

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

In the Matter of the Appeal of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency.

OAH No. 2022090425

DECISION

Thomas Heller, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this appeal by videoconference on February 14, 2023. It was heard at the same time as an appeal by Claimant's twin sister involving a similar issue. (OAH Case No. 2022090426.) A separate decision is being issued in each appeal. The parties should refer to the OAH case number to identify the claimant to whom each decision applies.

Claimant was represented by her foster mother. The names of Claimant and her family members are omitted to protect their privacy.

Jorge Morales, Appeals Specialist, represented Eastern Los Angeles Regional Center (ELARC).

ISSUE

ELARC determined Claimant to be provisionally eligible for Lanterman Act services and supports in May 2022, reversing an earlier determination in November 2021 that she was not eligible. Claimant's foster mother asked ELARC to backdate the determination to November 2021, arguing that the psychological evaluation of Claimant underlying ELARC's determination in November 2021 was inadequate and unfair. ELARC denied the request, and Claimant appealed. Should the eligibility determination be backdated to November 2021 as requested?

EVIDENCE RELIED UPON

Documents: ELARC exhibits 1-8, 10-23; Claimant's exhibits A-D. Testimony: Randi Elisa Bienstock, Psy.D; Claimant's foster mother.

FACTUAL FINDINGS

Background and Procedural History

1. ELARC determines eligibility and provides funding for services and supports to persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Lanterman Act). (Welf. & Inst. Code, § 4500 et seq.; undesignated statutory references are to this code.)

2. Claimant is a four-year-old girl who was born in November 2018. She has a twin sister, who is the claimant in the appeal that was heard along with this one. Claimant and her sister live together with their foster mother, the foster mother's 10-year-old son, and other non-relative foster children. Claimant's foster mother has cared for the twins since September 2019, and she is currently in the process of adopting them.

3. In August 2020, Claimant began receiving early intervention services from ELARC under the Early Start program. The Early Start program was established by the California Early Intervention Services Act (Gov. Code, § 95000 et seq.) for infants and toddlers who are born with, or at risk for, developmental delays. Claimant's social worker at the Los Angeles County Department of Children and Family Services (DCFS) referred Claimant to ELARC for early intervention services due to concerns about Claimant's speech and language development and overall behavior. The Early Start program is not a part of the Lanterman Act, which has different eligibility criteria.

4. Early Start program eligibility ends when a child turns three years old. Before Claimant's third birthday, ELARC asked Randi Elisa Bienstock, Psy.D., a psychologist, to assess Claimant's then-current behavioral, cognitive, and adaptive functioning. The purpose of the assessment was to help ELARC determine if Claimant was eligible for services and supports from ELARC under the Lanterman Act after she aged out of the Early Start program.

5. Dr. Bienstock reviewed Claimant's Early Start program records, interviewed Claimant's foster mother, and performed a psychological evaluation of Claimant on September 22, 2021. Dr. Bienstock performed the evaluation by videoconference due to the COVID-19 pandemic public health emergency. Dr.

Bienstock also evaluated Claimant's twin sister at the same time to assess the sister's own eligibility for Lanterman Act services and supports.

6. During the videoconference evaluation, Claimant made eye contact with Dr. Bienstock, waved and smiled at her, and appeared to Dr. Bienstock to be quite social and engaging. Claimant also appeared happy to show Dr. Bienstock toys she was enjoying, and Dr. Bienstock observed Claimant playing cooperatively with her sister and seeking out her foster mother for attention and shared enjoyment.

7. Dr. Bienstock did not test Claimant directly using standardized psychological tests due to limitations of the videoconference environment. But Dr. Bienstock administered several standardized tests to Claimant's foster mother to assess Claimant's behavioral, cognitive, and adaptive functioning. On the Achenbach Child Behavior Checklist, Claimant's foster mother reported significant concerns regarding tantrums and behavior regulation difficulties. On the Autism Diagnostic Interview – Revised, the overall results did not reveal behaviors or characteristics associated with autism spectrum disorder. On the Developmental Profile, Third Edition, Claimant's physical skills were below average, her adaptive skills were well below average, her social-emotional skills were in the low average range, and here cognitive and communication skills within the average range. On the Vineland Adaptive Behavior Skills, Third Edition, Claimant's communication skills fell within the adequate range, her daily living skills and motor skills fell within the moderately low range, and her socialization skills fell within the adequate range.

