BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

SAN ANDREAS REGIONAL CENTER, Service Agency.

OAH No. 2020090511

DECISION

Administrative Law Judge Holly M. Baldwin, State of California, Office of Administrative Hearings, heard this matter on January 13, 2021, by videoconference and telephone.

James Elliott represented service agency San Andreas Regional Center (SARC).

Claimant was represented by his mother. Claimant was not present at hearing.

The record was held open for the submission of written closing arguments. SARC's closing brief was marked for identification as Exhibit 13. Claimant submitted a closing statement, which was marked for identification as Exhibit Z, and a document labeled "witness summary and closing statement," which was marked for identification as Exhibit AA. SARC submitted an objection and motion to exclude claimant's filings,

which was marked for identification as Exhibit 14. Claimant's response to the objections and motion to exclude was marked for identification as Exhibit BB.

In Exhibits Z and AA, claimant discussed statements made by Elliott while off the record on the day of hearing. SARC's motion to exclude those statements is granted, and those portions of Exhibits Z and AA will not be considered. As to the remainder of the statements and arguments in Exhibits Z and AA, the motion to exclude is denied.

The matter was submitted for decision on January 20, 2021.

Dispute Regarding the Issue to Be Decided

At the conclusion of the hearing and after the testimony of all witnesses had been heard, a dispute arose regarding the issue to be decided in this matter. SARC contends the issue is whether it erred in denying a full assessment at the intake screening stage, and claimant contends the issue is whether he is eligible for regional center services. The parties repeated these positions in the written closing arguments.

At the beginning of the hearing, the parties were asked to confirm their understanding of the issue in this matter. SARC's representative stated the issue is whether claimant is eligible for regional center services. Claimant's representative agreed. The hearing proceeded based on the premise that the question at hand was that of eligibility. SARC's expert witness testified regarding the decision to deny claimant at the intake screening stage, but also opined on the ultimate question of eligibility, as did claimant's expert.

It is determined that the issue to be decided in this matter is as follows:

ISSUE

Is claimant eligible for regional center services because he is substantially disabled by intellectual disability, or a condition that is closely related to intellectual disability or that requires treatment similar to that required for individuals with intellectual disability?

FACTUAL FINDINGS

Introduction and Procedural History

1. Claimant is 25 years old. He lives with his parents in Aptos.

2. In 2019, claimant asked SARC to evaluate his eligibility for regional center services. After reviewing information submitted by claimant, SARC notified him on November 21, 2019 that SARC was denying an intake assessment because the documents did not show any indication of an eligible condition under the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act).[1]

3. On July 6, 2020, claimant asked SARC to reconsider its decision, and provided additional documentation. On July 21, 2020, SARC notified claimant that its determination was the same after reviewing the additional information. Claimant appealed this determination and filed a fair hearing request.

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[1] Subsequent statutory references are to the Welfare and Institutions Code.

4. Claimant does not contend, and the evidence did not establish, that he has autism spectrum disorder, epilepsy, or cerebral palsy. Claimant contends that he is eligible for regional center services either due to intellectual disability, or under what is commonly referred to as the "fifth category" of eligibility: a condition closely related to intellectual disability or requiring treatment similar to the treatment required for individuals with intellectual disability. SARC does not dispute that claimant is substantially disabled, but contends that his impairments are not due to intellectual disability or a condition falling within the fifth category, and thus that he is not eligible for regional center services.

Applicable Eligibility and Diagnostic Criteria

5. The Lanterman Act provides assistance to individuals with five specified developmental disabilities: intellectual disability, cerebral palsy, epilepsy, autism, and the fifth category of disabling conditions that are closely related to an intellectual disability or that require treatment similar to that required for an individual with an intellectual disability. (§ 4512, subd. (a).)

6. Regional centers refer to the diagnostic criteria in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (published in 2013), commonly referred to as the DSM-5, in determining eligibility under the Lanterman Act.

7. The diagnostic criteria for intellectual disability are relevant to an eligibility claim under the fifth category. The DSM-5 sets forth the diagnostic criteria for intellectual disability. (DSM-5 at pp. 33, 37-38.) The essential features of intellectual disability are deficits in general mental abilities and impairment in everyday adaptive

functioning, relative to an individual's age, gender, and socio-culturally matched peers. Three criteria must be met for a diagnosis of intellectual disability.

First, there must be deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience. Individuals with intellectual disability typically have cognitive testing or IQ (intelligence quotient) scores that are two or more standard deviations below the mean. On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65 to 75, representing a threshold score of 70 with a plus or minus of 5 points as a margin for measurement error.

Second, there must be adaptive functioning deficits in conceptual, social, and practical domains that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility.

