BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

NORTH BAY REGIONAL CENTER, Service Agency.

OAH No. 2021020051

DECISION

Administrative Law Judge Holly M. Baldwin, State of California, Office of Administrative Hearings, heard this matter on July 15, 2021, by videoconference.

Attorney Jake Stebner represented service agency North Bay Regional Center (NBRC).

Claimant was represented by his sister. Claimant was present at hearing.

The record was held open for the submission of written closing arguments. NBRC's closing brief was received and marked for identification as Exhibit 7. Claimant did not submit a written closing argument.

The record closed and the matter was submitted for decision on July 22, 2021.

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 56 years old. He lives with his family, including his elderly mother, a sister, a brother, and a nephew.

2. Claimant's family asked NBRC to evaluate claimant's eligibility for regional center services. On December 21, 2020, NBRC issued a notice of proposed action, stating that it proposed to close claimant's case because NBRC found claimant did not have an eligible condition under the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act).[1] Claimant's representative filed a fair hearing request on January 8, 2021.

3. An informal meeting was held on January 19, 2021, between claimant's sister and NBRC representatives. NBRC did not change its determination as a result of that meeting.

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

4. Claimant does not contend, and the evidence did not establish, that he has autism, 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. NBRC contends that claimant does not have either intellectual disability or a condition falling within the fifth category that would render him 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 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. To be considered an eligible developmental disability under the Lanterman Act, intellectual disability or 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 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).) 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

9. Claimant was born in March 1965, and lived most of his life in the Philippines. He is the third born of seven children, and has always lived with his parents (his father is deceased). Claimant and his mother moved to the United States in November 2011, when he was 46 years old, to live with claimant's siblings.

10. No educational or medical records from respondent's childhood or adult life in the Philippines were available at hearing.

11. No detailed information was available regarding claimant's developmental history. His younger sister reports that claimant was born at full term and reached developmental milestones at a fairly normal rate, although she recalled that claimant "didn't talk much when we were young."

12. Claimant's sister reports that claimant was diagnosed with intellectual disability in the Philippines in 1982, at age 16 or 17, but the family does not have copies of any documents related to that diagnosis. Claimant's sister attempted to obtain school records from the Philippines, but was unsuccessful due to the COVID-19 pandemic lockdown restrictions.

13. Claimant received a bilingual education in Tagalog and English. He was behind in all his academics and performed poorly in school, but was able to graduate with a diploma in 1981 at age 16 (the typical age for graduation in the Philippine school system). He did not receive special education services in the Philippines, which does not have a special education system similar to the United States. Claimant received tutoring from his family and neighbors, and had to attend summer school every year in order to advance to the next grade. The year after receiving his diploma, claimant attended some college classes but dropped out due to academic difficulties.

14. Claimant reportedly had his first psychotic episode while he was attending college, and was using marijuana and cocaine during that time. Claimant reportedly had a psychiatric hospitalization in 2010 in the Philippines.

15. After moving to the United States, claimant continued to receive mental health treatment.

16. Records were provided from psychiatrist Elena Fowler, M.D., at Vallejo Integrated Care Clinic (Solano County Health and Social Services). Claimant had a diagnosis of "unspecified type schizophrenia, unspecified state (295.90)."

On August 3, 2012, Dr. Fowler noted that claimant was taking olanzapine (an antipsychotic medication), and had "some improvement in ability to function, he communicates with his family to some extent now, not as mute as before. Still appears anxious and restless from time to time, which may or may not be medication side effect or a long-lasting EPS [extrapyramidal symptoms or drug-induced movement disorder] from previous neuroleptic exposure." Dr. Fowler's mental status examination noted that claimant was oriented, appeared withdrawn, his speech was soft with minimal verbal contact, and his affect was flat. She ordered an increase in claimant's olanzapine and prescribed lorazepam for anxiety and possible movement disorder.

Dr. Fowler noted on September 7, 2012 that lorazepam did not work well for claimant, and that he continued to have constant movements in his limbs, and appeared restless. His affect was slightly brighter, and he was interested in participating in an adult day program. Dr. Fowler discontinued lorazepam and prescribed propranolol (a beta-blocker) in addition to the olanzapine.

On October 5, 2012, Dr. Fowler noted claimant's movement disorder had improved to some extent on propranolol but was still present; she adjusted the dosage of his medications. Claimant remained withdrawn with flat affect.

