

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

CENTRAL VALLEY REGIONAL CENTER,

Service Agency.

OAH No. 2017051248

DECISION

A fair hearing was held on September 11, 2017, before Timothy J. Aspinwall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, in Visalia, California.

Shelley Celaya, Client Appeals Specialist, represented Central Valley Regional Center (CVRC).

Claimant was present and represented by her mother.

Evidence was received, the record was closed, and the matter was submitted for decision on September 11, 2017.

ISSUES

Is claimant eligible for services from CVRC under the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., because she is an individual with an intellectual disability, or because she has a disabling condition that is closely related to intellectual disability or requires treatment similar to that required for individuals with an intellectual disability?

FACTUAL FINDINGS

1. Claimant was born in 1993. She is currently 23 years old. She resides with her parents, and has never lived independently. Claimant's parents are conservators of claimant's person and estate, appointed by the Kings County Superior Court in 2015. Claimant receives Social Security benefits based on being disabled.

2. Claimant's mother seeks services for claimant from CVRC under the Lanterman Act. She believes claimant will benefit from the services available through CVRC.

ASSESSMENTS, EVALUATIONS, AND DIAGNOSES

3. Psychological Report from Tulare County Office of Education, November 13, 2003. Claimant was initially placed in special education on May 29, 2003, based on a specific learning disability and speech or language impairment. Claimant's mother subsequently requested a psychological assessment because she was concerned that claimant was having difficulty in school processing and understanding information. John Lehmann, a Licensed Education Psychologist with the Tulare County Office of Education, administered the following tests: Wechsler Intelligence Scale for Children – 4th Ed. (WISC-IV), Brown Attention Deficit Disorder (ADD) Scales, and Conner's Behavior Rating Scale.

The WISC-IV showed a Full Scale IQ (FSIQ) of 73, which is below average, and extreme variability between the individual scores, including Verbal Comprehension (79), Perceptual Reasoning (63), Working Memory (80), and Processing Speed (97). Although claimant's cognitive functioning tested below average (FSIQ of 73), the variability of individual scores of 34 standard score points suggests that her overall score is not an accurate indication of her potential. Dr. Lehmann opined that claimant had been correctly placed in a resource specialist program as a student with a specific learning

disability. He noted that she seems to have some “specific and unusual problems in the processing of information that results in her getting only part of a communication and, therefore, either missing meaning or misinterpreting meaning and understanding.”

4. Student Assessment Report, April, 2005. Claimant was seen at Waukena Joint Union Elementary School and at the Diagnostic Center, Central California in March 2005, which was followed by a parent/school district conference on April 6, 2005. Claimant was then 11 years of age. The assessment included administration of the Stanford-Binet Intelligence Scale – Fourth Ed., which showed an IQ of 77.

The assessment also included administration of the Revised Children’s Manifest Anxiety Scale. The results were “significant” for Total Anxiety (89th percentile) and psychological anxiety (92nd percentile). The result for Worry/Overconcern was “possibly significant” (88th percentile).

5. Adaptive Behavior Assessment System – Second Ed. (ABAS-II), September 17, 2006. Edwyn Ortiz-Nance, PsyD., is a clinical psychologist with a subspecialty in pediatric psychology. He first met with claimant in November 2006, when claimant’s parents brought her to him because they were concerned she was not meeting developmental and educational milestones. Claimant presented to Dr. Ortiz-Nance with multiple areas of processing delays that contribute to her learning difficulties, with a social-emotional “overlay” consisting of low self-esteem, social-emotional immaturity, anxiety, and difficulties in developing close friendships among her classmates.

Dr. Ortiz-Nance administered the ABAS-II to assess claimant’s adaptive functioning. Claimant’s scores in the four domains of the ABAS-II were as follows: Conceptual (92), Social (78), Practical (88), and General Adaptive Composite (GAC) (84). Claimant was 14 years of age at the time the test was administered.

Dr. Ortiz-Nance also served as claimant’s treating therapist. He also testified on claimant’s behalf at the hearing in this matter.

