

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF THE EAST BAY,

Service Agency.

OAH No. 2018090322

DECISION

Administrative Law Judge Regina Brown, Office of Administrative Hearings, State of California, heard this matter in San Leandro, California, on February 5, 2019.

Megan Burns, Attorney at Law, represented Claimant,¹ who was not present.

Mary Dugan, Fair Hearing Specialist, represented service agency Regional Center of the East Bay (RCEB).

The record remained open for Claimant to provide additional documents. On February 12, 2019, RCEB requested leave to submit two scientific reports (collectively marked for identification as Exhibit 26) that a witness had referred to during testimony at hearing. On February 14, 2019, Claimant filed the following documents which were marked for identification: Exhibit A – Stanford Emergency Department Record, Exhibit B – Sutter Health Palo Alto Visit, Exhibit C – School Records from Newark Unified School District, Exhibit D – declaration in rebuttal to Exhibit 26. RCEB did not object to Exhibits A and B which were admitted into evidence. Exhibit C, which was reviewed by witnesses

¹ Claimant's name is not used to protect his privacy.

at the hearing, was admitted into evidence. Also, on February 14, 2019, Claimant filed an objection (marked for identification only as Exhibit E) to Exhibit 26. On February 22, 2019, RCEB filed a response, which was marked for identification only as Exhibit 27. Exhibit 26 was not admitted into evidence, and therefore, Exhibit D was also not admitted into evidence.

The matter was submitted on February 22, 2019.

ISSUE

Whether Claimant is eligible for regional center services because he suffers from a developmental disability, namely a disabling condition that is related to an intellectual disability and/or that requires similar treatment, which is commonly referred to as the "fifth category" of eligibility, under the Lanterman Developmental Disability Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act).²

FACTUAL FINDINGS

BACKGROUND

1. Claimant is a 24-year-old man. Claimant was referred to Regional Center of the East Bay (RCEB or regional center) by the Superior Court of California, County of Alameda (superior court), to determine his eligibility for regional center services. In particular, the superior court suspended the criminal proceedings³ against Claimant and RCEB was ordered to "evaluate [him] and to submit to the court within 15 judicial days a

² All citations are to the Welfare and Institutions Code unless otherwise indicated.

³ Claimant is charged with murder for stabbing his father to death.

written recommendation as to whether [he] should be required to undergo outpatient treatment or to be committed to a state hospital.”

2. On July 23, 2018, RCEB determined that Claimant does not have a developmental disability and is not eligible for regional center services because there was no evidence of an eligible condition prior to the age of 18 years old. In particular, Claimant has a history of schizophrenia, psychosis NOS [not otherwise specified], attention deficit hyperactivity disorder (ADHD), post-traumatic stress disorder (PTSD), mild neurocognitive disorder due to traumatic brain injury, alcohol use disorder, and cannabis use disorder. RCEB concluded that Claimant has special needs and his “adaptive functioning is impaired, but it is unclear to what degree impairments are related to significant mental health and substance abuse issues as well as decompensation from baseline functioning.” Moreover, RCEB concluded that Claimant is not significantly handicapped due to a diagnosis of developmental disability, including a disabling condition closely related to intellectual disability or requiring treatment similar to that required for individuals with intellectual disability to qualify for regional center services. RCEB issued a Notice of Proposed Action.

3. Claimant’s criminal defense attorney filed a fair hearing request. On September 24, 2018, RCEB held an informal meeting. Claimant relied on psychological testing performed in 2018, and contended that a diagnosis of neurocognitive disorder due to traumatic brain injury and his history strongly suggested “the presence of organic brain impairment.” In a letter dated September 27, 2018, RCEB reaffirmed the determination that Claimant was not eligible for services. RCEB indicated that neurocognitive disorder is not a qualifying condition for regional center services and, moreover, there was no evidence of a confirmed diagnosis of neurocognitive disorder. RCEB concluded that Claimant has several psychiatric diagnoses and a diagnosis of a learning disorder which are not qualifying conditions. RCEB recommended that Claimant

continue with comprehensive mental health services and supportive services. The matter proceeded to a fair hearing.

