

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

and

KERN REGIONAL CENTER,

Service Agency.

OAH Case No. 2017040510

DECISION

This matter was heard by Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Bakersfield, California, on September 18 and 19, 2017.

Matthew Bahr, Attorney at Law, represented Kern Regional Center (Regional Center or Service Agency).

Claimant's father¹ represented Claimant, who was present at the hearing.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument. On October 16, 2017, the parties submitted initial argument, and on October 30, 2017, they submitted reply argument. The documents have been marked for identification as Exhibits J and K (Service Agency's) and 1 and 2 (Claimant's). The matter was submitted for decision on October 30, 2017.

¹ Family relationships and titles have been used to protect the privacy of Claimant and her family.

ISSUE

Is Claimant eligible for Regional Center services by reason of a developmental disability within the meaning of the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act)?

FINDINGS OF FACT

1. Claimant is 35 years old. She graduated from high school in 1999. She attended two local colleges, Bakersfield College for two years and California State University, Bakersfield, for two years, and a college in Los Angeles, California State University, Northridge, for one-and-one-half years, but did not obtain a degree, and has not attended college in over 10 years. She is currently residing in the Mental Health Rehabilitation Center at Crestwood Behavioral Health in Bakersfield, California (Crestwood), an inpatient psychiatric treatment facility, where she is voluntarily undergoing treatment.

2. a. Claimant has been hospitalized on multiple occasions for psychiatric conditions. The earliest for which medical records were produced at the hearing occurred on October 14, 1999, when she was 17 years old. She was admitted to Memorial Hospital in Bakersfield, California. The admitting diagnoses were Depression, Not Otherwise Specified (NOS), and Polysubstance Use (marijuana, cocaine, and alcohol). She was stabilized and discharged on October 20, 1999, with a recommendation for placement in a residential drug treatment center.

b. Claimant was again admitted to a psychiatric hospital, Northridge Hospital Medical Center, Northridge, California, on April 5, 2006. On admission, Claimant was extremely agitated and paranoid. She initially refused to cooperate with treating professionals. Her condition improved with hospital care, which included medication. She was discharged on April 14, 2006, with diagnoses of Psychosis, NOS, probably drug-induced, rule-out schizophrenic illness, and Polysubstance Abuse.

3. a. Alexis M. Valos, Ph.D. (Valos), conducted a neuropsychological assessment of Claimant at the request of Crestwood and Claimant's parents due to concerns with mood, psychosis, and sensory processing. Dr. Valos evaluated Claimant on June 3, 7, and 10, 2016. Dr. Valos conducted an extensive battery of tests. In addition to personality, intelligence, and achievement tests, Dr. Valos administered the Beck Anxiety Inventory, the Beck Depression Inventory, Second Edition, the Autism Diagnostic Observation System, Second Edition (ADOS-2), the Social Communication Questionnaire (SCQ), the Childhood Autism Rating Scale-2 (CARS-2), and the Vineland Adaptive Behaviors Scale, Second Edition (Vineland). Dr. Valos interviewed Claimant, Claimant's parents, and a clinician at Crestwood, and reviewed treatment and other records.

b. Claimant and her parents provided information about Claimant's behaviors and difficulties growing up. Claimant was prone to screams and tantrums as early as six weeks of age. Claimant was sensitive to how her clothes felt, and her mother at times took her to school in pajamas. If Claimant wanted her hair in pigtails, she would have a tantrum and require the process to start over again if she did not think her hair was parted exactly down the middle. Reading books to Claimant was a challenge, and if one word was missed the reading would have to start over. Claimant did not like to be touched. Claimant's parents learned as early as the third grade that Claimant had few friends, something which has remained the case to the present. Claimant was diagnosed with depression as early as age seven and with Bipolar Disorder at age 16. She has been taking psychotropic medications since age 16. She suffered traumatic events at age 14. Claimant reported having been hospitalized for psychiatric conditions, both voluntarily and involuntarily, approximately 50 times. Claimant also reported using alcohol and controlled substances over the years.

c. Dr. Valos issued several mental health diagnoses, namely, Bipolar II Disorder, most recent episode mixed; Schizophrenia Spectrum or Other Psychotic Disorder