6. WISC-IV, October 17, 2007. Dr. Ortiz-Nance administered the WISC-IV, which showed a FSIQ of 65, with individual scores of Verbal Comprehension (71), Perceptual Reasoning (55), Working Memory (77), and Processing Speed (80). Claimant was 14 years of age at the time the test was administered.

7. Personality Inventory for Children, Second Edition (PIC-2nd). Dr. Ortiz-Nance administered the PIC-2nd on January 23, 2008. A "T Score" of 50 is the mean. Dr. Ortiz-Nance explained during his testimony that a T Score of 60 or above has clinical significance, suggesting intervention is necessary. Claimant had highly elevated scores in the area of Cognitive Impairment as a whole (98), including the subcategories of Developmental Delay of (116), Poor Achievement (77), and Inadequate Abilities (84). Claimant also had elevated scores in the areas of Psychological Discomfort (78), Social Withdrawal (90), and Social Skills Deficits (94).

8. Wechsler Abbreviated Scale of Intelligence (WASI), September 24, 2008. Dr. Ortiz-Nance administered the WASI, which showed a FSIQ of 67, with individual scores of Verbal IQ (74), and Performance IQ (64). Claimant was 15 years of age at the time the test was administered.

9. Letter Dated October 8, 2008, from Dr. Ortiz-Nance to Claimant's Parents. Dr. Ortiz-Nance's letter to claimant's parents provides his assessment of claimant based on the scores as indicated by the WISC-IV (FSIQ 65) and WASI (FSIQ 67), and the ABAS-II profile derived from the Parent and Teacher responses. Dr. Ortiz-Nance opined based on the IQ test scores indicating "mild mental retardation" and the ABAS-II scores, that claimant "could not effectively and independently take care of herself nor interact with others without support services to aid her in navigating daily life activities." He concluded by stating that he does not believe claimant "has and can gain the practical everyday skills required to function and meet environmental demands on her own."

10. Psychological Eligibility Evaluation, April 30, 2009. CVRC referred claimant to The Sullivan Center for Children for an evaluation of claimant's intellectual and adaptive abilities, pursuant to an earlier request for CVRC services by claimant's parents. Mark Barnes, Ph.D., and Kelli Barton, MA, of the Sullivan Center administered the WISC-IV and ABAS-II. Claimant was 15 years of age.

The WISC-IV showed an FSIQ of 80, with individual scores including Verbal Comprehension (83), Perceptual Reasoning (79), Working Memory (97), and Processing Speed (80), which together indicate that claimant is functioning in the low average range with regard to cognitive abilities. The Sullivan Center examiners recommended retesting in one year because the WISC-IV scores are not consistent with prior testing which indicated a lower level of intellectual functioning. There is no record of subsequent retesting.

The ABAS-II was completed by claimant's mother, who in the examiner's opinion appeared to be an accurate reporter of claimant's adaptive functioning behavior. Claimant's scores in the four domains were as follows: Conceptual (69), Social (64), Practical (42), and General Adaptive Composite (GAC) (55). Based on these scores the examiners concluded that claimant is functioning in the mild range of impairment with a weakness in Practical Skills.

The Sullivan Center examiners' impressions included that claimant experiences high amounts of anxiety which impact her decision-making skills, that she has difficulty making friends, and has an intense fear of unfamiliar environments and people. They found claimant to be "functioning within the mild range of impairment with regard to adaptive skills." They diagnosed claimant as follows:

Axis I	300.23	Social Phobia, Generalized
Axis II		Low Average Cognitive Functioning with Mild Adaptives

Axis III

Visual depth perception problems in which she does not accurately perceive the distance of objects, by report; Asthma and Allergies

The Sullivan Center examiner's recommendations included: (1) independent living and adaptive skills training; (2) consideration of vocational skills training; (3) continued therapy; and (4) retesting in one year because results of this testing were not consistent with previous testing.