EARLY HISTORY AND CHILDHOOD ASSESSMENTS

4. Claimant's mother was 32 years old when Claimant was born full term with no complications at the delivery. Claimant's mother became concerned with his development at two years old as his speech and early milestones were delayed. At the age of two, Claimant suffered a head injury after a garage door fell on his head which required sutures and left a visible scar. His mother reported that he had "noticeable deficiencies" after the head injury.

5. Claimant started receiving special education services in 2001, in the first grade. Claimant's individualized education plan (IEP) noted his primary disability as specific learning disability (SLD), non severe, and that his learning deficiencies affected his ability to access core curriculum. Also, Claimant had an auditory processing deficit.

6. According to his IEP, dated March 1, 2007, when Claimant was 12 years old and in the seventh grade, he was described as having a sense of humor, being very social, getting along well with his peers, and having a good knowledge of computers and general subjects. In English and math, he was testing far below basic proficiency, and he struggled with reading, comprehension, and spelling. Claimant also had difficulty remembering and had to work hard to focus. His writing was improving in fluency. His motor development and adaptive/daily living skills were age-appropriate. His IEP for eighth grade was similar to the year before, but it was noted that his reading and writing skills were developing slowly, and his spelling and fluency were developing more slowly and were very difficult for him. Claimant struggled to remember math facts and operations. Also, his social/emotional behavior development varied as he expressed anger at authority figures.

7. Chris Arrington, School Psychologist, with the Menlo Park City School District, conducted a reevaluation of Claimant and issued a report dated April 4, 2008. Arrington noted that throughout the testing Claimant showed appropriate focus and attention. Arrington administered several tests, including:

- a. The Matrix Analogies Test, Expanded Form (MAT-EF), which is a nonverbal test of reasoning ability that measures one's understanding of visual patterns, analogous reasoning, serial reasoning, and spatial visualization. Claimant's standard score was in the average range of 99, with all the subtest scores demonstrating him to be in the average range and suggested an even development with nonverbal reasoning abilities.
- b. The Developmental Test of Visual Motor Integration, 5th Edition (VMI-5), which assesses the extent to which an individual can integrate visual and motor abilities. Claimant's standard score of 87 was in the low average range when compared to others his age. However, no visual or motor coordination deficits were identified.
- c. The Test of Auditory Processing Skills which tests basic rote memory and auditory cohesion. Claimant obtained a memory index score of 86, which is in the low average range, and his auditory cohesion standard score of 88 was in the low average range. These scores reflected his significant academic difficulty in the classroom.
- d. The Woodcock Johnson II Tests of Achievement (administered by his teacher) tested Claimant's abilities in a range of academic subjects. Claimant scored below average in all areas except letter word identification where he scored average.

8. Arrington found that Claimant demonstrated grade level skills in some areas, but he continued to demonstrate academic deficits which made his progress in the general education program very difficult. In addition, Arrington summarized that "cognitively, [Claimant] present[ed] as demonstrating at least average cognitive abilities with a processing deficit in the areas of auditory processing." Arrington determined that

Claimant continued to meet the eligibility criteria for special education although no formal cognitive assessments were given. Arrington also noted that Claimant demonstrated a severe discrepancy between intellectual disability and achievement in basic reading, reading comprehension, mathematics reasoning and calculation, and written expression. However, the discrepancy was not primarily the result of "mental retardation."

9. Claimant's additional IEPs continued to note his primary disability as SLD, non severe. In the ninth grade, his IEP noted that Claimant had difficulty staying focused and paying attention for long periods of time. His grade point average was 1.067, and he was failing world studies and PE. He was also having a difficult time keeping up with his courses. He was struggling with family issues at home, and had a defiant and negative attitude, although he responded well to gentle interventions. It also noted that he was on the football team at the beginning of the year, but he quit due to asthma and allergies. In the eleventh grade, his IEP described Claimant as quiet and withdrawn, but sometimes social. He had numerous unexcused absences and tardies, was failing four of six classes, and he was 16.5 credits behind to graduate with his class.