On October 25, 2012, Dr. Fowler noted that claimant "paces more than before, scratches his skin more, making noises frequently but when asked if something bother him he answers 'I am OK.' Patient remains selectively mute, answering with short phrases to simple questions." Dr. Fowler adjusted claimant's medication dosages.

17. Claimant began receiving mental health services from Kaiser Permanente in Vallejo in November 2012, with a diagnosis of schizophrenia. He continues to receive treatment from Kaiser.

Adaptive Functioning

18. Claimant receives a great deal of support from his family. He has never been able to live independently. Claimant is able to perform his own personal hygiene activities, but needs reminders to do so. He needs assistance in choosing clothing that is appropriate for the weather. Claimant is not able to cook, clean, do laundry, or schedule his own appointments. His family reports claimant does not have an age-appropriate ability to be left alone for long due to a lack of safety awareness.

19. Claimant has never been able to drive or take public transportation independently. He cannot maintain a budget, although he can make small purchases at the store with the assistance of his sister. He does not go to the store by himself.

20. Claimant has attended an adult day program at the Solano Adult Health Center for the past seven years. He has never had employment without support. He

was employed for a few days doing janitorial work as part of a prior day program. Claimant has been receiving SSI (Supplemental Security Income) benefits since 2017.

21. Claimant's sister reports that claimant has a poor memory and needs constant direction and repetition. He has problems following more than two-step directions. He has difficulties generalizing information and skills from one situation to another, and needs tasks to be broken down into simple steps for learning.

22. Claimant is reported to have some difficulties with comprehending and expressing verbal and nonverbal communication. His sister reports that claimant has problems understanding conversation and needs information rephrased to a simpler level. He primarily answers questions with single words.

23. Claimant's sister reports that he has positive relationships with family and friends, but that he has never had a romantic relationship, and can have difficulties establishing and maintaining peer relationships. Claimant reported that he has friends at his adult day program but does not have contact with them outside of the program.

Psychological Evaluation by Kaiser: Dr. Holland

24. On March 5, 2020, Matthew Holland, Psy.D., with Kaiser Permanente in Vallejo wrote a psychological evaluation report, following testing of claimant on four days in January and February 2020. Dr. Holland administered a clinical interview, the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV), Wide Range Achievement Test – 4 (WRAT-4), and several other assessment instruments, including the Asian American Multidimensional Acculturation Scale (AAMAS).

Dr. Holland's notes regarding claimant's mental status and behavioral observations stated that claimant did not exhibit any observable physical or motor

abnormalities. He made appropriate eye contact and was oriented. He responded appropriately to interview questions; however, his responses were not elaborate and were typically characterized by one-word answers. The tone, rhythm, rate, and volume of claimant's speech appeared within normal limits, but his speech was occasionally monotone and exhibited pressured speech patterns when providing more elaborate responses. His thought content appeared congruent with the themes of the interview, and his thought processes appeared linear. Claimant's affect was slightly restricted. He denied hallucinations or delusions.

Dr. Holland noted that throughout the evaluation, there were multiple instances where claimant responded to test items hastily, most notably during the arithmetic, matrix reasoning, and visual puzzles subtests of the WAIS-IV. He also exhibited a pattern of his response time being faster on more difficult items than on the starting items, which also was noted during the reading portions of the evaluation. Claimant also exhibited some compensation strategies during the math computation subtest of the WRAT-4, such as talking to himself out loud and counting on his fingers.

Cognitive testing using the WAIS-IV yielded a full-scale IQ score of 60, which Dr. Holland described as being in the "seriously impaired" category, with a 95 percent confidence interval of the score falling between 57 and 65. Dr. Holland noted mild discrepancies among the subtests, with claimant's performance on the perceptual reasoning and processing speed indexes being significantly stronger than on the verbal comprehension and working memory indexes. Dr. Holland reported: "It is notable that [claimant's] Full Scale IQ diverged significantly from his expected intellectual ability as anticipated by his performance on the Test of Premorbid Functioning, which fell within the Average range."

Academic achievement testing using the WRAT-4 yielded a range of scores, ranging from 83 for word reading and 84 for spelling, 71 for math computation, 70 for reading composite, and 60 for sentence comprehension.

