

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

In the Matter of the Fair Hearing Request of:

CLAIMANT,

and

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2022010300

DECISION

David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by video conference on March 17, 2022.

Candace Hein, Fair Hearing Specialist, represented Westside Regional Center (Service Agency or WRC). Claimant was represented by his father (Father). Titles are used to protect confidentiality.

Oral and documentary evidence was received. The record remained open until April 4, 2022, for the parties to submit written closing briefs. WRC's Closing Brief was filed and is marked for identification as Exhibit 23. The ALJ notified Ms. Hein there

appeared to be missing words from the Brief, and a letter amending the Closing Brief was filed and is marked for identification as Exhibit 24. WRC also filed a medical document pertaining to Claimant. However, there was no mention of that document in the Closing Brief, and the record was held open for submission of briefs only. Therefore, the medical document is not being added to the evidence. Claimant's Closing Brief was filed and is marked for identification as Exhibit C. The record closed and the matter was submitted for decision on April 4, 2022.

SUMMARY/ISSUE PRESENTED

Claimant is almost one year old. Claimant has been diagnosed with cerebral palsy (CP), other delays and medical conditions, and he receives services from WRC under the Early Start program, designed for children up to age three. He seeks a waiver of certain Medi-Cal requirements to be able to receive additional services from WRC and Medi-Cal providers. To be eligible for the waiver, Claimant must meet the requirements to receive services under the Lanterman Developmental Disabilities Services Act, found at Welfare and Institutions Code section 4500 et. seq., referred to as the Lanterman Act. All further statutory references are to the Welfare and Institutions Code unless otherwise indicated. Claimant contends he meets those requirements. WRC contends Claimant is not substantially disabled by his CP, is not eligible for services under the Lanterman Act and, therefore, is not eligible for the waiver. As noted below, at the administrative hearing, WRC raised the further contention Claimant did not establish his CP is expected to continue indefinitely, another requirement to receive services under the Lanterman Act.

EVIDENCE RELIED UPON

WRC exhibits 1-24; Claimant's exhibits A-C; and testimony of Ari Zelden, M.D., and Claimant's Father.

FACTUAL FINDINGS

Jurisdiction and Fair Hearing Request

1. Claimant was born in April 2021 and has been diagnosed with CP. He suffers from several medical conditions, including oxygen deprivation during his birth, and spent two months in the hospital. At a meeting at WRC on July 23, 2021, Claimant was found eligible for services under the Early Start program under the category of high risk. Under Claimant's initial Individualized Family Services Plan (IFSP), he was to receive a one-time developmental evaluation and physical therapy two times per month from WRC vendors. (Exhibit 7.)

2. In a WRC interdisciplinary note dated October 21, 2021, Claimant's service coordinator at WRC, Felice Gardner, noted Father had requested WRC to send "waiver information," described as "institutional deeming medical." (Exhibit 22.) Gardner replied that WRC had reviewed Claimant's available medical records and he was not found eligible as "status 2." Status 2 is a reference to being found eligible under the Lanterman Act, which typically provides services to persons three and older. In a follow up interdisciplinary note dated November 19, 2021, Gardner documented she would request Father to send any medical records that included a diagnosis of CP for Claimant.

3. On December 16, 2021, the Service Agency sent a letter and a Notice of Proposed Action (NOPA) to inform Father of its determination Claimant does not meet the criteria that would make him eligible for services under the Lanterman Act. (Exhibit 2.) The letter noted Claimant had a diagnosis of CP, however WRC determined he was not substantially disabled within the parameters of the Lanterman Act.

4. Father submitted a Fair Hearing Request, which resulted in the March 17, 2022 hearing. In the Fair Hearing Request (Exhibit 2), Father referenced several medical conditions and delays experienced by Claimant and requested a "medical waiver to get our son medical coverage."

5. In the initial IFSP it is noted Claimant has private health insurance as well as Medi-Cal. Therefore, the Fair Hearing Request for medical coverage seemed ambiguous until further information was provided.