Third, the onset of the intellectual and adaptive deficits must occur during the developmental period, that is, during childhood or adolescence.

8. The DSM-5 notes that intellectual disability is categorized as a neurodevelopmental disorder, and thus is distinct from the neurocognitive disorders, which are characterized by a loss of cognitive functioning. (DSM-5 at p. 40.) The DSM-5 describes the category of neurocognitive disorders as the group of disorders in which a deficit in cognitive function is acquired rather than developmental, meaning it has not been present since birth or very early life, and represents a decline from previous cognitive function. (DSM-5 at p. 591.) Examples include neurocognitive disorders due to traumatic brain injury, Alzheimer's disease, Parkinson's disease, or other medical conditions. The DSM-5 includes a less severe level of cognitive impairment, mild neurocognitive disorder, which in the earlier Fourth Edition (DSM-IV)

(TR text revision published in 2000) was subsumed under "cognitive disorder not otherwise specified (NOS)."

9. As with the other specified developmental disabilities, a disability under the fifth category must originate before the age of 18, must continue or be expected to continue indefinitely, and must constitute a substantial disability for the person. (§ 4512, subd. (a).) "Substantial disability" requires significant functional limitations in three or more areas of major life activity: receptive and expressive language, learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency. (§ 4512, subd. (l)(1); Cal. Code Regs., tit. 17, § 54001, subd. (a).) Eligible developmental disabilities do not include disabling conditions that are solely psychiatric disorders, solely learning disabilities, or solely physical in nature. (Cal. Code Regs., tit. 17, § 54000, subd. (c).)

Developmental, Social, Educational, and Medical History

10. Claimant was born in June 1995. He had some delays in language skills and was close to age five when toilet trained.

SPECIAL EDUCATION

11. Claimant received special education services from elementary school through high school.

12. In December 1998, when claimant was age three and in preschool, he was referred for evaluation due to concerns of delayed communication skills. Testing revealed significant delays in expressive language and articulation/phonological skills. Claimant was recommended for enrollment in speech therapy.

13. An Individualized Education Program (IEP) from February 1999 noted claimant's eligibility for special education due to speech and language impairment and that he needed a small group setting. An IEP from January 2000 noted claimant's improvement in some areas, but that his language skills remained below age level.

14. In November 2000, when claimant was age five and in kindergarten, he was assessed for special education services. Testing results showed below average cognitive, academic, language, adaptive/social, and visual motor skills. He was found eligible for special education services due to speech and language impairment. Recommendations included breaking tasks into smaller steps, frequent repetition of new material, and teaching new concepts with "hands-on" learning.

15. When claimant was five years old, he was assessed by the University of California, San Francisco's Langley Porter Psychiatric Hospital and Clinics, due to his parents' concerns regarding behavioral problems and anxiety. The evaluation resulted in a diagnosis of ADHD (attention deficit hyperactivity disorder), combined type, and a referral to a child psychiatrist.

16. Cognitive testing of claimant in 2002 (second grade) showed a full scale IQ of 81, in the borderline to low average range.

17. In elementary school, claimant was placed in a classroom for children with emotional disturbances (ED). In December 2003, when claimant was eight, the IEP team determined that he had progressed so that an ED special class was too restrictive an environment, and that a mild-to-moderate special class would meet his needs. However, such a classroom was not available at claimant's neighborhood school, where his parents wanted him to remain. In March 2004, claimant's parents expressed their concern that his behavior had regressed in the ED special classroom due to

behavior problems of other students. The IEP team decided to place claimant in a mainstream third-grade class with additional resource specialist support and afternoon time in the special class. He was in a mild-to-moderate special class for most of fourth grade, but then returned to an ED special class in spring 2005.

18. In May 2005, claimant's parents wrote a letter objecting to his placement in the ED class and stating the IEP mainstreaming plan was not being followed. They requested that claimant be placed in a mainstream fifth grade classroom with an aide, but this did not occur.

19. Claimant had a triennial reassessment in October 2005 (fifth grade). He was in the ED special class, received mental health services and speech and language services, and was mainstreamed in a fifth grade class for some subjects. Cognitive testing showed a full scale IQ of 80. His sub-scores were in the borderline to low average range, with verbal ability higher than visual-perceptual ability, and working memory higher than processing speed. These results were commensurate with the previous testing in 2002 and 2000. Claimant was found to continue to meet the criteria as an emotionally disturbed student.

20. At claimant's triennial reassessment in October 2007 (seventh grade), he was in a mild-to-moderate special class in the category of emotionally disturbed. Cognitive testing suggested average intelligence, with a full scale score of 99 on an abbreviated test. He was found to be making progress emotionally. He was recommended to continue with speech therapy due to mild dysfluencies.

