

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

JAMANE C.

Claimant,

vs.

ALTA CALIFORNIA REGIONAL
CENTER,

Service Agency.

OAH No. 2011091129

DECISION

This matter was heard before Administrative Law Judge Danette C. Brown, State of California, Office of Administrative Hearings, on December 20, 2011, February 13, 2012, and October 23, 2012, in Sacramento, California.

Julie Ocheltree, Attorney at Law, represented Alta California Regional Center (ACRC or the service agency). Robin Black, Legal Services Manager, ACRC, was also present.

Abigail L. Roseman, Attorney at Law, represented the El Dorado Public Guardian, conservator for Jamane C. (claimant). Lee Jackson, El Dorado Public Guardian representative, was also present. Claimant did not appear.

The matter was held open for the parties to submit simultaneous closing briefs by November 30, 2012. ACRC's closing brief was received on November 30, 2012, and marked as Exhibit 23 for identification. Claimant's Closing Brief was received on November 27, 2012, and marked as Exhibit B for identification. The matter was submitted for decision on November 30, 2012.

ISSUE

1. Is claimant eligible to receive regional center services and supports by reason of a diagnosis of mental retardation?

2. If claimant is not eligible for regional center services under the category of mental retardation, is he eligible under the “fifth category” because he has a condition closely related to mental retardation, or that requires treatment similar to that required for individuals with mental retardation?

FACTUAL FINDINGS

Background and History

1. Claimant was born on April 4, 1970. He is currently 42 years old. Claimant has been under a conservatorship since approximately May 1987. At that time he was a resident of Serendipity Diagnostic and Treatment Center (Serendipity), where he stayed for approximately one year. Claimant had difficulties at an early age, although his mother indicated that he became much worse when he entered high school. At age two, claimant ingested lighter fluid and other toxic substances on other occasions. His sexual experiences started when he was a young boy. Claimant admitted exposing himself to a 19-year old female who fondled him when he was six years old. At age 7, claimant was molested by an 18-year old male, which involved oral genital activity. When claimant was age 8 or 9, he sunbathed in the nude with two 18-year old females, which included some sex play. At age 10, he attempted intercourse with a four-year old, and at age 11, claimant began exposing himself in public. When he first arrived at Serendipity, he drank his own urine and ate his own feces, resulting in acute hospitalization. He had problems with personal hygiene, taking seldom showers and refusing to comb his hair. When eating, he stuffed his mouth with handfuls of food and smeared food all over his face. Serendipity recommended that claimant be housed in a locked facility after releasing him on his 18th birthday. Claimant has since been under the care of the El Dorado Public Guardian for all of his adult life.

2. In July 2011, claimant was referred to ACRC by the El Dorado County Superior Court, after he was found to be incompetent to stand trial on a charge of assault with intent to commit a felony, in violation of Penal Code section 220. The facts and circumstances of the incident are that on January 28, 2011, at the El Dorado County Mental Health facility, claimant grabbed a woman, who was also being treated at the facility, and began “pelvic thrusting” her from behind. Staff at the facility separated the two, and the woman began crying. Claimant stated, “I want to rape her! I want to rape her!” The police were called, and the woman pressed charges. Claimant was arrested and charged with attempted rape and assault. The court requested that ACRC evaluate claimant to determine if he was developmentally disabled, and to provide placement recommendations.

3. A social assessment was performed by an ACRC intake counselor on August 3, 2011. The social assessment interview was conducted at the El Dorado County Jail. Claimant wore a red jumpsuit and was led into the room by a corrections officer. Claimant was in shackles and handcuffs attached to his waste. Public Guardian and ACRC staff were present. Respondent’s mother was not present. Claimant initiated the conversation by stating that he wanted new medications to help him feel better. Claimant said he weighed

about 180 pounds and that he was 67 inches tall. He seemed to be able to provide accurate information regarding his birth date and place of birth, but did not know his social security number. He rambled at times, but gave accurate and chronological information about his past placements. He showed clear progression from one thought to another, then said that he raped a 12-year old girl while he was at the Parkhill Board and Care Home. His receptive and expressive language skills appeared to be adequate and he gave a good recollection of part of his childhood. He named places he visited as a child, like Yosemite National Park. Claimant recalled that a man named Oscar came to his grandmother's home when he was little, and asked claimant to perform oral sex on him at a creek near the home. Regarding his mental health issues, claimant said that he hears voices and that they tell him to reveal himself. Mari Robertson, claimant's public guardian for the past seven years, stated that claimant has never had a bank account, and could not tell her how much money he had left if he bought an eight dollar shirt with a twenty dollar bill. Claimant was unable to count by fives.

4. Claimant's mother was also interviewed as part of the social assessment. Ms. C was a single mother who was helped by friends to care for claimant when he was an infant. She then left her son to her adoptive mother, who lived on a ranch in Placerville. Claimant was cared for by his grandparents until his mother married. Claimant then lived with his mother, stepfather, half-brother and sister, in Sacramento. The relationship between Ms. C and her (now) ex-husband was violent. While Ms. C said that claimant was not physically abused, claimant said that he was "hit" and "bruised" by his "alcoholic" stepfather. Ms. C knew of an occasion when claimant was molested. She recalled that although there was "no penetration," the son of an owner of a care home where claimant lived was the perpetrator.