8. Dr. Bienstock's diagnostic impression was that further assessment was needed to rule out a language disorder and/or a speech sound disorder. Dr. Bienstock also noted Claimant's history of foster care placement and her medical diagnoses related to fetal alcohol spectrum disorder. But Dr. Bienstock did not diagnose Claimant

with any disabling condition that would qualify her for Lanterman Act services and supports.

9. Based on Dr. Bienstock's evaluation, ELARC determined in November 2021 that Claimant would not qualify to services and supports from ELARC after she aged out of the Early Start program. Claimant's foster mother disagreed and appealed ELARC's determination. The appeal was resolved without a hearing with an agreement that ELARC would have another psychologist evaluate Claimant. ELARC asked Renee Kim, Psy.D., to perform the psychological assessment.

10. Dr. Kim assessed Claimant in April 2022, when Claimant was three years and five months old. The assessment was performed in person, but with social distancing and face masks due to COVID-19 protocols. Dr. Kim reviewed Claimant's available records, interviewed Claimant's foster mother, observed Claimant's behavior, and administered several standardized psychological tests.

11. The test results indicated that Claimant's cognitive functioning fell within the high end of the borderline range with low average verbal comprehension and visual spatial skills. Claimant's overall adaptive skills fell within the low range. The results of Dr. Kim's evaluation were inconsistent with an autism spectrum disorder, although Claimant displayed some social communication delays. But Claimant appeared to present with sensory processing difficulty and regulatory difficulty, which Dr. Kim concluded may be attributed to Claimant's early birth history. Claimant also displayed frequent toe walking behaviors and an uncoordinated gait, and she tended to stiffen her right leg while her left leg turns inward and pushed forward to ambulate.

12. Dr. Kim diagnosed Claimant with an Unspecified Neurodevelopmental Disorder as defined in the Diagnostic and Statistical Manual of Mental Illnesses, Fifth

Edition. Dr. Kim's diagnoses also included borderline cognitive skills and fetal alcohol spectrum disorder by history. Dr. Kim recommended appropriate educational programming and socialization opportunities and re-referral if Claimant did not make significant progress in her skills. Dr. Kim also referred Claimant to her primary care physician to address her motor difficulties.

13. Based on Dr. Kim's evaluation, ELARC reversed its prior decision and determined Claimant was provisionally eligible for Lanterman Act services and supports. Provisional eligibility is available to a child who is three or four years old if the child has a disability that is not solely physical in nature and has significant functional limitations in at least two areas of major life activity. (§ 4512, subd. (a)(2).) ELARC made its provisional eligibility determination on May 26, 2022, finding that Claimant had significant functional limitations in communication and daily living skills.

14. Claimant's foster mother asked ELARC to backdate Claimant's eligibility determination from May 2022 to November 2021, when ELARC had initially denied eligibility. Claimant's foster mother argued that Dr. Bienstock's evaluation of Claimant was unfair and too brief to be accurate and account for her developmental issues, especially since Dr. Bienstock evaluated Claimant's sister at the same time. Given Dr. Kim's findings, Claimant's foster mother argued Claimant should have been eligible as of November 2021 after Dr. Bienstock's evaluation.

15. On September 8, 2022, ELARC sent Claimant's foster mother a notice of proposed action denying the request. Claimant's foster mother timely submitted a fair hearing request to appeal the denial.

Hearing on Appeal

16. ELARC called Dr. Bienstock to testify about the details of her evaluation of Claimant. Dr. Bienstock testified the evaluation was appropriate and included about 40 minutes of observing Claimant and her sister by videoconference. The COVID-19 pandemic required a virtual evaluation, and while virtual evaluations have limitations, Dr. Bienstock's findings appeared to be a valid depiction of Claimant's functioning at the time. In Dr. Bienstock's opinion, evaluating Claimant and her sister together was helpful to understanding their functioning, not harmful. Dr. Bienstock also testified her evaluation of Claimant included a detailed records review and detailed interview of Claimant's foster mother.

17. Claimant's foster mother testified the videoconference evaluation was only about 15 minutes for both Claimant and her sister, which was not enough time for Dr. Bienstock to get a thorough understanding of either child's functioning. Claimant's foster mother believes that Dr. Bienstock disregarded the children's behaviors of concern, and Dr. Kim's evaluation only a few months later shows that Dr. Bienstock's conclusions were unfair and wrong. Therefore, Claimant's foster mother believes the eligibility determination for Claimant should be backdated. She explained that earlier eligibility will affect the DCFS stipend that Claimant receives for support, and DCFS in fact suggested pursuing this appeal.