21. In September 2010, at claimant's triennial reassessment (10th grade), he was found eligible for special education services on the basis of processing issues in the areas of attention and visual-motor integration skills. Cognitive testing yielded a

full scale score in the low average range, with sub-test scores in the average range for verbal comprehension and perceptual reasoning, significantly delayed range in working memory, and borderline range in processing speed.

PSYCHIATRIC ISSUES

22. Claimant had four psychiatric hospitalizations when he was between the ages of 16 and 21.

23. In January 2012 (age 16), claimant was hospitalized for five days after a suicide attempt. He was given diagnoses of major depressive disorder, recurrent; ADHD; anxiety disorder NOS; and rule out bipolar disorder type 2.

24. In October 2012 (age 17), claimant was hospitalized for six days. He was given diagnoses of bipolar affective disorder, manic episode with psychosis; and ADHD by history.

25. In August 2015 (age 20), claimant was hospitalized and was given a diagnosis of bipolar I disorder, most recent episode manic with psychotic features.

26. In December 2016 (age 21), claimant was hospitalized for 11 days due to suicidal ideation. He was given diagnoses of bipolar affective disorder, mixed state with psychotic features, resolved; history of ADHD; history of obsessive-compulsive disorder; and history of social anxiety.

COMPLETION OF HIGH SCHOOL

27. After claimant was hospitalized during his senior year of high school, he was homeschooled for his last semester, under the home/hospital program. Claimant received a certificate of completion of high school.

28. Claimant has taken some extension classes through a community college, but to do so he required one-on-one support from a parent acting as an aide.

Department of Rehabilitation Services and Employment

29. Claimant has received services as a young adult through the Department of Rehabilitation (DOR). He began receiving DOR services in 2015. Claimant was able to work for a few months in 2016 at an IHOP restaurant, but was hospitalized in December 2016 and had to stop work.

30. In 2018, the DOR referred claimant to Community Life Services, which provided supported services for employment development, exploring paid positions, and onsite and virtual job coaching.

31. In June 2019, the DOR referred claimant for immersion services through an organization called SBI, to assist him in becoming more comfortable around other people despite anxiety.

32. Through Community Life Services, claimant obtained a part-time job in October 2019 as a clerk at a grocery store, bagging groceries, helping customers to their vehicles, cleaning, and doing price checks. Community Life Services provided job coaching that was phased out over time as claimant became more comfortable with the staff at the store. Claimant took a leave of absence from work in March 2020, because he was unable to consistently process and remember changes in procedures implemented due to the COVID-19 pandemic.

Claimant returned to work at the grocery store in July 2020, with renewed support from Community Life Services to discuss health and safety concerns with his employer, and to understand and follow the COVID-19 safety guidelines.

33. A July 14, 2020 letter from the DOR noted that claimant's job is a good fit because he has near-constant supervision by the checkers and managers at the store. Without this supervision, he would be unable to maintain his position, due to issues with memory, attention, concentration, anxiety, and intrusive thoughts.

34. DOR rehabilitation counselor LeNae Liebetrau wrote a letter summarizing services received by claimant, including job coaching. Liebetrau noted that claimant's ADHD impairs his ability to pay attention and keep track of tasks, while his mental health issues have him constantly worrying that other people are judging him and hearing his thoughts.

2019 Cognitive Testing and Psychological Evaluation by DOR

35. On July 15, 2019, licensed psychologist Maryam Tajiki, Ed.D., wrote a report after evaluating claimant for the DOR. Claimant was 24 years old at that time.

On the Wechsler Adult Intelligence Scale, fourth edition (WAIS-IV), claimant received a full scale IQ score of 80 (low average). Claimant scored in the average range on the verbal comprehension index (96); in the borderline range on the perceptual reasoning index (75); in the low average range on the working memory index (83); and in the low average range on the processing speed index (81).

On the Wide Range Achievement Test, fourth edition, claimant scored in the very low range on math computation (7th percentile rank); low average range on spelling (21st percentile); and high average range on word reading (79th percentile).

Dr. Tajiki noted that claimant's general intellectual functioning is in the low average range. He meets criteria for specific learning disabilities in spelling and math computation. She recommended that claimant have extra time to complete tasks, and

an environment with less distraction of noise. She noted that claimant "presents as someone who would be challenged in attempting to engage in competitive employment or training efforts that involve much new learning with time limited."

In discussing claimant's emotional functioning, Dr. Tajiki noted that claimant's interview suggested he was experiencing difficulty with attention and concentration, and inability to remember directions, as well as nervousness and anxiety around people. She noted that he appeared to have substantial psychological dysfunction.

Dr. Tajiki found claimant would benefit from vocational training and supports.