(substance induced); Substance Dependence, in early remission; Generalized Anxiety Disorder; Specific Learning Disorder with Impairment in Mathematics; and Other Specified Neurodevelopmental Disorder (non-verbal learning disorder). Dr. Valos recommended that Claimant continue to receive mental health services.

d. Dr. Valos administered the Vineland to assess Claimant's adaptive behavior skills. The test measures how effectively individuals cope with common life demands and how well they meet the standards of personal independence for someone of their particular age, group, socio-cultural background, and community setting. Based on Claimant's mother's report, Claimant performed in the low range, first percentile, in the Communication, Daily Living Skills, Socialization, and Motor Skills domains.

e. In order to evaluate Claimant for the presence of Autism Spectrum Disorder (ASD), Dr. Valos administered the ADOS-2, the SCQ, and the CARS-2. The ADOS-2 is a semi-structured standardized assessment of communication, social interaction, play by imaginative use of materials, and restricted and repetitive behaviors. Dr. Valos administered one of the tests' five 60-minute modules, Module 4, which is designed for adolescents or adults with fluent speech. Claimant obtained an overall score of 16, which is above the ASD diagnostic range of 7 to 9 and above the Autism diagnostic cutoff of 10.

In administering the ADOS-2, Dr. Valos observed deficits in communication. Thus, Claimant used repeated statements and phrases several times during the ADOS assessment, an indication of stereotyped/idiosyncratic use of words and phrases. There was little reciprocal conversation sustained by Claimant. Claimant used some spontaneous descriptive gestures, but these were limited in range or context. She did not make emphatic or emotional gestures.

In terms of reciprocal social interaction, Claimant had poorly modulated eye contact to initiate, terminate, or regulate social interaction. She made limited facial expressions to Dr. Valos. Respondent provided limited indication of responsibility for her actions. Her

social overtures lacked integration into context or lacked social quality; she made a few social overtures that were generally brief in nature. The quality of Claimant's social responses was limited, and included briefly discussing her current reading, her desire to stay sober, and her religious aspirations.

Claimant expressed some creative or make-believe actions, but these were limited in range or occurred in response to the structured setting. She demonstrated some creative storytelling during one of the structured tasks, but was unable to come up with a creative storyline during another task.

Claimant giggled repeatedly during a task involving telling a story from a book. She made many religious references throughout the testing and discussed her continued need for a "comfort blanket." Claimant displayed unusually routinized speech and activities, but did not display conduct that appeared to be compulsive in quality. Dr. Avalos concluded that these constituted evidence of stereotyped behaviors and restricted interests.

f. The SCQ is a 40-item parent-report screening questionnaire designed to assess symptomology associated with ASD. Information is elicited regarding the individual's entire developmental history. Claimant's score on the SCQ was 22, above the 15-point score which points towards the presence of ASD.

g. The CARS-2 is a 15-item behavioral scale designed to identify children with ASD, which is sensitive enough to differentiate ASD's severity. Claimant obtained a score of 28.5 on a scale of 15 to 60, placing Claimant in the range of "mild to moderate" symptoms of ASD.

h. Dr. Valos diagnosed Claimant with ASD, Level 1, under the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5). With respect to this diagnosis, Dr. Valos recommended behavior therapy and referral to Regional Center for an eligibility determination. Dr. Valos did not opine as to whether Claimant's condition constituted a substantial disability for her. While the Vineland indicated significant

adaptive skills deficits, these were not specifically attributed to ASD in whole or in part.

4. On November 1, 2016, John Faber, M.D. (Faber) of the Amen Clinics (Amen) in Costa Mesa, California, conducted a follow-up examination centered on brain imaging referred to as a SPECT Study. Dr. Faber correlated the imaging findings with the results of his examination of Claimant and the completion of several mental health screening tools. One of these, the Adult Amen General Symptom Checklist, completed by Claimant's mother, contained three questions pertaining to Autism and had positive responses. Neither the screening tool nor the score was explained in the report. Of note, Dr. Faber diagnosed Claimant with ASD, and wrote: "[Claimant] has struggled making relationships since age 2. She continues having difficult times initiating and maintaining relationships. Psychological tests such as ADOS, SCQ, and CARS-2 indicated that [Claimant] scores in the autistic range." (Exh. 9a, at p. 15.) While Dr. Faber did not explain the basis for his diagnosis, his report and conclusions are consistent with and supportive of Dr. Valos's findings and opinions.

