

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

VALLEY MOUNTAIN REGIONAL CENTER,

Service Agency.

OAH No. 2013110270

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Modesto, California, on March 18, 2014.

The Service Agency, Valley Mountain Regional Center (VMRC), was represented by Anthony Hill, Assistant Director of Case Management.

Claimant was represented by his mother and grandmother.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on March 18, 2014.

ISSUE

Did VMRC establish that its original determination that claimant qualified for regional center services on the basis of autism is clearly erroneous pursuant to Welfare and Institutions Code section 4643.5, subdivision (b)?¹

FACTUAL FINDINGS

1. Claimant is a five-year-old boy who lives in the family home with his parents and younger brother. At age 26 months he became eligible for California Early Start services after being referred by his grandmother "due to speech concerns."

Claimant qualified for California Early Start services through VMRC pursuant to the California Early Intervention Services Act,² which provides early intervention services for infants and toddlers from birth to 36 months who have disabilities or are at risk of disabilities, to enhance their development and to minimize the potential for developmental delays.

2. As part of the initial intake on March 24, 2011, VMRC Intake Coordinator Sue Kluding utilized the Modified Checklist for Autism in Toddlers (M-CHAT) and the Pervasive Development Disorders Screening Test-II (PDDST-II). The M-CHAT is a screening tool for toddlers between 16 and 30 months of age that is designed to identify children who may benefit from a more thorough developmental and autism evaluation. Both the M-CHAT and the PDDST-II are parental report screening tools that were completed by Ms. Kluding in interview format with claimant's parents during the

¹Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

² California Government Code section 95000 et seq.

intake interview. Based on these reports, "some concerns were noted for the presence of an autism spectrum disorder."

3. An initial Individual Family Service Plan (IFSP) meeting was held on April 21, 2011, and it was determined that claimant qualified for services based on "Communication delay and concerns for autism." The IFSP team determined that claimant would be referred for further evaluation to "rule out or confirm diagnosis of Autism Spectrum Disorder..."

4. Claimant was referred to Clinical Psychologist Michele Thomason-Jimenez Ph.D., a regional center vendor, for an evaluation to determine if he "meets criteria for an Autism Spectrum Disorder (ASD)." The evaluation was conducted on June 23, 2011, and included a review of records, clinical interview completed by claimant's parents, behavioral observations, and administration of the Autism Diagnostic Observation Schedule (ADOS), Module I, Mullen Scales of Early Learning (Mullen) and Adaptive Behavior Assessment System, Second Edition (ABAS-II).

Dr. Thomason-Jimenez's report offered the following:

DSM-IV-TR³ DIAGNOSES

³ The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) was the standard for diagnosis and classification at the time of this assessment. It is a multi-axial system which involves five axes, each of which refers to a different domain of information as follows:

| | |
|----------|--|
| Axis I | Clinical Disorders |
| | Other Conditions That May Be a Focus of Clinical Attention |
| Axis II | Personality Disorders |
| | Mental Retardation |
| Axis III | General Medical Conditions |
| Axis IV | Psychosocial and Environmental Problems |

Axis I Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS)

Axis II No Diagnosis: Appears to have average cognitive potential

Diagnostic Impressions

Based on a comprehensive review of all written information gathered on [claimant] prior to today’s evaluation (see review of records above) and careful analysis of [claimant’s] behavioral presentation during the Autism Diagnostic Observation Schedule (ADOS) structure play session, **it appears the diagnostic category that best summarizes his symptoms and behaviors is PDD NOS (Pervasive Developmental Disorder, Not Otherwise Specified, 299.8, an autism spectrum disorder (ASD)).** [Claimant] has significant impairments in communication and socialization, but displays limited repetitive behaviors.

(Bolding in original.)

5. DSM-IV-TR⁴ section 299.00, Autistic Disorder, states:

Axis V Global Assessment of Functioning

⁴ The Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition (DSM-V) was released in May 2013. The plain language of the Lanterman Act’s eligibility categories includes “autism” but does not include other PDD diagnoses in the DSM-IV-TR (Rett’s Disorder, Childhood Disintegrative Disorder, Asperger’s Disorder, and PDD-NOS). The Lanterman Act has not been revised since the publication of the DSM-V to

The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests. Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual... The impairment in reciprocal social interaction is gross and sustained . . . The impairment in communication is also marked and sustained and affects both verbal and nonverbal skills.

