

**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. 2022060378

DECISION

David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by video conference on July 14, 2022.

Candace J. Hein, Fair Hearing Specialist, represented the Westside Regional Center (WRC or Service Agency). Claimant was represented by his mother (Mother). Titles are used to preserve confidentiality. Claimant was not present at the hearing.

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on July 14, 2022.

ISSUE

Claimant has been diagnosed with Autism Spectrum Disorder (ASD). Is Claimant substantially disabled by his ASD and, therefore, eligible for services from the Service Agency?

EVIDENCE RELIED UPON

WRC exhibits 1-14; and testimony of Dr. Kaely Shilakes, WRC psychologist; Lynn Wang; and Claimant's Mother.

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a four-year, seven-month-old male who lives with his family within the catchment area of the Service Agency. He has been diagnosed with ASD.

2. In December 2021, Mother requested that Claimant be assessed by the WRC for eligibility for services. Possible services from the WRC would fall under the Lanterman Developmental Disabilities Services Act (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 noted.) ASD is a developmental disability for which services may be available under the Lanterman Act. A second requirement to receive services is that the consumer must be substantially disabled due to the eligible developmental disability. This is determined by reference to seven areas of major life activity, discussed in more detail below.

3. On February 25, 2022, WRC Intake Counselor Jennifer Morales wrote a letter and WRC issued a Notice of Proposed Action including the WRC's determination that Claimant did not meet eligibility requirements and the request for services was denied. (Exhibit 3.)

4. Mother filed a Fair Hearing Request dated March 10, 2022. This hearing was then scheduled.

Assessments and Testing of Claimant

5. A Psychosocial Assessment was performed by Intake Counselor Morales, who noted, among other things, Claimant's developmental milestones, current status of strengths and supports needed, family history, and health and medical status. It was noted Claimant had been diagnosed with ASD. Morales recommended a referral for psychological evaluation and obtaining medical and school records.

6. Mother provided a report to the WRC by Dr. Samantha Kujac, Psy.D., and Dr. Sai Iver, M.D., dated October 15, 2021, that included test results and the diagnosis of ASD for Claimant. (Exhibit 7.) As noted in this report, Claimant received the following scores and descriptions on subtests of the Wechsler Intelligence for Children: Fourth Edition: Verbal Comprehension, standard score 132, description "Very Superior": Visual Spatial, standard score 94, description "Average": and Working Memory, standard score 100, description "Average." On the Vineland Adaptive Behavior Scales, Third Edition (VABS-3), Claimant scored in the adequate range for the Adaptive Behavior Composite, and in the adequate range in the domains of Communication, Daily Living Skills, Motor Skills, and Socialization. In the Maladaptive Behavior domain, his Internalizing scale was average, and his Externalizing scale was elevated. Claimant was in the typical range on the Sensory Processing Measure,

Second Edition, which used Mother's responses to assess Claimant's functions in his home environment. Responses were scored separately from Claimant's parents and his teacher for the Social Responsiveness Scale-Second Edition, in which Claimant was rated as within normal limits in the areas of Social Communication Interactions and Restricted Interests and Behavior. Claimant's scores were in the average range on the Behavioral Assessment Scale for Children, Third Edition, based on reports from Mother and his teacher. On the 14 categories for the Childhood Autism Rating Scale (CARS2-ST), Claimant scored from 1 to 2.5, with a General Impressions score of 2. A score of 1 indicates normal behaviors, and 4 indicates severely abnormal behaviors for the child's age. Claimant's total score of 25 fell within the Minimal-to-No Symptoms of ASD range. Dr. Kujac and Dr. Iver wrote that Claimant had clinically significant impairments that significantly impacted his daily social, emotional, and adaptive functioning. They recommended an intensive program such as Applied Behavioral Analysis (ABA) interventions and play based strategies such as the floor time DIR [Developmental Individual Difference, Relationship] model, and referral to a local regional center.

7. To gather further information, the Service Agency referred Claimant for a psychological evaluation by Naz Bagherzadeh, Psy.D., who evaluated Claimant remotely via telehealth on January 1, 13, and 17, 2022. Claimant was four years old at that time. Among other things, Dr. Bagherzadeh reviewed the report by Dr. Kujac and Dr. Iver. Dr. Bagherzadeh also observed Claimant, gathered information from Claimant's Mother, and administered several tests. Dr. Bagherzadeh summarized his findings in a report. (Exhibit 5.)