5. After Dr. Valos's diagnosis of ASD, Claimant sought eligibility for Regional Center services. In support of the request, Claimant's mother submitted a letter dated July 18, 2016, which stated, in part: "[A]t the meeting last week with Crestwood, we were advised to assist [Claimant] in making an application with [Regional Center], as it was felt that [Claimant] could benefit by the services [Regional Center] has to offer. We were further apprised that [Claimant] was misdiagnosed when she was in grade school, and that Jay Fisher, Ph[D], the clinical psychologist we consulted with regard to [Claimant]'s behavioral issues and issues related to social integration, focused on depression and did not make the connection with autism. To be fair to Dr. Fisher, autism was not commonly discussed in those days. At the point where we sought professional services for [Claimant] when she was in third grade, [Claimant] was suicidal, withdraw[n], unable to engage in typical childhood activities, unable to interact with other kids or adults in appropriate ways,

and would often have total meltdowns over what others considered to be inconsequential issues. She would throw herself to the ground and hold her breath, scream uncontrollably, withdraw to her room for long periods of time, refuse to dress in certain clothes that did not 'feel' right, insist that pigtails in her hair were not straight and tear them out, and insist that we missed words in reading books to her, so that we were required to start the book over from the beginning. . . ." (Exh. D1.)

6. On December 12, 2016, Monica Damian Fowler, M.A., Service Agency Assessment Coordinator, obtained information from Claimant to assist in making an eligibility determination, which she summarized in a "Confidential Client Information" report. Service Agency thereafter referred Claimant for an assessment of whether Claimant has ASD.

7. a. Michael Musacco, Ph.D. (Musacco), conducted the assessment on December 15, 2016. He interviewed Claimant, reviewed records (Dr. Valos's report, Amen records, and records of the October 14, 1999, and April 5, 2006 psychiatric admissions), and administered the ADOS-2, Module 4.

b. Claimant obtained a score of 7 in the ADOS-2, which although in the ASD range, 7 to 10, was below the Autism cutoff, which is 10. Dr. Musacco did not provide detailed results of his ADOS-2 administration. He concluded: "Despite her relatively elevated score, I did not obtain data to confirm the diagnosis of [ASD]. The client has social difficulties and emotional problems. Nevertheless, there is clear evidence that she possesses symptoms of a mental disorder and psychosis. The symptoms of her mental illness have a direct impact on her social interaction skills and emotional difficulties. The client indicated that her social and interpersonal difficulties did not begin until high school, which is after the time when she began showing psychiatric symptoms. Thus, she did not have an early developmental history suggestive of [ASD]. Instead, her primary difficulties appear to be the product of a psychiatric condition." (Exh. H10, at p. 3.)

c. Dr. Musacco diagnosed Claimant with Stimulant Use Disorder and Major Depression with Psychotic Features (provisional).

d. Dr. Musacco testified at the hearing in support of his findings. He reiterated that the earliest reported symptoms were of mental health problems. He specifically referred to the psychiatric admissions on October 14, 1999, and April 5, 2006, in which mental health evaluators did not note any symptoms of ASD or diagnose the condition. Dr. Musacco attributed social difficulties to psychiatric illnesses and not ASD.

e. Dr. Musacco had not reviewed the July 18, 2016 letter written by Claimant's mother, which he recognized as containing early childhood evidence pertinent to a diagnosis of ASD. He candidly testified that the letter contained significant information, which would lead him to reexamine his opinion.