6. The nature of Claimant's request became clearer with information provided during the hearing and in WRC's Closing Brief. (Exhibit 23.) Two waivers are explained, one of which (HCBS) was discussed with Father, and the other (HCBA) which Father chose not to seek. The HCBS waiver, or Home and Community-Based Services for the Developmentally Disabled Waiver, allows services to be provided by regional centers when some Medi-Cal rules are waived. Those services may be provided in ways that may not be available to other people enrolled in Medi-Cal. Further, full Medi-Cal coverage without considering family income and without a family share of costs is provided through a process called "institutional deeming."

7. To qualify for the HCBS waiver, a regional center consumer must be "status 2"; that is, the consumer must meet the eligibility requirements for services under the Lanterman Act.

8. Another confusing aspect of the evidence was the reliance of WRC on two different reasons to determine Claimant would not be eligible under the requirements of the Lanterman Act. In the letter accompanying the NOPA, WRC relied upon language in the Lanterman Act requiring a person to be substantially handicapped by a developmental disability, and contended Claimant, although diagnosed with CP (an eligible developmental disability), was not substantially handicapped by it. (Exhibit 2.) This same reason was cited in a letter after an informal conference on February 11, 2022. (Exhibit 3.) At the hearing, WRC also contended Claimant did not meet the requirement that, to be eligible, a person's developmental disability must continue or be expected to continue indefinitely.

Medical Records and IFSP's

9. The earliest medical record in evidence is dated April 26, 2021, and documents Claimant's discharge from the neonatology unit at Cedars Sinai and transfer to Children's Hospital of Los Angeles (CHLA) less than two weeks after he was born. (Exhibit 10.) Among the issues noted for Claimant are: neurologic, elevated tone in all extremities but greater in Claimant's lower extremities, and absent suck reflex; respiratory distress at birth, failure to utilize room air so a nasal canula was placed, and difficulty handling secretions; and abnormality of his jaw resulting in use of a feeding tube.

10. Exhibit 11 is comprised of consultation and referral notes from Claimant's hospitalization at CHLA from April 26, 2021, to discharge on June 14, 2021. Numerous tests, examinations, and assessments are documented. X-rays of Claimant's extremities depicted bone abnormalities, and arthrogryposis, a condition affecting his joints, was suspected. A brain MRI showed diffusivity consistent with white matter injury. Also referenced are requests for consultation for otolaryngology, plastic surgery,

pulmonology, genetic testing, spinal ultrasound, and others. No other relevant information was gleaned by the ALJ. It is noted the records in this exhibit are comprised of 18 pages out of 157 pages.

11. A report of polysomnography (sleep study) performed May 5, 2021, revealed Claimant had seven obstructive sleep apneas, 46 central sleep apneas, episodic hypoxemia (low oxygen concentration in the blood), and 68 obstructive hypopneas (shallow breaths). (Exhibit A.) A second polysomnography report from November 17, 2021, revealed Claimant had 14 obstructive sleep apneas, 41 central sleep apneas, episodic hypoxemia, and 90 obstructive hypopneas. (Exhibit B.)

12. The discharge summary from CHLA, dated June 14, 2021, lists 14 numbered diagnoses and, of note, is the first reference in the evidence to Claimant's diagnosis of spastic quadriplegic CP. (Exhibit 12, p. A70.) Of a total of 59 pages, 16 pages are provided. During the hospitalization, the most active issue was Claimant's inability to feed orally. A nasal gastric tube was used for feeding and Claimant gained weight. Doctors recommended a gastric tube for more stable tube placement however Claimant's parents were unwilling and stated, despite the benefits, the risk of anesthesia possibly contributing to any developmental delay outweighed the benefits.

13. An IFSP review meeting took place August 26, 2021, and the addendum added several new outcomes and increased occupational therapy from one hour per month to one hour per week. (Exhibit 6.)

14. Occupational therapy temporarily ended on October 18, 2021, and the therapist provided a final report referencing Claimant's developmental handling, response to sensory input, oral-motor and feeding treatment. (Exhibit 14.) Issues noted

included poor oral awareness and poor oral motor skills, increased saliva production, and tongue issues requiring referral for an ENT evaluation.

