

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of the Fair Hearing Request of:

CLAIMANT

vs.

TRI-COUNTIES REGIONAL CENTER,

Service Agency.

OAH No. 2019100664

DECISION

Thomas Heller, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on August 24-25, 2020.

Susan Sindelar, Deputy Public Defender, Santa Barbara County Office of the Public Defender, represented Claimant, who did not appear. Claimant's name and his family member's names are omitted to protect their privacy.

Catherine Spencer and Tanika Harris, Managers of Services and Supports, represented Tri-Counties Regional Center (TCRC).

Zenith Hernandez, Hanna Interpreting Services, provided Spanish interpreter services for Claimant's mother during most of her testimony. With the parties' consent, Claimant's brother interpreted part of the testimony due to problems with Ms. Hernandez's audio connection.

Oral and documentary evidence was received. At the end the hearing, the parties requested that the administrative law judge hold the record open for closing briefs. The briefs were marked for identification as exhibits D (Claimant's brief), 23 (TCRC's) brief, and E (Claimant's reply brief).

The record was closed and the matter was submitted for decision on October 6, 2020.

ISSUE

Whether Claimant is eligible for services under the Lanterman Developmental Disabilities Services Act.

EVIDENCE RELIED UPON

Documents: TCRC exhibits 1 through 8 and 10 through 22; Claimant's exhibits A through C. Testimony: Nancy Boroy, M.A., Mary Louise Bland, Ph.D., and Steven M. Graff, Ph.D., testified for TCRC. Tona Wakefield, Francisco Palencia, Claimant's mother, Edward Macias, Ed.D., and Lillian Street testified for Claimant.

FACTUAL FINDINGS

Jurisdictional Matters

1. TCRC determines eligibility and provides funding for services to persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Lanterman Act), among other entitlement programs. (Welf. & Inst. Code, § 4500 et seq.)¹

2. Claimant is a 22-year-old male who currently lives in the Department of State Hospitals pursuant to a court-ordered commitment. In 2019, the Superior Court of California, County of Santa Barbara referred Claimant to TCRC to assess whether he had a developmental disability as defined in the Lanterman Act. (See § 4512, subd. (a).)

3. TCRC assessed Claimant and determined he was ineligible for services because he did not have a developmental disability as defined in the Lanterman Act. TCRC sent the Superior Court a letter dated September 27, 2019, describing that determination.

4. On October 1, 2019, TCRC received Claimant's Fair Hearing Request to appeal TCRC's denial of eligibility. Claimant later waived his rights to have a fair hearing within 50 days of the date that TCRC received his fair hearing request (§ 4712, subd. (a)) and to have a final administrative decision rendered within 80 days of the date that TCRC received the request (§ 4712.5, subd. (a)).

¹ Undesignated statutory references are to the Welfare and Institutions Code.

Background

5. Claimant was born in Mexico on February 24, 1998. He and his family came to the United States and settled in Santa Barbara, California in 2003. According to his mother, Claimant was always behind his siblings in developmental milestones as a small child, but she thought it was just because he was the youngest child. She reported he sat up at eight to nine months, crawled after 12 months, walked after two years, could not write his name until age six, and could not cut or draw in straight lines. Claimant's mother also noted he took longer than his siblings to learn to tie his shoes and to toilet train, and she was unable to leave him at day care like his siblings because he would cry too much and staff would not allow him to remain. He did not learn to share and did not understand that items were not his.

6. Claimant did not attend kindergarten. He began elementary school in Santa Barbara in 2004 as an English as a Second Language (ESL) learner. In May 2006, near the end of second grade, his teachers expressed concern about his learning difficulties in first and second grade. In November 2006, a school psychologist found that he demonstrated a severe discrepancy between his ability and his achievement in multiple academic areas. He scored in the low average range when assessed with a nonverbal intelligence test, and the discrepancy between his intelligence and school performance was attributed to auditory and visual processing deficits. As a result, Claimant was found eligible for and began receiving special education services under an Individualized Education Plan (IEP) under the classification of Specific Learning Disability.

7. Claimant received follow-up psychoeducational assessments in 2009 and 2012. Cognitive assessment results in November 2012 indicated that Claimant's overall nonverbal cognitive ability was within the average range, but he presented with

significant deficits in auditory processing. At the time, Claimant was a 14-year-old ninth grader. The school psychologist noted that Claimant's academic achievement scores had improved in the past three years and he did not display a severe discrepancy between his ability and his achievement at that time.