Request for Regional Center Services and SARC's Review

36. In 2019, claimant asked SARC to evaluate his eligibility for regional center services, and submitted documents including special education records. SARC sent claimant a letter on November 21, 2019, stating that SARC was denying an intake assessment because the documents supported mental health concerns but did not show any indication of an eligible condition under the Lanterman Act.

37. On July 6, 2020, claimant asked SARC to reconsider its decision, submitting a recent neuropsychological evaluation report by Dr. Alloy (discussed below in Factual Findings 46 through 55.)

38. On July 21, 2020, SARC notified claimant that its determination was the same after reviewing the additional information, and denied an intake assessment. The letter, signed by SARC clinical psychologist Ashley Berry, Psy.D., and district intake manager Janet Juarez, M.S., noted that claimant had an extensive mental health history with commensurate self-direction and memory impairments. SARC noted that cognitive testing in 2019 indicated average/low average skills, and that recent

additional testing supported both mental health and attentional difficulties. The letter concluded that records do not support a diagnosis of intellectual disability or of autism spectrum disorder, or consideration under the fifth category.

TESTIMONY OF DR. BERRY

39. Dr. Berry is a licensed clinical psychologist who has been employed by SARC since 2018. She has been licensed in California since 2017. She estimates that she performs between 100 and 200 intake screenings for regional center eligibility per year.

40. Dr. Berry testified regarding her review of claimant's case. She reviewed the documents claimant submitted, looking for whether there was evidence of an eligible condition to support moving forward for a full assessment.

In 2019, Dr. Berry reviewed educational documents submitted by claimant, and found no evidence of a developmental disability as defined by the Lanterman Act. She found evidence of psychiatric issues, behavioral problems, and attentional difficulties. Nothing in her review suggested to Dr. Berry that claimant has an intellectual disability or similar condition.

Dr. Berry reviewed claimant's case again in 2020, after claimant submitted Dr. Alloy's neuropsychological evaluation report. She did not find that Dr. Alloy's report provided evidence that claimant has an eligible condition. Dr. Berry's supervising psychologist also reviewed claimant's case and agreed with her conclusions. Prior to her testimony, Dr. Berry also reviewed claimant's additional hearing exhibits.

41. Having reviewed all the documents provided by claimant, in Dr. Berry's opinion, claimant does not have a condition that would render him eligible for regional center services.

42. Dr. Berry discussed the criteria for diagnosing intellectual disability, which involve looking at IQ and cognitive test scores, including both verbal and non-verbal indexes, and looking at adaptive functioning skills. A person with intellectual disability will typically have low scores and skills in all these areas.

Dr. Berry noted that it would be unusual for a young adult with intellectual disability or a similar condition to have no indication of such a condition in their educational documents during the developmental period, especially if they have received special education services (including cognitive testing and triennial reviews) throughout their time in school. Dr. Berry also noted that a person can show poor intellectual reasoning skills or test poorly for reasons other than intellectual disability, such as poor motivation and effort or problems with attention and processing.

Dr. Berry found that claimant's scores on cognitive testing and standardized testing were in the low average to high average range, which is not suggestive of intellectual disability or a similar condition.

43. Dr. Berry also discussed adaptive functioning skills and their role in determining eligibility for regional center services. To receive services, a person must have both an eligible condition and be substantially disabled by it; one cannot use substantial impairment in adaptive functioning alone to qualify. Dr. Berry also noted that one's adaptive functioning skills may be poor due to reasons other than intellectual disability or another qualifying condition.

To assess substantial impairment in the seven areas of major life activity, Dr. Berry looks at assessments of adaptive functioning such as the Adaptive Behavior Assessment System (ABAS) or Vineland instruments, other documentation, and verbal reports.

44. Dr. Berry agreed that claimant has a substantial disability, but opined that claimant's impairments are not due to an eligible condition. She agreed claimant has shown impairments in self-care, self-direction, living independently, learning, and economic self-sufficiency.

45. Dr. Berry discussed her review of Dr. Alloy's report. Dr. Alloy diagnosed claimant with Cognitive Disorder NOS. Dr. Berry opined that this is not intellectual disability or a similar condition that would fall within the fifth category. A diagnosis of a cognitive disorder means that a person was previously functioning at a particular level and then had a cognitive decline. Such a cognitive impairment can be due to a number of reasons, such dementia, traumatic brain injury, or substance abuse. Cognitive impairment can also be due to psychiatric conditions.

In Dr. Berry's opinion, Dr. Alloy's diagnosis of Cognitive Disorder NOS is insufficient to demonstrate developmental disability in claimant's case. Claimant's cognitive testing in the developmental period and as a young adult showed low average and borderline scores, which is clear evidence that claimant does not have intellectual disability or a similar condition, despite his problems in adaptive functioning. Dr. Berry noted that not all neurological impairments qualify as fifth category conditions.