15. Exhibit 13 is comprised of 16 out of 59 pages of CHLA outpatient notes. Cardiology issues include small defects, some of which had resolved however no significant cardiac problems are noted. Douglas Vanderbilt, M.D., a neonatologist, examined Claimant on October 21, 2021, and noted Mother's concerns regarding Claimant's general movements and feeding. Of note, Dr. Vanderbilt's diagnoses at that time do not include CP. More specifically, line number 9 that previously referred to spastic quadriplegic CP is now blank. (Exhibit 13 at p. A82.) Dr. Vanderbilt recommended, among other things, the regional center follow Claimant in the Early Start program with physical therapy and occupational therapy, follow up by various medical specialties, and a developmental assessment when Claimant is 12 months old. Separate notes by Dr. Vanderbilt are found in Exhibit 15, identical to the portion of Exhibit 13 relating to his examination of and diagnoses for Claimant.

16. Exhibit 16 is a physical therapy note dated November 1, 2021, recommending an increase in services. Physical therapy began in August 2021, two times per month. The recommended increase is for weekly sessions, "per his pediatric neurologist," as well as feeding/swallowing occupational therapy. (*Id.* at p. A99.) Claimant was 6.5 months old, but he performed at the three-month gross motor level. Therapist Carrie Mc Nitt used a section of the Peabody Test and provided examples of Claimant's gross motor functions, several of which were deficient. Mc Nitt noted the parents were very involved and were instructed in home exercises.

17. An IFSP review meeting took place November 5, 2021, and the addendum modified several outcomes. Infant stimulation services were to be provided, one hour per week, through May 2022. (Exhibit 5.)

18. A Physical Therapy Developmental Evaluation report by Debby Bohn, pediatric physical therapist, is dated November 12, 2021. (Exhibit 17.) It was requested by WRC. Bohn obtained history information from Mother and evaluated Claimant via telehealth using the Developmental Assessment of Young Children-2 (DAYC-2). Claimant was 6 months, 27 days-old at that time. Claimant performed in the seven listed domains as follows:

(1) Cognitive: age equivalent-6 months, standard score-101, rating-average; (2) Receptive communication: age equivalent-3 months, standard score-90, rating-average; (3) Expressive communication: age equivalent-2 months, standard score-80, rating-below average; (4) Fine motor: age equivalent-3 months, standard score-89, rating-below average; (5) Gross motor: age equivalent-4 months, standard score-91, rating-average; (6) Adaptive: age equivalent-4 months, standard score-90, rating-average; (7) Social emotional: age equivalent-4 months, standard score-86, rating-below average.

Bohn provided example of Claimant's performance in each domain, including above, below, and normal actions. She recommended increasing physical therapy to one time per week and continuing occupational therapy and infant stimulation one time per week.

19. An IFSP meeting took place January 19, 2022, and the resulting IFSP notes, among other things, new family concerns and resources, and services provided. (Exhibit 4.) Claimant was receiving occupational therapy/feeding therapy with CHLA one time per week, and WRC had provided "EI" (not explained by the evidence) one time per week, occupational therapy/fine motor one time per week, and physical therapy one time per week. Father reported various concerns, including Claimant's overall development, muscular development, trouble swallowing saliva that leads to

several daily incidents of choking, oxygen desaturation found during sleep studies, and that Claimant has difficulty being comforted and often seems sad and to cry with no reason. Of the 16 goals identified for Claimant, he has met two and is “in progress” for the remainder. WRC ongoing or new services to address these goals, through February 2022, are: physical therapy one time (one hour) per week; occupational therapy one time (one hour) per week; infant stimulation services, one time (one hour) per week, and a one-time developmental evaluation. The IFSP also refers to a Special Instructor charged with overseeing service providers and parents’ implementation of home programs to ensure timely and consistent services for Claimant.

20. Physical therapist Mc Nitt authored a report dated January 20, 2022, recommending that services continue at the rate of one time per week. (Exhibit 9.) Claimant was nine months old; his gross motor skills were at the five-to-six-month level as measured by the Peabody Test. Examples of skills are given, including some improvements and emerging abilities and some continuing limitations.

