 20.)

ASD BASED ON DSM-5

14. According to the DSM-5, a diagnosis of ASD is made "only when the characteristic deficits of social communication are accompanied by excessively repetitive behaviors, restricted interests, and insistence on sameness. [¶] Because symptoms change with development and may be masked by compensatory mechanisms, the diagnostic criteria may be met based on historical information, although the current presentation must cause significant impairment." (DSM-5, pp. 31-32.)[6]

15. The DSM-5, section 299.00, identifies the specific diagnostic criteria which must be met to provide an ASD diagnosis, as follows:

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disorders previously referred to as early infantile autism, childhood autism, Kanner's autism, high-functioning autism, atypical autism, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, and Asperger's disorder. (DSM-5, § 299 at p. 53.)

[6] Neither the Lanterman Act nor any of the Act's implementing regulations define autism or ASD. However, the established authority for this purpose is the DSM, "a standard reference work containing a comprehensive classification and terminology of mental disorders." (*Money v. Krall* (1982) 128 Cal.App.3d 378, 384, fn. 2.)

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Deficits in social-emotional reciprocity, ranging, for example from abnormal social approach and failure of normal back and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.
3. Deficits in developing, maintaining, and understanding relationships, ranging, for example from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers. [¶] . . . [¶]

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).
2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).

3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).
4. Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching objects, visual fascination with lights or movement). [¶] . . . [¶]

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual disability (intellectual development disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

(DSM-5 at pp. 50-51.)

16. In response to ALJ Garrett's decision, in 2014 Claimant obtained a new assessment under DSM-5 from Dr. Nancy A. Blum, a licensed clinical psychologist, and then sought regional center services based on Dr. Blum's diagnosis of ASD. (Exhibit 6.) WRC retained Dr. Karen E. Hastings, a licensed psychologist, to re-evaluate Claimant under the DSM-5 criteria in 2016. (Exhibit 3.) At the hearing on Claimant's appeal of WRC's 2016 denial of eligibility, Claimant and WRC, based on the assessments conducted by Drs. Blum and Hastings, agreed that Claimant exhibited restricted

repetitive patterns of behavior, interests, or activities and that therefore Claimant satisfied two of the four subcategories set forth in Category B of the ASD criteria. This agreement is supported by evidence received at the hearing. (Exhibit 3 at pp. 11-12; Exhibit 6 at pp. 39-40.) To qualify for an ASD diagnosis under the DSM-5, Claimant therefore needs to establish that she has met the criteria of all subcategories of Category A as well as the criteria of Categories C, D and E.

CLAIMANT'S EVIDENCE

17. Dr. Blum testified on behalf of Claimant at the hearing. She was knowledgeable, passionate and confident in her diagnosis. According to Dr. Blum's CV, she received her doctorate in clinical psychology in August 1993. She was a postdoctoral fellow in child clinical and pediatric psychology at the UCLA Neuropsychiatric Institute from 1993 to 1994. She received her California psychology license in March of 1995 and her California marriage and family therapist license in January of 1991. She is in the National Register of Health Service Psychologists and has a Certificate of Professional Qualification in Psychology. She has been in private practice since 1995. In private practice, she has conducted developmental evaluations of children at WRC and Lanterman Regional Center. She has also served as the Assistant Clinical Director for The HELP Group, a large non-public special education school for seriously emotionally disturbed, learning disabled, and/or developmentally disabled children with severe behavior problems. In addition to her private practice, Dr. Blum is a lecturer in psychology at California State University in Northridge. (Exhibit G.)

18. Dr. Blum's evaluation of Claimant was thorough. She spent five hours over the course of two days interviewing Claimant's mother (on June 26, and July 1, 2014) and two additional days testing and interviewing Claimant (July 29, and July 31, 2014). She also reviewed Claimant's medical records and administered a battery of 17 tests to Claimant, including the Autism Diagnostic Observation Schedule – Module 4 (ADOS), an

observational assessment of ASD; the Autism Diagnostic Interview – Revised (ADI-R), a comprehensive semi-structured interview of a parent familiar with the developmental history of an individual suspected of having autism; the Baron-Cohen's Autism Spectrum Quotient, an instrument that quantifies an individual's views of her own autistic traits; and, the Baron-Cohen's Empathy Quotient, an instrument that quantifies empathy in adults suffering from ASD. She also reviewed all past evaluations, addressing their differing conclusions and pointing out their shortcomings.