8. Claimant continued to receive IEP services under a Specific Learning Disability classification until he was about 16 years old, when he had a psychotic episode involving auditory hallucinations and paranoid thinking. He began receiving services from Santa Barbara County Alcohol, Drug and Mental Health Services in December 2014 and was initially diagnosed with Psychosis, NOS (i.e., Not Otherwise Specified). Later, he was diagnosed with Schizophrenia. His school IEP designation was changed from a Specific Learning Disability to an Emotional Disturbance, and he began receiving school supports based on the changed classification. A school Psychoeducational Assessment Report dated November 3, 2015, noted that Claimant was taking Risperdal for symptoms of psychosis and auditory hallucinations, and that he continued to have areas of emotional instability. The school psychologist also documented that Claimant's cognitive processing had been assessed in January 2015, when he was just under 17 years old, and found to be in the average range.

9. Claimant's grades in seventh and eighth grade were generally good, but he performed poorly in high school. He was frequently absent or tardy and was also suspended once for being under the influence of marijuana. His IEP in November 2015 reported that he was credit deficient for graduation with a high school grade point average of 1.1. However, he graduated and received a diploma in June 2016. He enrolled in community college briefly and had jobs at several fast food restaurants for short periods, but was fired from each job for unsatisfactory performance.

Assessment in 2018

10. In September 2018, a social worker requested that Claimant be evaluated for a developmental disability after observing Claimant at a court hearing in Los Angeles County. Claimant had been arrested and jailed after being found in a storage unit in Pasadena, California. Nancy Boroy, M.A., an intake coordinator for TCRC, interviewed Claimant on September 28, 2018, at the Los Angeles County Jail. She noted his mental health history and referred him for a psychological evaluation.

11. Ubaldo F. Sanchez, Ph.D., a licensed psychologist, evaluated Claimant for TCRC on October 16, 2018, reviewing his history and administering the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV); Adaptive Behavior Assessment System – Third Edition (ABAS-3) – Parent Form; Autism Diagnostic Interview – Revised (ADI-R); and Autism Diagnostic Observation Scale – 2 (ADOS-2), Module 4. Claimant had been released from jail, and his mother accompanied him to the evaluation. Claimant scored in the “extremely low range of measured intelligence” on the WAIS-IV, and his ABAS-3 scores, based on his mother’s input, indicated low to extremely low functional abilities, including in communication, functional academic ability, home living, health and safety, self-care, and self-direction. (Exhibit 7.) His ADI-R and ADOS-2 total scores did not fall within the range for autism spectrum disorder. Dr. Sanchez also noted that Claimant had been diagnosed with Schizophrenia and was taking Risperdal 2 mg per day. He was seen every three to four weeks by a psychiatrist and once a week by a psychologist, and he had a history of auditory hallucinations and paranoia. He had also been hospitalized in a psychiatric facility.

12. Based on the records reviewed, test results, and behavioral observations made during the evaluation, Dr. Sanchez concluded that Claimant met the criteria in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental*

Disorders, Fifth Edition (DSM-5) for diagnoses of Borderline Intellectual Functioning; Schizophrenia (Paranoid Type); and Problems Related to Other Legal Circumstances. Dr. Sanchez noted that Claimant's mental illness was serious and that he needed to remain in ongoing mental health treatment including psychotropic medication.

13. On November 13, 2018, TCRC staff psychologist Mary Louise Bland, Ph.D., reviewed Dr. Sanchez's findings and Claimant's records for purposes of assessing Claimant's eligibility for services due to a developmental disability. Dr. Bland concluded that before his mental health issues arose, Claimant had average intelligence and specific learning disabilities, with behaviors typical for someone his age and no indication of deficits in adaptive behavior. Unfortunately, he developed severe mental health issues and his intellectual abilities and adaptive functioning were compromised due to the disordered thinking and the cognitive issues associated with psychoses. The test scores obtained by Dr. Sanchez reflected the effects of Claimant's psychotic disorder. They did not indicate that Claimant has a developmental disability such as an intellectual disability or needs treatment similar to someone with an intellectual disability. Based on Dr. Bland's review, TCRC determined that Claimant was not eligible for services from TCRC.

