

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018020775

DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on August 15, 2018.

Stephanie Zermeño, Consumer Services Representative, represented the Inland Regional Center (IRC).

Claimant's mother appeared on behalf of claimant, who was present at the hearing.

The matter was submitted on August 15, 2018.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act, specifically under the basis of intellectual disability, epilepsy, or Autism Spectrum Disorder (ASD)?

FACTUAL FINDINGS

BACKGROUND

1. Claimant is a 49-year old male. Claimant's mother applied to IRC to obtain services under the Lanterman Act alleging claimant had an intellectual disability, epilepsy, or ASD. On January 12, 2018, IRC notified claimant of its determination that he was not eligible for regional center services because the information it reviewed did not establish that claimant had a substantial disability as a result of an intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment as an individual with an intellectual disability.

2. On February 6, 2018, claimant's mother on behalf of claimant signed a Fair Hearing Request appealing IRC's determination. The Fair Hearing Request was received by IRC on February 12, 2018.

3. On February 26, 2018, IRC held an informal meeting with claimant's mother and claimant regarding the fair hearing request. During the informal meeting claimant's mother provided information regarding why she believed that claimant was eligible for regional center services, including his inability to retain information and learn, and that he was diagnosed with Asperger's Syndrome approximately 20 years ago. On March 1, 2018, IRC wrote a letter informing claimant that IRC was adhering to its determination that claimant was not eligible for regional center services. This matter proceeded to hearing.

TESTIMONY OF BORHAN AHMAD, M.D.

4. Dr. Borhan Ahmad obtained his medical degree in Afghanistan prior to immigrating to the United States in 1981. In 1983 he successfully completed the examination to become a medical doctor in the United States. He completed his residency in General Pediatrics in 1991 in Akron, Ohio. He began practicing as a General

Pediatrician at Loma Linda University in 1996, working in the clinic. Additionally, he teaches resident physicians of Loma Linda University in pediatrics. Dr. Borhan is a board certified pediatrician. For the past 20 years, he has also worked approximately two days per week as a medical consultant at IRC providing consultations, assessing clients, and reviewing records for eligibility determinations for IRC, primarily for the eligibility bases of cerebral palsy and epilepsy.

5. Dr. Borhan reviewed the records provided by IRC and claimant for an eligibility determination under the category of epilepsy. Dr. Borhan stated that epilepsy is a neurological condition consisting of abnormal electrical impulses in the brain triggering symptoms of seizures and loss of consciousness. He stated that there are different severity levels of epilepsy; some patients experience seizures with extreme shaking and loss of consciousness, and some patients have more subtle symptoms of a brief lapse of awareness and staring spells. Dr. Borhan stated that the majority of epilepsy patients can control their seizures completely with medication. However, some patients have "intractable seizures," defined as those seizures that can't be controlled by medication. Dr. Borhan stated that intractable seizures are sometimes linked to other disorders such as intellectual disability. He explained that in order for a patient's epilepsy to be "substantially handicapping" as defined by the Lanterman Act, the patient must suffer from intractable seizures, also called "breakthrough seizures," and the patient's seizure symptoms have to be severe. Dr. Borhan stated that even if the epilepsy patient has intractable seizures, but the seizure symptoms are only mild in nature, then that patient would not be substantially handicapped such that they would be eligible for services from IRC.

6. Dr. Borhan testified that his review of claimant's school records showed no indication that claimant had epilepsy or was receiving medication for seizure activity while he attended school. Dr. Borhan stated that claimant's more recent medical records

from a neurologist indicated claimant had a history of very mild seizures during which he would have a brief lapse of awareness for a few seconds and would thereafter “snap out of it.” Dr. Borhan stated that none of the records he reviewed showed that claimant had been affected by his seizures to a point where he would be substantially disabled by them. Dr. Borhan stated he did not see any records indicating that claimant had been taking medication to control his seizures prior to the age of 18; however, even if he had been taking medication to control the seizures prior to the age of 18, that alone would not qualify claimant for IRC services because there was no evidence to indicate that claimant’s seizures were not controlled or were severe in nature. Dr. Borhan’s review of all of claimant’s school records and medical records did not provide any evidence to indicate that claimant was substantially disabled from epilepsy.