Dr. Holland diagnosed claimant with "intellectual disability, moderate," based on the results of the cognitive testing and full-scale IQ score of 60. He found that this diagnosis was consistent with family reports of claimant's level of adaptive functioning. Dr. Holland also noted claimant's diagnosis of schizophrenia (per medical record).

Dr. Holland discussed the possible effects of claimant's language ability and level of acculturation on his cognitive testing, stating that these may have negatively affected his scores on intelligence subtests for verbal comprehension. However, he noted that claimant received a bilingual education. Dr. Holland also found that if claimant's severely impaired performance on verbal comprehension subtests were explained solely by deficits in English language proficiency, then his performances on subtests for non-verbal abilities would not also be well below expectation, which they were. Claimant's family reported his comprehension and learning were also impaired in Tagalog. Dr. Holland concluded: "Altogether, it is more likely that his IQ, as described in the present evaluation, is an accurate depiction of his true intellectual functioning rather than a result of deficits in English language proficiency."

Despite noting claimant's schizophrenia diagnosis, Dr. Holland's report did not discuss whether claimant's schizophrenia affected his cognitive functioning.

Dr. Holland recommended that claimant apply for services at NBRC, continue to attend his adult day program, and continue with his psychiatric medication.

Assessment by NBRC

25. On March 26, 2020, NBRC intake assessment counselor Lester Baluyot conducted an intake interview by telephone with claimant and his sister, and wrote an intake social assessment report containing information regarding claimant's development, education, family history, adaptive functioning, and vocational history. Claimant was referred for further assessment.

Claimant spoke appropriately with Baluyot on the telephone, with his answers to questions being very brief at the beginning but more in depth later on. He did not always pronounce words correctly and was easily confused. Claimant had difficulties doing simple math (counting out loud when doing so), and his sister reports that he can only tell time on a digital clock. Claimant had some problems recalling information but was able to report what he had done over the weekend.

26. On December 2, 2020, licensed psychologist Ubaldo F. Sanchez, Ph.D., an NBRC consultant, wrote a psychological evaluation report after evaluating claimant on November 10, 2020, for intellectual disability or a fifth-category condition. Dr. Sanchez reviewed the records in claimant's NBRC file, conducted a mental status examination, and administered the WAIS-IV to claimant. The Adaptive Behavior Assessment System, Third Edition (ABAS-3) was completed by claimant's sister.

Dr. Sanchez noted that claimant has been diagnosed with schizophrenia and prescribed olanzapine. Dr. Sanchez wrote: "He has a history of auditory hallucinations and paranoid delusions. He experiences ideas of reference. He thinks that others can read his thoughts and that the TV and radio talk about him." Dr. Sanchez found that claimant needed to continue with mental health treatment and medication.

The mental status examination found that claimant was oriented, and used appropriate eye contact, gestures, and facial expressions. There was no evidence of thought derailment, hallucinations, or delusions. Claimant had a noticeable speech impediment and limited vocabulary for expressing himself.

Cognitive testing using the WAIS-IV resulted in a full-scale IQ score of 72, described by Dr. Sanchez as being in the lower end of the borderline range. Claimant's scores on the subtests ranged from extremely low, to borderline, to low average.

The ABAS-3 indicated extremely low functioning in communication, community use, functional academic, home living, and health and safety; low functioning in leisure, self-direction, and social skills; and below average functioning in self-care.

Dr. Sanchez found claimant met DSM-5 diagnostic criteria for: Other Specified Schizophrenia Spectrum and Other Psychotic Disorder;[2] Borderline Intellectual Functioning;[3] Specific Learning Disorder with Impairment in Reading, Moderate

[2] Diagnostic criteria for schizophrenia, schizophrenia spectrum disorder, and other psychotic disorders differ, but the key features of all such disorders include: delusions, hallucinations, disorganized thinking (typically derived from speech), grossly disorganized or abnormal motor behavior, and "negative symptoms" (for example, diminished emotional expression and avolition). (DSM-5, at pp. 87–88.)

[3] The DSM-5's description of Borderline Intellectual Functioning states: "This category can be used when an individual's borderline intellectual functioning is the focus of clinical attention or has an impact on the individual's treatment or prognosis. Differentiating borderline intellectual functioning and mild intellectual disability (intellectual developmental disorder) requires careful assessment of intellectual and

(history of); Impairment in Mathematics, Moderate (history of); and Impairment in Written Expression, Moderate (history of).

