BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

OAH No. 2013100435

DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter on December 10, 2013, in Napa, California.

Kristin Casey represented North Bay Regional Center, the service agency.

Claimant was present and represented by his grandmother.

The matter was submitted on December 10, 2013.

ISSUE PRESENTED

Whether claimant is eligible for regional center services due to mental retardation, or whether he is eligible for services due to a condition closely related to mental retardation or that requires treatment similar to that required by individuals with mental retardation, commonly referred to as the "fifth category" of eligibility under the

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Lanterman Developmental Disabilities Act (Act).[1]

FACTUAL FINDINGS

Eligibility Categories Defined

1. Official notice is taken of the diagnostic criteria for mental retardation set forth in the Diagnostic and Statistical Manual of Mental Conditions, Fourth Edition, Text Revision (DSM-IV-TR). DSM-IV-TR identifies three criteria:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

General intellectual functioning is defined by an individual's IQ as measured on a standardized intelligence test. Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below. "Adaptive functioning" refers to how effectively an individual copes with common life demands and how well the individual meets the standard of personal independence of someone of the same age and background.

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[1] The Act is found at Welfare and Institutions Code section 4500 et seq. All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

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2. To be eligible for services under the fifth category, an individual must have a developmental disability that is "closely related to mental retardation" or that "requires treatment similar to" that required for individuals with mental retardation. (§ 4512, subd. (a).) Like mental retardation, a fifth category condition must include a cognitive element as well as an adaptive functioning element. (*Samantha C. v. Department of Developmental Services* (2010) 185 Cal.App.4th 1462, 1486-1487.) Unlike mental retardation, however, a fifth category condition is not defined by an IQ score of 70 or lower, or by any particular IQ score. (See *Samantha C. v. Department of Developmental Services*, *supra*, 185 Cal.App.4th 1462: claimant found eligible under fifth category despite IQ scores of 90 and higher.)

CLAIMANT'S EVIDENCE

3. Claimant is an 18-year-old boy.

4. Claimant received special education services from about age five to age eight, due to delay in expressive language development. In 2003, when claimant was eight, he was recommended for retention in the second grade. Based upon a psycho-educational assessment at that time, however, claimant's school district determined that he did not qualify for special education services, and a speech and language reassessment concluded that he had within-average skills and no longer qualified for speech services. Claimant was advanced to third grade. From third grade until September 25, 2010, claimant did not receive special education services. There is no evidence from that period that claimant was mentally retarded.

5. On September 25, 2010, when he was 15 years old, claimant suffered a gunshot wound to the head in a drive-by shooting. He was admitted to the intensive care unit at John Muir Medical Center in Walnut Creek on September 26. It appears that, after the shooting, claimant lost consciousness for one-to-two hours.

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Claimant's medical records state that he suffered a "through and through to the back of the skull," that is, the bullet entered and exited at the top of his head. A CT scan upon admission to John Muir demonstrated a skull fracture, tiny bullet fragments in the scalp, a hemorrhagic contusion and some brain edema. Claimant's wound was irrigated and closed with sutures. No surgery was necessary. Claimant was placed on close supervision and a brain injury protocol.

Claimant was alert and fully oriented in a neurological consultation on September 26. His speech was fluent and he had full recall of the events leading to his hospitalization. A follow-up CT scan revealed no changes from the first scan. Claimant was transferred out of the ICU and then discharged to home on September 28. He returned to school within two weeks; it appears that, in the fall of 2010, claimant was in 10th grade.

6. From a neurological point of view, claimant has made a very good recovery from this terrible incident.

Claimant went to Kaiser Permanente for a follow-up neurosurgery consult on January 3, 2011. At that time, both claimant and his grandmother reported that claimant's memory was worse; that he was having frequent, daily headaches; that his sleep patterns had been off; and that he was more emotionally labile. Physician's Assistant Matthew Smith told claimant and his grandmother that claimant's symptoms were

> very typical of postconcussive syndrome. He has almost all of the hallmark signs and symptoms. I told them that in looking at the CT there did not appear to be areas of injury that would indicate that these would persist permanently, though I did tell them that the syndrome can often persist for 6 to 12 months after a severe injury. I told them from a neurological

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> standpoint there was not much to do other than to continue to monitor and observe him. From a rehabilitation point of view I think he would very much benefit from neuropsychological testing, at least so a baseline level can be obtained to see if he improves over time and also to develop an individualized education plan for his school.
>
> In terms of sports restrictions I told them until all of the symptoms have fully dissipated, he should not play sports as his symptoms are indicative of continued brain injury and healing.