10. Claimant's IEP dated April 4, 2012, when Claimant was 17 years old and in the twelfth grade, described him as a thoughtful and sensitive young man, and a deep thinker who was aware of what was going on around him. He was interested in science and computers and enjoyed learning about new things. He had achieved a grade of B+ in English. He was described as average in paying attention, following directions, understanding concepts, completing homework, producing quality work, using materials in class effectively, and asking questions for help. He also needed improvement in completing assignments on time, having appropriate study habits, and being organized. He had occasional lapses of self-control, and needed constant prodding and encouragement. He was failing a Ceramics class because of missing assignments, but the teacher described him as very quiet and well behaved. He was failing Biology

because of several tardies and not completing assignments on time. He was receiving a grade of D+ in Algebra where the teacher described him as seeming to understand the concepts but having a low test score and missing worksheets.

11. According to Claimant's medical records, at age 15, he was diagnosed with adjustment disorder with depressive mood and was treated by a psychologist for an undetermined amount of time. He also suffered a concussion, but the details were not established at hearing. He started regularly smoking marijuana at age 15. At age 16, Claimant was diagnosed with problems with learning.

ADULT DIAGNOSES AND ASSESSMENTS

12. In 2013, at the age of 18, Claimant began using synthetic cannabis, "Spice" daily up to three or four times a day. Between the ages of 20 and 21, Claimant was diagnosed with psychosis, paranoid schizophrenia, and severe cannabis use disorder. In March 2014, Claimant was hospitalized for psychosis and diagnosed with severe depression and substance-induced psychotic disorder. His medical records noted that he had a history of sexual, physical, and emotional abuse. In May 2015, Claimant was admitted to the emergency room on a Welfare and Institutions Code section 5150 (5150) hold, and he came under the care of a psychiatrist and therapist at Palo Alto Medical Foundation. On October 31, 2015, Claimant was admitted to the emergency room on a 5150 hold as a danger to himself with complaints of auditory hallucinations and suicidal thoughts. On December 4, 2015, Claimant voluntarily admitted himself for suicidal ideation. After his release, Claimant went to live with his father until his father's death in February 2016. Claimant was immediately arrested and underwent testing to evaluate his mental competency.

13. In September 2017, Laeeq Everd, Psy.D., a licensed clinical psychologist and neuropsychologist, performed a neuropsychology examination of Claimant regarding his neurocognitive status and the impact on his functioning. Dr. Everd is a

professor at the Wright Institute and has a small therapy practice. Dr. Everd's examination, over a period of two days, was based on an interview of Claimant and a review of his school and medical records. Dr. Everd also administered psychological tests to Claimant. In his report, Dr. Everd concluded that based on Claimant's history and neurocognitive testing profile, it strongly suggested the presence of brain impairment indicative of brain injury in the form of Mild Neurocognitive Disorder Due to Traumatic Brain Injury (TBI).⁴ Furthermore, Claimant's overall cognitive capacity was roughly equivalent to that of a 12-year-old child with substantial deficits in the key areas of organization, attention, learning, memory, and executive functioning. According to Dr. Everd, special education did not address his cognitive impairments. Dr. Everd suggested that Claimant would benefit from neurocognitive rehabilitation in addition to psychotherapy and substance abuse treatment to address his psychological conditions and limited coping capacities.

14. On March 21, 2018, clinical neuropsychologist Howard J. Friedman, Ph.D., conducted an evaluation of Claimant at the request of his attorney. Dr. Friedman reviewed Dr. Everd's report and Claimant's school and medical records. Dr. Friedman concluded that Claimant's cognitive limitations impeded his capacity to communicate effectively with his attorney, and ability to understand information or recall information so as to confront its accuracy. Dr. Friedman opined that Claimant displayed impairment regarding his competency to stand trial and his impairment was based on a history of cognitive impairment (historical and chronic in nature and unlikely to change) as well as psychiatric disorder. Dr. Friedman diagnosed Claimant with schizophrenia by history, mild neurocognitive disorder due to multiple etiology, PTSD by history, ADHD by history, alcohol use disorder in remission and cannabis use disorder in remission.

⁴ Dr. Everd's examination and report will be discussed fully below.

15. On May 29, 2018, forensic neuropsychologist R. Dempsey, Psy.D., conducted psychological testing, at the request of the superior court, regarding Claimant's competency to stand trial. Dr. Dempsey concluded that Claimant was not capable of proceeding with trial due to his deficits in factual knowledge. Dr. Dempsey determined that Claimant is a lower functioning individual who meets criteria for borderline intellectual functioning with deficits in memory and executive functioning including attention with a lengthy substance abuse history and historical diagnosis of psychosis.

