

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

In the Matter of the Eligibility of:

Claimant

vs.

Central Valley Regional Center, Service Agency

OAH No. 2020090426

DECISION

Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on February 4, 2021, from Sacramento, California.

Claimant's father represented claimant.

Tamara Salem, Appeals and Compliance Coordinator, represented Central Valley Regional Center (CVRC or regional center).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on February 4, 2021.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act - Welfare and Institutions Code¹ §§ 5000 et seq.) based on a diagnosis of autism; and if so, do the resulting symptoms constitute a substantial disability?

FACTUAL FINDINGS

Jurisdictional Matters

1. On or about September 8, 2020, CVRC provided a Notice of Proposed Action to claimant, finding her ineligible for services pursuant to section 4512, subdivision (a). The regional center based its decision on the Intake Assessment by Alex Vang, CVRC Intake Counselor, signed March 2, 2020; the Psychological Assessment by Angie Wright Morrow, Ph.D. dated July 16, 2020; and the findings of the CVRC Multidisciplinary Eligibility Team (Team) dated August 28, 2020.

2. On or about September 10, 2020, claimant and her parents filed a Fair Hearing Request (Request), appealing CVRC's denial of eligibility and services. In the Request, claimant indicates her eligibility as: "developmental disability and/or handicapping condition closely related to intellectual disability and/or requiring similar treatment." However, at hearing, claimant's father amended the Request, identifying

¹ All further references will be to the Welfare and Institutions Code unless otherwise stated.

claimant's eligibility for regional center services is based upon a diagnosis of autism alone.

Background

3. Claimant is a 19-year-old female, who lives with her grandparents in Clovis. Currently, she is taking general education classes at Clovis Community College. She is not employed and relies on her parents for financial support. Claimant maintains all activities of daily living independently. She manages her personal grooming. She can do laundry, purchase clothes, pay bills, and pick up prescriptions on her own, but she needs reminders to take the same medications. She can heat food in the microwave; go grocery shopping, but often buys non-nutritious foods; and she maintains a driver's license and drives herself to school as needed. She is involved in church and has volunteered at the library.

MEDICAL HISTORY

4. Claimant provided medical records from her psychiatrist, Bradely Wajda, D.O., covering care from April 14, 2014, through September 4, 2019. In April 2014, Dr. Wajda diagnosed claimant with Pervasive Developmental Disorder (PDD) – Not Otherwise Specified (NOS) and a Conduct Disorder (Axis I); his medical records or S.O.A.P.² notes, dated April 24, 2014, rules out Autism Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD), Anxiety Disorder, Body Dysmorphic Disorder, and Obsessive Compulsive Disorder (OCD). In January 2015, Dr. Wajda added a Bipolar Disorder diagnosis, and his S.O.A.P. notes, dated January 28, 2015, indicates his desire to rule out Anxiety Disorder too. From January 28, 2015 through September

² S.O.A.P. stands for subjective, objective, assessment, and plan.

4, 2019, Dr. Wajda's assessment of claimant was "no change." From 2014 through 2019, Dr. Wajda prescribed claimant several classes of medications, including antipsychotics, antidepressants, and anticonvulsants/pain, as well as recommending regular multivitamins; and in July 2015, he referred her for ongoing counseling.

EDUCATION

5. Claimant attended public school in the Clovis Unified School District (District). The District found claimant eligible for an Individualized 504 Plan for at least grades nine through twelve (2015-2019). A 504 Plan is provided to K-12 students under the Rehabilitation Act of 1973 (29 U.S.C. §§ 701 et seq.); a federal civil rights law prohibiting discrimination against persons with disabilities when they are working or participating in programs receiving federal funding. The Rehabilitation Act uses the definition of disability outlined by the Americans with Disabilities Act of 1990 (ADA - 42 U.S.C. §§ 12101 et seq.). In sum, section 504 of the Rehabilitation Act requires public school districts to provide accommodations to students with ADA qualifying disabilities.³

6. Claimant provided her grade 12 Individualized 504 Plan, dated August 2018. The 504 Plan lists claimant's qualifying diagnoses to include: Anxiety Disorder, Sensory Integration Disorder, ADHD, OCD, and PDD. The 504 Plan offered claimant accommodations, including "anytime pass to counselor, psychologist, or nurse so that

³ Of note: students who qualify for accommodation under the Rehabilitation Act may not qualify for services under Individuals with Disabilities Education Act (IDEA – 20 U.S.C. §§ 1400 et seq.) (i.e. special education in school) or the Lanterman Act (i.e. regional centers).

student has a safe place to deescalate if feeling anxious, overwhelmed, or tired[; and] One extra block day on classroom assignments or homework if requested by [claimant] or her parents.”