5. As part of the social assessment, claimant's educational history, social abilities and activities, behavior concerns, medical history, psychiatric history, substance abuse history, legal history, early developmental history, and adaptive skills were reviewed:

Educational History. Claimant dropped out of school in the 10th grade. ACRC was unable to determine if claimant was in special education, as any records have been purged. A copy of the Stanford Diagnostic Test Student Profile for claimant, dated October 1988, showed that claimant, at age 18, showed grade equivalents that were far below his age level. Individual Educational Program (IEP) notes showed that claimant attended special education classes throughout high school. Claimant was shy and somewhat of a loner, and had an average attention span of 30 minutes. Claimant was resistive and unmotivated to learn. While at Serendipity, Director Bernard Hudson, M.D., wrote that psychological testing revealed that claimant had a Verbal IQ of 86, Performance IQ of 68 and a Full Scale IQ of 76, which placed him in the borderline intellectual range. Dr. Hudson also indicated that claimant was "gravely disabled due to a mental disorder characterized by behavior that is extraordinarily bizarre including trying to drink his own urine, trying to strangle himself, eating his own feces, public masturbation, attempting to eat Ajax because he wanted to hurt himself, etc."

Social Abilities/Activities. Claimant displayed age-appropriate social abilities during the interview. He was comfortable, and talked fondly about the years he spent in various care homes. He had friends when he was younger, such as “David,” his older brother who passed away, and “Andy.” He remembered playing with toys, and loved railroad/country music.

Behavior Concerns. At the time of the assessment, claimant was in solitary confinement due to criminal charges of sexual assault and attempted rape. Claimant has a long history of sexual experiences, behavior, and uncontrolled urges. In his letter of April 4, 1988, Stanley Wang, M.D., Chief Psychiatrist, El Dorado County Department of Health, Community Mental Health Center, wrote that claimant was “lacking in judgment” and “is extremely defensive.” Dr. Wang stated that claimant “carries a diagnosis of childhood onset pervasive mental disorder in a schizoid personality.” Dr. Wang opined that an adult diagnosis might be that claimant has “borderline intellectual functioning.” Dr. Wang concluded that claimant remained gravely disabled by way of mental illness and “mental retardation,” and that claimant is a high risk of danger to others.

Medical History. Claimant was taking numerous medications at the time of the assessment: Cogentin, Celexa, Klonopin, Propanolol, Benadryl, Lithium, Geodon, Haldol, and Buspar. He considered himself healthy.

Psychiatric History. Claimant underwent psychological evaluations beginning in his teen years, to present. The evaluations were requested for various purposes. In his teen years, the evaluations served to document intake and discharge information, and the psychological and psychiatric treatments provided at each facility in which claimant resided. The Serendipity evaluation served to determine claimant’s mental health status prior to turning age 18, as claimant would be released from Serendipity at age 18. Many evaluations throughout the years served to determine claimant’s overall mental health status, and treatments for his sexual impulse control problems. Later evaluations, in 2011, served to determine if claimant is competent to stand trial in the current criminal matter filed against him. Daniel W. Edwards, Ph.D., MPH, made a psychological diagnosis of claimant on June 28, 2011:

Axis I: Schizophrenia, paranoid type
Axis II: Mild Mental Retardation (Full Scale IQ 58)
Axis III: Negative
Axis IV: 5 Severe
Axis V: 6 Very Poor

Recent diagnoses by other psychologists who evaluated claimant were also made as follows:

Abraham Nievod, Ph.D., J.D., on March 28, 2011:

Mental Retardation, Mild to Moderate, DSM-IV¹-TR; 318.0
Pervasive Developmental Disorder, NOS, DSM-IV-TR:299.8
Schizophrenia, Paranoid or Disorganized Type, DSM-IV-TR: 295.10

Eugene Roeder, Ph.D., on February 23, 2011:²

Claimant “presents as a severely mentally ill individual with severe psychosexual difficulties. By report, [claimant] was said to have the ability to understand the nature and purpose of the proceedings, but not capable of cooperating in a rational manner.”

Other diagnoses, when claimant was 17, were as follows³:

Serendipity, on January 17, 1988:

Axis I: 299.90 Childhood Onset of Pervasive Developmental Disorder
Axis II: 301.20 Schizoid Personality Disorder
Axis III: Negative
Axis IV: 5 Severe
Axis V: 6 Very Poor

Napa State Hospital, between April 1988 to December 1988 (provisional diagnosis upon admission was taken from Serendipity’s diagnosis):

Axis I: Exhibitionism
Axis II: Deferred
Axis III: Chronic Atopic Dermatitis
Axis IV: Enduring Cure Severe, Early Sexual Stimulation/Early Sadistic Punishment
Axis V: Adm. 20; 1 yr. + 40 Discharge 50.

Substance Abuse History. Claimant said he would drink occasionally but has never taken marijuana or other controlled substances.

Legal History. In May 1988, claimant was placed under a Lanterman-Petris-Short (LPS) Conservatorship, two months after he turned age 18. His mother and sister were not

¹ Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition.

² Dr. Roeder gave a summary, rather than a diagnosis.

³ There were additional psychiatric diagnoses made by numerous medical professionals throughout the years, which are discussed later in this proposed decision.

recommended by authorities to be claimant's conservator. In July 2011, claimant's LPS Conservatorship was replaced by Limited Conservatorship granted by the El Dorado Superior Court. ACRC could not determine whether claimant had been previously charged with criminal acts.

