

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

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2020090984

DECISION

Chris Ruiz, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on April 1, 2021.

Candace Hein, Fair Hearing Specialist, represented Westside Regional Center (WRC).

Marlene Lueck and Melissa Lander, Stand Out Advocates, represented claimant.

Documentary evidence and testimony was received as evidence. The record was closed, and the matter was submitted for decision on April 1, 2021.

ISSUE

Is claimant eligible for regional center services based on a diagnosis of Autism Spectrum Disorder (ASD)?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is 12 years-old and is in the sixth grade. Claimant seeks eligibility for regional center services based on a diagnosis of ASD.
2. On May 14, 2020, WRC sent a letter and a Notice of Proposed Action to Claimant's parents, informing them that WRC had determined that Claimant is not eligible for regional center services because she was deemed not to be substantially handicapped by an eligible condition.
3. On July 22, 2020, claimant's mother caused a Fair Hearing Request to be filed on behalf of claimant, which appealed WRC's denial of eligibility.

Eligibility Requirements

4. Eligibility for services from a regional center requires the consumer to have a diagnosis of an eligible condition and to be "substantially disabled" due to that condition. It is a two-pronged determination.
5. ASD is an eligible condition. WRC does not dispute that claimant has been appropriately diagnosed as having ASD. However, WRC contends that claimant is not substantially disabled to the extent required for regional center eligibility. Under

regulations discussed in more detail below, and as related to a 11-year-old, an eligible condition is considered a substantial disability when there are significant functional limitations in three or more of the following areas of major life activity: (1) self-care; (2) receptive and expressive language; (3) learning; (4) mobility; (5) self-direction; (6) capacity for independent living; and (7) economic self-sufficiency.

Prior Decision Finding Claimant Not Eligible

6. In 2015, claimant sought to be found eligible for services from WRC.

7. At that time, WRC did not dispute that claimant was appropriately diagnosed with ASD. However, WRC contended that claimant was not substantially disabled by her disability and found claimant had significant functional limitations only in the area of receptive and expressive language. Claimant contended she was also substantially disabled in the areas of self-care, learning, and self-direction.

8. On June 23, 2016, ALJ David B. Rosenman issued a decision which affirmed WRC's prior determination that claimant was not eligible for services.

Claimant's Current Status

9. Approximately four years after ALJ Rosenman's decision, claimant requested that WRC re-evaluate her disability and find her eligible for services.

10. WRC contends claimant has significant functional limitations in only one area of major life activity, which is self-direction. Claimant contends significant functional limitations exist in at least two of the other areas of major life activity.

11. For any consumer who is age 11, WRC does not evaluate the major life activities of economic self-sufficiency and capacity for independent living because

these areas are not considered age appropriate. Kaely Shilakes (Shilakes), Intake Manager and WRC Staff Psychologist, credibly testified that since claimant was age 11 at the time of WRC's evaluation, the major life activities of economic self-sufficiency and capacity for independent living were not considered appropriate for evaluation.

12. Claimant does not claim significant functional limitations in the major life activity of mobility.

13. Therefore, the only remaining areas for consideration are self-care, receptive and expressive language, and learning. The parties agree that claimant has significant functional limitations in the area of self-direction.

14. This Decision will focus on the three areas of major life activity in dispute, in order to determine if there is sufficient evidence to support a finding that claimant has significant functional limitations in at least two of these major life activities.

The Medical Evidence

15. WRC relies on a report, dated November 4, 2019, from Diedre Cook (Cook), Psy. D., psychologist assistant, who was working under the supervision of Gabrielle du Verglas (Verglas), Ph. D., clinical psychologist. Cook found that claimant did not meet the criterion for a diagnosis of ASD.

16. Claimant relies on clinical psychologists Shannon McHugh (McHugh), Learn & Burn, and Tamar Apelian (Apelian), Achieving Milestones and Progress, whose reports are dated June 2020 and June 8, 2020, respectively.

17. The only licensed psychologist who testified at hearing was McHugh.

18. In 2018, McHugh began working with claimant in a group setting, which continued for approximately one year. In 2019, McHugh began working with claimant, in a 1:1 setting, at a rate of once per week, which is still on-going.

19. McHugh believes her experience with claimant, and that of Apelian, both of whom have observed claimant over a number of years, should be given more weight than the opinion of Cook, who saw claimant only one time. McHugh believes Cook's opinion is not accurate because of a number of factors. First, the Autism Diagnostic Observation Schedule (ADOS) test is not a reliable tool to assess females. McHugh asserts females are generally more difficult to diagnose correctly because of their ability to "mask" their limitations. Claimant presents as a high-functioning individual who can mask her disability for a limited time, which claimant generally tries to do when she meets a person for the first time. Second, McHugh opined it would be difficult for a medical professional to experience and evaluate the full extent of claimant's condition based on a single evaluation. McHugh reviewed WRC's medical reports and noted that Cook only saw claimant on one occasion. Third, McHugh believes Cook's evaluation was further hampered because of Cook's level of experience in diagnosing consumers. Cook was a psychologist assistant when she evaluated claimant, at the early stages of her career as a licensed psychologist. Apelian's report, dated June 8, 2020 (exhibit B) contained similar critiques of Cook's opinion as testified to by McHugh.