To diagnose Autistic Disorder, it must be determined that an individual has at least two qualitative impairments in social interaction; at least one qualitative impairment in communication; and at least one restricted repetitive and stereotyped pattern of behavior, interests, or activities. One must have a combined minimum of six items from these three categories. In addition, delays or abnormal functioning in at least one of the following areas, with onset prior to age three, is required: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

6. Dr. Thomason-Jimenez determined that claimant had two qualitative impairments in social interaction; one qualitative impairment in communication; and one restricted repetitive and stereotyped pattern of behavior, interests, or activities. This did

reflect the current terminology of Autism Spectrum Disorder. Claimant was diagnosed under the DSM-IV-TR.

not reach the required combined minimum of six items from these three categories required to support a diagnosis of Autistic Disorder.

7. It was also noted that “overall, [claimant’s] performance on the Mullen Scales suggest that he likely has average non-verbal reasoning skills. His verbal skills are not as well developed as [sic] his non-verbal reasoning skills and appear to be somewhat delayed. His motor abilities remain unclear, as he was inattentive during the motor portions of the assessment. [Claimant] is not suspected of having global delays in cognitive functioning.”

8. Claimant’s adaptive skills were evaluated using the ABAS-II, where his mother was asked to “respond to questions about various aspects of his daily living skills and asked to rate his ability to perform age appropriate tasks.” “Adaptive skills are the activities of daily living, including communication skills, self-care skills, and social and leisure skills.” Claimant’s scores are summarized as follows:

| <u>Composite Scores</u> | <u>Standard Score**</u> | <u>Description</u> |
|-----------------------------------|-------------------------|--------------------|
| Conceptual | 88 | Below Average |
| Social | 83 | Below Average |
| Practical | 92 | Average |
| General Adaptive Composite | 90 | Average |

** A standard score of 100 is considered to be average.

9. Dr. Thomason-Jimenez “recommended that [claimant’s] diagnosis be reviewed **prior to age three** to determine if he meets full criteria for autism, or if his PDD NOS continues to be the most appropriate diagnosis.” (Bolding in original.)

10. On December 8, 2011, as claimant approached his third birthday and would no longer qualify for early intervention services, he was re-evaluated by Dr. Thomason-Jimenez who reported the following:

Diagnostic Impressions:

Axis I Autistic Disorder

Axis II No Diagnosis-Average Cognitive Potential

Based on a comprehensive review of all written information gathered on [claimant] prior to today's evaluation (see review of records above) and careful analysis of [claimant's] behavioral presentation during the Autism Diagnostic Observation Schedule (ADOS) structure play session, **it appears the diagnostic category that best summarizes his symptoms and behaviors is Autistic Disorder (299.0).**

[Claimant] has significant impairments in communication and socialization, and some repetitive behaviors. (Bolding in original.)

Dr. Thomason-Jimenez determined that claimant had two qualitative impairments in social interaction; three qualitative impairments in communication; and one restricted repetitive and stereotyped pattern of behavior, interests, or activities. This reached the combined minimum of six items from these three categories required to support a diagnosis of Autistic Disorder.

11. On the Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPPSI-III) claimant achieved a Full Scale IQ score of 100. No clinically significant difference was observed between his Verbal and Performance IQ scores, and cognitive delays were not present.

Claimant's adaptive functioning, as rated by his mother and measured by the ABAS-II, was reported to be in the borderline to low average range.

12. This evaluation included the following recommendation:

Due to his young age and numerous strengths, it is recommended that [claimant's] diagnosis be reviewed within one to two years. Despite the change in his diagnosis (from PDD NOS to Autism), [claimant] does appear to have made gains in his socialization and language skills that will hopefully continue. It is not unusual for the symptoms of Autism to become more clear as a child's language skills develop and his level of cognitive functioning becomes more clear. (That is, this change in diagnosis does not signify a regression in [claimant's] skills.)

13. The VMRC Eligibility Review Team found claimant eligible for regional center services with a recommendation for a "re-evaluation and redetermination by age 5 to confirm or revise [claimant's] diagnosis."