Early Developmental History. Development milestones were delayed. Claimant typically spoke with one or two words, but when placed at Head Start, his communication improved. Claimant's mother observed claimant to be slower than other children. She indicated that claimant started in special education when claimant was in kindergarten, but could not remember the criteria that qualified him for special education. She remembered claimant to be obsessed by little toy trains. He engaged in imaginary play with a toy soldier or Spiderman. In claimant's early teens, his mother recalled that claimant removed all his clothes at school.

Adaptive Skill Domains. Communication. Claimant had adequate expressive and receptive language skills to engage in the interview. He could advocate for himself by knowing what his needs were. He displayed thoughtful insight into his condition when he gave reasons for "revealing himself." He attributed anger, behaviors, and voices as causes for his exhibitionism. He had no articulation problems in his speech. Learning. All special education records were destroyed when claimant turned age 26. His grades at Ponderado Alternative Education Center show that he got an A in Math Comprehension, B in Computers, D in Basic Math, and a B in English. Self-Care. All basic self-care needs were met independently. Self-Direction. Claimant had extreme difficulty in making sound choices through his life. He has been living in care homes since age 18, thus, much of his decision-making was made for him. He seemed sure that he wanted to go to a developmental center to receive treatment. Claimant stated that he is unable to follow directions and cannot take care of himself. Mobility. Claimant is ambulatory and has a steady gait. Capacity for Independent Living. Claimant itemized the chores he performed in care homes. He would mop floors, mow the grass and cut hedges, clean his room, and go shopping with his money. He remembered using the microwave, but not the washer and dryer. Economic Self-Sufficiency. Claimant has never worked.

6. On August 8, 2011, ACRC's interdisciplinary team met, and after completing its full assessment of claimant, determined that claimant was not qualified to receive services because he did not have an intellectual developmental disability. Furthermore, ACRC determined that claimant did not present with any other developmental disability as specified by the Lanterman Act (Welf. & Inst. Code, § 4400 et seq.)

7. Under the Lanterman Act, ACRC accepts responsibility for persons with developmental disabilities. A developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely and that constitutes a substantial disability for the individual. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and what is commonly known as the "fifth category" – a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals. (Welf. & Inst. Code, § 4512, subd. (a).)

Given the disjunctive definition – a condition closely related to mental retardation or requiring similar treatment to that required for individuals with mental retardation – the fifth category encompasses two separate grounds for eligibility.

8. On August 31, 2011, ACRC sent a Notice of Proposed Action to the El Dorado Public Guardian, stating that claimant has been determined not eligible for ACRC services under the Lanterman Act.

9. On September 23, 2011, the El Dorado Public Guardian, on behalf of claimant, appealed ACRC's decision, and filed a fair hearing request, citing "Discrimination, Incomplete Investigation, and Investigation standards inconsistent with previous Public Guardian client application." The El Dorado Public Guardian believes that claimant is eligible for ACRC services under the Lanterman Act under the category of mental retardation. In the alternative, eligibility is separately sought for claimant based on his having a condition closely related to mental retardation, or that requires treatment similar to that required for individuals with mental retardation.

March 2, 1987 Psychological Evaluation by Doral Leek, Ph.D.

10. Claimant was 16 years old when he was referred to Dr. Leek for a psychological examination by the El Dorado County Superior Court, because claimant was cited for indecent exposure in October 1986. In February 1987, claimant was again cited for indecent exposure. Dr. Leek's evaluation was made for the purpose of assessing claimant's psychosexual functioning, and to aid in treatment planning. Dr. Leek administered the "MMPI," "Brief Intelligence Test," "Draw and Person Test," and "Rorschach Test," and evaluated claimant's family and school history, behavioral problems, emotional problems, and psychosexual development. Dr. Leek determined that claimant was born in a normal pregnancy, swallowed lighter fluid at two, had pneumonia and lung problems until age four, experienced high temperatures, ate and slept normally, reported severe headaches, and had a close friend. He was slow in school and did not present severe behavior problems. Claimant cited his major stress events as moving from his hometown at age 14, breaking his leg at age four, and when his stepfather "flips out." Claimant first exposed himself to females at age 6, and engaged in such activities throughout his childhood and into his teen years.

11. Dr. Leek determined that "objective and projective testing reveal[ed] a 16 year old of average intellectual ability who has long term social and personal maladjustments. [Claimant] reported bizarre sensory experiences, unusual ideas and perceptions, and difficulty in controlling his behavior." Dr. Leek diagnosed claimant with Schizoid Disorder of Childhood and Adolescence and Exhibitionism, and ruled out neurologic disorder. She recommended placement in a well-controlled treatment environment, a neurological evaluation, and individual and group treatment. Dr. Leek did not diagnose claimant with mental retardation.

June 5, 1987 Psychological Evaluation by Serendipity

12. Claimant was referred to Serendipity to assess his (then) current intellectual and emotional/behavioral functioning. He was administered the WAIS-R, Bender Visual Motor Gestalt Test, H-T-P, and the Rorschach Ink Blot Technique. Claimant was taking the medications Thorazine, 50 milligrams, and Valium, 5 milligrams, at the time. With regard to claimant's test behavior, claimant was cooperative but appeared to lose track and was distracted. He displayed motor agitation (shaking his leg), which decreased during tasks that required greater concentration. The following test results reflected claimant's current functioning:

VERBAL TESTS	Scaled Score	PERFORMANCE TESTS	Scaled Score	
Information	09	Picture Completion	04	VIQ = 86
Similarities	07	Picture Arrangement	06	
Arithmetic	04	Block Design	05	PIQ = 68
Vocabulary	06	Object Assembly	--	
Comprehension	--	Coding	04	FSIQ = 76
(Digit Span)	(07)	(Mazes)	(00)	
Verbal Score	40	Performance Score	24	
(Pro rated)		(Pro rated)		

13. Serendipity concluded that claimant was a seriously disturbed, but not psychotic, young person. Intelligence testing was spotty and inconsistent, indicating in at least some verbal areas, that claimant had the potential to place in the average range. Due to claimant's defects in perceptual accuracy (reality testing) and severe cognitive inflexibility, his functioning was below average. Serendipity did not diagnose claimant with mental retardation.