7. In June 2019, claimant graduated from high school with a diploma. She applied for and was accepted into a Certified Nursing Assistant (CNA) program. She moved into an assisted living environment and took and passed her driver’s test. By September 2019, claimant had begun CNA classes, and was successfully living in the assisted living environment, driving on her own, and scheduling her own therapy appointments. In 2020, claimant began attending Clovis Community College. In or about February 2020, claimant and her parents requested services from CVRC.

Eligibility for Regional Center Services

8. Claimant seeks eligibility under the developmental disability of autism. The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5, effective May 2013) identifies ASD to include autism disorder, Asperger’s disorder, and PDD-NOS. For Autism, the DSM-5 provides five diagnostic criteria to evaluate (A-E). The criteria include:

(A) persistent deficits in social communication and social interaction across multiple contexts, including deficits in (1) social-emotional reciprocity, (2) nonverbal communication behaviors used for social interaction, and (3) developing, maintaining, and understanding relationships;

(B) restricted, repetitive patterns of behavior, interests, or activities, as identified by at least two of the following: (1) stereotyped or repetitive motor movements, use of objects

or speech, (2) insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior, (3) highly restricted, fixated interests that are abnormal in intensity or focus, (4) hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment;

(C) symptoms that are present in the early developmental period;

(D) symptoms that cause clinically significant impairment in social, occupational, or other important areas of current function; and

(E) disturbances not better explained by intellectual disability or global developmental delay.

ASD ASSESSMENTS

Dr. Morrow – July 2020

9. CVRC sent claimant for an assessment with Dr. Morrow. Dr. Morrow reviewed the CVRC Intake Assessment, Dr. Wajda's S.O.A.P. notes, and on July 16, 2020, conducted a clinical interview and administered the following tests to claimant: Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV), Adaptive Behavior Assessment Scale, Third Edition (ABAS-III), Social Communication Questionnaire (SCQ), Childhood Autism Rating Scale, Second Edition Questionnaire for Parents or Caregivers (CARS-II-QPC), and Autism Diagnostic Observation Schedule, Second

Edition (ADOS-II). Dr. Morrow drafted an Assessment Report on July 29, 2020 and gave the same to CVRC. CVRC offered the Report, but Dr. Morrow did not testify at hearing.

10. In the Report, Dr. Morrow summarized claimant's background, including prenatal, developmental, educational, medical, and family history; the prior evaluation by CVRC Intake Counselor Vang, including independent living, social/emotional and cognitive/communication skills; claimant's test scores; and her behavioral observations. Taken together, Dr. Morrow found claimant did not meet the diagnosis of ASD.

11. For background, Dr. Morrow administered the CARS-2-QPC; an unscored data collection tool to assist a clinician in assessing an individual for ASD. In this case, claimant's mother was asked to rate her child in 15 functional areas relevant to autism, on a scale of one to four, pinpointing symptom severity. The 15 areas include early development, social, emotional, and communication skills, repetitive behaviors, play and routines, and unusual sensory interests. From the CARS-2-QPC, Dr. Morrow learned: claimant never displayed challenges with communicating, nor did she struggle to play as a young child; claimant sometimes has a hard time sustaining an interactive conversation with others, because she can dominate conversations; she makes friends easily, but has difficulty maintaining friendships; claimant previously rocked when she was upset, and she always does things that might result in self-injury (e.g. scratching herself); claimant has difficulty coping with a change in routine and new experiences, and sometimes has specific ways things must be done; and claimant is always overly sensitive to some sounds, smells, textures, and may overreact to others' touch.