Self-Care

20. McHugh's prepared a report in June 2020 regarding her observations and opinions concerning claimant. McHugh diagnosed claimant as having ASD, but she did not consider the areas of major life activity. However, McHugh testified that

claimant has significant functional limitations in the areas of self-direction, self-care, learning, and independent living skills.

21. In the area of self-care, claimant desires to take care of her needs, but her disability prevents her from doing so. For example, claimant will shower, but forget to rinse the shampoo from her hair. Also, claimant tries to cook meals for herself, but leaves the stove on when she is done. Claimant requires multiple daily reminders to perform self-care tasks,

22. Shilakes testified that WRC, in considering whether a consumer has significant functional limitations, assesses the consumer's capacity to perform the tasks at issue, such as shampooing her hair and turning off the stove, as compared to whether the consumer actually performs these acts. In other words, since WRC found claimant physically capable of rinsing her hair and turning off the stove, WRC did not find that claimant has significant functional limitations in the area of self-care.

23. Contrary to WRC's conclusion regarding the area of self-care, Apelian and McHugh both found that claimant does have significant functional limitations in self-care. Claimant does not show initiative and consistency for self-care activities including feeding, grooming, dressing, hygiene (especially for female puberty), and safety skills in the community.

24. McHugh's and Apelian's opinions are more convincing. If claimant has the physical capacity to perform self-care acts, but claimant's autism prevents or significantly limits claimant's ability to perform the acts, then claimant's disability results in a significant functional limitation, whether the cause is mental or physical. Claimant established she has significant functional limitations in the area of self-care.

Receptive and Expressive Language

25. McHugh opined that claimant has significant functional limitations in learning, but not receptive and expressive language. Apelian opined that claimant has significant functional limitations in both areas.

26. Because McHugh and Apelian are not consistent in their opinions regarding claimant's limitations in the area of receptive and expressive language, it is appropriate to defer to WRC's evaluation of claimant, which found that claimant has significant functional limitations only in the area of self-direction. Claimant offered conflicting evidence in this area and did not establish significant functional limitations in the area of receptive and expressive language.

Learning

27. Claimant attends school and has a behavioral aide. Apelian concluded that "self-direction is impacting [claimant's] ability to . . . learn."

28. McHugh's testimony regarding learning did not detail why McHugh believes claimant has significant functional limitations in learning.

29. Apelian's opinion is similar to WRC's in that both found claimant's significant functional limitations in the area of self-direction have a resulting impact on claimant's learning. However, this impact was not established to be the equivalent of claimant having significant functional limitations in the area of learning. While there is some overlap in the major life activities, each area must be assessed separately. It was not established that claimant has significant functional limitations in the major life activity area of learning.

Final Result

30. It was established that ASD causes claimant to have significant functional limitations in the major life activity areas of self-direction and self-care. It was not established that ASD causes claimant to have significant functional limitations in the major life activity areas of receptive and expressive language and learning.

LEGAL CONCLUSIONS

1. Claimant has been diagnosed with a developmental disability (Autism Spectrum Disorder) which is the first requirement to becoming entitled to WRC services under the Lanterman Developmental Disability Services Act, which begins at Welfare and Institutions Code¹ section 4500.

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the regional center's decision. Where a claimant seeks to establish eligibility for services, the burden is on the appealing claimant to demonstrate by a preponderance of evidence that the regional center's incorrect. Claimant has not met that burden of proof in this case.

3. Pursuant to section 4512, a claimant must also establish that she has a substantial disability. Pursuant to section 4512, subdivision (l)(1), "substantial disability" means the existence of significant functional limitations in three or more of the

¹ All further statutory references are to the Welfare and Institutions Code.

following seven areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- Self-direction.
- Self-care.
- Receptive and expressive language.
- Learning.
- Mobility.
- Capacity for independent living.
- Economic self-sufficiency.

4. As discussed in Factual Findings 10-12, claimant did not claim to have significant functional limitations in the area of mobility. Additionally, the areas of capacity for independent living and economic self-sufficiency were not considered because of claimant's age.

5. California Code of Regulations, title 17 (CCR), section 54001, subdivision I(a), states, in pertinent part:

"Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the areas of major life activity [stated in Legal Conclusion 4], as appropriate to the person's age.

Claimant's ASD does not cause claimant to be substantially disabled, with significant functional limitations in three or more major life activities. (Factual Findings 9-30.)

ORDER

The Service Agency's determination that claimant is not eligible for regional center services is sustained, and claimant's appeal of that determination is dismissed.

DATE:

CHRIS RUIZ

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.