Assessment in 2019

14. The court referral to TCRC in 2019 was for the purpose of determining his eligibility for services and his competence to stand trial in pending criminal proceedings. Ms. Boroy and a bilingual service coordinator met with Claimant on September 13, 2019, at the Santa Barbara County Jail. Claimant told Ms. Boroy he was in jail for stealing two bottles of champagne from his girlfriend's house. When asked the girlfriend's name, he stated he was "not sure." Ms. Boroy asked about what Claimant understood about schizophrenia, and he stated he "got it" when he was a

freshman or sophomore in high school in 2014. Claimant stated he heard voices and felt scared, afraid, and like he was being chased. Claimant also stated he took medication but could not remember the name of the medication. Ms. Boroy observed that Claimant used appropriate eye contact but often looked around the room and sometimes smiled without obvious reason.

15. Steven M. Graff, Ph.D., a licensed psychologist and the Director of Clinical Services for TCRC, evaluated Claimant for TCRC with the assistance of a Spanish interpreter on October 16, 2018. Dr. Graff reviewed Claimant's school records and prior assessments, interviewed Claimant in English, and administered the Receptive One-word Picture Vocabulary Test (Spanish-Bilingual Edition) and the Test of Nonverbal Intelligence-Fourth Edition (TONI-4) in Spanish. The interpreter reported to Dr. Graff that he was not needed because Claimant understood English. Nonetheless, the testing instruments were nonverbally based in order to minimize any cultural or language factors.

16. On the Receptive One-word Picture Vocabulary Test, Claimant had a standard score of 62 (first percentile), which was in the mildly disabled range. On the TONI-4, Claimant had an index score of 66 (first percentile), which Dr. Graff reported was in the mild intellectually disabled range. Dr. Graff noted that Claimant's mood varied during the testing, vacillating between appearing uninterested in the evaluation, then looking bored, and at other times impatient for Dr. Graff to finish. Overall, Dr. Graff felt that Claimant did not give his best effort to the testing, and that his scores may be a mild underestimate of his cognitive abilities. Claimant also smiled at random times and appeared to be acting on internal stimuli and possibly voices, at times looking around as if he heard noises that Dr. Graff could not hear.

17. Based on Claimant's records, test results, and observed behaviors, Dr. Graff initially diagnosed Claimant with "Schizophrenia, Paranoid Type (by history);" and "Mild Intellectual Disability (may be slight underestimate of his abilities however his adaptive functioning is in the mild range of impairment)." (Exhibit 8.) In his psychological evaluation report dated September 19, 2019, Dr. Graff concluded that Claimant's schizophrenia was the most severe diagnosis and "there are no indications of any developmental disability prior to his 18th birthday" for purposes of eligibility for services from TCRC. (*Ibid.*) Instead, Claimant "has a severe and persistent mental illness (schizophrenia) and is impaired solely by it." (*Ibid.*)

18. TCRC's clinical team reviewed the intake and assessment information and notified the Superior Court that Claimant did not have a developmental disability as defined in the Lanterman Act. On October 3, 2019, Dr. Graff prepared an addendum to his report to "correct[] his erroneous use of the diagnosis of intellectual disability disorder." (Exhibit 8.) In the addendum, Dr. Graff changed his diagnosis of Mild Intellectual Disability to "Major Neurocognitive Disorder", explaining "Major Neurocognitive Disorder . . . is characterized by a significant cognitive decline from a previous level of performance in one or more cognitive domains. Intellectual Disability Disorder should not be diagnosed if the onset of intellectual and adaptive deficits is later than the developmental period. It is clear that the onset of [Claimant's] cognitive and adaptive deficits occurred after his first psychotic episode and is not related to a developmental process. Therefore a diagnosis of intellectual disability is contraindicated." (*Ibid.*) Dr. Graff's diagnosis of Schizophrenia, Paranoid Type (by history) was unchanged, as was his opinion that Claimant did not have a qualifying developmental disability for purposes of the Lanterman Act.

Neuropsychological Evaluation in 2020

19. On February 7, 2020, the Superior Court referred Claimant to Edward Macias, Ed.D., a licensed psychologist, for further evaluation of Claimant's current cognitive status and competence to stand trial. Dr. Macias reviewed records, performed a clinical interview and mental status examination, and administered the Wechsler Adult Intelligence Scale IV (WAIS-IV), Boston Naming Test (BNT), Rey Auditory Verbal Learning Test (RAVL), Trail Making Test A and B, Rey-Osterrieth Complex Figure Test, Stroop-Color Word Test (Stroop-CWT), Rey Memory Test for Malingering, Wiggins/Brandt Interview, and Malingering Profile Index.