RCEB ASSESSMENTS

16. On April 11, 2018, Carmen Hernandez, RCEB Assessment Counselor met with Claimant at the Santa Rita jail. During the interview, Hernandez observed that Claimant was able to engage in reciprocal back and forth conversations with appropriate eye contact. He appeared to comprehend and informed her that he does not have a developmental disability, but he has mental health disabilities. He was able to provide information about his day to day activities in jail, his previous schools and employment, and housing situation. During the assessment, Hernandez noted that Claimant did not move a lot and he was responsive, but he appeared depressed with a flat affect. His speech was clear, understandable and he was able to answer questions properly. He did answer slowly and provided simple answers, but he appeared knowledgeable of information except about the incident that caused his detainment. Claimant was not forthcoming about his mental health history.

During the social assessment, Claimant indicated that he graduated from high school, but he actually had obtained a GED. Claimant knows how to add, subtract, divide, multiply, read and write. He knows how to tell time and can operate various technological devices independently. He knows how to share, take turns, and follow rules. He can follow multiple step directions, complete chores independently, cook, shop

and manage his checking account. He knows how to drive and take public transportation. His attention span for a preferred activity is more than 30 minutes. He does not have friends and has always had trouble fitting in with peers. He socializes with his uncles and family members. He uses eating utensils independently, needs no support toileting, has no concern with sleeping habits, has no fine or gross motor skills limitations, and needs no support with bathing, hygiene, or dressing. Claimant worked as a janitor at Palo Alto University for approximately one year and Logitech for three weeks before his detainment. Also, he worked as a car valet for a hotel for six months.

Hernandez also spoke with Claimant's mother about his prenatal and developmental health history. Claimant has a history of intellectual disability on his maternal side and a history of mental health problems and substance abuse on both his maternal and paternal sides of his family. His mother received prenatal care and denied using alcohol, cigarettes or recreational drugs during pregnancy. She indicated that he always had challenges at school and was withdrawn from others, but he did well in certain subjects and had trouble in others. He also would line up his shoes and was sensitive to loud noises when he was younger. His parents separated when Claimant was 16 years old, and he continued to live with his father but he had regular contact with his mother. His mother indicated that the family dynamic was unstable because of the separation and substance abuse.

17. On June 11, 2018, Michelle Wysopal, Psy.D., conducted a psychological evaluation to determine Claimant's eligibility at the request of RCEB. Dr. Wysopal reviewed his school records, Dr. Everd's report, Dr. Friedman's evaluation, his medical and mental health records, and spoke to his mother about his developmental history. Claimant provided a limited verbal history.

Dr. Wysopal determined that when Claimant was 18 years old, he moved in with his brothers and uncles and he paid rent and utilities until there was a conflict and dispute over rent. He then lived intermittently between his mother and father. According

to his IEPs, his behavior in school was not indicative of significant social emotional deficits and his overall behavior was age-appropriate. He had short term jobs and managed his own funds from a trust fund. He had a driver's license, would drive himself to and from work, and would use navigational systems when driving. He had no difficulties getting ready for work. Claimant showers and brushes his teeth daily without reminders. He eats, toilets, and dresses independently. He would sometimes need reminders from his mother about his spending habits, but he would pay for his own personal items. He could read and write, but had difficulty with math calculations. According to his mother, Claimant needed reminders to clean up after himself and he did not cook meals for himself or complete his chores. He has a history of substance abuse of alcohol, marijuana, and "Spice" which caused him to experience hallucinations. According to Dr. Wysopal, Claimant was able to provide clear and logical answers to her questions; he maintained appropriate eye contact; and he put forth good effort in testing.

18. Dr. Wysopal administered several tests to Claimant including the Wechsler Adult Intelligence Scale – IV (WAIS IV). Claimant received a Full Scale IQ score of 77 on the WAIS IV which is in the borderline range. He received a verbal comprehension score of 87 which is in the low average range, and a processing speed score of 81 which is in the low average range. Dr. Wysopal also attempted to administer the Adaptive Behavior Assessment System – Third Edition (ABAS-III), however, the testing was cut short.