Claimant returned to Kaiser Permanente for a follow-up neurosurgery consult on May 16, 2011, where he again saw Physician Assistant Smith. Smith took a history from claimant, who reported occasional mild headaches and difficulty sleeping. Following his examination, Smith reported:

> [Claimant] is neurologically totally normal. No deficits whatsoever. I told [claimant] at this point considering the time that has elapse[d] since his injury he could return to non-contact sports such as baseball, basketball, swimming and the like – but, given his previous injury, he should not participate in any type of contact sports . . . .

7. Despite claimant's positive neurological outcome, he has had academic and behavioral problems since he was shot. About six months after the shooting, claimant's school district prepared a psycho-educational assessment report, dated May 12, 2011. The report states that since claimant started 10th grade, he had earned 60 of

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the 120 credits he attempted; his grades had gone down; and his teachers had expressed “significant concern” regarding his ability to pay attention in class, complete his assignments, and comprehend lessons. He had passed the English/Language Arts section of the high school exit examination, but not the math section. The report also noted concerns about claimant’s behavior: since the beginning of 10th grade, claimant had 165 tardy days, 132 unexcused class absences, 51 in-house suspensions, six Saturday school detentions and 15 suspensions. The report notes that claimant’s grandmother had expressed concerns about claimant’s apparent decrease in drive and effort. Claimant himself reported that he had difficulties with attention and with maintaining focus. Outside of school, claimant has come to the attention of the Juvenile Court.

8. Before applying to NBRC for services in 2013, claimant had two psychological assessments that included the administration of standardized intelligence tests.

9. Bradley R. Brummett, Ph.D, a clinical neuropsychologist at Kaiser Permanente, performed a neuropsychological evaluation of claimant in February 2011 and wrote a report dated February 18, 2011. Dr. Brummett took a history from claimant and his grandmother, and administered a battery of tests. Claimant told Dr. Brummett that he had used marijuana sporadically since sixth grade, but had increased to daily use following the shooting to help manage his stress; he denied using it on the days that he was tested by Dr. Brummett.

Among other tests, Dr. Brummett administered the Wechsler Intelligence Scale for Children, fourth edition (WISC-IV). Claimant’s full-scale IQ score of 61 was in the extremely low range.

In his report, Dr. Brummett wrote:

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Overall, this patient has multiple areas of significant cognitive impairment. Although he was a below average student prior to his injury, a review of his academic records (pre-/post-injury) and results from the current evaluation indicate that he has experienced a significant decrease in his overall cognitive functioning. These problems are consistent with postconcussional disorder (PCD) with neurocognitive and psychopathological features. Although he had abstained from marijuana use for at least 48 hours prior to the evaluation, it is likely that his history of daily use may have impacted his performance on tasks such as concentration, memory, and processing speed. However, this is not thought to be a primary source of etiology. The patient's psychological symptoms (self-reports of depression and [Post-Traumatic Stress Disorder] may have also impacted his performance, but this is not thought to be a primary source of etiology.

Given that this injury/concussion was approximately 6 months ago, it is expected that the patient will continue to experience some neurological and cognitive improvement over the next 6-12 months. Improvement of the patient's psychological functioning would also likely contribute toward overall improvement in functional abilities.

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In light of claimant's intellectual functioning, Dr. Brummett referred him to NBRC. Dr. Brummett also recommended psychological care and education about the harmful effects of drugs, "particularly when recovering from a concussion."

10. Claimant's school district administered numerous tests in the course of its May 2011 psycho-educational assessment. Although the district did not administer the WISC-IV, it did administer the Differential Ability Scales, second edition (DAS-II). Claimant's results on this test were in the very low range, similar to the results obtained by Dr. Brummett on the WISC-IV.

CLAIMANT'S REQUEST FOR REGIONAL CENTER SERVICES

11. In light of the testing performed by Dr. Brummett and the school district, and pursuant to the recommendation of the Juvenile Court, claimant sought services from NBRC. Assessment Counselor Dale Carr, M.S., performed an initial social assessment, and psychologist Todd Payne, Psy.D., performed a psychological evaluation. Patrick Maher, M.D., the regional center's medical consultant, reviewed claimant's post-injury medical records and was part of the team that acted on claimant's request for services.

12. In August 2013, Dr. Payne administered a battery of psychological tests to claimant, including the Wechsler Adult Intelligence Scale, fourth edition. In the WAIS-IV, claimant obtained a full-scale IQ score of 65. This score is similar to the scores obtained by Kaiser Permanente and the school district.