14. On September 27, 2013, at age four years, seven months, claimant was re-evaluated by Dr. Thomason-Jimenez. Claimant's scores on the WPPSI-III were as follows:

| <u>Scale</u> | <u>Standard Score</u> |
|----------------|-----------------------|
| Verbal IQ | 110 |
| Performance IQ | 121 |
| Full Scale IQ | 115 |

[Claimant] achieved a Full Scale IQ of 115, which reaches the High Average range. However, a clinically significant, 11-point difference was observed between his Verbal and Performance IQ scores. The Full Scale IQ is derived from a combination of

the Verbal IQ and Performance IQ scores. Given that these scores are significantly different from one another, the Full Scale IQ does not accurately capture [claimant's] strengths. A better estimate of [claimant's] intellectual potential is his high Performance IQ of 121, which reaches the Superior range. The Performance IQ is designed to measure novel, non-verbal problem solving, such as the ability to identify visual patterns and replicate visual designs with blocks. Non-verbal problem solving appears to be an area of significant strength for [claimant]. His verbal reasoning and knowledge, while slightly lower, still reach the High Average range. He earned a Verbal IQ of 110. These cognitive test data suggest that [claimant] is very bright and has above average cognitive potential.

Claimant's adaptive functioning, as measured by his mother's responses on the ABAS-II, was reported to be in the Below Average range.

15. Dr. Thomason-Jimenez administered Module 3 of the ADOS, which is appropriate for children with fluent speech. She determined that claimant had only one qualitative impairment in social interaction; one qualitative impairment in communication; and one restricted repetitive and stereotyped pattern of behavior, interests, or activities. This did not reach the DSM-IV-TR requirement of at least two qualitative impairments in social interaction, and a combined minimum of six items from these three categories, to support a diagnosis of Autistic Disorder.

16. Dr. Thomason-Jimenez concluded as follows:

Diagnostic Impressions:

Axis I Pervasive Developmental Disorder, Not
 Otherwise Specified (PDD NOS)

Axis II No Diagnosis-Superior Non-Verbal Reasoning
 Skills

Based on a comprehensive review of all written information gathered on [claimant] prior to today's evaluation (see review of records above) and careful analysis of [claimant's] behavioral presentation during the Autism Diagnostic Observation Schedule (ADOS) structure play session, **it appears the diagnostic category that best summarizes his symptoms and behaviors is PDD NOS (Pervasive Developmental Disorder, Not Otherwise Specified, 299.8), an autism spectrum disorder (ASD).** [Claimant] has qualitative impairments in communication and socialization, and displays a few, mild repetitive behaviors. (Bolding in original.)

Dr. Thomason-Jimenez concluded in her recommendations that "[claimant] is clearly high functioning and his presentation is not consistent with autism; it is not recommended that his diagnosis be reviewed over time unless a significant change in symptoms is observed."

17. The VMRC eligibility team, which included VMRC Staff Psychologist Candace Adams, Ph.D., Staff Physician Janwyn Funamura M.D., and Intake Counselor Victoria Christiansen, determined that claimant did not meet the eligibility criteria for regional center services.

18. A Notice of Proposed Action (NOPA) was issued on October 29, 2013, informing claimant that VMRC determined he was not eligible for regional center services. The NOPA stated:

An interdisciplinary team composed of VMRC's clinical psychologist, physician, and service coordinator reviewed medical, psychological, and educational records and found your child ineligible for VMRC services.

Reason for action: The applicant does not have a substantially handicapping developmental disability.

19. Claimant filed a Fair Hearing Request through his parent, dated November 4, 2013, disputing his ineligibility for regional center services. The reason for requesting a fair hearing was "the eibt services my son is receiving is benefiting him and I would like them to continue and have him be eligible for VMRC." Claimant would like VMRC to "be able to cofund eibt and continue to provide respite services."

20. Pursuant to the Lanterman Act, Welfare and Institutions Code section 4500 et seq., regional centers accept responsibility for persons with developmental disabilities. Welfare and Institutions Code section 4512 defines developmental disability as follows:

"Developmental disability" means a disability that originates before an individual attains age 18 years, 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 disability⁵ or to require treatment similar to that required for individuals with an intellectual disability [commonly known as the “fifth category”], but shall not include other handicapping conditions that are solely physical in nature.

21. California Code of Regulations, title 17, section 54000, further defines the term “developmental disability” as follows:

(a) “Developmental Disability” means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Development Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

⁵ Effective January 1, 2014, the Lanterman Act replaced the term “mental retardation” with “intellectual disability.” The terms are used interchangeably throughout.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

22. Welfare and Institutions Code section 4512, subdivision (l), defines "substantial disability" as:

(l) The existence of significant functional limitation 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.

