

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

In the Matter of:

CLAIMANT,

vs.

CENTRAL VALLEY REGIONAL CENTER,

Service Agency

OAH No. 2022120592

DECISION

A fair hearing was held on February 7, 2023, before Timothy J. Aspinwall, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, by video conference from Sacramento.

The Service Agency, Central Valley Regional Center (CVRC), was represented by Amy McMahon, Legal Services Manager.

Claimant was represented by her sister who also serves as her conservator.¹

¹ Their names have been omitted to protect claimant's privacy.

Evidence was received, the record was closed, and the matter was submitted for decision on February 7, 2023.

ISSUES

Is Claimant eligible for services from CVRC under the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., because she is an individual with an intellectual disability, or a disabling condition closely related to intellectual disability or that requires treatment similar to that required for individuals with an intellectual disability?

FACTUAL FINDINGS

Background

1. Claimant was born in July 1967 and is 55 years of age. She has never lived independently. She currently resides with her younger sister who is her conservator, and her twin sister who is a client of CVRC. In 2022, Claimant's younger sister/conservator sought CVRC services for Claimant, which CVRC denied. Claimant's conservator timely filed a fair hearing request, and this hearing followed.

Prior Assessments, Diagnoses, and Eligibility Determinations

2. Documentation of prior assessments is minimal and fragmented over the years 1971 through 2022. The relevant available evidence is summarized below.

3. In November 1971, a public health nurse referred Claimant and her twin sister to CVRC because of "delayed speech development and need for diagnostic

workup." Claimant was then four years and three months of age. In October 1971, prior to the referral, Claimant and her twin sister were seen by Roberta Shekerjian, MD, who noted her impression that Claimant "was possible for mild cerebral dysfunction." CVRC's case management plan included short- and long-range goals to establish whether CVRC is the appropriate agency for Claimant, and if not, to refer Claimant to an appropriate agency if needed.

4. In September 1984, a school psychologist with Fresno Unified School District administered psychological testing of Claimant, who was then age 17 and in 11th grade. The testing included the Wexler Adult Intelligence Scale (WAIS) for testing intelligence quotient (IQ), and the Wide Range Achievement Test (WRAT). Claimant's scores on the WAIS showed a verbal IQ of 72, a performance IQ of 90, and a full scale IQ of 78. Claimant's scores on the WRAT showed 37th percentile in reading, 27th percentile in spelling, and 4th percentile in arithmetic.

5. In February 1988, a CVRC social worker prepared a social assessment pursuant to a request from a Fresno County mental health worker for an assessment and possible CVCR program placement. The CVRC social assessment noted that Claimant is suspected of having an intellectual developmental disorder. Claimant was then 20 years of age. The CVRC social assessment states that Claimant "appears to be of borderline intelligence" and that she takes Triavil for depression, anxiety and agitation. Claimant was known to CVRC during a one year period in 1971-72, when at age four Claimant and her twin sister received speech therapy. Claimant's abilities in the independent living domain include an ability to fix simple meals, complete specific chores, and use public transit for simple direct trips. Claimant is not able to handle money, and was not able to name the number of quarters and dimes in a dollar. Claimant is able to choose her own clothing for purchase with the assistance of family

members. Claimant's abilities in the cognitive domain included her ability to multiply single digit numbers, read the newspaper weather report, and read the television guide. Claimant graduated from high school as a special education student, and obtained some work experience through the school's program at the Veterans Administration Hospital where she helped in the laundry with tasks such as hanging clothing and doing some sewing. She has no other work experience.

6. A CVRC diagnostic sheet dated April 6, 1988, signed by a physician, a psychologist, and a counselor, states that Claimant has a "borderline level of intellectual functioning" and is not eligible for CVRC services. A related closing summary dated April 8, 1988, signed by two social workers, states that the interdisciplinary team reviewed Claimant's records including the 1984 psychological testing (Factual Finding 4), and medical information showing that Claimant had been admitted to the hospital emergency department in October 1985, after exhibiting suicidal ideations and auditory hallucinations. The closing summary noted that Claimant was currently attending a day treatment program through Fresno County Mental Health, and recommended that Claimant and her twin sister be referred to the Fresno Community College-Enabler's Program.