27. As noted above, on December 21, 2020, NBRC determined that claimant did not have an eligible condition under the Lanterman Act. Claimant filed a request for fair hearing. An informal meeting was held in January 2021.

28. After additional information was received from claimant's psychiatrist, suggesting a concern for autism spectrum disorder (ASD) (see Factual Finding 30), NBRC referred claimant for an ASD evaluation.

29. On May 31, 2021, licensed psychologist Robert Horon, Ph.D., wrote a psychological evaluation report, after reviewing claimant's records and conducting an evaluation of claimant on May 11, 2021. Dr. Horon interviewed claimant and his sister, and administered the ABAS-3 and the Autism Diagnostic Observation Schedule, Second Edition, Module 4 (ADOS-2).

Dr. Horon noted that claimant was brief in his responses and answered most open-ended questions with yes, no, or "I don't know" responses. Dr. Horon asked claimant's sister to translate several questions into Tagalog, and claimant's responses were similarly brief. Claimant made a few comments that struck Dr. Horon as odd, but

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adaptive functions and their discrepancies, particularly in the presence of co-occurring mental disorders that may affect patient compliance with standardized testing procedures (e.g., schizophrenia or attention-deficit/hyperactivity disorder with severe impulsivity)." (DSM-5, at p. 727.)

he used appropriate eye contact and did not exhibit stereotyped behaviors or restricted interests.

The ABAS-3 resulted in a General Adaptive Composite score of 59 (below first percentile), with claimant rated as impaired across the adaptive domains.

The ADOS-2 revealed deficits in communication and reciprocal social interactions, but did not show stereotyped behaviors and restricted interests, and there was no historical evidence of such behaviors or interests.

Dr. Horon opined that claimant did not meet the full diagnostic criteria for ASD, which requires restricted, repetitive patterns of behavior, interests, or activities (Criterion B from the DSM-5), along with deficits in social communication and social interaction (Criterion A from the DSM-5).

Dr. Horon diagnosed claimant with Selective Mutism, provisional, as well as noting the five diagnoses made by Dr. Sanchez (described in the last paragraph of Factual Finding 25) and stating that he found no reason to question those diagnoses based on his own assessment.

Letter from Treating Psychiatrist: Dr. Kuhlman

30. Claimant's psychiatrist, Lisa Kuhlman, M.D., the associate physician in charge of mental health and addiction medicine at the Kaiser Permanente in Vallejo wrote a letter dated March 26, 2021, and completed an undated handwritten referral form. She did not testify at hearing.

On the referral form, in the field labeled "intellectual disability," Dr. Kuhlman noted that claimant has displayed intellectual impairment, is generally mute, it is unclear whether he can process correctly, and he possibly has a receptive learning

disability. In the "other" field, she wrote that claimant appears to struggle with social unawareness, along with an inability to communicate.

In her letter, Dr. Kuhlman noted that claimant arrived at her clinic in November 2012 with a schizophrenia diagnosis, and he has been compliant with a low-dosage antipsychotic medication. Dr. Kuhlman has never witnessed any psychotic behavior from claimant and has "always questioned his diagnosis." She noted that claimant is difficult to assess due to his paucity of speech and limited understanding of basic questions. Dr. Kuhlman suspected a developmental disability or autism, and therefore, he was evaluated and found to have an IQ score of 60 (Dr. Holland's evaluation). Dr. Kuhlman requested that NBRC reconsider its eligibility decision.

Dr. Kuhlman disagreed that negative symptoms of schizophrenia could have led to a decline in intellectual ability, finding that claimant's symptoms go beyond the negative symptoms of schizophrenia. Dr. Kuhlman wrote: "We do not believe that [claimant] developed a low IQ as the result of Schizophrenia."

Dr. Kuhlman also suggested that autism may need to be ruled out. (This caused NBRC to refer claimant to Dr. Horon for an ASD evaluation.)

Dr. Kuhlman also relayed comments from the Kaiser psychologist regarding the discrepancy of IQ scores between the testing conducted by Kaiser and Dr. Sanchez:

- For a score of 72 on the WAIS-IV, there is 95 percent confidence that the true IQ score falls between 68 and 77, and the low end of that range falls within the mild intellectual disability range.

- It is likely that claimant would score higher on a second test.

