

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

In the Matter of:

CLAIMANT

v.

NORTH BAY REGIONAL CENTER, Service Agency.

OAH No. 2022060591

DECISION

Administrative Law Judge Karen Reichmann, State of California, Office of Administrative Hearings, heard this matter on October 24 and November 15, 2022, by videoconference.

Attorney Adeyinka Glover represented claimant. Claimant's mother appeared at the hearing as his authorized representative. Claimant was not present.

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

The record closed and the matter was submitted for decision on November 15, 2022.

ISSUE

Is claimant eligible for regional center services based either on autism spectrum disorder (ASD) or under the fifth category?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is an adult male born in November 1985. He seeks regional center eligibility based on ASD or under the fifth category (a disabling condition closely related to intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability). This is the third time that claimant has applied for regional center eligibility.

2. On May 3, 2022, NBRC issued a Notice of Proposed Action to claimant notifying him that his request for eligibility was denied. NBRC does not dispute that claimant is substantially disabled, but does not believe that he has a developmental disability.

3. Claimant timely submitted a Fair Hearing Request, and this hearing followed.

Claimant's Background

4. Claimant is the youngest of six children. He was born in Mexico and immigrated to the United States with his family at age two. He speaks both Spanish and English. Claimant resides in Sonoma County and attended schools in the Sonoma Valley Unified School District. There are limited school records available.

5. Claimant repeated kindergarten.

6. Claimant's mother became concerned about claimant's lack of academic achievement when he was about 14. Claimant was evaluated for special education in May 2000, when he was 14 years old. The evaluator concluded that claimant did not meet federal and state criteria for special education, that there was no significant discrepancy between his general ability and achievement, and that he had no significant processing disorder.

7. Claimant performed poorly in high school. Claimant did not earn enough credits to promote from ninth grade, and his mother again requested that he be assessed for special education services.

8. Claimant was assessed for speech and language deficits in the fall of 2001, when he was 15 years old. The speech-language pathologist noted that claimant's test results indicated some deficits in most language areas, and that he qualified for special education as communicatively handicapped.

9. School records from early 2004 reflect that claimant received resource specialist services and attended general education classes. Claimant missed a lot of school in his senior year and did not graduate.

10. Claimant worked at as a courtesy clerk in a supermarket for about two years, from approximately 2005 through 2007. He has been unable to maintain employment since that time. He has received vocational services from the Department of Rehabilitation.

11. Claimant lives with his parents and one of his brothers.

12. Claimant has been diagnosed and treated for mental health conditions, including depression and PTSD (post-traumatic stress disorder) related to sexual abuse he suffered as a child.

Diagnostic Criteria for Autism Spectrum Disorder

13. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5), section 299.00, sets forth the diagnostic criteria for ASD as follows:

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive):

(1) Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.

(2) Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.

(3) Deficits in developing, maintaining, and understanding relationships, ranging for example, from

difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive):

(1) Stereotyped and repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).

(2) Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal and nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).

(3) Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).

(4) Hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment (e.g. apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling

or touching of objects, visual fascination with lights or movement).

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capabilities, or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

NBRC Eligibility Determinations

2013 DETERMINATION – INTELLECTUAL DISABILITY

14. In 2013, claimant sought eligibility based on intellectual disability. He was evaluated by Ubaldo F. Sanchez, Ph.D. Dr. Sanchez reviewed records provided by the family, interviewed claimant and his father and brother, and administered IQ and adaptive functioning assessments. Using the WAIS-IV, Dr. Sanchez determined that claimant had a full scale IQ of 84, which is low average. Dr. Sanchez diagnosed PTSD

and Learning Disorder, not otherwise specified. He also wrote, "Diagnosis Deferred on Axis II." Axis II diagnoses include personality disorders.

15. Dr. Sanchez attributed claimant's impairments in the communication, community use, self-care, self-direction, functional academic, home living, and social skills domains to his level of emotional functioning. He advised that claimant continue mental health treatment. In light of Dr. Sanchez's evaluation, NBRC issued a Notice of Proposed Action to claimant denying eligibility.

2019 DETERMINATION – ASD

16. Claimant again sought eligibility in 2019, on the basis of ASD. Claimant provided NBRC with medical records reflecting his treating clinicians' opinions that he is developmentally delayed and a neuropsychological evaluation done by clinical neuropsychologist Carolyn Crimmins, Psy.D., and neuropsychological fellow Gera Anderson, Psy.D., in 2019. Drs. Crimmins and Anderson wrote that claimant had some behaviors observed in patients with ASD, but that these behaviors could be attributable to other causes such as a mood disorder or sexual abuse/PTSD. They concluded that claimant presented with "a mixture of premorbid cognitive impairment and mood symptomology" and recommended that he be assessed for eligibility by NBRC.

17. NBRC arranged for licensed psychologist Todd Payne, Psy.D., and registered psychologist Daniel Silva, Psy.D., to evaluate claimant on July 15, 2019. Drs. Payne and Silva met with claimant, performed a DSM-5-based interview of his parents, administered the Autism Diagnostic Observation Schedule, Second Edition, Module 4 (ADOS) to him, and wrote a report with their findings. Claimant's mother reported in

the interview that she began to feel concerned about claimant's development when he was 15 years old because he had become very withdrawn.