Dr. Wysopal diagnosed Claimant with mild intellectual disability. She also diagnosed Claimant, per history, with alcohol use disorder in remission, ADHD, cannabis use disorder in remission, mild neurocognitive disorder, PTSD, and schizophrenia. In her report, Dr. Wysopal wrote the following:

Test results indicate that [Claimant] is in the Borderline range of intellectual functioning with deficits in adaptive

functioning across the domains of social, communication, and leisure activities. Based on [Claimant's] self-report, his mother's report and records, [Claimant] has particular difficulty within the conceptual domain of activities of daily living. He has significant impairments in short-term memory, executive functioning and academic skills, compared to similar aged peers. He requires help from his mother to manage his finances as well as to help him understand and manage conflicts within his family. Additionally, he has had difficulties in understanding complex social interactions and how to navigate them, as well sustained difficulties in practical domains of life such as maintaining employment and appropriate leisure activities. Records and collateral reports indicated a long-history of difficulty understanding social cues, susceptibility to the influence of others, and risk of manipulation by others.

Both Mild Intellectual Disability and Mild Neurocognitive Disorder Due to Traumatic Brain Injury were considered as diagnoses. Mild Neurocognitive Disorder Due to Traumatic Brain Injury applies to presentations in which symptoms characteristic of a neurodevelopmental disorder are present that cause impairment in social, occupational, or other important areas of functioning. Records indicated that [Claimant] experienced two concussions, one of which occurred at two years of age and involved loss of consciousness. However, [his mother] reported that

[Claimant's] deficiencies were present prior to these injuries and continued throughout his life. As a result of this information, the diagnosis of Mild Intellectual Disability is the most appropriate.

According to the Diagnostic and Statistical Manual, 5th ed. (DSM-5)⁵ an individual must have an IQ of two standard deviations or more below the population mean, deficits in adaptive functioning, and onset during developmental period in order to meet criteria for Intellectual Disability. [Claimant's] test results suggest that his IQ is in the Borderline range and he demonstrates deficits with adaptive functioning according to his mother and self-report. These deficits have been apparent since a young age. Based on available information, it appears that [Claimant] would meet criteria for the diagnosis of Intellectual Disability. His documented academic difficulties despite appropriate accommodation throughout childhood and previous testing support this. These deficits are considered to be lifelong.

19. On July 11, 2018, RCEB's eligibility team convened consisting of Hernandez, Monica Li, Psy.D., and Paul Fujita, M.D. The eligibility team determined that Claimant did not have an eligible disability that manifested prior to the age of 18 years old. In the eligibility decision formulation, the team concluded that:

⁵ DSM-5 refers to Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (2013).

There is no evidence of an eligible condition such as ID in available records prior to the age of 18 years. Special ed records note "Specific Learning Disability" and a MAT-EF score was average. Truancies, tardies and disruptive behaviors were exhibited in school. Testing done after the age of 18 years included low avg-avg. scores (9/17 WAIS-IV VIQ=93, 6/18 WAIS -IV VIQ=87) and cognitive finding in the borderline range (9/17 WAIS-IV FSIQ=77, 6/18 WAIS-IV FSIQ=77). There is 2 hx of dxs of schizophrenia, psychosis NOS, ADHD, PTSD, mild neurocognitive DO due to TBI, alcohol use DO and cannabis use DO. Adaptive functioning is impaired but it is unclear to what degree impairments are related to significant mental health and substance abuse issues as well as decompensation from borderline functioning.

CLAIMANT'S EVIDENCE AT HEARING

20. Dr. Everd testified credibly at hearing regarding the neuropsychology examination of Claimant which involved a battery of tests, including the WAIS-IV, where Claimant achieved a full-scale intelligence score of 77, which falls within the borderline range of intellectual functioning. Claimant's verbal comprehension score of 93 was within the average range, and his scores of 79 for perceptual reasoning, 71 for working memory, and 76 for processing speed were all within the borderline range. Dr. Everd concluded that Claimant's overall cognitive functioning was consistent with the status of borderline intellectual functioning and his overall IQ score represented the cognitive capacity equivalent to that of a 12-year-old child. Dr. Everd diagnosed Claimant with PTSD, ADHD, and Mild Neurocognitive Disorder Due to TBI.