21. An occupational therapy progress report of February 1, 2022 includes that one goal established in December 2021 has been met by Claimant and two other goals are in progress. (Exhibit 8.) Generally, steady improvement is noted in his fine and visual motor skills and social skills. Continued therapy is recommended.

22. An informal meeting occurred February 11, 2022, as part of the fair hearing process, followed by Hein’s letter summarizing the meeting. (Exhibit 3.) Father expressed frustration that eligibility had not been decided, and referenced the following conditions of Claimant: CP, brain damage, physical abnormalities, unable to eat, danger of suffocation, drooling, and worsening sleep apnea. Hein noted that Claimant’s medical records from his treating pediatrician, although authorized, had not

been sent to WRC. WRC did not change its determination the criteria of a substantial disability had not been met.

Testimony of Dr. Ari Zeldin

23. Ari Zeldin, M.D., has been a consultant for WRC since 2000 and has reviewed thousands of cases relating to eligibility and services under Early Start and the Lanterman Act. He reviewed the medical records noted above and testified he did not consult for WRC on Claimant's entry into the Early Start program, but agreed Claimant was eligible for the program. Dr. Zeldin noted the CP diagnosis in earlier records from CHLA was no longer included when Dr. Vanderbilt made his report in October 2021.

24. The primary focus of Dr. Zeldin's testimony was his opinion a diagnosis of CP in a child less than 18 months-old is rare, although he has made such diagnoses in the past. He did not see the CP diagnosis as being well-substantiated when it was given, and noted muscle tone, an element of a CP diagnosis, changes a lot in the first 12 to 18 months of a child's development. Although there is no predictable trajectory for any child's development and improvement, the records show Claimant is improving in some ways. Because conditions may not persist as a child ages, Dr. Zeldin would not make a diagnosis of CP for Claimant at this time. Similarly, Dr. Zeldin did not believe Claimant presented as substantially handicapped in at least three of the areas identified for eligibility under the Lanterman Act. Dr. Zeldin was not more specific on the subject of the areas of substantial handicap for Claimant.

25. Dr. Zeldin reviewed the letter following the informal meeting in February 2022. (Exhibit 3.) The list of Claimant's conditions noted by Father did not change Dr. Zeldin's opinion. The various concerns noted by Father were medical issues, and not

specific to the eligibility decision under the Lanterman Act. Dr. Zeldin added that, as Claimant approached age three, WRC would again review his condition to determine if he was eligible under the Lanterman Act.

Testimony of Father

26. Father's testimony was earnest and believable. He was particularly concerned that claimant chokes on his saliva, his oxygen level gets reduced, and he requires CPR. This happens multiple times per day. Father gave more details on the subjects he had discussed in the informal meeting. Father reviewed the sleep studies and believed they indicated Claimant's apnea problem was getting worse. He reviewed the records of therapy providers and noted Claimant was below average in some domains and questioned how it could be concluded Claimant was not substantially disabled. He added that the family wanted the Medi-Cal waiver so there would be no delay in getting necessary treatments and services. In particular he noted a nurse visits Claimant every week but has not been paid for the last six months. Father testified Claimant is covered by Medi-Cal "but it does not kick in unless the regional center gives a waiver." He also stated Claimant receives some Medi-Cal coverage, but it is only due to Covid and will stop at some point. Father also stated his doctors have contacted the insurance company multiple times, but some unspecified services have still not been approved.

Other Relevant Evidence

27. The evidence was less than clear concerning Claimant's current Medi-Cal coverage. His Medi-Cal caseworker spoke with Gardner, his WRC service coordinator, and Gardner made a note October 21, 2021, that the caseworker confirmed being placed on the waiver would not change Claimant's benefits. Further, the caseworker

tried to explain the waiver to Father. (Exhibit 22.) Gardner's note of November 19, 2021, indicates she followed up with the caseworker to see "if there are any eligible codes that [Claimant] and his family situation qualify for at this time." (*Ibid.* at p. A114.) Claimant is not "status 2 eligible and therefore a referral for institutional deeming medi-cal [*sic*] cannot be made at this time." (*Id.*)

