

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

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL CENTER,

OAH No. 2019030602

DECISION

Matthew Goldsby, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on November 19, 2019, in Alhambra, California.

Jacob Romero, Fair Hearing Coordinator with the Eastern Los Angeles Regional Center (Service Agency), appeared and represented the Service Agency. Claimant's mother¹ appeared and represented claimant as his authorized representative. Claimant was not present at the hearing. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

¹ This decision refers to claimant by party designation and to his family members by their relationship to claimant, and not by their respective names, in order to protect their privacy.

STATEMENT OF ISSUES

The issue in this case is whether claimant is eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act).²

EVIDENCE CONSIDERED

Documents. Service Agency's exhibits 1-13; claimant's exhibits A-D.

Testimony. Randi E. Bienstock, Clinical Psychologist; claimant's mother and aunt.

FACTUAL FINDINGS

1. Claimant is a three-year-old boy living with his mother. Claimant received Early Intervention Services from the Service Agency until April 13, 2019, when he turned three years old.

2. In February 2019, the Service Agency referred claimant to Lisa M. Doi, Ph.D., a licensed psychologist, to conduct a psychological evaluation of claimant to determine his then-current levels of cognitive and adaptive functioning and the presence, if any, of a developmental disability related to an intellectual disability or autism.

3. Dr. Doi reviewed records relating to claimant's medical history, including an Occupational Therapy Developmental Assessment Report dated April 11, 2017, a

² Welfare and Institutions Code sections 4500 et. seq.

Speech-Language Progress report dated August 2, 2018, and an Occupational Therapy Report dated August 16, 2018. The records reflected that claimant was born at 36 weeks' gestation without medical complication and that he was presently in good and stable health. These records further indicated that claimant demonstrated significantly delayed receptive language and age-appropriate expressive language skills.

4. Dr. Doi administered formal diagnostic testing and scales, including the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV), elements of Module 1 of the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2), the Autism Diagnostic Interview, Revised (ADI-R), and the Developmental Profile (DP-3). Cognitive testing of claimant generated results in the average range, although his full scale intelligence quotient (IQ) score was computed to be in the low-average range. Claimant's verbal comprehension skills were assessed in the mild deficit range. The ADOS-2 results did not reflect significant characteristics of Autism Spectrum Disorder.

5. Dr. Doi made behavioral observations during the evaluation. She observed that claimant made good eye contact, that he was well groomed and neatly dressed, that he was responsive to questions while maintaining a responsive social smile, and that he exhibited good effort during the evaluation. Dr. Doi noted no oddities of speech and observed no repetitive motor mannerisms.

6. Dr. Doi interviewed claimant's mother who reported that claimant does not interact with his peers, that he flaps his hands at home, and that he insists on sameness. The mother also described claimant as strongly attached to his blanket, and that he may cry or throw up when separated from her.

7. Dr. Doi ruled out a diagnosis of either intellectual disability or autism, and diagnosed claimant with Language Disorder. In light of the behaviors reported by claimant's mother, Dr. Doi strongly recommended that claimant receive another psychological evaluation prior to enrollment in kindergarten, concluding, "It is difficult to render an unequivocal opinion regarding future levels of functioning in very young children. As a result, it is important to reevaluate periodically to maintain an accurate clinical picture." (Exhibit 4, page 8.)

8. At the hearing, claimant's mother testified in greater detail about claimant's behavior at home. She regularly observes claimant "overreact to stuff that is normal," and that, if there are people in the room, he withdraws and "isolates a lot." The mother testified that claimant has sensory aversions to shaving cream, dirt, and sand, that he cannot tolerate loud noise and will cover his ears when dogs bark, that he will take off running without awareness of danger or his surroundings, and that he is fascinated with trains and cars. She states that claimant cannot stay in one place for long and that he does not play with his friends, opting instead to "be in his little world." The mother testified that claimant cries when his fingernails are trimmed or when he gets a haircut, and that claimant gets overwhelmed with any change of routine. Claimant's mother testified that claimant will "grab her hard and scratch," that he likes to "repeat stuff over and over," that he tantrums daily, and that the only way to calm him down is to sing and hold him. She further described that, since Early Intervention Services concluded, claimant's behaviors have worsened.

9. Claimant's mother presented letters to corroborate her testimony. Claimant's aunt wrote a letter and testified that she babysits claimant on a regular basis and that she has observed all of the behaviors described in the mother's testimony. A teacher wrote that claimant tantrums daily, that he cries uncontrollably

when his mother leaves the classroom, that he forces himself to throw up, that he often flaps his hands, and that he hits himself with his hands or bangs his head on the floor.