19(a). Except for one notable result, Claimant scored within the ASD range on each of the tests administered by Dr. Blum. (Exhibit 6 at pp. 29-33.) Claimant scored well above the cut-off for ASD on ADOS. This score was consistent with the score Dr. Sarita Freedman, a licensed psychologist, obtained in her 2010 assessment of Claimant. (Exhibit 13 at pp. 8-10.) The overall result was also consistent with the ADOS results obtained by the UCLA Neuropsychiatric Hospital in 2004. (The UCLA Neuropsychiatric Hospital report did not include Claimant's actual ADOS scores; the report stated "scores from this measure are suggestive of a diagnosis of Autistic Disorder as part of her psychological evaluation." (Exhibit 9 at p. 6.)) Although Dr. Blum's results were significantly higher than those obtained in 2004 from Dr. Gabrielle du Verglas, a psychologist retained by SCLARC, Dr. Verglas still found that Claimant met the cut-off for Asperger's Disorder (and ASD under the DSM-5 criteria). (Exhibit 10 at p. 8: "Her responses on the Autism Diagnostic Observation Schedule resulted in scores consistent with the autism spectrum category.")

19(b). Dr. Blum acknowledged that the ADOS scores she obtained were widely divergent from those obtained by Dr. Ann L. Walker, another SCLARC psychologist, who in her 2007 assessment scored Claimant at 2, well below the autism cut-off and any of the scores obtained from any of the independent evaluators and Dr. du Verglas. (See

Exhibit 12 at pp. 5, 10.) Dr. Blum opined that the discrepancies existed because of the subjectivity of the test and its dependency on the skills of the administrator.

19(c). Claimant also met the ADI-R cut-off for ASD in the areas of reciprocal social interaction and language/communication. Claimant's mother reported in response to the ADI-R interview that Claimant had a long history of problems with "reciprocal direct gaze," has little to no reciprocal social smile, and exhibits a "markedly limited range of facial expressions." Claimant's mother also noted that Claimant did not have any peer relationships, did not offer comfort to others, and never shared objects or food with others. (Exhibit 6 at pp. 29-31.)

19(d). Claimant did not meet the ADI-R cutoff in the area of restricted and repetitive behaviors and interests. The cutoff in that area was 3 for ASD; Claimant scored a 2. Claimant's mother reported that Claimant had no preoccupation with objects or any compulsive adherence to nonfunctional routines or rituals and no compulsive adherence to nonfunctional routines and rituals. However, Claimant's mother did note that Claimant has definite circumscribed interests, which have included tsunamis, the Christian Church and atheism, which preclude her from interacting with others. Dr. Blum noted that Claimant's failure to meet the ADI-R cutoff in this area did not preclude a diagnosis of ASD.

19(e). The ADI-R scores obtained by Dr. Blum were again at odds with the scores obtained in 2007 by Dr. Walker. Dr. Walker found that Claimant's reciprocal social interaction, communication, and patterns of interest were all in the non-autistic range. (Exhibit 12 at p. 5.) Dr. Blum asserted that Dr. Walker's findings did not comport with Dr. Walker's own observations and Claimant's history and pointed to a number of instances where Dr. Walker's scores ignored pertinent historical information. For instance, Claimant's mother reported that Claimant exhibited compulsive and obsessive behaviors, including watching the movie "Stand by Me" repeatedly, rigidity about her

eating choices and room arrangement, and obsessively researching and reading about tsunamis and her family tree. Yet, Dr. Walker did not credit any of this in scoring the "restrictive and stereotype patterns of interest" component of the ADI-R, giving Claimant a zero. (Exhibit 6 at pp. 42-43.)

19(f). Claimant met the cut-off score for the Baron-Cohens' Autism Spectrum Quotient, indicating that claimant views herself as having ASD. (Exhibit 6 at p. 32.) She also sees herself as having a substantial empathizing deficit, which is associated with an ASD diagnosis. (*Id.* at pp. 32-33.)