11. Letter January 15, 2015, from Dr. Ortiz-Nance. Dr. Ortiz-Nance has been claimant's therapist since approximately May 2008. The issues that brought claimant to his office were anxiety and depression. Dr. Ortiz-Nance opined that this co-morbid condition is exacerbated by her moderate Intellectual Developmental Disorder. His diagnosis of her includes:

- 319 (F71) Intellectual Developmental Disorder-Moderate
- 309.21 (F93.0) Separation Anxiety Disorder
- 300.2 (F41.1) Generalized Anxiety Disorder (PROVISIONAL)
- 300.4 (F34.1) Persistent Depressive Disorder

His opinion at the time of writing was that claimant has a developmental lag of approximately six years less than her chronological age, and that she has serious deficiencies in decision-making, personal safety, and ability to manage money. Dr. Ortiz-Nance opined in his letter in his testimony that because of claimant's intellectual development disorder exacerbated by anxiety and depression, she is unable to live independently, fully care for herself, or make decisions that would promote her general well-being.

12. Psychological Evaluation. Dr. Ortiz-Nance prepared a report dated January 24, 2017, regarding testing performed when claimant was 22 years 11 months of age (approximately August 2015). Claimant's mother requested the assessment to ascertain whether claimant would qualify for Social Security benefits.

Claimant's mother served as respondent in that she provided responses to questions and requests for information in several of the test instruments. She appeared to be a good historian and provide accurate information regarding claimant's level of functioning. The assessment instruments administered included the Adaptive Behavior Assessment System (ABAS-3), Reynolds Adaptable Intelligence Test (RAIT), Sensory Profile, and the Slosson Intelligence Test Revised 3 (SIT-R3).

On the ABAS-3, claimant scored in the "extremely low range" in all skill areas (conceptual, social, and practical). On the RAIT, claimant scored in the "below average" range (greater than one standard deviation below the mean) on all indexes, including Crystallized Intelligence, Fluid Intelligences, Total Intelligence, and Quantitative Intelligence. On the SIT-3, claimant's profile showed a Mean Age Equivalent (the age where her performance would be in the average range) of 9.6 to 9.8 years of age. Dr. Ortiz-Nance opined in his report and his testimony that the test results are a true reflection of claimant's level of functioning, and that her presentation will have little, if any, fluctuation across time. He does not believe that claimant is able to manage funds, budget, or self-govern, nor does he believe her abilities will improve significantly over time.

13. Psychological Disquisition. Dr. Ortiz-Nance prepared a report dated March 28, 2017, regarding assessments performed in 2007 and 2008, including the WISC-IV, WASI, and ABAS-II. Dr. Ortiz-Nance again expressed his opinion that claimant is not able to manage funds, budget, or self-govern, and that he does not believe her abilities will improve significantly. Dr. Ortiz-Nance further opined in his report and testimony that

claimant will learn and grow from experience, but not quickly or significantly enough to become self-sufficient and independent.

14. Psychological Case Note. In response to the current request for CVRC services made by claimant's mother, CVRV asked Kao Yang, Ph.D., Staff Psychologist II at CVRC to complete additional testing related to claimant's adaptive functioning and achievement. Dr. Yang met with claimant on August 15, 2017, to complete two measures of adaptive functioning (Street Survival Skills Questionnaire (SSSQ), and the ABAS-II Adult Form) and one measure of achievement (Wide Range Achievement Test - 4th Ed. (WRAT-4).)

The SSSQ is an objective measure to evaluate functional knowledge and independent living skills. The SSSQ has a mean of 100 and a standard deviation of 15. Claimant's Survival Skills Quotient was tested at 84, within the Low Average Range.

Claimant's mother served as the respondent providing answers in response to questions in the ABAS-II. Based on her responses, claimant's scores in the four domains were as follows: Conceptual (61), Social (62), Practical (55), and GAC (54). Dr. Yang found that all of these scores fall within the Extremely Low range.