7. On October 18, 2022, a privately employed psychologist, Alexander Johnson, Psy.D., conducted a psychological evaluation of Claimant, pursuant to a referral by Fresno County Behavioral Health for an assessment of whether Claimant has an intellectual disability or other related neurodevelopmental disorder. At the time of Dr. Johnson's evaluation, he did not have access to Claimant's prior psychological assessments or records of her medical history. Dr. Johnson administered the WAIS-IV to measure her current level of intellectual functioning, and the Vineland Adaptive Behavior Scales Domain-Level, Third Edition (Vineland-3) to measure her adaptive

abilities including daily living skills. Claimant's scores on the WAIS-IV showed verbal comprehension of 58, perceptual reasoning of 73, working memory of 66, processing speed of 74, and a full scale IQ of 62, which falls within the extremely low range. Claimant's scores on the Vineland-3 showed a communication score of 60, daily living skills of 54, socialization of 56, and adaptive behavior composite of 60, which is below the first percentile. Dr. Johnson found that Claimant is "highly vulnerable to social manipulation and exploitation by others" and that "she requires assistance with nearly all tasks of daily living. These symptoms appeared during her early developmental period and continue to persist." Based on Claimant's historical information and observed behavior throughout the evaluation, Dr. Johnson diagnosed Claimant with F72 Intellectual Developmental Disorder, Severe.

Regional Center Eligibility Criteria

8. Regional centers provide services to individuals who have a "developmental disability" as defined in the Lanterman Act. In order to qualify for services from CVRC, an individual must be diagnosed with one or more of the five developmental disabilities outlined in the Lanterman Act: intellectual disability, cerebral palsy, epilepsy, autism, and/or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability (fifth category). (Welf. & Inst. Code, § 4512, subd. (a).) An individual who has one of the included developmental disabilities must be "substantially disabled" by that disability. To establish a "substantial disability," the individual must have significant functional limitations in three or more major life activities: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and/or economic self-sufficiency. (Welf. & Inst. Code, § 4512, subd. (l)(1).) A qualifying condition must start before the age 18 and

be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.) In addition, the individual's functional limitations must be directly related to the developmental disability that qualifies the individual for services under the Lanterman Act.

INTELLECTUAL DISABILITY

9. Intellectual disability is addressed in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, (DSM-V). The DSM-V provides the following three criteria that must be met for a diagnosis of intellectual disability.

- A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
- B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
- C. Onset of intellectual and adaptive deficits during the developmental period.

10. The DSM-V notes that, with regard to Criterion A, "individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally ± 5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65 - 75 (70 ± 5)." With respect to IQ scores, the DSM-V further notes that "[i]ndividual cognitive profiles based on neurophysiological testing are more useful for understanding intellectual abilities than a single IQ score." The DSM-V cautions:

IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score.

11. The DSM-V provides that "Criterion B is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community."

12. Criterion C is met if the onset occurs during the developmental period, such that "intellectual and adaptive deficits are present during childhood or adolescence."

FIFTH CATEGORY

13. The Lanterman Act provides for assistance to individuals with “disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability.” (Welf. & Inst. Code, § 4512, subd. (a).) This is known as the “fifth category.” The fifth category is intended to include individuals whose IQ scores are higher than 70, but who still have significant deficits in cognitive functioning. To fall within the fifth category, an individual must (a) function like someone with an intellectual disability, or (b) require treatment similar to the treatment required by individuals with an intellectual disability. However, eligibility may not be based on “other handicapping conditions” that are solely resulting from learning disabilities or psychiatric disorders. (Cal. Code. Regs., tit. 17, § 54000, subd. (c)(1), (2).)

14. The fifth category is not a diagnosis in the DSM-V. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129, the California Court of Appeal established a general standard: “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].” It is therefore important to consider factors required for a diagnosis of intellectual disability when assessing fifth category eligibility.

Testimony of Kao Yang, Ph.D.

15. Kao Yang, Ph.D., is a clinical psychologist employed by CVRC as a staff psychologist. Claimant’s September 1984 IQ scores (Factual Finding 4) are higher than would be consistent with intellectual disability because a diagnosis of intellectual

disability requires a score below 70 on all the scales. In addition, Claimant's 1984 scores on the WRAT did not indicate any intellectual disabilities.

16. Claimant's 1984 IQ scores were also inconsistent with fifth category eligibility for regional center services. However, Dr. Yang opined that Claimant's abilities referenced in the independent living domain of the 1988 Social Assessment (Factual Finding 5) are "possibly consistent" with fifth category eligibility. These included Claimant's ability to fix simple meals, complete specific chores, use public transit for simple direct trips, and her inability to handle money or purchase clothing without assistance from family members.