20(a). Based on the foregoing tests and her own observations, Dr. Blum found that Claimant met each of the diagnostic categories for ASD identified in the DSM-5. With respect to deficits in social-emotional reciprocity (Category A(1)), Dr. Blum found that:

> Starting in infancy, the applicant was reluctant to interact with others. Her mother would have to pull her toward her and "get in her face" to get her to engage or play any basic baby games. The applicant became rigid and stiff when touched.
>
> As an adult, [Claimant] isolates herself. She can engage socially in brief structured situations such as psychotherapy sessions and during assessments, but this does not detract from the fact that she usually is isolative. She does not initiate social interactions, and tries her utmost to avoid responding to social interactions, for example, hiding her face when her mother tries to talk to her or even leaving the room.

(*Id.* at pp. 36-37.)

20(b). With respect to deficits in nonverbal communicative behaviors used for social interaction (Category A(2)), Dr. Blum reported that applicant had "difficulty understanding nonverbal communicative behaviors" and as a young child, had "extreme difficulty with eye contact and facial expression." Dr. Blum buttressed her diagnosis by citing a psychoeducational evaluation of Claimant conducted when Claimant was in ninth grade that indicated that Claimant "makes very little eye contact and holds her head low when talking." (*Id.* at pp. 37-38.)

20(c). With respect to deficits in developing, maintaining, and understanding relationships, Dr. Blum also found that Claimant "always had difficulty with relationships." According to her interviews with Claimant and Claimant's mother, Dr. Blum found that Claimant had no more than four or five "friends" through her life and that since shortly after high school, Claimant has had no friendships. According to her interviews, claimant does not talk to her sister, and generally avoids her mother, "except to ask her to buy her items from the grocery store and pharmacy or to share her restricted, fixated interests." (*Id.* at p. 38.)

20(d). Dr. Blum found that Claimant met each of the subcategories of category B of the DSM-5 ASD criteria, although the DSM-5 requires that only two of the subcategories be met. Most persuasively, Dr. Blum noted that Claimant had highly restricted, fixated interests, including at times spending hours repeatedly watching the movie "Stand By Me" and spending most of her waking hours researching Christianity, tsunamis and atheism (Category B(3)), and that she was hypersensitive to light and sound (Category B(4)). (*Id.* at pp. 39-40.)

21. Dr. Blum provided evidence that Claimant had symptoms of ASD during her developmental period, including unusual rocking behavior when claimant was an

infant, persistent social withdrawal, and impairments in the use and recognition of verbal and non-verbal communications.

22. Dr. Blum concluded that Claimant's autism "produce[d] major impairment of social functioning and executive dysfunction and requires interdisciplinary planning and coordination of services to assist her in achieving maximum potential." (*Id.* at p. 44.) Dr. Blum noted that Claimant had substantial functional limitations in all six areas of disability. She found that claimant (a) exhibited difficulty with both receptive and expressive language; (b) had significant problems with behavioral and emotional regulation which impede her learning; (c) limped, wandered and exhibited poor judgment, all interfering with her mobility; (d) had poor self-care in that she rarely bathes and does not brush her teeth daily; (e) lacked self-direction in that she could not make independent choices, exhibits poor self-control, and does not take responsibility when appropriate; (f) has no capacity for independent living, given her extremely limited ability to function both inside and outside of the home; and (g) was not economically self-sufficient in that she had never held a job. (*Id.* at pp. 44-47.)

23. Dr. Blum attributed the limitations set forth in Factual Finding 22 to Claimant's ASD. Although Dr. Blum noted that Claimant also suffered from mental health disorders as well, such as OCD, PTSD and specific learning disorder,[7] she concluded that those disorders did not cause Claimant's limitations or impairments. (Exhibit 6 at pp. 36, 47.)