- Claimant's deficits in adaptive functioning are well documented. The DSM-5 notes that IQ scores are approximates of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks; that a person with an IQ score of 70 may have actual functioning comparable to individuals with a lower IQ score; and that clinical judgment is needed in interpreting the results of IQ tests.

Testimony of Dr. Payne

31. Todd Payne, Psy.D., testified at hearing. Dr. Payne has been a licensed psychologist in California since 2002, and has worked as an NBRC psychologist since 2003. Dr. Payne was part of the NBRC eligibility assessment team for claimant, along with an intake assessment service coordinator, a physician, and a supervisor.

32. Dr. Payne discussed the Lanterman Act eligibility criteria, and opined that claimant does not have one of the five qualifying conditions.

33. Dr. Payne discussed the DSM-5 diagnostic criteria for intellectual disability, including significantly impaired general intelligence (generally with an IQ score of 70 or lower, although this is not a firm cut-off), significant deficits in adaptive functioning, and onset during the developmental period. He noted that various factors may complicate the interpretation of IQ test results, some of which are present in this case. This makes it more difficult to determine claimant's intellectual functioning prior to the age of 18. Many times IQ scores are stable over a person's lifetime. But, some situations can cause changes in IQ scores, such as medical or psychiatric conditions.

Dr. Payne noted that cognition is impaired by schizophrenia, and that although such an impairment is not one of the formal diagnostic criteria, patients with

schizophrenia commonly show a decline in cognitive ability.[4] Dr. Payne also explained that the negative symptoms of schizophrenia and impaired cognition tend to be persistent, even if overt psychotic symptoms such as hallucinations and delusions are controlled with medications. He also stated that the active or positive symptoms of schizophrenia may diminish over time more than the negative symptoms.

34. Dr. Payne discussed his concerns with Dr. Holland's psychological evaluation report. Dr. Holland noted that during his evaluation, claimant responded hastily to multiple test items. Dr. Payne noted that transitory factors, such as hasty responses, tiredness, psychiatric symptoms, or medication side effects can affect a person's test performance on some days and not others. Dr. Payne disagreed with Dr. Holland's diagnosis of "moderate" intellectual disability based on the IQ score of 60, stating that the DSM-5 requires clinicians to assign a severity range based on adaptive deficits rather than the IQ score. Regardless, Dr. Payne opined that an IQ score of 60, and claimant's reading skills, are more reflective of mild intellectual disability than moderate intellectual disability.

More importantly, Dr. Payne found there was insufficient evidence to show that claimant suffered from this level of cognitive impairment before the age of 18. The WRAT-4 academic testing conducted by Dr. Holland resulted in some scores in the 80s and others that were much lower. Dr. Payne opined that having higher scores for some

[4] This is consistent with the following notation in the DSM-5's description of associated features for schizophrenia: "Cognitive deficits in schizophrenia are common and are strongly linked to vocational and functional impairments. These deficits can include decrements in declarative memory, working memory, language function, and other executive functions, as well as slower processing speed." (DSM-5, at p. 101.)

overlearned skills, such as reading and spelling, may indicate that claimant had higher skills in the past.

Dr. Payne noted that Dr. Holland discussed the potential impact of claimant's English-language proficiency.

Dr. Payne was concerned that Dr. Holland's evaluation did not discuss claimant's psychiatric condition and whether it might affect his cognitive testing.

35. The NBRC eligibility assessment team noted that there was no conclusive evidence of what claimant's prior abilities were, and they had concerns that the testing conducted by Dr. Holland may underestimate claimant's ability. The NBRC eligibility assessment team referred claimant for an evaluation by Dr. Sanchez.

36. Dr. Payne reviewed the WAIS-IV test conducted by Dr. Sanchez, which yielded a full-scale IQ score of 72 (borderline range), about nine months after Dr. Holland's testing using the same instrument yielded a score of 60. Dr. Payne explained that some variance in IQ scores can be expected due to transitory factors, but 12 points is a large difference. Prior exposure can increase scores, but he would expect a more modest increase of only a couple of points. Dr. Payne noted that claimant had similar scores for verbal comprehension on both tests, but that he scored higher on the second testing for perceptual reasoning, working memory, and processing speed.