Claimant received a combined score of 17 on the ADOS, which is above the cutoff for ASD. Applying the DSM-5 diagnostic criteria, Drs. Payne and Silva found that claimant satisfied the criteria in section "A" but displayed none of the traits in section "B." Accordingly, they concluded that claimant does not satisfy diagnostic criteria for ASD.

18. In light of the report of Drs. Payne and Silva, NBRC denied claimant's request for eligibility in September 2019.

2022 DETERMINATION – ASD AND FIFTH CATEGORY

19. Claimant submitted new information to NBRC with a new request for eligibility in 2022, notably the report of Kaiser Permanente psychologist Jonathan Cook Waldron, Ph.D. Dr. Waldron evaluated claimant in November 2021. He interviewed claimant and his parents and administered a number of assessment tools, including an IQ test, the Autism Mental Status Exam, and the Autism Diagnostic Interview – Revised (ADIR) (a parent interview regarding the subject's development up to 36 months of age). Dr. Waldron did not administer the ADOS. Dr. Waldron noted that claimant had been diagnosed with ASD in 2013. He wrote that: "Information gathered via behavioral observations, descriptions of current functioning, assessments, and developmental history was complex and multifaceted. However, there was compelling enough evidence to suggest a DSM-5 Autism Spectrum Disorder diagnosis is an accurate description of [claimant's] social and behavioral patterns." Dr. Waldron concluded that claimant meets the DSM-5 criteria for ASD.

20. NBRC assessment counselors interviewed claimant and his mother in March 2022 and wrote a report summarizing the interviews. An NBRC eligibility team performed a comprehensive case review and determined that claimant is not eligible for NBRC services. Claimant was not reassessed by NBRC psychologists.

Testimony of Claimant's Mother

21. Claimant's mother reported that he was a docile child who always wanted to be around her, and that he did not like school other than art class. She did not describe claimant demonstrating restricted, repetitive patterns of behavior, interests, or activities during childhood. She stated that she requested that he be evaluated by the school district because he was not bringing home any homework.

22. Claimant's mother testified that presently, claimant needs assistance in many activities of daily living. He does not cook or clean. He needs to be reminded to wake up, bathe, and put on clean clothes. Claimant's parents bring him to appointments and help him manage his diabetes.

23. Claimant's mother reported that claimant talks repetitively about certain topics, including repeating rambling and nonsensical statements about his experiences in high school. Claimant also repeatedly asks her the same questions over and over, for example he repeatedly asks about their neighbors. Claimant's mother described him laughing inappropriately and saying hurtful and offensive things without noticing that he has offended someone. She reported that claimant has no friends. Claimant's parents are concerned that he will become homeless when they are no longer able to help him.

Claimant's Expert, Valerie Benveniste, Ph.D.

24. Claimant retained licensed clinical psychologist Valerie Benveniste, Ph.D., as an expert. Dr. Benveniste started her career in education, working as a teacher, counselor, and school psychologist, before earning her Ph.D. Dr. Benveniste has conducted 1,800 psychological evaluations for several regional centers in southern California.

25. Dr. Benveniste reviewed claimant's medical, psychological, and educational records and NBRC's records. She interviewed claimant and his mother over FaceTime in September 2022, but did not perform a formal assessment. She wrote a report with her opinions and testified at the hearing.

26. Dr. Benveniste believes that claimant meets eligibility criteria for NBRC services both for ASD and under the fifth category. She believes that certain statements in his school records reflect that claimant presented with traits of ASD that were not identified by the school district. She notes that the speech-language pathologist who assessed claimant in 2001 remarked on his "amazing vocabulary" and "jumpy eye movement" and called him "interesting." Dr. Benveniste inferred from these statements that the pathologist did not recognize that claimant was displaying ASD, and commented that ASD was much less well known during claimant's childhood than it is today. Dr. Benveniste believes that claimant stopped going to school because he could not function well in a general education classroom due to ASD that went unrecognized. Dr. Benveniste does not believe that claimant's struggles in school relate to his PTSD.

27. Dr. Benveniste believes that the ASD assessment performed by Dr. Waldron is the most comprehensive and most reliable. She noted that Dr. Waldron

performed the extensive and detailed ADIR interview, whereas Drs. Payne and Silva did not. She also believes that there is a discrepancy between how Drs. Payne and Silva described claimant's clinical presentation and how they scored his behaviors when analyzing the DSM-5 diagnostic criteria for ASD.

28. Dr. Benveniste believes that claimant's IQ scores are better interpreted as reflecting borderline rather than low-average intellectual function, arguing that the full scale IQ score of 84 calculated by Dr. Waldron in 2021 was skewed by one very high subset and noting that other important subtest scores were very low. She believes Dr. Sanchez's assessment of claimant's intellectual functioning in 2013 inadequately addressed his adaptive functioning deficits. Dr. Benveniste believes that claimant would benefit from services similar to those needed by individuals with intellectual disability, such as assistance living independently and supportive employment services.