18. Claimant's foster mother also presented medical records showing that Claimant was diagnosed with cerebral palsy in December 2022. Cerebral palsy is one type of developmental disability as defined in the Lanterman Act. Claimant's foster mother has also relocated, and ELARC will not be making any future eligibility determinations about Claimant and her sister. A different regional center will make those determinations.

Analysis of Evidence

19. The evidence does not prove that ELARC's provisional eligibility determination for Claimant should be backdated to November 2021. Psychological diagnoses can vary by practitioner and by evaluation, and patient behavior can also vary by evaluation. Dr. Bienstock's diagnostic impressions of Claimant differed from those of Dr. Kim, but Dr. Bienstock's impressions were reasonably based on her own evaluation, which included records review, detailed information from Claimant's foster mother, and clinical observations of Claimant.

20. Dr. Bienstock only observed Claimant by videoconference, but that was due to COVID-19 protocols, and Dr. Bienstock did not err by following those protocols. There is conflicting evidence about long Dr. Bienstock's clinical observations lasted, but there is no evidence in the record that they had to last for any specific period of time to meet professional standards. There is also no evidence in the record that observing the sisters together violated professional standards. Furthermore, Dr. Bienstock's evaluation included more than just clinical observations. Her report includes a detailed review of Claimant's developmental history and of the information provided by Claimant's foster mother.

21. Based on these facts, Dr. Bienstock's evaluation is not a basis for backdating Claimant's provisional eligibility determination. It was not shown to be unfair or inappropriate, and Dr. Kim's different diagnostic impressions of Claimant do not prove it was.

LEGAL CONCLUSIONS

1. The Lanterman Act provides services and supports to meet the needs of persons with developmental disabilities, regardless of age or degree of disability. (§ 4501.) "'Developmental disability' means a disability that originates before an individual attains 18 years of age; 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, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature." (§ 4512, subd. (a)(1).)

2. A developmental disability must be a "substantial disability" in order for an individual to qualify for Lanterman Act services and supports. (§ 4512, subd. (a)(1).) "'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: [¶] (A) Self-care. [¶] (B) Receptive and expressive language. [¶] (C) Learning. [¶] (D) Mobility. [¶] (E) Self-direction. [¶] (F) Capacity for independent living. [¶] (G) Economic self-sufficiency." (§ 4512, subd. (f)(1).)

3. Additionally, a child who is three or four years old who is not otherwise eligible for services "shall be provisionally eligible for regional center services if the child has a disability that is not solely physical in nature and has significant functional limitations in at least two of the following areas of major life activity, as determined by a regional center and as appropriate to the age of the child: [¶] (i) Self-care. [¶] (ii) Receptive and expressive language. [¶] (iii) Learning. [¶] (iv) Mobility. [¶] (v) Self-

direction.” (§ 4512, subd. (a)(2)(A).) To be provisionally eligible, a child is not required to have one of the developmental disabilities listed in section 4512, subdivision (a)(1). (§ 4512, subd. (a)(2)(B).)

4. ELARC determined Claimant was provisionally eligible but denied the request to backdate that determination to November 2021. Claimant disagrees with ELARC’s refusal to backdate the determination and has properly exercised her right to appeal. (See §§ 4700-4716.) As the party seeking relief, Claimant has the burden of proof. (Evid. Code, § 500; see *Lindsay v. San Diego County Retirement Board* (1964) 231 Cal.App.2d 156, 161.) This burden of proof requires proof by a preponderance of the evidence, because nothing in the Lanterman Act or another law provides otherwise. (Evid. Code, § 115 [“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”].) A preponderance of the evidence means “‘evidence that has more convincing force than that opposed to it.’ [Citation.]” (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Analysis

5. The Lanterman Act does not describe a process for backdating an eligibility determination, calling into question whether it is even allowed. But even if it is, the evidence does not prove that ELARC’s determination should be backdated in this case. Dr. Bienstock’s evaluation was not shown to be unfair or inappropriate. While Dr. Bienstock’s diagnostic impressions of Claimant differed from those of Dr. Kim, Dr. Bienstock’s conclusions were reasonably based on her own evaluation, which included records review, information from Claimant’s foster mother, and clinical observations of Claimant. The different outcome of Dr. Kim’s evaluation does not prove negligence or

wrongdoing by Dr. Bienstock or ELARC that justifies backdating ELARC's provisional eligibility determination.

ORDER

Claimant's appeal is denied.

DATE:

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration pursuant to subdivision (b) of Welfare and Institutions Code section 4713 within 15 days of receiving the decision, or appeal the decision to a court of competent jurisdiction within 180 days of receiving the final decision.