8. Kimball Hawkins, Ph.D. (Hawkins) was a member of the Service Agency team responsible for making the eligibility determination. He evaluated the evidence presented to Service Agency, including the reports prepared by Drs. Avalos and Musacco, and expressed his opinions about Claimant's eligibility at the hearing. Dr. Hawkins concluded that Claimant did not have ASD because there was no evidence that Claimant had ASD before age 18 and there was no evidence that the condition, if present, was a substantial handicap. In his opinion, the challenges faced by Claimant are the result of her psychiatric conditions.

9. On March 2, 2017, Service Agency concluded that Claimant was not eligible for services under the Lanterman Act, and sent her a letter dated March 16, 2017, notifying her of the decision. Claimant filed a Fair Hearing Request on March 21, 2017, challenging the determination and this matter ensued.

LEGAL CONCLUSIONS

1. In order to be eligible to receive services from Regional Center, Claimant must have a developmental disability, which is specifically defined 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. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism.² This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability, but shall not include other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code, § 4512, subd. (a).)

2. "Substantial disability" is defined in California Code of Regulations, title 17, section 54001, subdivision (a), as: "(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."

3. The qualifying developmental disability at issue is autism. The evaluation and opinions of Dr. Valos, which are consistent with the evidence from Dr. Faber and others at Amen, establish that Claimant has ASD. Dr. Valos was the only clinician to have examined Claimant who considered all the developmental history provided by Claimant and her parents and analyzed it in making a determination of the presence of autism. Neither Dr. Musacco nor Dr. Hawkins obtained information from Claimant's mother, and

² Autism, as defined by clinicians under DSM-5 is ASD.

the person who actually examined Claimant on behalf of Service Agency, Dr. Musacco, did not review available documents from Claimant's parents regarding early childhood behavior. Dr. Musacco acknowledged the importance of such early childhood behavior information and conceded that consideration of the evidence in Claimant's mother's July 18, 2016 letter would lead to a reexamination of his opinion.

Opinions and conclusions by Drs. Hawkins and Musacco which did not take into account evidence such as that contained in the July 18, 2016 letter from Claimant's mother have been given less weight. In addition, Drs. Musacco's and Dr. Hawkins's assumption that clinicians providing treatment during psychiatric admissions would have documented evidence of autism is not persuasive, as those individuals were presented with crisis situations and were focused on the emergencies at issue. Of note, Crestwood clinicians with the opportunity to observe Claimant over a longer period referred Claimant for a broader assessment that ultimately led to a diagnosis of ASD. While there is no dispute that Claimant has psychiatric conditions, the existence of these conditions does not rule out the presence of ASD.

Accordingly, the credible evidence establishes that Claimant has ASD.

4. The remaining issue is whether Claimant's ASD constitutes a substantial disability for her. On this issue the evidence is not clear. The evidence clearly establishes that Claimant has functional limitations. As Dr. Valos concluded, in part through administration of the Vineland, these functional limitations are substantial. However, Dr. Valos did not analyze the specific role ASD played in those limitations. Service Agency concluded that any limitations were the result of psychiatric conditions, but reached its conclusion without fully considering the evidence supporting the presence of ASD. Thus, the evidence is insufficient to determine if Claimant's ASD constitutes a substantial disability for her.

5. Welfare and Institutions Code sections 4542 and 4643 require regional

centers to provide assessment services to individuals believed to have a developmental disability. As set forth in factual finding numbers 1 through 8 and legal conclusion numbers 1 through 4, Claimant has a qualifying condition, ASD, which if substantially disabling, can constitute a developmental disability within the meaning of the Lanterman Act. Accordingly, before a final determination can be made, Service Agency must fully assess whether Claimant's ASD constitutes a substantial disability for her.

6. In order to enhance the potential for efficient assessment and the likelihood that the results of any additional evaluation will be accepted by both parties, it is recommended that a mutually agreed-upon expert conduct the additional assessment. Of course, Claimant is free to obtain further opinions from Dr. Valos or any other clinician of her choice on the issue of substantial disability.

7. By reason of factual finding numbers 1 through 8 and legal conclusion numbers 1 through 6, Claimant established that additional assessment is warranted to determine if she has a developmental disability that makes her eligible for services under the Lanterman Act.

ORDER

Claimant's appeal is sustained consistent with this Decision.

DATED:

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

NOTICE

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