January 17, 1988 Serendipity Discharge Summary

14. On January 17, 1988, Tamara Navarro, M.S. (Navarro), a Social Worker at Serendipity, wrote to Daryl Keck of El Dorado County Mental Health Services. She provided a history of claimant's sexual behaviors. She recommended that claimant be placed in conservatorship before his 18th birthday, as it was Serendipity's plan to discharge claimant close to his 18th birthday, as Serendipity was not licensed to care for patients age 18 or older. Claimant's discharge diagnosis at the time was:

- Axis I: Childhood Onset Pervasive Mental Disorder 299.80
- Axis II: V71.09 No Diagnosis
- Axis III: Negative
- Axis IV: 5 Extreme
- Axis V: GAF 25

Navarro stated that claimant remained gravely disabled. She cited claimant's behaviors such as isolating himself and sleeping excessively, crawling out of his bed and refusing to come out for as much as an hour at a time, refusing to shower or shave, and stuffing his mouth with handfuls of food. Despite claimant's behavior, coupled with his urges to expose himself in public and to masturbate excessively, Navarro did not state in her letter, discharge summary, or treatment plan that respondent was diagnosed with mental retardation.

April 4, 1988 Letter by Stanley Wang, M.D.

15. Dr. Wang, Chief Psychiatrist for the El Dorado County Department of Health, Community Mental Health Center, wrote a letter in support of an LPS Conservatorship for claimant, who turned 18 on the date of Dr. Wang's letter. Dr. Wang stated that claimant had an "I.Q. roughly around 76, last assessed in 1987," and that claimant carried a "diagnosis of childhood onset pervasive mental disorder in a schizoid personality." Dr. Wang suggested that an adult diagnosis "might be" appropriate that claimant had "borderline intellectual functioning," but later in his letter, Dr. Wang stated that claimant remained gravely disabled by way of mental illness and mental retardation. The reference to mental retardation may have been a misstatement on Dr. Wang's part, as his letter strongly suggested that he reviewed Serendipity's psychological evaluation, and agreed with it.

August 19, 1996 Assessment by Evan B. Sundby, Ph.D.

16. Dr. Sundby met with claimant on August 6, 1996, to assess claimant's treatment for sexual impulse control, and to provide placement recommendations. Dr. Sundby agreed to provide treatment to claimant in one of his sex offender treatment groups for "intellectually/emotionally impaired clients." Claimant was scheduled to begin treatment in September 1996. During his interview with Dr. Sundby, claimant disclosed significant pedophilic fantasies, thoughts, and urges, upon which he had acted in the past. Dr. Sundby had concerns about claimant's dangerousness to the community, and recommended that claimant be placed in a group home in an isolated setting, away from schools, parks, and shopping malls, etc. He further recommended that claimant be closely supervised, especially during outings, and that it was critically important that claimant not have unsupervised access to children. Dr. Sundby recommended a more restrictive living environment if claimant resisted or broke any of the "rules." Dr. Sundby did not evaluate claimant for mental retardation, or indicate that claimant was mentally retarded.

February 23, 1997 and February 23, 1998 Renewals of Conservatorship by Arthur I. Molho, Ph.D. and Robert Price, M.D.

17. Dr. Molho, a psychologist, examined claimant in February 1997 and 1998, for the purpose of renewing claimant's conservatorship. In 1997, Dr. Molho observed claimant to exhibit the following clinical symptoms: inappropriate affect; tangential thinking; limited insight; below average intelligence; impulsivity; and impaired judgment. His diagnosis of claimant's clinical condition was chronic undifferentiated schizophrenia, borderline

intellectual functioning, and pedophilia. In 1998, Dr. Molho similarly observed claimant's clinical symptoms: limited range of insight; very impaired judgment; concrete circumstantial thinking; markedly below average intelligence; impulsive traits; affect is bland; ongoing sexual focus on young girls. Dr. Molho's prognosis for claimant's improvement in 1997 was "guarded," and was "poor" in 1998. Dr. Molho concluded that claimant was incapable of accepting treatment involuntarily, and deemed claimant a gravely disabled person. Dr. Molho did not diagnose or indicate that claimant was mentally retarded.

Dr. Price also examined claimant in February 1997 and 1998. Dr. Price observed claimant to exhibit the following symptoms in 1997 and 1998: circumstantial thought process; inappropriate affect; depressed mood; limited insight; and impaired judgment. Dr. Price diagnosed claimant with schizophrenia, undifferentiated type, borderline intellectual functioning, and pedophilia. Claimant's prognosis for improvement was guarded, was incapable of accepting treatment involuntarily, and continued to be a gravely disabled person. Dr. Price did not diagnose or indicate that claimant was mentally retarded.

April 4, 2011 Psychological Evaluation by Eugene Roeder, Ph.D.