NBRC's Expert – Katie Pedgrift, Psy.D.

29. Katie Pedgrift, Psy.D., was on the eligibility team and testified at the hearing to explain NBRC's 2022 decision denying eligibility. She is a licensed clinical psychologist and has worked for NBRC for 10 years. Dr. Pedgrift performs assessments for eligibility, but did not assess claimant. The eligibility team reached the decision to deny eligibility based on the records from claimant's previous applications, all records provided by claimant, and on the 2022 interview performed by NBRC staff. She reported that the decision to deny eligibility was unanimous.

30. Dr. Pedgrift explained why she did not find Dr. Waldron's 2022 report finding that claimant has ASD persuasive. She noted that Dr. Waldron did not mention the 2019 report of Drs. Payne and Silva, suggesting that he either did not have it or chose not to address it. In her experience, a subsequent evaluator normally addresses

prior evaluations, and explains any disagreement. She found that Dr. Waldron did not sufficiently provide an explanation for why he believes ASD explains claimant's clinical findings rather than any other conditions. She noted that it is unclear from Dr. Waldron's report why he states that claimant was diagnosed with ASD in 2013. Dr. Pedgrift also commented that she does not typically see ASD evaluations of adults performed by Kaiser Permanente practitioners, and that this is the first report she has seen by Dr. Waldron.

31. Dr. Pedgrift believes that the 2019 evaluation by Drs. Payne and Silva is the most comprehensive ASD evaluation of claimant, and that the ADOS assessment tool they used is "the gold standard." She explained that the ADIR interview used by Dr. Waldron is an excellent tool, but is not used by NBRC when evaluating individuals in their 30's for ASD, because it requires parents to reliably recall developmental milestones prior to 36 months of age. NBRC evaluators typically use the DSM-5-based interview in lieu of the ADIR for these individuals. Dr. Pedgrift questions the reliability of the ADIR relied on by Dr. Waldron because of the passage of time from when claimant was 36 months of age and when Dr. Waldron interviewed his parents in 2022.

32. Dr. Pedgrift explained that the eligibility team did not find claimant eligible under the fifth category because the records reflected consistent IQ scores in the low average range, and because there was no evidence that claimant is similar to individuals with intellectual disability, noting that he did not receive special education services alongside students with intellectual disability.

33. Dr. Pedgrift reviewed Dr. Benveniste's report and listened to her testify at the hearing, and remained firm in her opinion that claimant is not eligible.

34. Dr. Pedgrift disagrees with Dr. Benveniste's characterization of claimant's intellectual functioning as borderline because the records instead reflect low average functioning. She also believes that Dr. Benveniste is improperly presuming that claimant has an intellectual impairment because he has low adaptive functioning, when there are numerous other possible explanations for his low adaptive functioning.

Ultimate Findings

ASD

35. The evidence was insufficient to establish that claimant is substantially disabled by ASD. Dr. Waldon did not testify at hearing. It was unclear whether he had reviewed the evaluation report of Drs. Payne and Silva. Dr. Benveniste opined that claimant has ASD, but she did not formally evaluate him with any diagnostic assessment tools.

The report of Drs. Payne and Silva, and the testimony of Dr. Pedgrift, are well-reasoned and persuasive, and established that claimant does not meet the diagnostic criteria for ASD. The opinions of Dr. Benveniste are based heavily on inferences and speculation, and do not establish that it is more likely than not that claimant suffers from ASD.

FIFTH CATEGORY

36. The fifth category includes "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." The fifth category was created "to allow some flexibility in determining eligibility so as not to rule out eligibility of individuals

with unanticipated conditions, who might need services." (*Mason v. Office of Admin. Hearings* (2001) 89 Cal.App.4th 1119, 1129.)

37. Dr. Pedgrift's opinions are more persuasive than the opinions of Dr. Benveniste on the issue of fifth category eligibility. The evidence did not establish that claimant suffers from a disabling condition, manifested during the developmental period, that is closely related to intellectual disability or requires treatment similar to that required for individuals with intellectual disability.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500 et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

2. A developmental disability is 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." The term "developmental disability" refers only to intellectual disability, autism, epilepsy, cerebral palsy, and what is commonly referred to as the "fifth category." (Welf. & Inst. Code, § 4512, subd. (a).) Handicapping conditions that consist solely of psychiatric disorders, learning

disabilities, or physical conditions do not qualify as developmental disabilities under the Lanterman Act. (Cal. Code Regs., tit. 17, § 54000, subd. (c).)

3. Regional center services are limited to individuals who meet the eligibility requirements established by law. It is claimant's burden to prove that he has a developmental disability, as that term is defined in the Act.

4. NBRC's experts have performed multiple evaluations of claimant and have reviewed all records provided by his family. NBRC determined that he does not have a developmental disability within the meaning of the Act. There was insufficient evidence to rebut this persuasive evidence. (Factual Findings 35 through 37.)

5. Claimant has not met his burden of establishing that he is entitled to regional center eligibility due to autism spectrum disorder or under the fifth category. Accordingly, his appeal is denied.

ORDER

Claimant's appeal is denied.

DATE:

KAREN REICHMANN
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.