20. Overall, Claimant's performance was significantly below average/normal and suggested poor memory, poor executive function, slow mental processing speed, and significantly below average mental skills, IQ, and intellectual functioning. On the WAIS-IV, Claimant's full-scale IQ was measured at 63, which is within the cognitively impaired range of intelligence. Considering all the test results, Dr. Macias diagnosed Claimant with a DSM-5 diagnosis of Major Neurocognitive Disorder. Classifying Claimant's neurocognitive impairments and deficits as severe, Dr. Macias determined that Claimant functioned mentally at the level of a child between 12 to 14 years of age, and that his condition was permanent. Dr. Macias also noted that Claimant had been diagnosed with Schizophrenia in the past and been treated with medication. However, Claimant did not seem to be experiencing psychotic symptoms at the time of the evaluation.

Hearing

TCRC's CASE

21. TCRC offered relevant school and mental health records for Claimant and records of the assessments of Claimant in 2018 and 2019. It also presented the testimony of three witnesses.

Nancy Boroy, M.A.

22. Ms. Boroy described her two intake interviews of Claimant and testified that Claimant's mother was involved in the intake process in both 2018 and 2019. Ms. Boroy testified she did not perform a full intake assessment of Claimant in 2019 because she had just seen in for an intake assessment in 2018. During the interview in 2019, Claimant was disheveled and rocking back and forth.

Mary Louise Bland, Ph.D.

23. Dr. Bland has been a Staff Psychologist with TCRC for 22 years. She testified that the assessments and testing conducted prior to the onset of Claimant's mental illness did not evidence intellectual disability or deficits in adaptive behavior. Claimant's academic difficulties before the onset of mental illness were primarily due to a learning disability, and his intellectual abilities were in the average and low average range. It was only after the onset of Claimant's mental illness that he showed deficits in cognitive ability and adaptive skills.

24. Dr. Bland attributed Claimant's diminished cognitive functioning and extremely low adaptive functioning to his mental illness, not to an intellectual disability. Dr. Bland noted that a mental illness such as Schizophrenia often causes a decline in cognitive and adaptive skills. This decline is secondary to Schizophrenia and

not the result of an intellectual disability. Furthermore, the treatment of Schizophrenia is medication-based, unlike the treatment for intellectual disability or similar conditions, which is not. Dr. Bland did not meet personally with Claimant or his mother but based her opinions on a review of Claimant's records.

Steven Graff, Ph.D.

25. Dr. Steven Graff has been facilitating and overseeing the eligibility determination process for regional centers for 24 years. He is a former Chairperson of the Association of Regional Center Agencies (ARCA) Psychologists Group and the current Chairperson of the ARCA Clinical Directors Group. Dr. Graff testified that in his observation of Claimant, he did not present with an intellectual disability. Instead, Claimant had major psychiatric issues that were gravely disabling. There was never a definitive diagnosis of intellectual disability by any of the professionals by TCRC. Dr. Graff initially diagnosed Claimant with Schizophrenia, Paranoid Type (by history) and Mild Intellectual Disability, but he changed the latter diagnosis to Major Neurocognitive Disorder in his addendum report. He testified his initial diagnosis was a mistake because intellectual disability by definition requires evidence of onset with the developmental period (i.e., before age 18), which Claimant's records did not show. Dr. Graff also testified that Claimant's adaptive functioning appeared to have increased somewhat with the use of anti-psychotic medication.

CLAIMANT'S CASE

26. Claimant offered additional school and mental health records and the written report of Dr. Macias's assessment in February 2020. Claimant also presented the testimony of five witnesses:

Tona Wakefield

27. Tona Wakefield is a resource specialist with the Santa Barbara County Office of the Public Defender. She has worked on Claimant's case for almost two years. Ms. Wakefield testified that efforts to place Claimant in the community and at a program have failed due to the extensive needs and support he requires to accomplish activities of daily living. Her entire job is to house and support people with serious mental illness, and there are no programs in the county other than TCRC programs that could take Claimant based on the needs that he has. Ms. Wakefield further opined that Claimant requires specialized residential care or supported semi-independent living to assist him with cooking, cleaning, and hygiene, with one-on-one assistance; continued service coordination and management; generic or special social or recreational services in the form of day programs; and behavioral support. She testified that the only placements she is aware of that provide these kinds of services and supports are TCRC-based placements.