10. The mother also presented evidence that, since August 20, 2018, claimant has been receiving children's outpatient services at Violence Intervention Services pursuant to a diagnosis of Childhood Emotional Disorder, unspecified. The record reflects that therapy sessions have been "focused on supporting [claimant's] co-regulation capacity," that claimant and his father have been participating in the family sessions, and that claimant has made some progress towards his treatment goals. (Exhibit A.)

11. At Early Childhood Clinic at LAC+USC Medical Center, claimant was evaluated and treated by Erica Shoemaker, M.D., M.P.H., director of clinical services for the Child and Adolescent Psychiatry Department of the medical center. On April 13, 2016, she wrote a letter to the Service Agency, reporting, "Based on mother's report, and repeated evaluations in our clinic, [claimant] displays deficits in social relationships and nonverbal communication in addition to repetitive behaviors and sensory sensitivities. He meets criteria for autism spectrum disorder with mild impairment. He would greatly benefit from opportunities for socialization with other children in the school setting an ongoing therapy to encourage him to use language and interact with peers and adults." (Exhibit 3.)

12. Randi Bienstock, Psy.D, reviewed the letter of Dr. Shoemaker as well as all reports and records relating to the Service Agency's determination of claimant's ineligibility for regional center services. In the opinion of Dr. Bienstock, Dr. Shoemaker's letter, in and of itself, was insufficient to establish eligibility. Because the letter references "repeated evaluations," Dr. Bienstock considered a review of those

evaluations to be important in assessing Dr. Shoemaker's conclusion, but the referenced evaluations were not presented to the regional center or as evidence at the hearing.³ In her brief letter, Dr. Shoemaker does not reference if any formal testing measures were administered to support her diagnosis.

13. Dr. Bienstock testified that the rule-out diagnosis of Dr. Doi was entitled to greater weight because it was supported by multiple reports and documentation whereas the opinion of Dr. Shoemaker was conclusory and unexplained. A psychiatric outpatient evaluation conducted and electronically signed by Dr. Shoemaker at LAC+USC on April 16, 2019, reflected a diagnostic impression of "Autism Spectrum Disorder Level 1 requiring support." (Exhibit 12.) However, claimant's mother was the sole source of information except for brief observations documented during a mental status exam that Dr. Bienstock believed were inconsistent with the DSM-5⁴ diagnostic criteria for a diagnosis of Autism Spectrum Disorder, including the following:

³ The law does not accord to an expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. (*County of Sacramento v. Workers' Comp. Appeals Bd.* (2013) 215 Cal.App.4th 785.) Bare conclusion of an expert without supporting facts are not entitled to evidentiary weight. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 509-511.)

⁴ Regional centers refer to the diagnostic criteria in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, commonly referred to as the DSM-5, to determine eligibility under the Lanterman Act.

A. Claimant's behavior was described as, "calm, cooperative, developmentally appropriate, plays with toys present, some play with staff but primarily self-play, no evidence of imaginary play." (Exhibit 12, page 2.)

B. Claimant's motor skills were described as follows: "No abnormal/involuntary movements observed, open-and-closed hands a few times perhaps to say 'all done.'" (Exhibit 12, page 2.)

C. Claimant's speech was described as, "occasional babbling but for the most part was able to speak, during this session the patient spoke at least 50-75 words." (Exhibit 12, page 2.)

D. Claimant's cognition was described as, "intact (not formally tested, unable to identify the location of his nose)." (Exhibit 12, page 2.)

14. Other documentation reviewed by Dr. Bienstock did not contradict the rule-out diagnosis of Dr. Doi. A school district assessment tested claimant in the area of learning disability and found that he did not meet the criteria for an Individual Education Plan (IEP) under learning disability. An occupational therapy record review, a language and speech preschool assessment report, and adapted physical education assessment report, also supported the diagnosis and conclusions of Dr. Doi.

LEGAL CONCLUSIONS

1. The burden is on claimant to demonstrate that he is entitled to regional center services, and that the Service Agency's determination of ineligibility is incorrect. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156.) At any point, a failure

to satisfy a requirement for eligibility by a preponderance of the evidence will result in a conclusion of ineligibility. (Evid. Code, § 115.)