13. Dr. Payne, supported by Dr. Maher, concluded that claimant's scores on the intelligence tests are unreliable and disregarded them. In an undated written report, Dr. Payne explained the basis for his decision:

> During the present evaluation, the test results are of questionable reliability due to inconsistencies in test

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> performance. On two tests of non-verbal analogical reasoning there was a noticeable pattern of responding incorrectly to many fairly easy items, while at the same time answering a number of more difficult items correctly. On a test of general intellectual functioning, [claimant] scored in the very low range overall and consistent with prior, post-injury test results. He also scored in the very low range on a test of receptive vocabulary and a test of paper and pencil construction of geometric shapes. However, the scores on these two tests are significantly lower than those obtained in 2011 and also inconsistent. His performance on tests of immediate and delayed story recall and facial recognition were impaired.
>
> In my opinion the psychometric test results that have been obtained since [claimant] was injured are unreliable in estimating his degree of impairment. This is because, taken as a whole, the level of impairment displayed on formal testing is well in excess of what would be expected given the medical records that describe the nature of his injury. While in theory, it is certainly possible that an individual could have pre-existing impairment, in [claimant's] case it is most likely he had generally normal intellectual abilities. Therefore, current general intellectual impairment is unlikely.

Dr. Payne went on to write:

> While the testing results are likely unreliable it's important to understand that this statement does not imply that [claimant] is malingering or deliberately feigning symptoms. Furthermore it is not implied that [claimant] has no significant cognitive after effects from his injury. The level of [claimant's] traumatic brain injury likely would best be classified as "complicated mild" as he did not have an extended period of loss of consciousness, but he did have abnormal brain imaging findings. Recovery in this situation is often less complete than in mild traumatic brain injury. However, a profile of intellectual disability or a similar general intellectual deficit would not be expected given that the available information indicated that [claimant] had normal general intelligence before his injury.

Dr. Payne attributed claimant's low test scores to poor effort on the tests, which he believes may have been due to fatigue, lack of motivation, anxiety or substance abuse.

Dr. Payne diagnosed claimant with "Post-Traumatic Stress Disorder" and "Neurocognitive Disorder due to Traumatic Brain Injury, (provisional diagnosis, unspecified severity)."

14. On the strength of Dr. Payne's report, NBRC issued a Notice of Proposed Action in which it concluded that claimant is not eligible for regional center services because "he is not substantially disabled by . . . an intellectual disability, or a condition closely related to an intellectual disability or requiring treatment similar to that required by persons with an intellectual disability." Claimant filed a timely appeal, and this hearing followed.

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EVIDENCE PRESENTED AT HEARING

15. Although the Notice of Proposed Action concluded that claimant is not "substantially disabled" by an eligible condition, NBRC has not assessed whether claimant is substantially disabled. Dr. Payne testified at hearing that, when the regional center concludes that an applicant does not have an eligible condition, it does not go on to assess the applicant's disability.

16. Dr. Maher testified that claimant's wound was limited to the scalp and the lining of the brain, that claimant was stable from the time he presented to John Muir, and that he recovered neurologically from the injury. Dr. Maher stated that an injury like claimant's can cause post-concussive syndrome, with memory problems, headaches, disruption of sleep patterns and emotional lability, and that these symptoms can last for months following the injury. He stated also that such an injury can cause emotional problems. In Dr. Maher's opinion, however, the shooting did not cause significant impairment of claimant's intellectual functioning because, in his words, that is "usually seen" where there has been massive trauma and severe edema, or coma.

17. Dr. Payne's testimony at hearing was consistent with the opinions he expressed in his written report. NBRC also produced a letter, dated September 18, 2013, that Dr. Payne had written to the Superior Court. In that letter, Dr. Payne summarized his reasons for disregarding claimant's standardized intelligence tests:

> While [claimant] has obtained low scores on intellectual testing on two other occasions after his injury [in addition to NBRC's testing], these findings were not found to indicate that [claimant] has an intellectual disability either. This is because the level of impairment suggested in much of the present and prior testing is greatly in excess of what would normally be expected for a person who sustained the type of

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> injury that [claimant] has sustained, even when considering variability in recovery patterns. Given that [claimant] had normal intelligence before his injury, it is implausible, given the available medical descriptions of his injury and recovery that he would currently be functioning like an individual with an intellectual disability.

18. Several evaluators, including Dr. Payne, have diagnosed claimant as suffering from psychological conditions, such as depression and post-traumatic stress disorder. The evidence does not establish, however, and NBRC does not appear to assert, that claimant's current condition is due solely to a psychiatric disorder.

19. Claimant produced no evidence at hearing.

LEGAL CONCLUSIONS

1. Under the Act, the State of California accepts "a responsibility for persons with developmental disabilities and an obligation to them which it must discharge." (§ 4501.) The Act provides 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." (*Ibid.*) Regional centers are required to carry out the state's responsibility to the developmentally disabled.
(§ 4620.)