24. Dr. Blum appeared to have obtained a true sense of Claimant as a result of the time she spent in her assessments. She was critical of prior assessments by SCLARC

[7] In her report, Dr. Blum also diagnosed Claimant with Other Specified Schizophrenia Spectrum and Other Psychotic Disorder. However, at the hearing, she withdrew that diagnosis based on her conversation with Claimant's psychiatrist.

contract psychologists because they did not reflect an accurate and complete history of Claimant's development. She also asserted that the SCLARC psychologists had not spent sufficient time interviewing Claimant and Claimant's mother. Although at times Dr. Blum appeared to be more of an advocate than a neutral evaluator, her conclusions reflected her observations and a close review of Claimant's prior evaluations. Her testimony and report were credible.

REGIONAL CENTER EVIDENCE

25. WRC introduced the report of Dr. Karen Hastings to establish that Claimant did not meet the criteria for ASD set forth in DSM-5. (Exhibit 3.) Dr. Hastings did not testify. The Service Agency did not provide any information regarding Dr. Hastings' credentials.

26. Dr. Hastings conducted her evaluation of Claimant on November 9, 16, and 30, 2016. The evaluation included interviews with Claimant's mother and Claimant as well as the review of prior evaluations. Dr. Hastings did not administer any ASD-specific testing such as ADOS or ADI-R. Based on her observations and interviews, Dr. Hastings concluded that Claimant suffered from Other Specified Schizophrenia Spectrum and Other Psychotic Disorder, PTSD by history, in remission, and OCD, by history, in remission. (*Id.* at p. 16.)

27. Dr. Hastings' report is not persuasive. Dr. Hastings mistakenly relies on ALJ Garrett's decision in making her diagnosis that Claimant does not have ASD. Dr. Hastings appears to believe that ALJ Garrett's Legal Conclusions are binding in this proceeding and that "the only question moving forward is has there been some substantial change in Claimant's condition or functioning which would suggest she now meets criteria for ASD." (*Id.* at 15.) Under this reasoning, Dr. Hastings notes that the only change in Claimant's condition is the presence of auditory hallucinations, which are not included in the DSM-5 criteria for ASD. Dr. Hastings therefore concludes that "the ruling

of the fair hearing judge, in 2013, remains unchallenged even when the ASD criteria are considered under the DSM V." (*Ibid.*)

28. Contrary to Dr. Hastings' statements, ALJ Garrett's ruling is not controlling because the claims and issues raised in this action are not identical to those raised in the proceeding before ALJ Garrett. (See *People v. Barragan* (2004) 32 Cal.4th 236, 252-253 [a prerequisite for applying the doctrine of collateral estoppel, i.e., where the issues litigated and determined in a prior judgment operate as an estoppel or conclusive adjudication as to the issues in the second action, is that the claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding].) ALJ Garrett analyzed testimony and reports based on the diagnostic criteria set forth in DSM-IV-TR. The changes in diagnostic criteria for autism in DSM-5 constitute a change in the eligibility requirements under the Lanterman Act and therefore a change in relevant circumstances. (See *Melendres v. City of Los Angeles* (1974) 40 Cal.App.3d 718, 730 ["if new facts or changed circumstances have occurred since the prior decision, the former judgment may not bar a later suit"]; *Huber v. Jackson* (2009) 175 Cal. App. 4th 663, 677-78 [collateral estoppel doctrine did not apply due to a new statutory enactment and church's adoption of a new canon]; 40A Cal.Jur.3d Judgments, § 232 [changed conditions alter the conclusive effect of a judgment where the changed conditions have no bearing on the former adjudication].) In addition, Dr. Blum's assessment, which contained new neurological testing and was based on the criteria set forth in DSM-5, constitutes new evidence. (Compare *In re H.S.* (2001) 188 Cal.App.4th 103 [post-hearing expert report inadmissible because it was based on "old" evidence available at time of the hearing and only drew a conclusion from others' reports, and therefore could not be considered new evidence].)