Dr. Everd is aware of the eligibility criteria for regional center services. Dr. Everd opined that Claimant demonstrates a pattern of cognitive performance consistent with a TBI with deficits in some areas similar to an individual with intellectual disability and the treatment for a TBI is similar to treatment for an intellectual disability. Moreover, he opined that Claimant had significant disability in three major life activities which arose before the age of 18 in receptive language, learning, and self-direction based on his academic records.

21. Dr. Everd concluded that Claimant was eligible under the fifth category before the age of 18 years old because:

- a) the pattern of his test scores was consistent with Claimant having a TBI at the age of two and he has had deficits since that time;
- b) Claimant's IQ score of 77 at age 23 would have been the same at age 16, because IQ scores stabilize at age 16;
- c) Claimant's history of attention issues, deficits with memory and learning impairments required special education interventions; and
- d) Claimant's history of physical and sexual trauma with associated PTSD and ADHD, in combination, frequently results in exacerbation of both neurocognitive and psychological impairments resulting in greater deficits in adaptation and achievement.

22. Dr. Everd indicated that he is an expert in the area of TBI and closed head injury. Dr. Everd acknowledged that there were no medical records available diagnosing Claimant with a TBI after age two. Dr. Everd opined that a head injury before the age of two, and the nature of the injury which occurred before four years old, would have significant long lasting effects. This is because the bones of the skull are still suturing at that age and are not as protected resulting in greater potential of direct impact of forces to the brain which is in the process of development and can interrupt developmental milestones. Based on the location of Claimant's visible scar on his head, Dr. Everd

opined that he would likely have sustained damage to white matter in the brain which impacts processing efficiencies and have long term impairment. In addition, a concussion that Claimant sustained at age 15 would have added to his intellectual impairment. According to Dr. Everd, with an early childhood TBI one would expect a child to have a high learning curve, but there would be gaps of abilities over time as tasks became more complicated with age and one would have more deficits.

Regarding Claimant's diagnosis of schizophrenia, Dr. Everd acknowledged that one would expect to see a decline in IQ over time. Here, Dr. Everd opined that Claimant's deficits were too significant to be due to schizophrenia solely and his testing results could be due to both a neurocognitive disorder and his mental health issues. According to Dr. Everd, marijuana use does not change one's IQ or cause neurocognitive decline. Regarding Claimant's use of "Spice," Dr. Everd did not have an opinion because he does not know its impact on cognitive abilities and this area is not well studied. Dr. Everd also acknowledged that Claimant's impairments in coping and independent functioning could be attributed in part to his chronic drug use and multiple voluntary and involuntary psychiatric hospitalization.

RCEB EVIDENCE AT HEARING

23. Dr. Li has been a licensed clinical psychologist since 2002, and she has been employed as a staff psychologist with RCEB since 2004. Dr. Li was on the eligibility team and testified at hearing. Dr. Li never personally evaluated Claimant and only reviewed the available records. Dr. Li does not specialize in TBI.

24. Dr. Li agreed with Dr. Friedman's and Dr. Wysopal's conclusions that Claimant suffers from mild neurocognitive disorder due to multiple etiology, and he has had a decline in cognitive function. However, Dr. Li distinguished neurodevelopmental onset which did not occur prior to the development of Claimant's neurocognitive disorder. In determining that Claimant was not eligible for services under the fifth

category, the eligibility team looked at the presence of chronic mental illness, his prior drug use and alcohol use, as well as SLD that qualified him for special education services, and his academic skills and test scores prior to the age of 18. The team came to a different conclusion than Dr. Everd. The team found that Claimant had a scatter of academic skills and his range of abilities were below average to average. According to Dr. Li, a student with an intellectual disability would have global low academic scores and Claimant's grades were not typical of such a student. Also, Claimant was frequently missing school, late to class, having trouble at home, and sometimes exhibited disruptive behavior that affected his educational progress as opposed to an intellectual disability. A person with an intellectual disability would have adaptive deficits and could not read at a ninth grade level and his or her activities of daily living would be impaired. In this case, Claimant's activities of daily living were noted as age appropriate. According to Dr. Li, Claimant's IEP records show a trajectory of development. Dr. Li's testimony was credible and persuasive that Claimant did not have a developmental disability present prior to the age of 18 years old.