2. An individual qualifies for regional center services only if he or she has a developmental disability, as that term is defined by the Act and by regulations issued by the Director of Developmental Services. The Act defines "developmental disability" as

> a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely,

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> and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

(§ 4512, subd. (a).)

The term “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.

(§ 4512, subd. (l).)

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By regulation, the Department of Developmental Services has defined the term developmental disability to exclude conditions that are "solely psychiatric disorders," "solely learning disabilities," or "solely physical in nature." (Cal. Code Regs., tit. 17, § 54000, subd. (c)(1), (c)(2) & (c)(3).)

3. Neither the Act nor its implementing regulations (Cal. Code Regs., tit. 17, § 50900 et seq.) assigns burdens of proof. In this case, claimant asserts that he is eligible for regional center services due to mental retardation or a fifth category condition. Under Evidence Code section 500, claimant has the burden of proving that he has one of those conditions. The standard of proof applied is preponderance of the evidence. (Evid. Code, § 115.) While claimant has the burden of proof, the regional center is obligated to assess his eligibility claim. (§ 4643; Cal. Code Regs., tit. 17, § 54001.)

4. Claimant has established a prima facie case of general intellectual impairment consistent with mental retardation or a fifth category condition. All three of the standardized intelligence tests administered to claimant since his September 2010 injury, including the intelligence test administered by NBRC, reveal significantly subaverage general intellectual functioning.

5. NBRC chose to disregard claimant's intelligence tests. It concluded that claimant has normal intelligence and does not meet the cognitive element for mental retardation or a fifth category condition. For that reason, it did not assess whether claimant's condition constitutes a substantial disability, whether his condition can be expected to continue indefinitely, whether his condition is "closely related" to mental retardation, or whether it requires treatment "similar to that" required by individuals who are mentally retarded. A full assessment of claimant's eligibility has not been performed.

6. There is some ambiguity as to NBRC's reason for disregarding the intelligence tests. Dr. Payne notes that he found inconsistencies in claimant's test

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performances, suggesting that those inconsistencies may have been a reason to disregard them. But Dr. Payne does not state that the tests are invalid – he describes them as "unreliable," not invalid – and neither Kaiser Permanente nor claimant's school district found his intelligence tests invalid. It appears that the fundamental reason Dr. Payne chose to ignore claimant's intelligence tests is that he found it unlikely claimant's gunshot wound would lead to general intellectual impairment. He states exactly that in his report and in his letter to the Juvenile Court, and NBRC relies on Dr. Maher's medical opinion to support the proposition that the injury would not cause intellectual impairment. NBRC's reasoning seems to be that claimant had normal intelligence before the shooting; the injury he suffered in September 2010 would not likely lead to general intellectual impairment; therefore, claimant's low, post-injury IQ scores must be attributable to something else. NBRC attributes the low scores to poor effort by claimant, and speculates that his poor effort may be due to fatigue, lack of motivation, anxiety or substance abuse.

If that is NBRC's reasoning, it is unpersuasive as the basis to disregard claimant's intelligence tests. Kaiser Permanente and claimant's school district were aware of claimant's injury, but neither of these agencies found his tests results unreliable. Moreover, neither Dr. Payne nor Dr. Maher rules out claimant's gunshot wound as a possible cause of intellectual impairment. Dr. Payne wrote that claimant's injury "would not normally be expected" to cause the level of impairment demonstrated by claimant, and Dr. Maher testified that intellectual impairment is "usually seen" with more serious wounds. Their expectations concerning the typical consequences of a gunshot wound like claimant's are not a sufficient basis to reject claimant's otherwise valid intelligence tests.

7. Assuming for the sake of argument that claimant's post-injury IQ scores of 61 and 65 are not reliable, that in itself does not justify NBRC's failure to assess

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claimant's eligibility for services under the fifth category. Although a fifth category condition is similar to mental retardation, the conditions are different. The Legislature created the fifth category to "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 Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129.) There is sufficient evidence of intellectual impairment to require an assessment of whether claimant has a condition closely related to mental retardation, or a condition that requires treatment similar to that required by individuals with mental retardation.

8. Because a full assessment of claimant's condition has not been performed, it is premature to determine whether claimant is eligible for regional services. NBRC will be ordered to reassess claimant's eligibility under the categories of mental retardation and fifth category, consistent with the findings and conclusions set forth in this decision.

ORDER

North Bay Regional Center shall reassess claimant to determine whether he is eligible for regional center services due to mental retardation, or due to a condition closely related to mental retardation or a condition that requires treatment similar to that required by an individual with mental retardation.

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DATED: 12/30/13

_____/s/_____________________________

DAVID L. BENJAMIN

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.

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