BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. REDWOOD COAST REGIONAL CENTER, Service Agency.	OAH Case No. 2017070394

DECISION

Administrative Law Judge Karen Reichmann, Office of Administrative Hearings, State of California, heard this matter on November 15, 2017, in Ukiah, California.

Lauren Gardner, Attorney at Law, represented the Redwood Coast Regional Center (RCRC).

No appearance was made by or on behalf of claimant.

The matter was submitted for decision on November 15, 2017.

ISSUE

Has RCRC established that the original determination that claimant is eligible for regional center services is clearly erroneous?

FACTUAL FINDINGS

1. Claimant is an adult RCRC consumer. In a Notice of Proposed Action dated June 20, 2017, RCRC notified claimant of its decision that he is no longer eligible for regional center services because he "no longer meets the criteria for a qualifying

Regional Center diagnosis." Claimant appealed, and this hearing followed.

2. Claimant is 55 years old. He has been a regional center consumer since at least 1999, based on epilepsy. He was previously a client of the North Bay Regional Center (NBRC) until he moved to Mendocino County in 2014 and became a client of RCRC. It appears that he was a client of the Regional Center of the East Bay at some point as well. No evidence was presented pertaining to the original eligibility determination.

3. Claimant experienced seizures beginning in early childhood. He underwent an EEG at least as early as age 9. He was evaluated by a neurologist by the time he was 13 years old. In a report dated July 27, 1976, written when claimant was 14 years old, neurologist M. John Rowe, III, M.D., wrote that claimant "has a photo-sensitive seizure disorder which he frequently self-induces." Dr. Rowe recommended that claimant take phenobarbital and clonazepam, two anti-seizure medications. In a letter dated March 11, 1980, Dr. Rowe wrote that he treated claimant in December 1979 for frequent seizures at home.

4. Claimant also has a long history of psychiatric illness. He was referred for psychiatric treatment by age 11. Dr. Rowe noted in 1980 that claimant "has serious psychological problems" that interfered with the treatment of his seizure condition.

5. Claimant attended high school at a private boarding school in Germany. Correspondence from the school noted that claimant was experiencing one to five sunlight-related seizures daily, was being treated by a neurologist, and that an EEG again suggested epilepsy. Claimant has reported that he was in a bicycle accident while in Germany at the age of 17, which resulted in a traumatic brain injury. Although there are no medical records pertaining to the accident, more recent medical records support claimant's report of a traumatic brain injury.

6. Claimant's most recent Individual Program Plan (IPP), dated February 24,

2015, noted that claimant was having a hard time living independently and needed significant support. It was noted that claimant has poor impulse control, difficulty focusing, engages in inappropriate behaviors, and needs assistance with medication compliance and organizing his home environment. The IPP provided that RCRC would fund 120 hours per month of supportive living services, money management services, and bus passes. At the time of the hearing, RCRC was providing only limited services to claimant. RCRC tried to provide supportive living services but it was unsuccessful. Most recently, claimant was receiving money management assistance and a modest "SSP restoration" payment from RCRC, and no other services.

7. Both RCRC and NBRC have had difficulty providing services to claimant due to his threatening behavior and his refusal to work with people. Vendors have refused to work with him because of his aggressive behavior, including slashing the tires of an attendant providing supported living services in 2010. A RCRC employee who was involved in the eligibility redetermination now has a restraining order against claimant for her protection.

8. Claimant receives support from other social service agencies. He receives social security disability income, in-home support services, housing subsidies, and has also received vocational rehabilitation services.

9. Claimant has had some employment, including as a grocery bagger for a supermarket. He has had difficulty maintaining employment due to his intimidating behavior. He has also had difficulty maintaining housing as he has been evicted due to destructive and threatening behavior.

10. Claimant's medical records reflect that he is viewed as a poor and untrustworthy historian. Claimant continues to take anti-seizure medications. He has a history of poor compliance with his medication regimen.