The WRAT-4 is a test that measures basic academic skills in the area of reading, sentence comprehension, spelling, and math computation. The scores for the WRAT-4 have a mean of 100 and a standard deviation of 15. Claimant's scores were as follows: word reading (92), sentence comprehension (82), spelling (97), math computation (70), and reading composite (85). Claimant's word reading and spelling scores were within the average range. Her sentence comprehension and reading scores were both within the below average range, and her math computation score was within the low range.

15. Individualized Education Program (IEP). The records include four separate IEP reports prepared in 2005, 2008, 2009, and 2012. The final IEP was prepared in anticipation of claimant's graduation from high school. The IEPs taken together note a

severe discrepancy between claimant's intellectual ability and achievement in the areas of reading skills and math reasoning. The discrepancy was found to be due to a disorder in auditory processing and one or more of the basic psychological processes involved in acquiring, organizing or expressing information. This was manifested in an impaired ability to listen, reason, speak, read, write, spell or do mathematical calculations. It was noted that claimant could be appropriately placed in the general education classroom in math and English language arts with resource assistance in small groups or individual work. It was not noted that claimant has an intellectual disability.

TESTIMONY AT HEARING

16. Carol Sharp, Ph.D. Dr. Sharp is a Staff Psychologist employed by CVRC for approximately 14 years. She serves on the team that recommends whether a person is eligible for services at CVRC. Dr. Sharp met claimant only briefly. Based on her review of the records in this matter and the diagnostic criteria, Dr. Sharp concluded that claimant has a learning disability in conjunction with anxiety and depression, but not an intellectual disability or condition closely related to an intellectual disability, and is therefore not eligible for services at CVRC.

17. Dr. Sharp focused specifically on claimant's IQ scores as a basis for her opinion that claimant does not have an intellectual disability. She noted that claimant tested as having an FSIQ of 80 in 2009, when she was 15 years of age, and an FSIQ of 77 in 2005, when she was 11 years of age. (Factual Findings 4 and 10). The DSM-V criteria for intellectual disability includes FSIQ's in the range of 60 to 75. (Factual Finding 25.) On this basis, Dr. Sharp opined that an FSIQ of 80 does not meet the DSM-V criteria for an intellectual disability, and that an FSIQ of 77 is "borderline."

18. Dr. Sharp also noted that in the RAIT intelligence test reported in the January 24, 2017, Psychological Evaluation (Factual Finding 12), claimant scored in the

“below average” range in all indexes. Dr. Sharp opined that the results from the RAIT do not support a claim for intellectual disability.

19. In considering whether claimant has a disabling condition closely related to intellectual disability, Dr. Sharp opined that significant variability between subtest scores within the same IQ test may indicate a learning disability rather than an intellectual disability. Substantial variation in subtest scores is seen in the IQ tests reported in 2003 (Factual Finding 3) and 2007 (Factual Finding 6).

20. Dr. Sharp noted that claimant had demonstrated elevated levels of anxiety. (Factual Finding 4.) Claimant was also diagnosed with depression. (Factual Finding 11.) Dr. Sharp opined that a learning disability in conjunction with anxiety and depression can cause low adaptive functioning that appears similar to an intellectual disability, but which is in fact not the result of an intellectual disability or a condition closely related to intellectual disability. Dr. Sharp also opined that high levels of anxiety can have a downward effect on a person’s IQ scores.

21. Edwin Ortiz-Nance, Psy.D. Dr. Ortiz-Nance believes that his diagnosis of claimant as having an intellectual development disorder exacerbated by depression and anxiety is accurate, based on his assessments and articulated in his written reports outlined in the Factual Findings. He does not believe that claimant’s higher IQ scores on tests other than those he administered invalidate his diagnosis. He testified that a person can score higher than their actual potential, but not significantly. On cross examination, he also agreed that a person can score lower than their actual IQ because of suboptimal performance on the test.

22. Based on his assessments clinical observations, Dr. Ortiz-Nance does not believe that claimant has the ability to manage her own affairs, or that she can be expected to live independently in the future. He believes claimant’s intellectual disability

began during her developmental years (before the age of 18), and that she will always need someone or a program to help manage her daily living and financial affairs.