18. Dr. Roeder's psychological evaluation served to determine whether claimant was competent to stand trial in the current criminal case against him. Dr. Roeder reviewed claimant's relevant history and his present situation of facing the potential of going to Atascadero State Hospital if denied ACRC services. Dr. Roeder stated that claimant "presents on the psychological evaluation as a severely mentally ill individual with severe psychosexual difficulties." Claimant is having difficulty in custody, and is housed in an isolation cell because of his unpredictable behavior. He is bothered by auditory hallucinations, and is focused on being punished and taking responsibility for his actions. Dr. Roeder stated that claimant remains extremely impulsive and incapable of controlling or modulating his behavior or his thinking. Dr. Roeder did not diagnose claimant with mental retardation or indicate that claimant exhibited any behaviors to indicate mental retardation.

June 28, 2011 Competency Evaluation Report by Dr. Edwards

19. Dr. Edward's psychological examination also served to determine whether claimant was competent to stand trial. Like Dr. Roeder, Dr. Edwards reviewed claimant's relevant history, and analyzed claimant's present situation. Dr. Edwards also administered the Rey 15 Item Test, the Mini Mental State Exam, and the Montreal Cognitive Assessment (MOCA). On the Rey 15 Item Test, claimant could only recall two of the 15 symbols. Scores below nine are considered to be a sign of poor effort and probable malingering. On the Mini Mental State Exam, claimant scored 14 out of 30. Scores below 23 are an indication of dementia in the elderly. On the MOCA, claimant scored 12 out of 30. Individuals with Alzheimer's disease had scores between 11.4 and 21. Dr. Edwards considered claimant's low scores on the Mini Mental State Exam and the MOCA to be a result of poor effort and probable malingering. Dr. Edwards stated that, "In summary, I think

[claimant] is afraid of going to prison or a State Hospital and resisted doing his best to avoid these alternative placements. He wants to go to a “Developmental Center” for the people with Pervasive Developmental Disorders or with Mental Retardation.” Dr. Edwards stated:

Claimant’s Adaptive functioning level seems like it is most consistent with Mental Retardation or severe PDD. He probably would do best i[n] a locked facility like that in Porterville for the Developmentally Disabled. It would certainly be worth discussing with the Alta California Regional Center for the Developmentally Disabled.

Dr. Edward’s psychological diagnosis is set forth in Finding 5. Under Axis II, he assessed claimant as having Mild Mental Retardation, in line with Dr. Nievod. Dr. Edward’s did not provide a FSIQ for claimant, instead relying on Dr. Neivod’s FSIQ of 58 in his analysis.

Chronology of Claimant’s Mental Health Diagnoses by El Dorado County Mental Health

20. From 1983 to 2010, El Dorado County Mental Health documented claimant’s mental status and psychiatric diagnoses. These assessments provide an insightful chronology of claimant’s mental health from his early teen years into adulthood. This evidence is extremely persuasive. In 1983, when claimant was 13, John McKean, M.D., diagnosed claimant with:

Axis I: Adjustment Disorder with Mixed Disturbance of Emotions and Conduct
309.40
Axis II: No diagnosis V71.09
Axis III: None
Axis IV: 5-Severe
Axis V: 4-Fair

In 1985, when claimant was 15, Ethan Harris, M.D. diagnosed claimant as follows:

Axis I: Psychosexual Disorder not elsewhere classified. Masturbating in classroom
302.89; Pedophilia 302.20
Axis II: No diagnosis V71.09
Axis III: None
Axis IV: 5 severe
Axis V: 5-poor

Throughout 1990 and 1991, when claimant was 20 and 21, Dr. Wang diagnosed claimant as follows:

Axis I: Adjustment disorder with mixed emotional features possibly to psychotic proportion 309.28
Axis II: Deferred 799.90
Axis III: None
Axis IV: Stress level not specified
Axis V: Globals: 40/40/40 in 1990; 40/50/50 in 1991

Another 1991 admission note by John Zil, M.D., J.D. showed claimant's diagnosis as:

Axis I: Bipolar disorder
Axis II: Deferred 799.90
Axis III: None
Axis IV: Stressors moderate, decrease of medication and loss of friendship
Axis V: G.A.F.: Currently 35, highest in past year presumable higher, estimated at 50

In 1995, when claimant was 25, Tien Tran, M.D., showed claimant's diagnosis as:

Axis I: Schizophrenia, differentiated type, by history 295.90
Axis II: Borderline intellectual functioning (**IQ of 76**) V62.89
Axis III: None
Axis IV: B – Problems related to the social environment
Axis V: G.A.F.: Current - 55, initial – 55, past year – 65

In July 1996, when claimant was age 26, Dr. McKean showed claimant's diagnosis as:

Axis I: Schizophrenia, differentiated type 295.90; Neuroleptic induced Parkinsonism 332.1
Axis II: Borderline intellectual functioning V62.89
Axis III: None
Axis IV: B – Problems related to the social environment
Axis V: G.A.F.: Current - 55, initial – 55, past year – 65

Two years later, in 1997, when claimant was age 27, Dr. Price showed claimant's diagnosis as:

Axis I: Schizophrenia, differentiated type; Pedophilia
Axis II: Borderline intellectual functioning
Axis III: None
Axis IV: Same
Axis V: Current GAF of 55

In 1998, claimant's diagnosis did not change. Interestingly, no evidence was submitted to show claimant's mental health status in 2000, and the decade following it. In 2010, when claimant was 40, his diagnosis showed:

Axis I: Schizophrenia, undifferentiated type, by history 295.90; Pedophilia 302.2
Axis II: PDDNOS, with antisocial obsessive-compulsive and narcissistic traits;
Borderline intellectual functioning V62.89
Axis III: Other; history of leukopenia, gum infection – poor oral hygiene
Axis IV: B – Problems related to the social environment
Axis V: B – Social Environment – Other Psychosocial & Environmental Problems;
Current GAF 50, Past GAF 50

Testimony of ACRC's Expert Phyllis S. Magnani, Ph.D.