11. A psychiatric evaluation was performed by Mary Lu Schreiber, M.D., in

2000. She diagnosed depression with agitation, borderline intellectual functioning, borderline personality disorder, polysubstance abuse by history, seizure disorder, and hypertension by history. She noted that claimant had a history of not taking medications and of abuse of street drugs. She refers to medical records that were not made part of the record for this proceeding, including a 1993 psychological evaluation that noted borderline intellectual level and short-term memory losses consistent with organic brain disorder, specifically frontal lobe dysfunction. She also referred to "many ER visits" due to seizures which were considered to be related to substance abuse and withdrawal.

12. A 2015 MRI report of claimant's brain noted mild cerebral cortical atrophy. A neurologist's medical record from that same year noted claimant had peculiar head morphology, extremely poor impulse control, tremulousness of the chin and outstretched hands, and engaged in inappropriate familiarity with the examiner.

13. RCRC conducted an assessment of claimant earlier this year. Psychologist Ubaldo F. Sanchez, Ph.D., performed a psychological evaluation of claimant on March 30, 2017, and prepared a report dated May 5, 2017. Dr. Sanchez was asked to assess claimant for autism spectrum disorder and to assess his risk for violence.

Dr. Sanchez observed that claimant wore a soiled shirt and appeared disheveled, that he was emotionally labile and volatile, that he appeared to function within the low average range of measured intelligence, that he demonstrated paranoia, that his insight into his emotional state is limited, and that his judgment regarding decisions affecting his wellbeing is limited. Claimant reported that he had not had a seizure in seven years.

Dr. Sanchez concluded that claimant did not meet the diagnostic criteria for autism spectrum disorder and that he presented a moderate risk for violence. Dr. Sanchez diagnosed 1) unspecified bipolar and related disorder; 2) major neurocognitive disorder due to history of traumatic brain injury, with behavioral disturbance; 3) history of cannabis disorder, severe; and 4) other specified personality disorder, with borderline

and narcissistic features. Dr. Sanchez recommended that claimant continue to receive mental health treatment and psychotropic medications, and noted, "it is of paramount importance that he is monitored to ensure he takes his prescribed medications on a regular and consistent basis."

14. An interdisciplinary team which included John Sullivan, M.D., and service coordinator Billie Wyant met in June 2017 to review claimant's continuing eligibility for regional center services. After extensive discussions, the team concluded that claimant was not eligible. They concluded that claimant's epilepsy was not disabling, that he did not qualify for eligibility under any other condition, and that his problems were the result of his psychiatric disorders.

15. Dr. Sullivan testified at hearing regarding RCRC's determination that claimant is not developmentally disabled. Dr. Sullivan explained that in determining whether an individual is substantially disabled by epilepsy, RCRC considers the individual's seizure burden. Seizure burden means the frequency and severity of seizures, whether the seizures present a risk of danger to the individual, how long it takes the individual to recover, whether the seizures can be controlled by medication, and the side effects of the seizure medication. RCRC also looks at whether the individual has other neurological or cognitive problems in addition to seizures. Many RCRC clients with epilepsy also have intellectual disability or cerebral palsy.

RCRC tries to sort out what adaptive and functional problems are due to the epilepsy as opposed to another cause, such as a mental illness. In this case, the RCRC team concluded that claimant has many problems but that his problems are not due to epilepsy. They concluded that his problems are due to his bipolar and personality disorders. Dr. Sullivan does not believe that claimant's paranoia, anxiety, and threatening behaviors relate to his epilepsy.

Dr. Sullivan noted that claimant's seizures during the developmental period were

small seizures and not traumatic seizures. He believes that claimant's main problems during the developmental period were behavioral and not neurological. He does not believe that claimant's epilepsy was disabling "in three areas" during the developmental period. Dr. Sullivan observed that there have been reports of grand mal seizures during claimant's adulthood, but that these seizures appeared to be due to drug toxicity or drug withdrawal. Claimant reported to Dr. Sanchez that he had not had a seizure in seven years. The RCRC team concluded that claimant is not currently disabled by his epilepsy.

Even if claimant suffers from post-traumatic neurological disorder relating to the traumatic brain injury, Dr. Sullivan does not believe he qualifies for fifth category because his condition is not similar to intellectual disability.