Claimant's Neuropsychological Evaluation by Dr. Alloy

46. Richard Alloy, Ph.D., received his doctoral degree in psychology in 1979 and has been a licensed psychologist in California since 1982. He has been in solo private practice since that time. Dr. Alloy completed a two-year program in 1998 and was certified as a neuropsychologist. For the last several years, Dr. Alloy's practice has focused on diagnostic testing rather than clinical practice. Dr. Alloy has never worked for or contracted with a regional center.

47. Dr. Alloy evaluated claimant in May 2020 and wrote a neuropsychological evaluation report dated June 26, 2020. He testified at hearing regarding his evaluation. He reviewed claimant's educational and medical records and reviewed the recent cognitive testing done by Dr. Tajiki. Dr. Alloy interviewed claimant and his mother, administered a variety of neuropsychological tests and assessments to claimant, and had claimant's mother complete questionnaires for the Adaptive Behavior Assessment System – 3 (ABAS-3) and Gilliam Asperger's Disorder Scale.

48. During the mental status examination conducted by Dr. Alloy, claimant was cooperative, acted appropriately, did not seem sedated, and displayed no indication of overt psychiatric symptoms. At hearing, Dr. Alloy explained that medications can contribute to cognitive impairments, but in this case, claimant's impairments cannot be explained by medications alone.

49. Dr. Alloy's report discussed five indicators from the Halstead-Reitan Neuropsychological Battery. Claimant scored in the moderately impaired range on the Neuropsychological Deficit Scale, and in the mild to moderate impairment range on the Impairment Index. On individual tests, his score on the test of general problem solving functions was normal, his score on the test of visuomotor alternating attention

was severely impaired, and his score on the test of specific incidental haptic memory was severely impaired. Dr. Alloy opined that: "Given the results of 4 of these 5 powerful indicators being in the impaired range, there is a strong likelihood that some diffuse or generalized organic impairment exists for [claimant]."

50. On the ABAS-3, claimant's general adaptive composite score was 66 (first percentile rank), with Dr. Alloy finding: "Thus, it is clear that [claimant] does have great difficulty with adaptive functioning and would be expected to have significant difficulty functioning independently."

51. Dr. Alloy made the following diagnoses for claimant, using the diagnostic criteria of the DSM-IV-TR:

- Axis I (clinical disorder): Cognitive Disorder Not Otherwise Specified; Anxiety Disorder Not Otherwise Specified; Bipolar I Disorder, Most Recent Episode Unspecified; ADHD Combined Type; and Mathematics Disorder.

- Axis II (personality disorder): Personality Disorder Not Otherwise Specified with dependent, antisocial, avoidant, depressive, and self-defeating tasks.

- Axis III (physical disorder): None.

- Axis IV (psychosocial stressors): Problems related to the social environment, educational problems, occupational problems, housing problems, economic problems.

- Axis V (Global Assessment of Functioning): 40 – major impairment in social, occupational, and academic functioning.

52. Dr. Alloy concluded: "The primary diagnosis here is a Cognitive Disorder Not Otherwise Specified. This is based on the neuropsychological testing showing a moderate degree of brain impairment overall. . . . Since there is no history that would explain a later onset of these symptoms, it is concluded that this level of impairment existed prior to age 18. This is supported by the school records reviewed above."

At hearing, Dr. Alloy discussed his diagnosis of Cognitive Disorder NOS, explaining that this category under the DSM-IV is for disorders characterized by cognitive dysfunction presumed to be due to the direct physiological effect of a medical condition, that do not meet criteria for any of the specific deliriums, dementias, or amnestic disorders. Dr. Alloy stated this diagnosis does not require the cognitive disorder to be a new or changed condition. Dr. Alloy did not elaborate on what medical condition he believes claimant's cognitive disorder is due to.

53. Dr. Alloy was questioned regarding his use of the DSM-IV, rather than the DSM-5. He conceded that the current edition of the DSM is the DSM-5, published in 2013. When asked why he uses the outdated DSM-IV for making diagnoses, Dr. Alloy stated there are questions about the research used for the DSM-5's organization, and that he finds the five-axis diagnostic framework in the DSM-IV to be more helpful and descriptive. Dr. Alloy dismissed concerns about reliance on the DSM-IV despite the regional center's use of the DSM-5 for diagnosis, stating that he believes functional ability is more important in this case than diagnosis. When questioned regarding the difference between developmental disorders and neurocognitive disorders (defined in the DSM-5 as those not present from birth or early life and representing a decline in cognitive function), Dr. Alloy again stated he was focusing more on claimant's functional impairments.