21. Phyllis S. Magnani, Ph.D., Staff Psychologist at ACRC, is a licensed clinical psychologist, and has been a staff psychologist at ACRC for over 10 years. Dr. Magnani holds a Ph.D. in Psychology (UC Davis, 1988), a Master's Degree in Psychology (UC Davis 1984), a Master's Degree in Social Research (Hunter College, New York, 1974), and a Bachelor's Degree in Childhood Education (Queens College, New York, 1966). Dr. Magnani's job at ACRC is to perform mental health evaluations, to participate on the eligibility review team to assist in making eligibility decisions. Dr. Magnani was on the eligibility review team in claimant's case.

22. Dr. Magnani observed claimant during the social assessment interview. Claimant had a pleasant affect, and was able to communicate clearly. He provided a good chronology of events, and displayed good insight into the implications of what he had done. Dr. Magnani could not determine claimant's intellectual function just on the basis of the interview.

23. Dr. Magnani reviewed claimant's many psychological evaluation reports written by medical professionals from the 1980's to present. Dr. Magnani testified that mental retardation becomes every evident looking at the results of the Rorschach Test. She did not provide an explanation for why this is so.

24. Serendipity administered the Rorschach Test, as well as the WAIS-R, and the Bender Visual Motor Gestalt Test. Serendipity determined that claimant's scaled verbal score was 40, and his scaled performance score was 24. His verbal IQ was 86, performance IQ was 68, and his FSIQ was 76. Dr. Magnani opined that the scores provided in the Serendipity report were not in the range of mental retardation, and that typically, one's IQ is generally stable once that person reaches adulthood. Therefore, claimant's FSIQ of 76 should not have significantly decreased. Claimant's diagnosis of "Axis I – Childhood onset. Pervasive Development Disorder Not Otherwise Specified (PDDNOS)," according to Dr. Magnani, is autism, not mental retardation. Overall, Dr. Magnani agreed with Serendipity's assessment and cognitive results of claimant at age 17.

25. Dr. Wang's letter of April 4, 1988 affirmed claimant's IQ of 76, and his analysis did not suggest to Dr. Magnani that claimant was mentally retarded. Interestingly, Dr. Wang noted claimant was gravely disabled by way of mental illness and "mental retardation," but Dr. Magnani did not see how Dr. Wang drew that conclusion, particularly if Dr. Wang had reviewed the Serendipity report. Moreover, Dr. Wang's assessments in 1990 and 1991 did not indicate mental retardation, nor did any other assessments by the El Dorado County Mental Health Department indicate that claimant was mentally retarded prior to age 18.

26. With respect to Dr. Roeder's report, which was written for the purpose of providing a competency evaluation for claimant's criminal case, Dr. Magnani did not find anything indicative of mental retardation in Dr. Roeder's assessment. Dr. Roeder concluded that claimant is mentally ill, with severe psychosexual difficulties.

27. Of the four psychological tests given by Dr. Leek, claimant appeared in the average range for intellectual ability. Dr. Magnani felt that it would have been helpful if Dr. Leek provided the results of the tests on the report so that she could provide a more thorough analysis.

28. In reviewing Dr. Sundby's assessment, Dr. Magnani determined that Dr. Sundby's recommendations that claimant be placed in a group home in an isolated setting, and be closely supervised during outings and around children, were "not in line" with mental retardation because the recommendations would have to have been more restrictive.

Claimant's Expert Dr. Nievod

29. Dr. Nievod performed a psychological evaluation of claimant as requested by the El Dorado Public Guardian. He interviewed and tested claimant on March 18, 2011. He administered the Wechsler Adult Intelligence Scale – Third Edition (WAIS-III), the Trail Making Test, and the Controlled Word Association Test (COWA).

30. Dr. Nievod administered the WAIS-III to measure claimant's general ability and reasoning skills. Claimant was administered 13 subtests of the WAIS-III, from which his IQ and Index scores were derived. Claimant's FSIQ is the aggregate of the verbal and performance scores and is usually considered to be the most representative measure of global intellectual functioning. Claimant's general cognitive ability is in the extremely low range of intellectual functioning, as measured by the WAIS-III. His overall thinking and reasoning abilities exceed those of approximately 0.3 percent of adults his age (FSIQ of 58). His verbal score is a measure of acquired knowledge, verbal reasoning, and comprehension of verbal information. Claimant's Verbal IQ is in the extremely low range, 64. Claimant's performance score provides an indication of an individual's nonverbal reasoning, spatial processing skills, attentiveness to detail and visual-motor integration. Claimant's nonverbal reasoning abilities, as measured by Performance IQ, is in the extremely low range, 58. Claimant also performed in the extremely low range in the perceptual organization index (attentiveness to detail and visual motor integration), working memory index (ability to

process information in memory), and processing speed index (ability to process simple or routine visual information).

General intellectual functioning is defined by the IQ obtained by assessment with one or more of the standardized individually administered intelligence tests, such as the WAIS scale. Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below. In terms of IQ measure of intelligence, Dr. Nievod determined that claimant's intellectual ability was within the range designated for a diagnosis of mental retardation.