Dr. Morrow also administered several scored assessments. First, the WAIS-IV, a global intellectual functioning test, measuring the general ability and reasoning skills of individuals 16-90 years. Based on the WAIS-IV, claimant's general cognitive ability is within the Low Average range of intellectual functioning. Her specific results: verbal

comprehension – average, perceptual reasoning – average, working memory – average, processing speed – extremely low, full scale – low average, general ability – average.

Claimant's mother also completed the ABAS-III questionnaire and the SCQ. The ABAS-II measures adaptive skills and the SCQ focuses on three areas of functioning: reciprocal social interaction, communication, and restricted, repetitive, and stereotyped patterns of behavior. On the ABAS-II, claimant's mother rated claimant as Below Average in conceptual, composite and practical composite skills, and on the SCQ, claimant's mother rated claimant a 10; below the 15 or greater score indicating ASD.

Finally, claimant completed the ADOS-II; a semi-structured, standardized assessment of language and communication, reciprocal social interaction, imagination, stereotyped behaviors and restricted interests, and other abnormal behaviors. Claimant was given the ADOS-II, Module 4, for adolescents or adults who are using fluent speech; Dr. Morrow found claimant displayed "minimal-to-no levels of autism-spectrum related systems."

In considering the assessments, Dr. Morrow noted: "[d]ue to the [claimant's] anxiety and comfort level with strangers, [claimant's] Mother was present during the assessment session. Interpretation should be proceeded with caution." Nonetheless, Dr. Morrow found claimant's assessment results were inconsistent with an ASD diagnosis.

12. Dr. Morrow then reviewed the DSM-5 criteria for ASD and compared claimant to the required criteria. For (A), an individual must meet all three components: (1) deficits in social-emotional reciprocity, (2) deficits in nonverbal

communicative behaviors used for social interaction, and (3) deficits in developing, maintaining, and understanding relationships. Dr. Morrow determined claimant met none of the three components of (A).⁴

13. CVRC received Dr. Morrow's Report. The Team met and on August 28, 2020, determined claimant was not eligible for services under an autism diagnosis. On September 8, 2020, CVRC notified claimant and her parents of the denial. On or about September 9, 2020, claimant and her parents filed a Request, seeking an informal meeting with CVRC and an administrative hearing.

Amanda Nicolson, Ph.D. – October 2020

14. Following the denial, claimant and her parents engaged Amanda Nicolson, Ph.D., Board Certified Behavior Analyst (BCBA-D), Center for Applied Behavior Analysis (ABA), to complete an assessment of claimant. Dr. Nicolson interviewed claimant and her parents via Zoom on October 12, 2020 and administered the CARS-II-High Functioning (HF) assessment test. Dr. Nicolson drafted an

⁴ While not required, Dr. Morrow did consider the second criteria; (B) restricted, repetitive patterns of behavior, interests, and activities. If an individual meets all three components of (A), the (B) criteria are evaluated; and an individual must meet at least two of four components of (B). (B) includes: (1) stereotyped or repetitive motor movements, use of objects, or speech; (2) insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior; (3) highly restrictive, fixated interests that are abnormal in intensity or focus; (4) hyper- or hypo activity to sensory input or usual interest in sensory aspects of the environment. Dr. Morrow found claimant met (1) and (4).

Assessment Report on October 12, 2020 and gave the same to claimant and her parents. On October 13, 2020, Dr. Wajda countersigned the Report. Claimant offered Dr. Nicolson's Report at hearing, but Dr. Nicolson did not testify.

15. In her Report, Dr. Nicolson summarizes claimant's CARS-II-HF test score and her behavioral observations. Taken together, Dr. Nicolson suggested claimant meets the diagnosis of ASD.

16. Dr. Nicolson administered the CARS-2-HF assessment test. The CARS-2-HF includes 15 items, rated by the clinician between one and four, based upon interactions and observations of claimant by her parents. Dr. Nicholson rated claimant with the following scores: social emotional understanding – 3 (significant), emotional expression and regulation of emotions – 3 (significant), relating to people – 2, body use – 2, object use in play – 2, adaptation to change/restricted interests – 3 (significant), visual response – 2, listening response – 3 (significant), taste, smell and touch response and use – 3 (significant), fear and nervousness – 2, verbal communication – 3 (significant), nonverbal communication – 2, thinking/cognitive integration – 3 (significant), level and consistency of intellectual response – 1, general impressions – 3 (significant). Dr. Nicolson gave claimant a total score of 37, placing her in the category of severe symptoms of ASD (34 or higher). Dr. Nicolson notes: "[t]here were several categories that were near textbook responses in regard to how [claimant] responded to the item on the assessment." A raw score of 37 equates to a T-score of 55, placing claimant in the 69-percentile of the population known to have been diagnosed with ASD.