Dr. Payne opined that if a person has different IQ scores on two different occasions, the higher score is usually the better measure of the person's true ability, because there are many reasons a person may score below their ability on a particular day, but a person cannot really score higher than their ability. In Dr. Payne's opinion, the IQ score of 72 is more likely to be an accurate measure of claimant's cognitive ability. Regarding Dr. Sanchez's diagnosis of Borderline Intellectual Functioning, Dr.

Payne noted that such a diagnosis indicates intellectual functioning below the low-average range, but higher than someone with mild intellectual disability. Borderline Intellectual Functioning also does not require a particular age of onset, as opposed to intellectual disability, which must appear during the developmental period.

37. Dr. Payne acknowledged that claimant suffers from deficits in adaptive functioning, and that claimant's family and neighbors report he had such deficits before the age of 18, but explained that this is not sufficient to prove the existence of a developmental disability under the Lanterman Act. To be eligible for regional center services, the person must also demonstrate the existence of an eligible condition prior to the age of 18, in addition to the adaptive functioning deficits.

In addition, some of the problems described by claimant's family and neighbors, such as claimant's difficulty in school, are not specific to intellectual disability or a similar condition. Claimant's problems in school are consistent with a learning disability, which is not an eligible condition under the Lanterman Act. Dr. Payne also noted that claimant's ability to finish high school, even with help, and start college classes, is less consistent with an intellectual disability or a similar condition.

38. Dr. Payne opined that more likely than not, claimant experienced a decline in his intellectual functioning after the age of 18, due to his schizophrenia. Based on the available information, Dr. Payne estimated that claimant most likely had intellectual abilities in the upper end of the borderline range to the low-average range, prior to the onset of his mental illness in his late teen years.

39. Based on a review of all the available information, the NBRC eligibility assessment team concluded that claimant does not have a qualifying condition under

the Lanterman Act. They concluded that the evidence did not show that claimant had intellectual disability or a fifth-category condition with an onset prior to the age of 18.

40. Dr. Payne reviewed the evidence submitted by claimant (see Factual Findings 24, 30 and 41-43), and it did not change his opinions.

Claimant's Additional Evidence

41. Claimant's sister testified at hearing and submitted a letter. She reiterated that claimant has had functional impairments throughout his life, including needing reminders for self-care, learning problems, inability to live independently, poor conversation skills, and problems with memory and focus. She stated claimant was diagnosed with intellectual disability before the age of 18, but she was unable to obtain documentation from the Philippines due to the pandemic. Claimant's family wants the best for him, especially since his mother and siblings are getting older.

42. Another of claimant's sisters also submitted a letter. She corroborated claimant's problems with adaptive functioning in all the areas discussed above.

43. Two of claimant's former neighbors from the Philippines also submitted a joint affidavit. These neighbors have lived in the same compound as claimant's family since 1969, and know claimant and his family very well. They observed that at age 16, when most boys are very conscious of how they look, claimant was not. He did not make an effort to comb his hair, cut his nails, or take a bath, and they or claimant's family had to remind him to do these tasks. The neighbors observed that when claimant was 16 years old, he had difficulty understanding simple instructions and had poor reading comprehension. He always had the assistance of friends and family with his homework, and attended summer school in order to pass his classes. Learning is difficult for claimant. The neighbors also observed that claimant was a loner, and a

quiet teenager who did not have many friends. He was good-natured and respectful to everyone.

Ultimate Factual Findings

44. 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, as opposed to his psychiatric condition or learning disability, which are not eligible conditions.

Claimant has not demonstrated by a preponderance of the evidence that he has intellectual disability. The evidence suggests that the cognitive testing by Dr. Sanchez (IQ 72) may be a more reliable measure of claimant's current cognitive ability than the testing by Dr. Holland (IQ 60). But even if Dr. Holland's cognitive testing results were found to be more reliable than the testing by Dr. Sanchez, there is insufficient evidence to conclude that claimant had this level of cognitive impairment prior to the age of 18. To the contrary, the evidence suggests that claimant suffered from a decline in cognitive function due to his psychiatric condition.

For the same reasons, 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, which arose before the age of 18.

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,[5] cerebral palsy, epilepsy, autism, and the fifth category of 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).)

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

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).)

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).)

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.)

6. At this time, 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 44.) It is undisputed that claimant suffers from significant functional limitations. However, the evidence presented at hearing is insufficient to establish that claimant has either intellectual disability or a fifth-category condition originating before claimant reached the age of 18. Accordingly, claimant's 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.