Francisco Palencia

28. Francisco Palencia began working for the Santa Barbara County Behavioral Wellness ACT Program one day prior to the hearing, with a background in substance abuse and mental health counseling. He has known and worked with Claimant's family for almost 10 years. Mr. Palencia explained that the services available through Santa Barbara County Behavioral Wellness, including triweekly check-ins and medication management, were inadequate support for the structure that Claimant requires. Mr. Palencia further opined that Claimant's issues are not solely related to mental health or substance abuse. Claimant's mother came to Mr. Palencia for help with Claimant's behaviors when Claimant was 12 or 13 years old, but Claimant was unable to grasp concepts and needed structure and coping skills to be productive

even then. Even after breaking information down into steps, Claimant still could not understand "after two seconds." Mr. Palencia noted that Claimant's mother did everything she could but was not able to and simply could not provide the structure Claimant needed on her own. Claimant's father left the family to return to Mexico in 2011.

Claimant's Mother

29. Claimant's mother testified it was always difficult for Claimant to learn even from a very young age. In addition to his delayed milestones, Claimant was very shy and wanted to be isolated. She testified that when Claimant was 11 years old, his father was deported due to domestic violence and the issues got even worse. Claimant isolated himself even more, would refuse to shower or dress, and was more depressed. Claimant did not and still does not understand sarcasm or jokes, and he simply laughs when others around him laugh. These behaviors preceded his psychotic break when he was 16 years old.

Edward Macias, Ed.D.

30. Dr. Macias has practiced neuropsychology for more than 25 years and teaches neuropsychology to students. He previously trained University of California, San Francisco physicians how to conduct neuropsychological testing, interventions, and behavioral modifications. Dr. Macias spent 10 hours interviewing and testing Claimant, reviewing records, and writing his report. The tests he conducted were standard measures of various functions of the brain.

31. Dr. Macias testified Claimant performed poorly on all the tests, which was indicative of significant cognitive deficits and significant brain impairment. Furthermore, Claimant's test scores were so low that it was likely the neurocognitive

involvement and deficits were present at an early age. Reviewing Claimant's test scores and school records, the impairment could very well have started when Claimant was a child, but the appropriate neuropsychological testing was not performed. Claimant's learning disability diagnosis was a possible red flag for performing at least a screening for neurocognitive deficits.

32. Dr. Macias also testified that most schizophrenics who are not actively psychotic will perform fine on the tests he administered to Claimant. Studies have shown that Schizophrenia can have some effect on an individual's IQ and cognitive functions, but not to the level that Claimant displayed. Claimant did not appear to be experiencing psychotic symptoms during the examination, and Dr. Macias opined that the level of impairment Claimant displayed was not due to Schizophrenia.

33. In his written report, Dr. Macias diagnosed Claimant with a Major Neurocognitive Disorder rather than an intellectual disability. When asked if Claimant had an intellectual disability, Dr. Macias testified he had not considered intellectual disability because Claimant's major problem was brain impairment. Considering the question during the hearing, Dr. Macias testified one could say Claimant had an intellectual disability, but it was not Claimant's primary reason for an inability to function. Dr. Macias also testified that a diagnosis of Major Neurocognitive Disorder can be closely related to a diagnosis of intellectual disability.

Lillian Street

34. Lillian Street, an investigator with the Santa Barbara County Office of the Public Defender, has worked with Claimant and his mother for almost two years. She testified that Claimant would lose jobs because he could not recall steps in tasks or would complete different tasks, e.g., he would mop the carpet or mix up steps in

cleaning out machines. Ms. Street also testified that the services and supports Claimant needs in the form of one-on-one aides and assistance with activities of daily living are unavailable to those receiving treatment solely for mental illness. She explained that the psychiatric facilities, including board and care facilities, allow patients to wander and if not locked, many patients elope as a result of insufficient staffing and patient monitoring.

Analysis of Evidence

35. The weight of the evidence supports a finding that Claimant does not have an intellectual disability. The expert evidence about Claimant's condition does not support that diagnosis. Dr. Sanchez diagnosed Claimant with Borderline Intellectual Functioning, not with intellectual disability. Dr. Bland also did not diagnose Claimant with an intellectual disability and explained that his cognitive scores before he turned 18 years old did not support that diagnosis. Dr. Graff initially diagnosed Claimant with Schizophrenia, Paranoid Type (by history) and Mild Intellectual Disability, but he later called the latter diagnosis a mistake and changed it to Major Neurocognitive Disorder. Dr. Macias also diagnosed Claimant with Major Neurocognitive Disorder and did not consider a diagnosis of intellectual disability before the hearing. While Dr. Macias opined at the hearing that Claimant has an intellectual disability, TCRC's evidence that he does not had more persuasive force.