31. The COWA consists of a set of three word-naming trials. The individual is given a letter, and is asked to say as many words as he can. For the letters F, A, and S, claimant produced 12 acceptable words. He was also asked to name as many items in a particular category, such as animals. Claimant named six animals in 60 seconds. Results of the COWA indicated that claimant has impaired language abilities and impaired verbal search abilities.

32. The Trail Making Test is designed to evaluate attention, sequencing, mental flexibility, and visual/motor functions. In Part A of the test, claimant was asked to take a page of randomly arranged circles containing numbers between one and 25, and to connect the circles with numbers in order as quickly as possible. In Part B, claimant was required to alternatively connect the circles containing numbers in order, with connecting the circles containing the letters in alphabetical order as quickly as possible. On Parts A and B, claimant scored in the significantly below normal range. Claimant took 125 seconds to complete part A, and could not complete the sequence in Part B, despite repeated attempts. In general, claimant had significant problems with attention and concentration. In addition, his scores indicated that as tasks became more complex, claimant had difficulties with the efficiency of his cognitive processing speed, shifting sets, learning on complex tasks, and integrating complex informational components.

33. Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. As a result of the tests used to determine adaptive functioning, Dr. Nievod determined that claimant has moderate to severe deficits in adaptive functioning. Dr. Nievod concluded that claimant is unable to manage self-care, in that he drank his own urine and smeared his feces, and would go for days without bathing or showering. Claimant is unable to live independently, as shown by his disruption and isolation in various settings. Claimant has very poor social/interpersonal skills when he is not on proper medication. Claimant cannot focus or sustain attention and concentration in order to work or enjoy leisure time activities. Claimant is without meaningful self-direction, and is unaware of health or safety issues.

34. Dr. Nievod determined that claimant suffers from the combined effects of three separate mental disorders, each of which contribute to his significant behavioral problems that resulted in his present incarceration:

- a. Mental Retardation, Mild to Moderate, DSM-IV-TR: 318.0.
- b. Pervasive Developmental Disorder, NOS, DSM-IV-TR:299.8
- c. Schizophrenia, Paranoid or Disorganized Type, DSM-IV-TR: 295.10

Based on his diagnosis, Dr. Nievod recommended that claimant undergo a full medical evaluation to determine if claimant's blood count changes forced the termination of Clozaril, which controlled claimant's sexual urges. He also recommended that claimant undergo a psychiatric evaluation to determine whether another medication could be as effective as Clozaril. Lastly, Dr. Nievod recommended that claimant's needs would be best served on a long-term basis by placing him in a facility specializing in the care and treatment of the mentally retarded and those with pervasive developmental disorders. Dr. Nievod added that "the symptomatic behavior that characterizes claimant's schizophrenia is often so primitive and childlike that a diagnosis of schizophrenia obscures the underlying issues of retarded intelligence and primitive functional abilities."

35. Dr. Nievod suggested that Serendipity's scores were not reliable, because claimant had not been given all of the tests, but was nevertheless given scores for those tests, which resulted in higher scores, and thus higher IQ's. Dr. Nievod asserted that if Serendipity added the scores of the tests that claimant actually completed, his IQ would have been 71, which falls in the range of mental retardation.

36. However, Serendipity noted that claimant's responses were spotty and inconsistent, and that inter-test scatter was significant. "There is also an 18 point discrepancy between the Verbal IQ score and the Performance IQ score in favor of Verbal."

ACRC pointed out that the DSM-IV states:

When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.

Serendipity addressed claimant's inconsistent scores as follows:

Intelligence testing was spotty and inconsistent, indicating in at least some verbal areas, Jamane has the potential to achieve in at least the average range. He is, however, functioning clearly below his level due to serious defects in perceptual accuracy (reality testing) and severe cognitive inflexibility. By history, this appears to be due to severe and pervasive defects in ego development. As more and more reality demands and

expectations are impinged upon Jamane, he does not have the resources to problem solve and successfully deal with life problems.

37. In conformity with the DSM-IV, Serendipity considered claimant's overall functioning, rather than his calculated IQ score. Serendipity concluded that claimant is a seriously disturbed, psychotic young person, however, he had potential to achieve average intelligence in some verbal areas. At the time of Serendipity's assessment, claimant was 17 years old. Serendipity did not diagnose claimant with mental retardation.

38. Dr. Nievod assessed claimant when he claimant was 41 years old, and found claimant to fall in the range of mental retardation. However, Dr. Nievod did not address whether claimant had mental retardation prior to age 18.

39. No other evidence was presented by claimant to show that he was diagnosed with mental retardation prior to age 18.

Eligibility Based Upon Mental Retardation

40. The DSM-IV provides, in part:

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 the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests. Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean) ... Thus, it is possible to diagnose Mental Retardation in individuals with IQ's between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning.

[¶] ... [¶]

Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation. Adaptive functioning refers to how effectively individuals cope with the common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.

Subaverage Intellectual Functioning

41. Claimant was first administered FSIQ testing at age 17, by Serendipity. Serendipity's evaluation is the most relevant, thorough, and thus reliable diagnosis of claimant's mental health prior to age 18. Claimant's FSIQ was determined to be 76, higher than the subaverage intellectual functioning IQ of 70 or below. And, while mentally retarded individuals could have IQ's between 70 and 75, claimant must show that he had significant deficits in adaptive behavior prior to age 18. Here, claimant's IQ was one point above the IQ cutoff for a mental retardation diagnosis. Consideration of claimant's adaptive behavior is also helpful in determining whether claimant met the mental retardation criteria.