54. Dr. Alloy discussed the eligibility criteria listed on SARC's website, and opined that claimant met the criteria for intellectual disability and/or the fifth category. In making these determinations, Dr. Alloy did not focus on diagnosis. He focused on claimant's adaptive functioning in the areas of the conceptual domain, social domain, and practical domain. In the conceptual domain, Dr. Alloy noted claimant's deficits in math and memory. In the social domain, he noted claimant's personality disorder that limits his abilities in empathy and social skills. In the practical domain, Dr. Alloy noted claimant's fourth-grade math ability limiting his money management, and history of difficulty with job responsibilities and organization of work tasks. In all three domains, Dr. Alloy noted claimant's "very severe impairment" scores on the ABAS-3, and the "high probability of Asperger's Disorder" (noting, however, that he had not actually made such a diagnosis).

Regarding the question of whether claimant has a substantial disability, Dr. Alloy opined that claimant has major impairments in the daily life activities of learning, self-direction, capacity for independent living, and economic self-sufficiency. Dr. Alloy is very concerned about claimant's ability to live independently, especially given his need for constant protective supervision.

Dr. Alloy conceded that mental illness can cause a range of impairments in functional skills.

55. Dr. Alloy's treatment recommendations included psychotherapy and psychiatric medication, legal planning, family support, and future retesting if claimant's symptoms improve or worsen. Regarding claimant's functional skills, Dr. Alloy recommended behavioral interventions to increase social skills; training for kitchen safety; keeping tasks to a minimum of complexity; relying on schedules, calendars, logs, and daily living checklists; and participating in various activities aimed at

cognitive skills development (games, puzzles, software for cognitive skills retraining, and working with a speech pathologist or occupational therapist).

Claimant's Additional Evidence

TREATING PSYCHOTHERAPIST LEGALLET

56. Steve Legallet, M.F.T., has been a licensed marriage and family therapist since 1992. He spent 22 years working for Santa Cruz County Children's Mental Health. For the last five years, he has been solely in private practice. Legallet testified at hearing and wrote a letter dated September 27, 2020.

57. Legallet was assigned to work with claimant through school when claimant was in the third grade and in an ED special class. After that year, claimant primarily worked with other therapists.

58. In 2012, when claimant was about 17 years old, he began seeing Legallet again for individual therapy. Claimant has seen Legallet weekly or biweekly since that time, and continues to receive therapy from him.

59. Legallet noted that in elementary school, claimant had a difficult time with academics, and problems making friends and getting along with peers. In claimant's senior year of high school, he became unable to function in mainstream classes due to overwhelming anxiety, even with special education support. He completed high school with home/hospital school services, a modified curriculum, and one-on-one support from his parents.

60. Legallet stated that claimant currently requires full-time support and supervision due to his psychiatric disabilities. His symptoms fluctuate and can be

unpredictable. At times he has difficulty functioning outside the home, due to periodic anxiety and symptoms such as thinking people can hear his thoughts.

61. Legallet does not believe that claimant can manage independently. He has problems concentrating and managing tasks. Claimant has had success in working at the grocery store, with the support of a job coach, his parents, and supervisors at work who are aware of his difficulties and make needed accommodations. Claimant continues to struggle with self-care, time management, dealing with other people, reading nonverbal cues, and making and maintaining friendships. Claimant desires a social network and enjoys people, but lacks confidence in his social skills. As a young adult, claimant has been highly motivated to gain skills and improve himself. He has expressed interest in culinary work, working with animals, or working as a mental health support person. Claimant has signed up for some online classes, but needs someone helping him to organize and focus in order to succeed.

LIDDY AND MARQUART OF COMMUNITY LIFE SERVICES

62. Jessica Liddy, a program manager at Community Life Services, testified regarding her work with claimant and also wrote a letter dated July 6, 2020.

63. Liddy has 25 years of experience in special education, working in schools as a paraprofessional aide for students. Liddy has worked at Community Life Services for over 10 years. Community Life Services is vendored by both the DOR and SARC to provide employment support services to clients.

64. Liddy has worked with claimant since 2018. She described him as pleasant and articulate, with a tendency to take on more than he can accomplish without support. She noted that claimant has memory problems and forgets tasks without consistent reminders. He needs support to learn new skills and to self-direct,

especially when given too many tasks at once. Liddy noted that claimant lacks social confidence and has deficits in executive functioning and impulse control. His severe anxiety can cause a lack of judgment in decision making, especially in emergency situations. Liddy believes claimant is substantially disabled in multiple areas of daily living, and states that claimant appears to need services similar to other clients she has worked with who are regional center consumers.