36. At the same time, the evidence supports a finding that Claimant has a disabling condition that involves more than just a psychiatric condition. Both Dr. Graff and Dr. Macias diagnosed Claimant with Major Neurocognitive Disorder in addition to Schizophrenia (by history), and Dr. Macias persuasively testified that the level of impairment he observed was too severe to be explained as merely the product of Claimant's psychiatric disorder. Furthermore, Dr. Macias's testimony that Claimant's

Major Neurocognitive Disorder was likely present but undetected before Claimant turned 18 years old makes more sense than the idea that it developed after Claimant became an adult. Claimant had learning difficulties and developmental issues throughout his childhood, and those issues became markedly worse after his psychotic break in high school when he was about 16 years old. TCRC offered no evidence of events or circumstances after Claimant turned 18 years old that would explain an adult onset of the Major Neurocognitive Disorder.

LEGAL CONCLUSIONS

General Legal Standards

1. The Lanterman Act provides facilities and services to meet the needs of persons with developmental disabilities, regardless of age or degree of disability. (§ 4501.) Under the Act, "'[d]evelopmental disability' means 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. . . . [T]his term 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).) "'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." (§ 4512, subd. (1)(1).

2. TCRC determined Claimant does not have a developmental disability as defined in the Lanterman Act. Claimant disagrees and has properly exercised his right to an administrative fair hearing. (See §§ 4700-4716.) As an applicant seeking to establish eligibility for government benefits or services, Claimant has the burden of proof. (See, e.g., *Lindsay v. San Diego County Retirement Board* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; see also *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1136 [denying eligibility where an applicant's expert opinion evidence did not "sufficiently refute" the regional center's expert opinion evidence].) This burden requires proof by a preponderance of the evidence, because no provision in the Lanterman Act or another law provides otherwise. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."].) A preponderance of the evidence means "'evidence that has more convincing force than that opposed to it.' [Citation.]" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Analysis

3. Claimant did not prove he has an intellectual disability. The expert evidence about Claimant's condition does not support that diagnosis. TCRC's evidence from its professionals that Claimant did not have an intellectual disability had more persuasive force than Claimant's opposing evidence. (Factual Finding 35.)

4. Claimant also did not prove he has cerebral palsy, epilepsy, or autism. (§ 4512, subd. (a).) None of the experts who testified or provided reports diagnosed Claimant with any of these conditions, and Dr. Sanchez's testing of Claimant does not support a diagnosis of autism spectrum disorder. (Factual Finding 11.)

5. However, Claimant did prove by a preponderance of the evidence that he has a "fifth category" developmental disability, that is, a "disabling condition[] . . . closely related to intellectual disability or . . . requir[ing] treatment similar to that required for individuals with an intellectual disability. . . ." (§ 4512, subd. (a); *see Samantha C. v. State Dept. of Developmental Services* (2010) 185 Cal.App.4th 1462, 1486-1487 (*Samantha C.*).

6. In *Samantha C.*, a young adult (Samantha) seeking regional center services was born prematurely and with hypoxia (oxygen deprivation). In elementary school, her cognitive abilities were measured to be in the average range, but she received special education services because of deficits in auditory processing, language, speech, and memory. She was later diagnosed with attention deficit disorder. She ultimately graduated from high school and enrolled in a junior college, but received Supplemental Security Income (SSI) disability benefits and qualified for Department of Rehabilitation services. During the process of requesting regional center services, cognitive tests yielded scores of 92 and 87, with a Full-Scale IQ score of 90, placing her in the average range. Adaptive functioning testing revealed that she functioned adequately in daily living and social skills, but at a moderately low level in the area of communication. While various experts arrived at different conclusions, at least two experts (whom the court found persuasive) opined that she had major adaptive impairments and functioned in the range of someone with mental retardation (i.e., intellectual disability). The same experts opined that her hypoxia affected her brain and created a neurocognitive disorder explaining her various deficits. One expert stated that her cognitive and adaptive skills deficits "'might all be subsumed under a diagnosis of Cognitive Disorder Not Otherwise Specified, indicating that they are secondary to a medical condition.'" (*Samantha C., supra*, 185 Cal.App.4th at p. 1493.)