8. At the hearing, Dr. Kaely Shilakes, the WRC staff psychologist, reviewed and interpreted Dr. Bagherzadeh's report. Dr. Shilakes has a Psy.D. in clinical psychology, with an emphasis in clinical psychology. She has performed psychological

assessments for the WRC, reviews assessments performed by others, and is familiar with the tests administered by Dr. Bagherzadeh, Dr. Kujac and Dr. Iver. According to Dr. Shilakes, most of the tests administered by Dr. Kujac and Dr. Iver yielded scores that, in her opinion, did not demonstrate significant limits in Claimant's functionality.

9. Dr. Shilakes testified about the three tests administered by Dr. Bagherzadeh. Information was gathered from Claimant's parents and by observation. On the Developmental Assessment of Young Children, Second Edition, Claimant scored in the average range in the Communication (receptive and expressive language) domain, poor in the Social-Emotional domain, and above average in the Cognitive domain. On the VABS-3, Claimant again scored in the adequate range in the domains of Communication, Daily Living Skills, Motor Skills, and Socialization. (Dr. Kujac had also administered the VABS-3 to Claimant, who had performed in the adequate range in these domains.) The CARS2-ST was also administered, with Claimant's total score of 30 falling within the range of Mild-to-Moderate Symptoms of ASD. Using the criteria from the Diagnostic and Statistical Manual, 5th Edition, Dr. Bagherzadeh opined that Claimant presented with behaviors consistent with ASD, Level 1, requiring support. Dr. Bagherzadeh recommended that Claimant's school district obtain a psychoeducational assessment, speech and language services be pursued, and ABA interventions be considered to address sensory sensitivities, play, and social skills. Dr. Shilakes acknowledges that Claimant has a diagnosis of ASD.

10. Dr. Shilakes testified about the seven areas of major life activity that are evaluated to determine if someone is substantially disabled by a developmental disability. These areas are listed in a statute and a regulation discussed in the Legal Conclusions below. The seven areas are: (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. Dr. Shilakes noted that, because of Claimant's young age, major life activity areas (6) and (7) do not apply. At least three of the remaining major life activity areas must be found for a consumer to have significant functional limitations and be considered as "substantially disabled." If so, the consumer is eligible for services under the express language of the Lanterman Act.

11. Considering all of the test scores and observations noted in the reports, Dr. Shilakes opined that Claimant had a significant limitation in his self-direction. She believed this was largely a function of the factors that support his ASD diagnosis. Dr. Shilakes testified she was part of a multidisciplinary team at the WRC that evaluated Claimant's eligibility on February 23, 2022. The team also included a service coordinator, a physician, an autism specialist, and a psychology consultant. The team unanimously concluded that Claimant is appropriately diagnosed with ASD, but that he does not have significant limitations in at least three of the seven areas of major life activities.

12. Claimant attends a preschool. His school district assessed his needs to determine if Claimant required an Individualized Education Plan (IEP). In March 2022 the Los Angeles Unified School District (LAUSD) performed an Occupational Therapy Assessment (Exhibit 10), a Language and Speech Assessment (Exhibit 8), and a Psycho-Educational Assessment (Exhibit 8). At an IEP meeting on March 24, 2022, LAUSD determined Claimant was not eligible for special education services.

13. Mother submitted the LAUSD reports to the WRC and an informal resolution conference was held. After review of the material, Ms. Hein from the WRC notified Mother that the WRC would not change the decision that Claimant was not eligible for services because, although diagnosed with the developmental disability of ASD, Claimant was not substantially disabled by that condition. (Exhibit 12.)

Additional Relevant Evidence

14. At the hearing, Mother expressed legitimate concerns about Claimant's history, his disability and challenging behaviors, and his need for services. She referred to several occupational therapy evaluations of Claimant, including a recent recommendation for therapy one time per week. However, the parents cannot afford that therapy and are trying to obtain health insurance coverage for it. Mother is not aware of any written reports from these OT evaluations. Claimant has no concern for danger, such as darting away. He does not seem to realize the consequences of his actions and has difficulty transitioning from one activity to another. Mother gave several examples of Claimant's challenging behaviors and deficits, including in the areas of self-care, communication, and self-direction.

15. Claimant began attending pre-school in October 2020 and will start a pre-Kindergarten program this fall at a charter school.