DISCUSSION

23. Regional centers provide services to individuals who have a “developmental disability” as defined in the Lanterman Act. In order to qualify for services from CVRC, an individual must be diagnosed with one or more of the five developmental disabilities outlined in the Lanterman Act: intellectual disability, cerebral palsy, epilepsy, autism, and/or 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 (fifth category). (Welf. & Inst. Code, § 4512, subd. (a).) An individual who has one of the included developmental disabilities must be “substantially disabled” by that disability. To establish a “substantial disability,” the individual must have significant functional limitations in three or more major life activities: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and/or economic self-sufficiency. (Welf. & Inst. Code, § 4512, subd. (l)(1).) A qualifying condition must start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.) In addition, the individual’s functional limitations must be directly related to the developmental disability that qualifies the individual for services under the Lanterman Act.

Intellectual Disability

24. 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. 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 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.

25. 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."

26. The evidence is not persuasive that claimant meets diagnostic Criterion A based on her IQ scores. Claimant underwent IQ tests in 2003 (FSIQ of 73, with extreme

variability among subtest scores), 2007 (FSIQ of 65, with extreme variability among subtest scores), 2008 (IQ 67), and 2009 (IQ 80). The 2009 IQ test result was accompanied by a notation that the test result is inconsistent with prior tests, and a recommendation of re-testing in one year. There is no record of re-testing, thus there remains some uncertainty about claimant's actual IQ. However, given that a person is highly unlikely to score significantly higher than their actual IQ, claimant's IQ is likely close to 80. Also, given that depression and anxiety can have a downward effect on an individual's IQ score, it is likely that claimant's lower scores are attributable to these conditions, not an intellectual disability. The fact that there is substantial variability in the subtest scores adds to the likelihood that claimant has a specific learning disability, not an intellectual disability. With respect to claimant's low adaptive functioning, the most persuasive evidence is that this is attributable to her depression and anxiety, not an intellectual disability.

27. 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." There is no dispute that claimant has low adaptive functioning. Again, however, this is more likely due to claimant's depression and anxiety than an intellectual disability. Thus, considering the evidence as a whole, it was not established that claimant fits within the definition of intellectual disability under the DSM-V criteria.

Fifth Category

28. 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." The fifth category is intended to

include individuals whose IQ scores are slightly higher than 70, but who still have significant deficits in cognitive functioning. To fall within the fifth category, an individual must function like someone with an intellectual disability or require treatment similar to the treatment required by individuals with an intellectual disability. Eligibility however, may not be based on "other handicapping conditions" that are solely resulting from learning disabilities or psychiatric disorders. (Cal. Code. Regs., tit. 17 § 54000, subd. (c)(1), (2).).

29. 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 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." It is therefore important to consider factors required for a diagnosis of intellectual disability when assessing fifth category eligibility.

30. As discussed above in Factual Findings 26 and 27, the evidence does not support a finding that claimant's IQ scores and low adaptive functioning are related to an intellectual disability. Rather, it is most likely that these are related to specific learning disabilities in conjunction with depression and anxiety. For this reason, claimant is not eligible for services under the Lanterman Act because of a disabling condition closely related to an intellectual disability.

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 she has a

qualifying developmental disability. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.) 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

2. 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 developmentally disabled individuals 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.)

3. An applicant is eligible for services under the Lanterman Act if 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.)

4. 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.

5. 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).)

6. As set forth in the Findings, claimant's mother did not establish that claimant is eligible for services under the Lanterman Act because she has an intellectual disability, or because she has a disabling condition that is closely related to intellectual disability or requires treatment similar to that required for individuals with an intellectual disability. Consequently, she did not establish that claimant is eligible for services and support from CVRC under the Lanterman Act. Claimant's appeal must therefore be denied.

ORDER

Claimant's appeal is DENIED. Central Valley Regional Center's denial of services to claimant under the Lanterman Act is SUSTAINED.

DATED: September 25, 2017

TIMOTHY J. ASPINWALL

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 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)