29. As a result of her mistaken reliance on ALJ Garrett's decision, Dr. Hastings appears to ignore many of her own observations. For instance, when analyzing whether

Claimant has deficits in social-emotional reciprocity, Dr. Hastings' observations are consistent with those of Dr. Blum – she points out that Claimant did not easily converse, did not build on Dr. Hastings' responses to carry on a conversation, and did not initiate any social chit-chat. (Exhibit 3 at p. 10.) Nevertheless, Dr. Hastings finds that Claimant does not suffer from such deficit because "the fair hearing judge concluded the patient failed to establish persuasive evidence she lacked social and emotional reciprocity." (*Ibid.*) Similarly, even though Dr. Hastings finds that Claimant has no friends and has difficulties in getting along with her family, she concludes that Claimant does not suffer from "deficits in developing, maintaining and understanding relationships" because ALJ Garrett found, among other things, Claimant "failed to establish that she did not develop peer relationships appropriate to her developmental level." (*Id.* at p. 11.) Dr. Hastings neglects to recognize that ALJ Garrett's finding is based on the DSM-IV-TR criteria, while the DSM-5 criteria in this category are much broader, encompassing deficits not only in developing relationships but also in maintaining and understanding them. (Compare DSM-IV-TR, § 299.00, Category A(1)(b) (Exhibit F at p. 10) with DSM-5, § 299.00, Category A(3).)

30. Dr. Hastings' report is filled with other errors. Her description of Dr. Pontius' 2006 evaluation conducted on behalf of Claimant omits that his principal diagnosis was pervasive developmental disorder, a diagnosis that is now part of the DSM-5 criteria of ASD. (Exhibit 3 at p. 5.) She makes no reference to Dr. du Verglas' 2004 assessment on behalf of SCLARC, which found evidence of Asperger's Disorder. She states without authority that ALJ Garrett decided that "no further evaluations should be considered." (*Id.* at p. 13.) Although Dr. Hastings reports that Claimant "has a history of being very sensitive to noise and light, such that she is very difficult to live with," Dr. Hastings concludes, without explanation, that Claimant does not meet the DSM-5 criteria of autism of hyperactivity to sensory input. (*Id.* at 12.) She also states that Dr.

Puri, Claimant's psychiatrist, does not mention OCD, when in fact the second page of her letter states: "Her OCD makes her keep things separate from everyone else." (*Id.* at pp. 13-14; Exhibit 5 at p. 2.)

31. Dr. Hastings fails to provide any analysis of prior assessments that diagnosed Claimant with autism. She offers no explanation for the wide discrepancy in testing results and conclusions, other than to say that regional center evaluators typically have more experience applying the DSM diagnostic criteria for autism than private evaluators. (Exhibit 3 at 14.) However, at least in the case of UCLA Neuropsychiatric Hospital, this is highly doubtful, as Dr. B.J. Freeman, who conducted Claimant's evaluation is well-renowned in her field. In addition, Dr. Blum has at least commensurate experience as regional center evaluators, as she has conducted more than 20 assessments on behalf of WRC and the Lanterman Regional Center.

32. Dr. Hastings' diagnosis that Claimant suffers from Other Specified Schizophrenia Spectrum, with PTSD and OCD in remission, is inconsistent with the diagnosis offered by Claimant's treating psychiatrist. She offers no explanation for the difference of opinion. Nor can she explain the causes of Claimant's functional limitations. Although she posits that Claimant's delayed response in conversation might be attributable to long-term prescription drug use, she offers no substantive evidence to support this theory.

33. Dr. Hastings' criticism of Dr. Blum's report is also not convincing. She does not find fault with any of Dr. Blum's testing methods or with her ADOS results. She argues that Dr. Blum, with Claimant's mother's help, essentially rewrote Claimant's developmental history. However, she fails to pinpoint what is new in Claimant's mother's account and how such information supported Dr. Blum's diagnosis. Dr. Hastings also assumes that, to the extent that the developmental history contains new information,

such information had been previously requested by other interviewers, when it could be that no such questions were asked.

34. Dr. Rita Eagle, a licensed psychologist and a psychology consultant at WRC, testified at the hearing regarding Dr. Hastings' report. Dr. Eagle received her doctorate in psychology in 1964, has been involved with autism for over 50 years, and has conducted clinical assessments for Harbor Regional Center for 14 years. Dr. Eagle observed Claimant for a "short time" through windows during Dr. Hastings' assessment. Dr. Eagle was not involved in determining whether Claimant was eligible to receive services from WRC.