23. California Code of Regulations, title 17, section 54001, provides:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and /or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of functional limitation, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(1) Receptive and expressive language.

- (2) Learning.
- (3) Self-care.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

24 Claimant's mother and grandmother, who is also his respite care worker, shared their concerns with his various behaviors. They noted that he can be self-absorbed and does not like to engage in a conversation unless he is interested. He can become over stimulated in larger groups, such as a classroom setting. He threw a hymnbook at someone at his church and thought it was funny and will also throw other objects. They opined that his behaviors evidence autistic traits.

25. At hearing, Dr. Thomason-Jimenez offered an extensive description of claimant's evaluation process, which was consistent with what was noted in her reports. She testified persuasively that as he has grown and matured, his presentation rules out autism. While he exhibits some characteristics of a mild ASD, such as those noted by his mother and grandmother, those behaviors are explainable by his PDD NOS diagnosis.

26. Dr. Barbara Johnson, Psy.D is a VMRC staff psychologist who routinely performs assessments and reviews those performed by her colleagues, for the purpose of determining the existence of developmental disabilities. Dr. Johnson was a member of the VMRC Eligibility Team that met after claimant's December 2011 evaluation conducted prior to his third birthday. She testified that while information available at that time "suggested [claimant] met the criteria for autism," it was recommended that his IPP (Individual

Program Plan) should “ensure reassessment prior to age 5 for the purpose of diagnostic accuracy and redetermination of ongoing eligibility.” This recommendation was based on the difficulty determining whether claimant’s concerns at that time would continue indefinitely and be substantially disabling due to his “young age and continued emerging skills.”

After reviewing claimant’s records, she testified persuasively that she agreed with the current VMRC Eligibility Team’s finding that there was no evidence to support a diagnosis of autism and claimant does not meet eligibility criteria for regional center services. She also recognized that claimant exhibits some characteristics of a mild ASD which are consistent with a diagnosis of PDD-NOS.

LEGAL CONCLUSIONS

1. Eligibility for regional center services is limited to those persons meeting the eligibility criteria for one of the five categories of developmental disabilities set forth in section 4512 as follows:

“Developmental disability” means a disability that originates before an individual attains age 18 years, 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 intellectual disability [commonly known as the “fifth category”], but shall not include other handicapping conditions that are solely physical in nature.

Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act.

2. Once a consumer has been found eligible for regional center services under the Lanterman Act, eligibility cannot be revoked unless a "comprehensive reassessment" causes the regional center to conclude that the original determination was "clearly erroneous." Section 4643.5, subdivision (b) provides:

An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.

3. An original determination may be found to be clearly erroneous because the individual does not have one of the qualifying conditions set forth in section 4512; that is he does not have intellectual disability, cerebral palsy, epilepsy, autism, or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability ("fifth category").

An original determination may also be found to be clearly erroneous when an individual does have one of the qualifying conditions but the condition does not constitute a substantial disability for the individual. If reassessment concerns substantial disability, section 4512, subdivision (l) requires:

Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

California Code of Regulations, Title 17, section 54001, subdivision (b) specifies:

The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

4. VMRC has the burden of proving that the original determination that claimant has a developmental disability is "clearly erroneous." VMRC established that a comprehensive reassessment was performed. The reassessment was comprehensive in scope of information reviewed and individuals who participated in the review and determination of eligibility. Based upon this reassessment, VMRC determined that claimant could no longer be considered to have autism, or to be substantially disabled.

Considering all available evidence, VMRC established that its original determination that claimant had a developmental disability is clearly erroneous. There was insufficient evidence to support a finding of autism. It was not established that claimant has cerebral palsy, epilepsy, intellectual disability or a condition closely related to intellectual disability, or requiring treatment similar to that required for individuals with intellectual disability. Accordingly, he does not have a developmental disability as defined by the Lanterman Act and is no longer eligible for regional center services.

ORDER

Claimant's appeal from the Valley Mountain Regional Center's denial of eligibility for continued services is DENIED. Claimant is not eligible for continued regional center services under the Lanterman Act.

DATED: March 27, 2014

SUSAN H. HOLLINGSHEAD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)