16. In his June 29, 2017, fair hearing request, claimant wrote, "I have had a seizure within the last 2 months."

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Act). (Welf. & Inst. Code, § 4500, et. seq.)[1] The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (§§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Act is a remedial statute; as such, it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

[1] All citations are to the Welfare and Institutions Code unless otherwise indicated.

2. As defined in the Act, a developmental disability is a "disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual." (§ 4512, subd. (a).) Under the Act, the term "developmental disability" includes epilepsy. (*Ibid.*)

3. Under the Act, conditions that are solely psychiatric in nature, or solely learning disabilities, are not considered developmental disabilities. (Cal. Code Regs., tit. 17, § 54000, subd. (c)(1)(2).) However, if mental illness co-exists with a developmental disorder, it does not preclude an individual from regional center eligibility.

4. Section 4643.5, subdivision (b), provides that "an individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes the original determination that the individual has a developmental disability is clearly erroneous." The burden of proof is on the regional center to establish that the original determination that claimant is disabled by epilepsy is clearly erroneous. This is a different burden of proof and a higher standard of proof than what governs an original eligibility determination.

5. Section 4512, subdivision (l)(2) provides that "a reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible."

6. The term "substantial disability" is defined as a condition which "results in major impairment of cognitive and/or social functioning." (Cal. Code Regs., tit. 17, § 54001, subd. (a).) Under current law, a disabling condition is substantial if it results in "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: (1) Self-care. (2) Receptive and expressive language. (3) Learning. (4) Mobility. (5) Self-direction. (6) Capacity for independent living. (7) Economic self-sufficiency." (§ 4512,

subd. (l); Cal. Code Regs., tit. 17, § 54001, subd. (a).)

Prior to 2003, however, section 4512 and California Code of Regulations, title 17, section 54001 did not require a significant functional limitation in three or more areas of major life activity in order to establish a substantial disability. Because claimant was originally made eligible prior to 2003, the pre-2003 versions of section 4512 and California Code of Regulations, title 17, section 54001, govern this matter. At the time claimant was made eligible, no set number of deficits was required to establish that an individual was substantially handicapped by a developmental disability. It does not appear that RCRC applied the pre-2003 criteria in its eligibility redetermination. Dr. Sullivan referred to "three areas" throughout his testimony.

7. Claimant experienced frequent seizures during childhood and was diagnosed with epilepsy, a developmental disability, during the developmental period. Claimant has been prescribed anti-seizure medications since adolescence. He also suffered a traumatic brain injury, which he reports occurred prior to age 18. RCRC's psychologist diagnosed major neurocognitive disorder. Because claimant is a poor medical historian, his reports regarding the frequency of his seizures cannot be accorded great weight.

Claimant is clearly severely challenged in most areas of life activity. He has had difficulty maintaining a stable living situation, in maintaining employment, with interpersonal relationships, with hygiene, and with managing his financial affairs. He is dependent on social services and supports.

8. RCRC has not met its burden under section 4643.5, subdivision (b), of proving that the determination that claimant is eligible for regional center services is clearly erroneous. Claimant's reported lack of recent frequent seizures does not establish that he is not developmentally disabled. RCRC asserts that claimant's significant challenges are the result of mental illness and not related to his epilepsy. The record was

insufficient to establish that his ongoing severe adaptive and functional deficits are solely related to his psychiatric condition and not to his developmental disability. Accordingly, claimant remains eligible for RCRC services under the Lanterman Act.

9. On November 27, 2017, RCRC forwarded a document it received on behalf of claimant explaining why he did not attend the hearing. This document was construed as a motion to reopen the record. RCRC submitted an opposition to the motion. In light of the fact that claimant's appeal is being granted, the motion to reopen the record is denied as moot.

ORDER

Claimant's appeal from RCRC's June 20, 2017, Notice of Proposed Action is granted. Claimant remains eligible for RCRC services.

DATED: December 1, 2017

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KAREN REICHMANN

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.