17. Finally, Dr. Nicolson reviewed the ASD criteria in the DSM-5 and compared claimant to the required criteria. Under (A), deficits in social communication and interaction, Dr. Nicolson found claimant met all three components: (1) social-

emotional reciprocity, (2) nonverbal communicative behaviors used for social interaction, and (3) developing, maintaining, and understanding relationships. Dr. Nicolson evaluated claimant's current severity of social-communication impairments to be a level 1 – requires minimal support.

Dr. Nicolson then quotes (B) criteria, restricted, repetitive patterns of behavior, interests, and activities, but makes no findings; nonetheless, she indicates claimant's current severity of restricted, repetitive patterns of behavior and interests to be a level 1 – requires minimal support. Dr. Nicolson also quotes (C) criteria, symptoms must be present in the early developmental period, but again makes no finding. Finally, for (D) criteria, Dr. Nicolson finds claimant to have symptoms causing clinically significant impairment in social, occupational or other important areas of current functioning. Based on her assessment, Dr. Nicolson recommends a diagnosis of ASD and "strongly recommends" ABA training for claimant and her parents.

CVRC FINDINGS

18. Kai Yang, Ph.D., CVRC Staff Psychologist II, testified at the hearing. Dr. Yang has worked at the CVRC for 14 years. She assesses potential clients for eligibility and is familiar with the laws and regulations defining eligibility criteria for regional center services. Claimant is seeking eligibility on the basis of a psychological condition: autism. Dr. Yang has advanced training and experience in the field of psychology and was the only subject-matter expert offered at hearing. Dr. Yang considered the evidence and found claimant did not have ASD, and therefore, she was not eligible for regional center services.

19. In this case, Dr. Yang was also a member of the Team who evaluated claimant's eligibility for services. The Team included: Rebekah Kawashima, M.D.,

contract physician, Dr. Yang, and Intake Counselor Vang. The Team reviewed Dr. Morrow's July 16, 2020 Psychological Assessment; the Clovis USD 504 Plan for 2018-2019 school year; and Dr. Wajda's S.O.A.P notes from April 14, 2014, through September 4, 2019.

20. Dr. Yang considered Dr. Wajda's April 2014 multiaxial⁵ diagnosis of PDD-NOS (Axis I) to be unreliable. First, in 2014, Dr. Wajda should have been using the DSM-5, effective in May 2013; the DSM-5 ended multiaxial diagnoses and removed an independent diagnosis of PDD-NOS. In the DSM-4, PDDs included five independent diagnoses, including autism disorder, Asperger's disorder, Rett's disorder, child disintegration disorder, and PDD-NOS. However, the DSM-5 combines autism disorder, Asperger's disorder, and PDD-NOS under a single diagnosis of ASD. Because Dr. Wajda used the DSM-4 to diagnose claimant with PDD-NOS, he ruled out the diagnosis of autism disorder. Because he did not use the DSM-5, it is unknown whether Dr. Wajda would have diagnosed claimant with ASD, because PDD-NOS is a subpart, or diagnosed claimant with a social communication disorder, a new diagnosis in the DSM-5 for individuals who do not meet the definition of autistic. As such, Dr. Wajda's PDD-NOS diagnosis cannot be relied upon and additional information was needed to determine claimant's eligibility.

21. In contrast, Dr. Yang considered Dr. Morrow's Report to be thorough, exhaustive, and supported by multiple assessment scores, including the "gold standard" of autism assessments – the ADOS-II. As such, Dr. Yang based her opinions

⁵ Axis I – clinical disorders, Axis II – personality disorders, Axis III – general medical disorders, Axis IV – psychological and environmental factors, and Axis V – global assessment of functioning.

regarding claimant's diagnosis and eligibility on Dr. Morrow's findings. In addition, Dr. Morrow evaluated claimant in-person; she interacted and engaged claimant; as well as observed claimant while she took multiple assessments. In short, claimant's ADOS-II score does not support an ASD diagnosis, and claimant's other assessment test scores provided consistent results with the ADOS-II. Based on the above, Dr. Yang found claimant does not have ASD and is not eligible for regional center services.