TESTIMONY OF PAUL ALLEN GREENWALD, PH.D.

7. Paul Allen Greenwald, Ph.D., is a licensed clinical psychologist and received his Ph.D. in Clinical Psychology from California School of Professional Psychology in 1987. Dr. Greenwald has worked as a staff psychologist at IRC since October 2008. His duties in the position of staff psychologist include reviewing records and conducting evaluations to assist the multidisciplinary team to determine if potential clients are eligible for services. During his employment at IRC, Dr. Greenwald has reviewed the records of over 1,500 clients or potential clients to determine their eligibility for services with IRC.

8. Dr. Greenwald opined that claimant is not eligible for IRC services on the basis of intellectual disability because he does not meet the requirement of an intellectual disability and because he did not have a substantial disability as defined in the Lanterman Act. (Welf. & Inst. Code § 4512, subd. (l); Cal. Code Regs., tit. 17, § 54001, subd. (a).) Dr. Greenwald explained that in order to have a diagnosis of intellectual disability under the American Psychiatric Association’s *Diagnostic and Statistical Manual*

of Mental Disorders, Fifth Edition (DSM-5), a person must have onset of symptoms during the developmental period - before the age of 18 - that includes both intellectual and adaptive functioning deficits that meet the following three criteria: (1) deficits in intellectual functions confirmed by clinical assessment and individualized, standardized intelligence testing; (2) deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility (such adaptive functioning deficits limit functioning in one or more activities such as communication, social participation, and independent living); and (3) onset of intellectual and adaptive deficits during the developmental period.

9. Dr. Greenwald explained that the DSM-5 also identifies the criteria for diagnosis of Autism Spectrum Disorder (ASD). The diagnostic criteria include persistent deficits in social communication and social interaction across multiple contexts; restricted repetitive and stereotypical patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or other important areas of function; and disturbances that are not better explained by intellectual disability or global developmental delay. An individual must have a documented DSM-5 diagnosis of Autism Spectrum Disorder prior to the age of 18 years to qualify for regional center services under the category of Autism Spectrum Disorder.

10. Dr. Greenwald reviewed all of the records regarding claimant, including school and medical records. He noted that claimant received special education services while he was in school under the classification of a language and speech impairment, also referred to as aphasia, and specific learning disorder. Dr. Greenwald explained that aphasia is a disorder wherein the person has difficulty with expressive and receptive communication. He noted that a diagnosis of aphasia is not necessarily indicative of a developmental disability and is not a qualifying diagnosis for eligibility at IRC. He also

noted that a learning disability is not necessarily indicative of a developmental disability and is not a qualifying diagnosis for eligibility at IRC. Dr. Greenwald noted that none of claimant's school records indicated that he qualified for special education under the classification of intellectual disability. Additionally, all of the school records indicated that claimant's intelligence was measured in the "low average" and "average" range, which is well above that associated with a diagnosis of intellectual disability. The school records further show that claimant was independent in self-care and had normal self-care skills, which is not consistent with a diagnosis of intellectual disability or ASD. Dr. Greenwald also noted that the school records show that claimant tried to be like other children because he was socially marginalized, indicating that claimant had social awareness, a characteristic inconsistent with a diagnosis of ASD.

11. Dr. Greenwald reviewed a psychological assessment report summarizing an assessment conducted on September 16, 1991, by Bob Chang, Ph.D., a staff psychologist at IRC, to evaluate claimant for eligibility for IRC services. At the time of the assessment, claimant was 22 years of age. Dr. Greenwald testified that Dr. Chang conducted a comprehensive assessment of claimant, including a review of records, and he conducted a battery of tests. Dr. Chang administered to claimant the Wechsler Adult Intelligence Scale- Revised. The results of that examination showed that claimant had a full-scale intelligence quotient (I.Q.) score of "at least 79" with a verbal I.Q. score of "at least 80" and a performance I.Q. score of "at least 82." Dr. Greenwald explained that these scores are in the "high borderline to low average range" and are not consistent with a diagnosis of intellectual disability. Another test administered by Dr. Chang was the Wide Range Achievement Test – Revised. The results from that test show that claimant had scores for reading and spelling in the "low average" range and scores in the "extremely low" range for mathematics. Dr. Greenwald explained that low scores in the area of mathematics are frequently associated with difficulty in paying attention and

maintaining concentration. As part of his assessment Dr. Chang also interviewed claimant and claimant's mother. Dr. Chang reported that claimant had good self-care skills and was able to complete most of his living skills. Based on his assessment Dr. Chang noted that claimant was able to provide good predictions to social behaviors and had good social skills. Dr. Chang concluded in his report that claimant was not eligible for services at IRC on the basis of either mental retardation¹ or autism.