17. Dr. Yang opined that the 2022 IQ scores (Factual Finding 7) are a valid representation of Claimant's current intellectual functioning. However, Dr. Yang does not agree with Dr. Johnson's conclusion that Claimant has an intellectual developmental disorder dating back to her early developmental years because Dr. Johnson had insufficient information about Claimant prior to the age of 18.

Testimony of Claimant's Sister/Conservator

18. Claimant's sister/conservator is 11 months younger than Claimant and her twin sister. Claimant's conservator has known them her entire life. Claimant and her twin sister were both born with intellectual delays. The twins were delayed before entering school, and were in special education classes together throughout their school years. Claimant's twin sister graduated from high school in 1985. Claimant was held back one year and graduated in 1986.

19. The twins both received services from Fresno County Behavioral Health. Claimant started receiving their services during her 20s, when she was diagnosed with

schizophrenia, and her twin sister started receiving services in her 30s when she too was diagnosed with schizophrenia.

20. The twins are very close. Claimant's twin is the more dominant, and Claimant tends to follow along. This has always been the case, even during their youth.

21. Claimant's twin participates five days per week in a CVRC day program in which staff works with clients in areas such as arts, crafts, reading, counting money, and math. Claimant's twin greatly benefits from her participation in the program. It gives her a reason to get up and out during the day, and helps develop pride in her ability to do things. Claimant would also benefit greatly if she were able to participate in the CVRC day program. Without the program, Claimant stays at home and waits for her twin sister to return in the early afternoon.

Analysis

22. With respect to the DSM-V Criterion A, Claimant's 2022 IQ scores and level of adaptive functioning would qualify her for eligibility based on an intellectual disability, if the 2022 WAIS-IV and Vineland-3 scores provide an accurate indication of her level of functioning during her developmental years. On this point, it is an open question whether Dr. Johnson would have arrived at the same diagnosis if he had access to Claimant's prior psychological assessments and records of her medical history. Given this uncertainty, and the limitations of IQ scores, the preponderance of evidence does not support a finding that the 2022 WAIS-IV and Vineland-3 scores provide an accurate indication of Claimant's intellectual functioning during her developmental years. Considering the evidence as a whole, Claimant is not eligible for regional center services based on an intellectual disability under Criterion A.

23. With respect to DSM-V Criteria B and C, Claimant has shown “deficits in adaptive functioning” that have resulted in her “failure to meet developmental . . . standards for personal independence and responsibility.” These “adaptive deficits limit [her] functioning in one or more activities of daily life.” These deficits were present during Claimant’s developmental years, and have continued throughout her life. Considering the evidence as a whole, Claimant meets the DSM-V Criteria B and C for intellectual disability. However, because she does not meet Criteria A, she is not eligible for regional center services because of an intellectual disability.

24. With respect to fifth category eligibility, the evidence established that Claimant functions like someone with an intellectual disability with respect to adaptive functioning, and requires treatment interventions similar to someone with an intellectual disability. For example, both Claimant and her twin sister required special education throughout their school years, both were referred to the Fresno Community College-Enabler’s Program, and both have been unable to live independently because of their limited adaptive functioning. Claimant’s deficits in intellectual and adaptive functioning are substantially disabling, and began in her developmental years. The evidence did not establish that Claimant’s disabilities are primarily the result of learning disabilities or a psychiatric disorder. Considering the evidence as a whole, Claimant is eligible for regional center services under the fifth category.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on the claimant to establish that he or

she has a qualifying developmental disability. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.) A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

The Lanterman Act

2. 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 developmentally disabled individuals 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.)

3. An applicant is eligible for services under the Lanterman Act if he or she is suffering from a substantial developmental disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

4. 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).)

5. As set forth in the Factual Findings, it was not established that Claimant is eligible for services under the Lanterman Act because she has an intellectual disability. Claimant is, however, eligible for services under the fifth category because she has a disabling condition that is closely related to intellectual disability or requires treatment similar to the treatment required by individuals with an intellectual disability. Consequently, it was established that Claimant is eligible for services and support from CVRC under the Lanterman Act. Claimant's appeal must therefore be granted.

ORDER

Claimant's appeal is GRANTED. Claimant is eligible for services and supports from Central Valley Regional Center.

DATE: February 21, 2023

TIMOTHY J. ASPINWALL
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. (Welf. & Inst. Code § 4712.5, subd. (a).)