65. In claimant's job at the grocery store, he is always supervised by managers and co-workers. Liddy noted claimant has been able to succeed in this job due to support. Claimant has expressed a desire to continue his education, and has shown interest in attending a culinary program at a junior college or pursuing landscaping. He wants to live independently someday.

66. Tracey Marquart, the founder and executive director of Community Life Services, also testified at hearing. She has over 20 years of experience serving people with disabilities, has received a graduate certificate in rehabilitation administration, and has received training in serving people with autism. Marquart reviewed Dr. Alloy's report and documents regarding In-Home Supportive Services (IHSS) services provided to claimant. She believes claimant is substantially disabled. She noted claimant is likeable and articulate, but he has anxiety, and compromised memory and executive function. He needs repetition and support to learn, and she believes he needs independent living skills training.

67. In her work, Marquart has seen people who are somewhat self-sufficient in school, but whose deficits become more apparent after they graduate and do not have the daily structure of school. She also notes that for people with dual diagnoses, sometimes a psychiatric disability will become more apparent first. Marquart has seen

regional center consumers who have similar abilities and behaviors to claimant, and similar needs for services.

TESTIMONY OF CLAIMANT'S MOTHER

68. Claimant's mother testified at hearing. She contends that claimant's psychiatric issues coexist with an eligible developmental disability. She contends that claimant is eligible for regional center services due to intellectual disability or the fifth category, based on Dr. Alloy's diagnosis of cognitive disorder NOS and claimant's level of adaptive functioning, with substantial limitations in learning, self-care, self-direction, independent living, and economic self-sufficiency. She states claimant needs prompting, coaching, one-on-one work, breaking things down into simple steps, and constant repetition.

69. Claimant's mother discussed claimant's adaptive functioning deficits. Claimant has difficulty transferring skills from one context to another. He needs prompts for self-care, such as taking medication, toothbrushing, bowel and bladder care, sleeping, meal preparation and clean-up, and wearing appropriate clothing. He has problems sequencing and remembering tasks, and needs structure in all contexts. He has impaired memory and poor judgment. Claimant has difficulty assessing danger and limited stranger awareness. He cannot drive or use public transit without getting lost, due to impaired spatial awareness and inability to follow directions.

70. As is noted in the special education records, claimant's parents did not agree with the special education categorization of severe emotional disturbance or with his placement in a classroom for emotionally disturbed children. They believed some other impairment was present to account for claimant's deficits. They asked for

one-on-one aides for claimant, without success. They thought he was "warehoused" and insufficiently served by special education services.

71. Claimant's mother also discussed the IHSS claimant has been receiving, and provided documents about these services. She explained that claimant currently requires 24-hour supervision.

Claimant has been treated by psychiatrist Paul Luther, M.D., since 2017. On June 23, 2020, Dr. Luther completed an assessment of need for IHSS protective supervision hours, noting claimant's diagnosis of schizoaffective disorder, bipolar type. Dr. Luther rated claimant as moderately impaired in memory on a variable basis relative to the degree of distraction and preoccupation with internal stimuli, degree of anxiety and depression, and side effects of medications. He rated claimant as moderately impaired in orientation due to psychiatric symptoms, and often needing reality testing and calming redirection to avoid increased agitation. He rated claimant as severely impaired in judgment, noting that increased anxiety, misinterpretation of reality, or exacerbation of paranoia can trigger sudden and unpredictable aggressive or suicidal impulses.

Dr. Alloy also completed an assessment of need for IHSS protective supervision hours, on June 30, 2020. He rated claimant as severely impaired in memory based on his neuropsychological testing; moderately impaired in orientation; and severely impaired in judgment, based on a review of medical records.

Claimant's IHSS hours were increased in December 2020, up to a total of 283 hours per month, with the majority of hours allotted for protective supervision, in addition to hours allotted for domestic services and personal care.

72. Claimant's services through DOR and Community Life Services are scheduled to end in January or February 2021, and claimant's mother is concerned about continuing support for him.

Ultimate Factual Findings

73. It is undisputed that claimant has substantial limitations in his adaptive functioning, but he has not shown that these are due to a developmental disability as defined by the Lanterman Act. The evidence suggests that many of claimant's functional limitations are due to his psychiatric conditions, ADHD, and learning disabilities. For other functional limitations, the etiology is not clear.

Claimant has not demonstrated by a preponderance of the evidence that he has intellectual disability. His cognitive testing results do not reflect intellectual deficits seen in people with intellectual disability. Claimant consistently scored in the low average or borderline range on cognitive testing, and his scores were not as low as two standard deviations below the mean test score.