25. Dr. Fujita is board certified in developmental-behavioral pediatrics. He has worked with regional centers for over 25 years, and he has been a staff physician at RCEB since 2004. He served on the eligibility team and testified at hearing. Dr. Fujita is not a specialist in TBI, but is familiar with TBI in the scope of developmental pediatrics.

26. Dr. Fujita opined that Claimant does not meet the criteria for fifth category. Dr. Fujita described the factors that he believes can cause cognitive and adaptive impairments that affected Claimant's functioning after 18 years old including:

- a) Claimant's chronic drug use since age 15 and use of "Spice" since age 18, that caused hallucinations;
- b) Claimant's history of onset of mental illness including psychosis and schizophrenia, anxiety and depression which are associated with cognitive impairments;

- c) Claimant's diagnosis of PTSD, including a history of physical and sexual abuse that are associated with cognitive impairments;
- d) Claimant's history of sustaining a concussion in 2015, and his unexplained head injury at age two; and
- e) Claimant's history of multiple hospitalizations.

Dr. Fujita agreed with Dr. Wysopal's and Dr. Friedman's conclusions; however, there are other factors that he considered. Dr. Fujita relied on Claimant's IEP's, which consistently concluded that Claimant has SLD and did not mention an intellectual disability. Claimant's testing at 13 years old demonstrated both below average and average scores. At that time, Claimant was not impaired enough to be a regional center client and his impairments were more consistent with a learning disability. Furthermore, Claimant's MAT nonverbal cognitive test score of 99 was not consistent with an intellectual disability. Dr. Fujita acknowledged that Claimant's memory test scored in the low average range. However, as an adult Claimant's memory was more impaired likely as a result of schizophrenia which causes problems in memory and working memory. Also, some of the grades that Claimant received in high school, such as a B+ in English, would not be achievable for one with an intellectual disability.

27. Dr. Fujita disagreed with Dr. Everd on the issue of the effect of substance abuse on Claimant's current functioning. Dr. Fujita also questioned whether Claimant suffered a severe head injury resulting in a TBI to cause an intellectual disability. Dr. Fujita referred to the social assessment which did not mention that Claimant was hospitalized as a result of the accident which suggested that it may not have been that severe.

28. Ultimately, in Dr. Fujita's opinion, Claimant does not have a condition closely related to an intellectual disability or that requires treatment similar to that required by individuals with an intellectual disability. Dr. Fujita's testimony was credible and persuasive.

INTELLECTUAL DISABILITY

29. In order to determine if Claimant meets the fifth category, a definition of intellectual disability is required. The DSM-5 defines "intellectual disability" as follows:

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social and practical domains. 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 sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of 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.

As set forth in the DSM-5, "The essential features of intellectual disability (intellectual developmental disorder) are deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual's age, gender, and socioculturally matched peers (Criterion B)."

30. The DSM-5 also distinguishes intellectual disability from communication and specific learning disorders: "These neurodevelopmental disorders are specific to the communication and learning domains and do not show deficits in intellectual and adaptive behavior." There is also a requirement that the intellectual deficits must be "general" in nature in order to meet the definition of an intellectual disability. In other words, an individual must display global intellectual deficits to be identified as having an intellectual disability under the DSM-5.

FIFTH CATEGORY

31. It is undisputed that Claimant currently presents as someone who has an intellectual disability or who has a condition similar to an intellectual disability. It is also undisputed that Claimant's current adaptive behavior deficits are consistent with the adaptive behavior deficits of a person with an intellectual disability or a condition closely related to or similar to an intellectual disability, and that these adaptive behavior deficits are likely to continue indefinitely.

32. However, Dr. Fujita's and Dr. Li's testimony was credible and more persuasive than Dr. Everd's testimony that there is insufficient evidence to document that Claimant had a developmental disability or a similar condition prior to age 18. The evidence established that Claimant's deficits are the result of SLD, mental illness, alcohol and drug abuse, and mild neurocognitive disorder that developed after the age of 18. His school records and testing at the age of 13 reveal evidence of SLD or ADHD, but do not demonstrate subaverage intellectual functioning. Claimant's medical records before the age of 18 also do not demonstrate subaverage intellectual functioning. Moreover, Claimant's history, in conjunction with his available test data, is not consistent with the effects of cognitive and intellectual limitations.