22. Following CVRC's denial, claimant engaged Dr. Nicolson, who evaluated claimant and suggested an ASD diagnosis. Claimant provided Dr. Nicolson's Report to CVRC, and Dr. Yang was asked to review the same. In sum, Dr. Yang was not persuaded by Dr. Nicolson's assessment and Report; and Dr. Yang's opinion was unchanged regarding claimant's eligibility denial. For Dr. Yang, Dr. Nicolson's assessment and Report were not exhaustive or as thorough as Dr. Morrow's; and did not provide a global picture of claimant. For example, Dr. Nicolson did not meet face-to-face with claimant; she only administered one assessment to claimant; and the CARS-2-HF is not the "gold standard" of autism assessment tests, like the ADOS-II.

Conclusion

23. Dr. Yang testified on behalf of the regional center and found claimant does not have ASD, and therefore, claimant is not eligible for regional center services. Dr. Yang was credible, and her opinions are consistent with Dr. Morrow's detailed and thorough Report.

24. In comparison, Dr. Nicolson's Report was not persuasive. She administered claimant only one assessment tool, and it was not the ADOS-II. In addition, Dr. Nicolson's findings raise several concerns: (1) she was retained by claimant and her parents following CVRC's denial; (2) her Report fails to list collateral

evidence she did or did not consider before making her findings; and (3) she suggests a diagnosis of ASD, and immediately thereafter, recommends ABA treatment for claimant with herself.

25. Considering all of the above, claimant did not prove, by a preponderance of the evidence, that she qualifies for regional center services under an autism diagnosis. Claimant did not offer sufficient evidence to contradict Dr. Yang's testimony or Dr. Morrow's assessment and Report.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.) "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.]" (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (*Ibid.*) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

Eligibility for Regional Center Services

2. The Lanterman Act is a California law giving people with developmental disabilities the right to services and supports enabling them to live a more independent and normal life (i.e. live like people without disabilities). In full, the Lanterman Act outlines the rights of individuals with developmental disabilities and their families, how the regional centers and service providers can help these individuals, what services and supports they can obtain, how to use the individualized program plan (IPP) to get needed services, what to do when someone violates the Lanterman Act, and how to improve the system.

3. A “developmental disability” is an intellectual disability, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to intellectual disability or require treatment similar to that required for individuals with intellectual disability. (§ 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000, subd. (a).) In addition, “[t]he Developmental Disability shall: (1) Originate before age eighteen; (2) Be likely to continue indefinitely; (3) Constitute a substantial disability for the individual” (Cal. Code Regs., tit. 17, § 54000, subd. (b).) However,

[t]he 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. [¶] (2) Solely learning disabilities. [¶] (3) Solely physical in nature.

(*Ibid.*, subd. (c).)

4. A "substantial disability" is defined by California Code of Regulations, title 17, section 54001, subdivision (a)(1) & (2), meaning:

(1) A condition which results in major impairment of cognitive and/or social functioning (2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age: (A) Receptive and expressive language; (B) Learning; (C) Self-care; (D) Mobility; (E) Self-direction; (F) Capacity for independent living; [and] (G) Economic self-sufficiency.

5. Based upon the Factual Findings as a whole, claimant did not prove, by a preponderance of the evidence, that she qualifies for regional center services under an autism or ASD diagnosis. Dr. Morrow completed a thorough assessment of claimant, finding she did not have ASD; Dr. Yang agreed. Claimant did not offer sufficient evidence to contradict Drs. Morrow and Yang's opinions. As such, claimant is not eligible for regional center services.

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ORDER

Claimant's appeal from Central Valley Regional Center's determination that she is not eligible for regional center services and supports is DENIED. Central Valley Regional Center's determination to deny services and supports to claimant is upheld.

DATE: February 18, 2021

ERIN R. KOCH-GOODMAN
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.