35. Dr. Eagle's testimony did little to advance WRC's assertion that Claimant did not suffer from ASD. While she testified that Dr. Hastings' report was a "good one," Dr. Eagle provided little to support her assertion. She disagreed with the findings Dr. Hastings made in connection with category B of the DSM-5 criteria. She was "surprised" by some of Dr. Hastings' findings regarding functional limitations. Although Dr. Eagle asserted that a good report addressed and critiqued discrepancies in prior reports, Dr. Hastings conducted little such analysis. Dr. Eagle also acknowledged that it was strange for Dr. Hastings to rely on ALJ Garrett's decision in making her diagnosis.

36. Dr. Eagle pointed to several factors which she believed did not support a diagnosis of ASD. However, much of her testimony was based on speculation, particularly in light of her limited observation of Claimant and her lack of interaction with Claimant's mother. She said that many of Claimant's behaviors were consistent with OCD and not ASD, even though Dr. Hastings had found that Claimant's OCD was in remission. Dr. Eagle believed that Claimant's mother's recollection had changed as a result of constant questioning, although she was unable to point to what changes were made, whether those changes, if made, were decisive in any way, or whether Claimant's mother's recollection was faulty. She suggested that Claimant's mother's recollection of

Claimant's infancy, as reported to Dr. Blum, was unreliable because Claimant's mother resided in a separate household from Claimant when Claimant was little and Claimant's mother worked late hours. However, Dr. Blum acknowledged she did not know the length of time of that separation, the nature of the separation and Claimant's age at the separation. Dr. Blum also opined that many of Claimant's issues were related to her medication but admitted she was not a medical doctor and could not state if her opinion was in fact true.

37. Dr. Eagle's criticisms of Dr. Blum's report are not sufficient to negate Dr. Blum's conclusions. While Dr. Eagle averred that the historical information collected by Dr. Blum was incomplete, confusing and incorrect, she did not specify which information she was challenging. In addition, the historical information collected by Dr. Blum was not inconsistent with past histories taken by UCLA Neuropsychiatric Hospital and Dr. Sarita Freedman. Dr. Eagle's assertion that Dr. Blum ignored test results that did not support an ASD diagnosis, such as Claimant's failure to meet the ASD cut-off for the restricted and repetitive behaviors and interests category of the ADI-R, is well-taken with respect to that one test category; however, failure to meet the requirements of one ADI-R test category does not preclude a finding of ASD under the DSM-5. In addition, WRC stipulated that Claimant met the DSM-5 criteria for restrictive and repetitive behaviors. Dr. Eagle also provides no support for her criticism of Dr. Blum's finding that Claimant's functional limitations were attributable to ASD instead of Claimant's mental health issues.

38. In light of the foregoing, Dr. Blum's testimony and assessment is more convincing than the testimony and assessment provided by the Service Agency. Dr. Blum's diagnosis is supported by Claimant's history, her testing and past evaluations. Accordingly, the totality of the evidence established that Claimant suffers from ASD.

39. At the hearing, WRC and Claimant agreed that Claimant is substantially disabled in the areas of self-direction, capacity for independent living, and economic self-sufficiency. The totality of the evidence supports this agreement, and further establishes that Claimant is unable to live by herself, cannot work, and has no self-direction and that these functional limitations are due to Claimant's ASD.

LEGAL CONCLUSIONS

1. Claimant established that she suffers from a development disability which constitutes a substantial disability for her, thus entitling her to regional center services. (Factual Findings 1 through 39; Legal Conclusions 2 through 6.)

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish her eligibility for services, the burden is on the appealing claimant to demonstrate by a preponderance of evidence that the Service Agency's decision is incorrect.

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

> a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . This [includes] intellectual disability, cerebral palsy, epilepsy, and autism. [It also includes] disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an

intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

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

5(a). Additionally, to prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that her disability constitutes a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (l):

(1) "Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

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

5(b). Similarly, California Code of Regulations, title 17, section 54001 states, in pertinent part:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

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

6. Claimant has met her burden of proof in this case. The preponderance of the evidence established that Claimant is eligible to receive regional center services.

ORDER

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

Dated:

CINDY F. FORMAN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.