Therefore, Claimant failed to establish that he has a disabling condition that requires treatment similar to that required for individuals with an intellectual disability that manifested before the age of 18. Instead, the evidence established that Claimant's conditions are not covered under the Lanterman Act.

LEGAL CONCLUSION

1. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. (§ 4501.) Neither the Lanterman Act nor its implementing regulations assign burdens of proof. In this case, Claimant asserts that he is eligible for regional center services under the "fifth category." Claimant has the burden of proving that he has that condition. The standard of proof is preponderance of the evidence. (Evid. Code, § 115.)

2. The Lanterman Act defines a developmental disability as:

[A] disability that originates before an individual attains 18 years of age, continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual.

...

[A developmental disability] shall include intellectual disability, cerebral palsy, epilepsy, and autism. 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 an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

(§ 4512, subd. (a).)

3. The DSM-5 also distinguishes intellectual disability from communication and specific learning disorders: “These neurodevelopmental disorders are specific to the communication and learning domains and do not show deficits in intellectual and adaptive behavior.” There is also a requirement that the intellectual deficits must be “general” in nature in order to meet the definition of an intellectual disability. In other words, an individual must display global intellectual deficits to be identified as having an intellectual disability under the DSM-5.

4. A developmental disability not resulting from one of the four listed conditions is referred to as a fifth category developmental disability. Eligibility under this category may be found despite normally disqualifying IQ scores, where it can be shown that an individual is in fact functioning at an adaptive and cognitive level as if he were developmentally disabled, and/or that the treatment he requires is consistent with that needed by an individual with developmental disabilities.

5. Conditions that are solely psychiatric in nature, or solely learning disabilities, do not qualify as developmental disabilities under the Lanterman Act. (Cal. Code Regs., tit. 17, § 54000, subd. (c).) This is the case even when serious problems with social and intellectual functioning exist.

DISCUSSION

6. This is a difficult case. It is undisputed that Claimant currently presents as someone who looks like he has a developmental disability or who has a similar condition. However, the parties disagree regarding whether his condition originated prior to the age of 18. Prior to age 18, there is no evidence of a diagnosis of a

developmental disability. There is conflicting evidence regarding Claimant's intelligence level and its cause. Further complicating the analysis is the fact that many of the behaviors exhibited by Claimant prior to age 18 are as consistent with SLD and ADHD as they are with developmental disabilities and the significance of those behaviors is also disputed.

The evidence that tipped the balance against Claimant's claim was the results of his testing, at age 13, of his reasoning ability that measured his understanding of visual patterns, analogous reasoning, serial reasoning, and spatial visualization. Claimant's standard score was in the average range of 99, and all the subtest scores placed him in the average range. The school psychologist concluded that the discrepancy between Claimant's intellectual disability and his achievement in reading, math and written expression was not the result of intellectual disability. Furthermore, at the age of 15, Claimant's mother specifically took him to his medical doctor because of her concerns with his behavior, and Claimant was diagnosed with problems with learning consistent with his designation of SLD for special education services. In addition, Claimant engaged in activities in high school such as football, albeit for a short period of time. His grades, although scattered, did not demonstrate global intellectual deficits. Finally, Claimant only appeared to have a decline in abilities (such as reading, writing, following directions, working, paying his bills, driving, taking public transportation, etc.) after his diagnoses of psychosis, schizophrenia and multiple voluntary and involuntary hospitalizations after the age of 18.

7. The totality of the evidence determined that Claimant has failed to establish that he has an eligible condition for regional center services. Claimant has not met his burden. Claimant failed to establish that his condition is due to a disabling condition that is closely related to an intellectual disability or requires treatment similar to that required for individuals with an intellectual disability that developed prior to age

18. Consequently, his appeal must be denied.⁶ He has several serious conditions which are not covered under the Lanterman Act, but may qualify him for services through other entities.

ORDER

Claimant's appeal is denied.

DATED: March 8, 2019

REGINA BROWN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Judicial review of this decision may be sought in a court of competent jurisdiction within ninety (90) days.

⁶ Given that Claimant has failed to establish that he is eligible under the fifth category, there is no need to address the issue of whether his condition constitutes a substantial disability.