12. Dr. Greenwald also reviewed a psychological assessment of claimant conducted by Richard J. Ault, Ph.D. on November 5, 2012, when claimant was 43 years of age. Dr. Ault performed a battery of tests, including the Wechsler Adult Intelligence Scale-Fourth Edition. The results of that test show that claimant had a full scale I.Q. of 67, but individual scores in verbal comprehension I.Q. of 81, perceptual reasoning I.Q. of 73, working memory I.Q. of 71, and processing speed I.Q. of 59. Dr. Ault concluded in his report that these scores "did not reflect a significant discrepancy between them." Dr. Greenwald testified that he strongly disagreed with Dr. Ault's conclusion in this regard because there was a 22 point difference between the score of 81 and 59, which is a large difference and definitely significant. Dr. Greenwald also stated that claimant's processing speed score was the lowest score and dramatically different than the other scores, and

¹ Dr. Chang used the term "mental retardation," which was the term used at that time to describe intellectual disability. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V), recently replaced the term "mental retardation" with the term "intellectual disability." Although the Lanterman Act has been amended to eliminate the term "mental retardation" and replace it with "intellectual disability," the California Code of Regulations has not been amended to reflect the currently used terms. For the purposes of this decision the terms "mental retardation" and "intellectual disability" are interchangeable.

may be indicative of a lack of attention rather than intellectual disability. Dr. Greenwald explained that the fact that claimant's other scores were so much higher is an indication that claimant is able to absorb information and retain it, which is not typical with an intellectual disability diagnosis. Dr. Ault also gave a summary of claimant's adaptive skills based upon interviews, and claimant's overall adaptive score was 31. Dr. Greenwald explained that an adaptive score of 31 shows that claimant is in the average range for adaptive capability and that claimant understands and follows instructions. Dr. Ault concluded that claimant had a diagnosis of "organic mental syndrome" and "mild mental retardation." Dr. Greenwald explained that the diagnosis of "organic mental syndrome" means some physical neuropsychological deficit that could have multiple causes, but which is not specific to the developmental period and is not the same as intellectual disability. Dr. Greenwald further explained that he disagreed with Dr. Ault's diagnosis of "mild mental retardation" because that diagnosis would not be accurate based on claimant's I.Q. scores, as discussed above. Additionally, Dr. Greenwald noted that this testing was conducted when claimant was 43 years old and well outside of the developmental period. Dr. Greenwald also noted that Dr. Ault never provided a diagnosis of ASD for claimant and never mentioned that condition in his report.

13. Dr. Greenwald testified the documents he reviewed from both school and medical records provide no indication that claimant has any global impairment of intellectual functioning, a condition that is closely related to intellectual disability or a condition requiring treatment similar to a person with intellectual disability, ASD, epilepsy or cerebral palsy. He further noted that none of those records show that claimant has a substantial disability from those conditions, and claimant never received any such diagnosis prior to the age of 18.

14. In conclusion, Dr. Greenwald stated that claimant does not meet the DSM-5 diagnostic criteria for intellectual disability; there is no evidence to indicate that

claimant has ASD; and none of claimant's records indicate any such diagnoses. Dr. Greenwald concluded that the evidence therefore did not support a finding that claimant was eligible for regional center services under any diagnosis.