2. In order to be eligible for regional center services, claimant must have a developmental disability. (Welf. & Inst. Code, § 4512, subd. (a).) To establish that he has a “developmental disability,” claimant must first prove that he suffers from a qualifying disability. Certain conditions are expressly excluded from the definition of a developmental disability. Specifically, conditions that are solely physical in nature do not qualify. (Welf. & Inst. Code, § 4512, subd. (a).) Also, psychiatric disorders alone and learning disabilities alone are not qualifying conditions. (Cal. Code. Regs., tit. 17, § 54000.) However, the regulations do not deny services to a claimant with a learning disability or psychiatric disorder, so long as the claimant can also establish a qualifying condition under the Lanterman Act. (*Samantha C. v. Department of Developmental Services* (2010) 185 Cal.App.4th 1462.)

3. If claimant suffers from a qualifying disability, the evidence must then show that the condition meets each of the following elements (Cal. Code Regs., tit. 17, § 54000, subd. (a)):

- a) The disability originated before claimant attained age 18;
- b) The disability is likely to continue indefinitely; and,
- c) The disability constitutes a substantial disability for claimant.

4. A developmental disability is presumed with evidence of any of the following four diagnoses: intellectual disability, cerebral palsy, epilepsy, or autism. (Welf. & Inst. Code, § 4512, subd. (a).) In this case, a psychologist assessed claimant and observed deficits in learning and memory. However, the psychologist determined

that claimant does not have intellectual disability, cerebral palsy, epilepsy, or autism. Accordingly, claimant has failed to prove by a preponderance of the evidence that he has been diagnosed with any of the four presumed grounds for eligibility.

5. Claimant may nonetheless qualify under a fifth category in two ways: (a) if he has a disabling condition closely related to intellectual disability, or (b) if he has a disabling condition that requires treatment similar to that required for individuals with intellectual disability. (Welf. & Inst. Code, § 4512, subd. (a).) Fifth category eligibility is broad, encompassing unspecified or undiagnosed conditions and disorders. However, this broad language is not intended to allow unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average functioning and impaired adaptive behavior who would benefit from regional center services. Establishing eligibility under the fifth category does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to intellectual disability (e.g., reliance on IQ scores). Eligibility under this category requires an analysis of the quality of claimant's cognitive and adaptive functioning and a determination of whether the effect on his performance renders him like a person with intellectual disability.

6. Moreover, a qualifying developmental disability under the fifth category requires "treatment similar to that required for individuals with an intellectual disability." (*Ibid.*) "The statutory definition does not include disabling conditions requiring similar services" because the Lanterman Act distinguishes between "treatment" and "services" as two different types of benefits available under the statute. (*Ronald F. v. State Dept. of Developmental Services* (2017) 8 Cal.App.5th 84, 98.)

7. In this case, after undergoing a psychological evaluation and appropriate testing, claimant failed to meet the criteria for Autism Spectrum Disorder. Moreover, claimant exhibited behaviors during observation that were inconsistent with autism and no competent medical evidence was presented to show that claimant's condition is closely related to intellectual disability. Although claimant would benefit from regional center services, no evidence was presented to show that his condition requires treatment similar to that required for individuals with intellectual disability. (*Samantha C. v. Department of Developmental Services, supra.*, 185 Cal.App.4th 1462; *Ronald F. v. State Dept. of Developmental Services, supra.*, 8 Cal.App.5th 84, 98.)

8. Opinion testimony from a properly qualified witness is generally necessary to demonstrate the elements for medical malpractice claims. (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304.) It follows then that establishing the factual elements of eligibility for regional center services, including the diagnosis of a qualifying condition and the merits of such a diagnosis, are within the knowledge and province of expert witnesses. (*Lawless v. Calaway* (1944) 24 Cal.2d 81.) The weight to be afforded to expert evidence regarding an ultimate issue of fact is a discretionary matter, to be evaluated in light of the facts of the particular case and the usefulness of the expert's opinions in arriving at the truth. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907.) In determining the credibility of any witness, an administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the witness's testimony at the hearing. (Evid. Code, § 780.)

9. Dr. Bienstock is properly qualified to testify as an expert. Dr. Bienstock credibly testified that the behaviors described by claimant's mother are cause for further evaluation as claimant develops, but that the factual elements of eligibility for

regional center services are not currently present, including the diagnosis of a qualifying condition and the merits of such a diagnosis.

10. Claimant has failed to meet his burden to show by a preponderance of the evidence that he currently has a developmental disability under Welfare and Institutions Code section 4512, subdivision (a). Accordingly, claimant is ineligible for regional center services under the Lanterman Act.

ORDER

Claimant's appeal is denied. Claimant is ineligible for regional center services under the Lanterman Act.

DATE:

MATTHEW GOLDSBY
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.