16. Lynn Wang is a Development Client Coach employed by Positive Development. She began working with Claimant in April 2022. Ms. Wang provides support services to Claimant three days per week, seven hours per day, in Claimant's pre-school and at his home, and for some recreational activities and appointments. Ms. Wang received her master's degree in fine arts from the University of California, Irvine. She has 10 to 12 years of experience as a teacher and tutor at the community college and college level, and some experience with students with ASD. When she was hired, Ms. Wang received training in providing support for children with developmental disabilities. She described her role as working with Claimant under supervision of a clinician and with an individual plan of support in a holistic support system. Claimant's plan is based on the DIR floor time model, not ABA.

17. Ms. Wang described several of Claimant's behaviors and limitations she has observed. For example, Claimant has sensory sensitivities such as to sounds and touch and may become dysregulated and need support to become calm. Claimant often wears headphones to screen sounds. He has trouble transitioning between activities. In his movement class or music class, Claimant becomes overwhelmed and may try to leave the class. She described one incident of Claimant kicking an object towards her, in reaction to her instructions to stop another troubling behavior. Also, when frustrated or angry Claimant may not use language effectively.

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 eligibility for Claimant. Jurisdiction in this case was thus established. (Factual Findings 1-5.)

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.) A consumer seeking to become eligible for services has the burden to demonstrate that the services should be provided, because 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. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an "array of services and supports should be established . . . to meet the needs and choices of each

person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (Code, § 4501.) These services and supports are provided by the state’s regional centers. (Code, § 4620, subd. (a).)

4. In order to be eligible for regional center services, a person must have a qualifying developmental disability. As applicable to this case, 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. . . . This [includes] autism.”

5. To prove the existence of a developmental disability within the meaning of Code section 4512, a claimant must show that he has a “substantial disability.” Pursuant to Code section 4512, subdivision (f):

“Substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

(1) Self-care. [¶] (2) Receptive and expressive language. [¶]
(3) Learning. [¶] (4) Mobility. [¶] (5) Self-direction. [¶] (6)
Capacity for independent living. [¶] (7) Economic self-sufficiency.

6. Very similar language is found in California Code of Regulations, title 17, section 54001. Any differences between the language in Code section 4512, subdivision (f) and in the Regulation are not relevant to this matter.

7. In determining eligibility, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS [California Department of Developmental Services] and regional center professionals' determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In this case, the WRC determined that while Claimant has a diagnosis of ASD, he does not have significant functional limitations in at least three of the seven areas of major life activity, as required to be eligible for services. (Factual Findings 1-17.)

8. Claimant's mother presented as a capable and caring person. Claimant has numerous challenges, as well as strengths, and his daily life can be difficult. Mother and Ms. Wang both provided examples. Mother, Father, and pre-school teachers provided information for numerous tests administered to Claimant. Whether those challenges are of clinical significance is the issue. Dr. Kujac and Dr. Iver wrote that Claimant had clinically significant impairments that significantly impacted his daily social, emotional, and adaptive functioning. However, the results of the tests they administered scored Claimant in the average or adequate range, which does not support their conclusions. Testing by Dr. Bagherzadeh yielded similar results. While the diagnosis of ASD was confirmed, the WRC clinician who administered the tests, and another clinician who reviewed the results and other reports, agreed that Claimant is not substantially disabled by his ASD. Therefore, a behavior which is noticeable to Claimant's parents or Ms. Wang may not be viewed as clinically significant by those who, by their training and experience, are qualified to make the eligibility determination. Mother pointed out the assessments and observations by Dr. Bagherzadeh were performed about six months ago and therefore may be outdated. However, the LAUSD testing was more recent, and that testing did not identify any additional significant functional limitations in any area of major life activity. There are

no convincing opinions by qualified clinicians that establish Claimant is currently substantially disabled by his ASD. Further, the law provides that deference is to be given to the WRC professionals' evaluation and determination of Claimant's eligibility for services.

9. Claimant has several challenging behaviors and other symptoms of his ASD. However, as set forth in Dr. Bagherzadeh's report and the test results, and as explained by Dr. Shilakes, Claimant has not met the legal requirements to establish that his ASD is substantially disabling based on the evidence available at this time. Claimant did not establish that WRC's decision denying him eligibility is incorrect.

ORDER

Claimant is not eligible for regional center services under the Lanterman Developmental Disabilities Services Act.

Claimant's appeal from the Service Agency's determination that he is not eligible for regional center services 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.