TESTIMONY OF CLAIMANT'S MOTHER

15. Claimant's mother testified regarding claimant's history and development. She testified that, when claimant was born, he was a difficult delivery and sustained brain damage as a result of deprivation of oxygen for a prolonged period of time caused by negligence of the hospital. She stated that claimant has been permanently impacted as a result of brain damage caused during his birth. She stated that he has taken medication for seizures since the age of 10 and also takes medication for depression. She stated that claimant has issues with some of his medication and, as a result, he can't drive a vehicle. Claimant's mother testified that claimant has difficulty following instructions and can't follow more than two or three instructions at a time. Claimant has worked for the past 20 years sweeping the floors of a lobby of a business for about two hours per week. She stated that claimant is always on time and a good worker, but claimant needs help getting a job that will sustain him. Claimant's mother is seeking IRC services because claimant needs job coaching services. She stated that she has attempted to obtain assistance for claimant from other agencies, but was repeatedly told that the agencies could not help claimant unless she could get claimant qualified for services from IRC. Claimant's mother is trying to get claimant the help that he needs and is frustrated by the lack of results from her efforts to do so. Claimant's mother is passionate about getting claimant the needed job coaching services because she is 75 years of age and will soon no longer be able to take care of her son. Claimant's mother simply wants claimant to be self-sufficient. She stated that claimant is substantially disabled as a result of his brain damage and he should qualify for services at IRC.

TESTIMONY OF CHERYL JANTZ

16. Cheryl Jantz is a family friend of claimant and his mother. Ms. Jantz testified that claimant's mother has struggled to obtain the proper documentation to show that claimant is substantially disabled by a qualifying condition to be eligible for IRC services. Ms. Jantz stated that claimant has a substantial disability and can't take care of himself. She stated claimant has difficulty maintaining a conversation and learning. She stated that claimant has never really held a job other than his job sweeping the floor for two hours a week. Ms. Jantz believes that with the proper training claimant would be able to hold a job. She stated that claimant's mother has attempted to get job training assistance for claimant, but "there is a monopoly on resources out there" and claimant must be an IRC client in order to get that job training. Ms. Jantz believes that claimant should be approved to receive IRC services.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish that he or she has a qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.)

2. 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

3. 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 the developmentally disabled, 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.) The Lanterman 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.)

4. An applicant is eligible for services under the Lanterman Act if he or she can establish that he or she is suffering from a substantial disability that is 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 intellectually disabled individuals. (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.)

5. California Code of Regulations, title 17, section 54000, also defines “developmental disability” and the nature of the disability that must be present before an individual is found eligible for regional center services. It states:

(a) Developmental Disability means a disability that is attributable to [an intellectual disability], cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to [an intellectual disability] or to require treatment similar to that required for individuals with [an intellectual disability].

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized [intellectual disability], educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through

disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for [intellectual disability].

6. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through a regional center, accepts responsibility for providing services to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

7. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act.

EVALUATION

8. Claimant's mother believes claimant is eligible for regional center services because of an intellectual disability, or based on a diagnosis of ASD. The Lanterman Act and applicable regulations specify the criteria an individual must meet in order to qualify for regional center services. Dr. Ahmad and Dr. Greenwald both provided a thorough and detailed explanation of claimant's records, and explained why claimant did not qualify for regional center services. Dr. Ahmed concluded that there was no evidence that claimant has epilepsy to an extent that is substantially handicapping or that is not under control with medication. Dr. Ahmed stated that claimant only has mild seizure activity, and claimant's records do not indicate that his seizures are not controlled by medication. Dr. Greenwald concluded that claimant's cognitive skills and intellectual abilities are in the low average range, and he had no significant deficits in adaptive functioning. Additionally, Dr. Greenwald concluded that there is no evidence claimant

has ASD or developmental deficits attributable to ASD. There was insufficient evidence to conclude that claimant had a qualifying developmental disability.

9. Claimant's mother was sincere and her testimony heartfelt. She is clearly motivated by her desire to help her child and obtain services that she believes are necessary to allow him to function in the world; she undoubtedly has her child's best interest at heart. However, claimant has the burden of proving that he is eligible for regional center services. That is, he must prove it is more likely than not that he has a qualifying developmental disability. The weight of the evidence presented at hearing did not establish that claimant is substantially disabled because of epilepsy, ASD, intellectual disability, or a condition closely related to an intellectual disability that requires treatment similar to that required for individuals with an intellectual disability, or cerebral palsy. As such, claimant failed to satisfy his burden of demonstrating eligibility for regional center services under the Lanterman Act.

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ORDER

Claimant's appeal from IRC's determination that he is not eligible for regional center services and supports is denied.

DATED: August 27, 2018

DEBRA D. NYE-PERKINS

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 ninety days.