Claimant also has not demonstrated by a preponderance of the evidence that he has a condition falling within the fifth category of regional center eligibility, that is, a disabling condition closely related to intellectual disability, or that requires treatment similar to that required by persons with intellectual disability. Dr. Alloy's diagnosis of Cognitive Disorder NOS does not provide sufficient support for a finding of fifth category eligibility. Dr. Alloy made that diagnosis presuming that claimant's problems with cognitive functioning were due to the physiological effect of a medical condition, but did not elaborate on what that medical condition might be. Moreover, Dr. Alloy's use of the DSM-IV in this context undermines the credibility and persuasiveness of his opinion. The current standard for use in regional center eligibility determinations is the

DSM-5, and the DSM-5 clearly distinguishes neurocognitive disorders from developmental disorders. Given these circumstances, it cannot be determined by a preponderance of the evidence that claimant has a disabling condition "closely related to" intellectual disability. Nor has claimant demonstrated by a preponderance of the evidence that he requires treatment similar to that required for intellectual disability.

LEGAL CONCLUSIONS

1. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on claimant to establish that he or she has a qualifying developmental disability. The standard of proof is a preponderance of the evidence.

2. The State of California accepts responsibility for people with developmental disabilities under the Lanterman Act. (§ 4500, et seq.) The purpose of the Lanterman Act is to rectify the problem of inadequate treatment and services, and to enable people with developmental disabilities to lead independent and productive lives in the least restrictive setting possible. (§§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.)

3. A developmental disability is a disability that originates before an individual reaches age 18; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. (§ 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000, subd. (b).) The term "developmental disability" includes

intellectual disability,[2] cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. (§ 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000, subd. (a).)

Under the Lanterman Act, handicapping conditions that are solely psychiatric in nature, solely learning disabilities, or solely physical in nature are not considered developmental disabilities. (Cal. Code Regs., tit. 17, § 54000, subd. (c).) Solely psychiatric disorders are excluded, even where there is impaired intellectual functioning, if it originated as a result of the psychiatric disorder or is an integral manifestation of the disorder. (*Id.*, § 54000, subd. (c)(1).)

However, the regulations do not deny services to a claimant with a learning disability or psychiatric disorder, so long as the claimant can also establish a qualifying condition under the Lanterman Act. (*Samantha C. v. Department of Developmental Services* (*Samantha C.*) (2010) 185 Cal.App.4th 1462.)

4. "Substantial disability" means major impairment of cognitive and/or social functioning, and the existence of significant functional limitations, as appropriate to the person's age, in three or more of the following areas of major life activity: receptive and expressive language, learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency. (§ 4512, subd. (l)(1); Cal. Code Regs., tit. 17, § 54001, subd. (a).)

[2] The term "intellectual disability" has replaced the formerly used term of "mental retardation."

5. A person may qualify for services under the fifth category in two ways: either by having a disabling condition found to be "closely related to" intellectual disability, or by having a disabling condition that requires "treatment similar to" that required by persons with intellectual disability. (§ 4512, subd. (a).) The fifth category is a legal category, not a medical or psychological diagnosis.

Appellate courts have discussed the requirements of fifth category eligibility. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129, the court held that the fifth category condition must be very similar to intellectual disability, with many of the same, or close to the same, factors required in classifying a person as intellectually disabled. Another decision has found that fifth-category eligibility may be based on the established need for treatment similar to that provided for individuals with intellectual disability, notwithstanding IQ scores within the average range. (*Samantha C., supra,* 185 Cal.App.4th at p. 1492.) However, the court in *Samantha C.* rejected the argument that adaptive functioning impairment standing alone is sufficient for fifth category eligibility. (*Id.* at pp. 1486-1487.) In *Ronald F. v. Dept. of Developmental Services* (2017) 8 Cal.App.5th 84, 98, the court found that "'treatment' is listed as one of the services available under section 4512, subdivision (b), indicating that it is narrower in meaning and scope than 'services and supports for persons with developmental disabilities.'" The Lanterman Act distinguishes between "treatment" and "services" as two different types of benefits available under the statute. (*Ibid.*) Although claimant might benefit from some of the services offered by the regional center, insufficient evidence was presented to show that his condition requires treatment similar to that required for individuals with intellectual disability.

6. Claimant has not met his burden of establishing that he has a developmental disability as that term is defined in the Lanterman Act. (Factual Finding

73.) It is undisputed that at present, claimant is substantially disabled. However, because there is insufficient evidence that claimant has intellectual disability or a condition closely related to intellectual disability or that he has treatment needs that are similar to the intellectually disabled, his appeal must be denied.

ORDER

Claimant's appeal of the service agency's denial of regional center eligibility is denied. Claimant is not eligible for regional center services based on the evidence presented at hearing.

DATE:

HOLLY M. BALDWIN
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.