7. The court held that Samantha had a fifth category condition and was therefore eligible for regional center services. First, the court concluded she had a disabling condition, i.e., she had "suffered birth injuries which affected her brain and that her cognitive disabilities and adaptive functioning deficits stem, wholly or in part, from such birth injuries." (*Samantha C., supra*, 185 Cal.App.4th at pp. 1492-1493.) Since the evidence established that her cognitive and adaptive deficits were related to her hypoxic birth episode, there was no substantial evidence that her condition was solely psychiatric or solely a learning disability, which are both excluded from the Lanterman Act definition of developmental disability. (*Id.*; see Cal. Code Regs., tit. 17, § 54000, subd. (c)(1)-(2).) Second, the court held that her condition required treatment similar to that required by individuals with intellectual disability, based on expert testimony comparing her treatment needs to those of intellectually disabled persons. (*Samantha C., supra*, 185 Cal.App.4th at pp. 1493-1494; cf. *Ronald F. v. Dept. of Developmental Services* (2017) 8 Cal.App.5th 84, 97-99 ["treatment" has "a different and narrower meaning" than "services" for persons with developmental disabilities, such as those listed in section 4512, subdivision (b)].)

8. In this case, Claimant proved he has a disabling condition closely related to intellectual disability. Both Dr. Graff and Dr. Macias diagnosed Claimant with Major Neurocognitive Disorder, and Dr. Macias's testing indicated major cognitive dysfunction similar to a person with an intellectual disability. (Factual Findings 30-33.) In fact, Dr. Graff initially identified Claimant's Major Cognitive Disorder as Mild Intellectual Disability (Factual Finding 18), further evidencing the similarity of the condition to intellectual disability.

9. Claimant also proved that Claimant's disabling condition likely originated before Claimant attained 18 years of age and is likely to continue indefinitely. Dr.

Macias indicated that Claimant's disabling condition was permanent (Factual Finding 20), and no evidence suggests otherwise. Furthermore, Dr. Macias's testimony that Claimant's Major Neurocognitive Disorder was likely present but undetected at an early age makes more sense than the idea that it developed after Claimant became an adult. (Factual Finding 36.)

10. In addition, Claimant proved that his disabling condition was not solely a learning disability or a "[s]olely psychiatric disorder[] where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder," which are excluded from the Lanterman Act definition of developmental disability. (Cal. Code Regs., tit. 17, § 54000, subd. (c)(1)-(2).) A preponderance of the evidence supports a finding that Claimant has a disabling condition that involves more than just a psychiatric condition or a learning disability. Both Dr. Graff and Dr. Macias diagnosed Claimant with Major Neurocognitive Disorder in addition to Schizophrenia by history, and Dr. Macias persuasively testified that the level of impairment he observed in Claimant was too severe to be explained as merely the result of Claimant's psychiatric disorder. (Factual Finding 36.)

11. Finally, the evidence shows that Claimant's disabling condition is a substantial disability. Dr. Sanchez's report for TCRC noted Claimant's low to extremely low functional abilities, including in communication, functional academic ability, home living, health and safety, self-care, and self-direction. (Factual Finding 11.) These results show significant functional limitations in more than three of the five areas described in section 4512, subdivision (1)(1). Self-care. [¶] (B) Receptive and expressive language. [¶] (C) Learning. [¶] (D) Mobility. [¶] (E) Self-direction. [¶] (F) Capacity for independent living. [¶] (G) Economic self-sufficiency." Dr. Bland also agreed that the results evidenced extremely low adaptive functioning. (Factual Finding 24.)

12. TCRC argues that Claimant's adaptive deficits are caused primarily by his Schizophrenia rather than his Major Neurocognitive Disorder. But Dr. Macias's testing indicates that Claimant's Major Neurocognitive Disorder is serious and the result of significant impairments in his functioning. Attributing Claimant's adaptive deficits to just one of Claimant's serious conditions and not the other is not justified.

13. Therefore, Claimant met his burden of proving he has a fifth category condition.

ORDER

Claimant's appeal is granted. Claimant is eligible for Lanterman Act services under the fifth category of developmental disability.

DATE:

THOMAS HELLER

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.