28. In Claimant's Closing Brief, Father refers to various medical records that include Claimant's diagnosis of CP that were not included in the evidence as well as some records that were in the evidence, and writes WRC had access to all the medical records. Father noted the responses from WRC to his request for the Medi-Cal waiver varied over time—first there was no eligible diagnosis, then the CP diagnosis was not a substantial disability for Claimant, then that Dr. Zeldin did not support the CP diagnosis at this time. Father lists the seven areas of substantial disability and refers to medical notes and conditions that he believes supports each of the seven regarding to Claimant.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, an administrative "fair hearing" is available to determine the rights and obligations of the parties. (Code, § 4710.5.) Claimant requested a fair hearing to appeal the Service Agency's denial of his eligibility under the criteria of the Lanterman Act. Jurisdiction in this case was thus established. (Factual Findings 1 through 8.)

2. The standard of proof in this case is the preponderance of the evidence because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) The party asserting a claim generally has the burden of proof in

administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, Claimant bears the burden of proof regarding his request for eligibility.

3. To be eligible for regional center services under the Lanterman Act, a person must have a qualifying developmental disability. Code section 4512, subdivision (a), defines "developmental disability" as "a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . [T]his term shall include intellectual disability, cerebral palsy, epilepsy"

4. A further consideration is found in California Code of Regulations, title 17, section 54000, which defines "developmental disability" as a disability attributable to an eligible condition that originates before age 18, is likely to continue indefinitely, and constitutes a substantial disability. Excluded are handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or solely physical in nature. As relevant here, the Regulation defines "solely physical in nature" as conditions such as "congenital abnormalities . . . or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation." (*Id.*)

5. The majority of the conditions experienced by Claimant and referenced by Father are medical conditions in the nature of handicapping conditions that are physical in nature. As such, they are excluded from the definition of a developmental disability found in the Regulation. The diagnosis of CP, first made while Claimant was treated at CHLA, did not appear in later records from CHLA. And while Dr. Zeldin does not necessarily agree with the CP diagnosis, more significant is his testimony to the effect Claimant cannot establish his disability "can be expected to continue,

indefinitely,” as that phrase is used in the law defining eligibility under the Lanterman Act., Code section 4512, subdivision (a).

6. Claimant has several challenging behaviors, conditions, symptoms, and diagnoses. Father’s concerns for his son’s health are legitimate and sincere. Although Father references “several medical chart notes from difference medical doctors who diagnosed [Claimant] has [C]erebral Palsy,” there is only one such note in evidence. (Closing Brief, Exhibit C, p. 2.) And as noted above, a later list of Claimant’s several diagnoses, also from CHLA, no longer includes the reference to CP. Claimant has not met the legal requirements to establish that he has a developmental disability that makes him eligible for services from WRC under the Lanterman Act. (Factual Findings 1-28.)

7. The changing nature of WRC’s positions and contentions is concerning. WRC is required under Code section 4701 to provide Father with “adequate notice” of its decision, including the reasons for that action and specific laws or regulations supporting that action. Here, WRC notified Father the reason for its decision denying Lanterman Act eligibility was Claimant was not substantially disabled by his CP. However, the only evidence offered in support of its decision was testimony by Dr. Zeldin, who summarily and without much explanation stated Claimant was not substantially disabled in three required domains. Dr. Zeldin’s testimony Claimant’s CP cannot, at this time, be expected to continue indefinitely was not included in the “adequate notice” provided to Father by WRC. However, Dr. Zeldin’s opinion was not challenged by any competent evidence. WRC should have been more specific in providing adequate notice to Father of the reasons for denial. However, Claimant still did not establish he is presently able to satisfy all the eligibility requirements.

8. About the time they reach two and one-half years of age, children in the Early Start program are, as required by law, evaluated to determine if they are eligible for services under the Lanterman Act. At that time, or sooner if there is different evidence relating to his eligibility, Claimant can be re-evaluated for Lanterman Act eligibility.

ORDER

Claimant's appeal of the Service Agency's decision to deny his eligibility under the Lanterman Act is denied.

DATE:

DAVID B. ROSENMAN

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.