Limitations in Adaptive Functioning in at Least Two Skill Areas

42. At age 13, claimant became increasingly difficult to motivate to be responsible, particularly after his mother divorced claimant's stepfather. His mother wanted him to cook his own breakfast, but claimant either would not, or could not do so. Claimant appeared to help his mother with the household chores, but they had arguments when claimant did not comply. At age 15, claimant performed poorly in school, and conflict remained in his home. This was the first time claimant exhibited problems with sexual impulse control, by getting caught masturbating in class. Claimant was unable to track or understand homework, or to engage verbally in group settings. At age 17, claimant drank his own urine, smeared his feces, and attempted to drown himself in the toilet. He was stabilized in the hospital, and returned to Serendipity. Claimant had extremely poor judgment and problems with sexual impulse control. He was isolative and slept whenever he could. He lacked personal hygiene and stuffed his mouth with handfuls of food. Serendipity concluded that claimant had "intense needs socially, interpersonally, intrapsychically, and medically ..." Serendipity concluded that claimant did not have the resources to problem solve and successfully deal with life's problems. The evidence showed that claimant had significant limitations in *at least* two of the following skill areas: 1) Self-care, and 2) Self-direction.

43. With regard to claimant's adaptive functioning at age 17, he showed deficits in at least two skill areas, but the evidence strongly suggests that claimant's adaptive functioning was the result of a mental disorder. There were grave concerns about claimant's sexual "acting out," and his "bizarre" behavior, warranting 24-hour supervision. With medications and hospitalization for his mental illness, Serendipity noted that claimant could

be placed in a lesser restrictive environment that may include a home or emancipation program, if he was able to gain control of his impulses. It is clear that claimant's problems with impulse control are best addressed, and have been remediated through medications, resulting in improved adaptive functioning. This would rule out his identified limitations in adaptive functioning in certain skill areas (e.g. self care and direction) being related to deficits in cognitive functioning. The history of claimant's mental health evaluations prior to age 18 is devoid of any reference to subaverage intellectual functioning and significant limitations in at least two of the skill areas set forth in Finding 42. And as noted, such limitations were better explained by claimant's history of mental disorders, and not any deficits in his intellectual functioning.

Conclusion on Eligibility Based on Mental Retardation

44. It was not established by a preponderance of the evidence that claimant is mentally retarded. Claimant did not meet the essential features of mental retardation as set forth in the DSM-IV.

Fifth Category Eligibility – Condition Closely Related to Mental Retardation

45. Claimant also seeks eligibility based upon his condition being closely related to mental retardation, the focus being upon both his cognitive test scores and his impairments in adaptive functioning. The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. (*Mason v. Office of Admin. Hearings* (2001) 89 Cal.App.4th 1119.)

46. According to Dr. Magnani, an individual with a condition closely related to mental retardation would generally have an IQ close to, but above, the range of mental retardation. She further pointed out that IQ's are generally stable once a person reaches adulthood. When claimant was assessed by Serendipity in 1988, his FSIQ was 76, above the range of mental retardation. A progress note from El Dorado County Mental Health that same year indicated claimant's IQ to be 70, however, this number does not appear to be credible, as there was no support cited. The only other IQ testing was administered by Dr. Nievod in 2011, when claimant was age 41. Dr. Nievod determined claimant's FSIQ to be 58. Interestingly, claimant's Verbal IQ, which was 86 in 1988, and was determined to be 64 in 2011, also declined, despite Serendipity's conclusion in 1988 that claimant had the potential to achieve in the *average* range. Dr. Nievod did not opine why claimant's FSIQ decreased over time, from 76 to 58, over the course of 23 years. Dr. Edwards, however, provided a persuasive and more plausible explanation of claimant's low scores on his assessment tests, which were a sign of poor effort and malingering. Dr. Edwards felt that claimant is afraid of going to prison or a state hospital, because he thinks that other inmates may hurt him because he is a sex offender. Dr. Edwards stated that this may be a realistic assessment on claimant's part. Claimant also said that he is afraid that he will be sent to Atascadero State Hospital, stating "you could get killed there." As a result, Dr. Edwards felt that claimant resisted doing his best to avoid alternative placements such as a state hospital.

Claimant wants to go to a “developmental center” for individuals with Pervasive Developmental Disorder or Mental Retardation. It appears that claimant knows that his current IQ of 58 is important.

47. In reviewing claimant’s test scores in the past and now, claimant went from a 16-year old of average intellectual ability (Dr. Leek), to a 17-year old with low average intellectual ability (Serendipity). Claimant was diagnosed with borderline intellectual functioning at age 25. (El Dorado County Mental Health.) The onset of schizophrenia in claimant’s mid-20’s did not seem to affect his borderline intellectual functioning into his 30’s and 40’s. Dr. Magnani indicated that some individuals with borderline intellectual functioning prior to age 18 can be found eligible for regional center services under the fifth category based upon having a condition closely related to mental retardation. However, an individual with a diagnosis of borderline intellectual functioning prior to age 18 is not automatically eligible for regional center services on that basis. Claimant was not diagnosed with borderline intellectual functioning prior to turning age 18, and therefore, cannot be eligible for regional center services under fifth category for having a condition closely related to mental retardation.

48. With respect to claimant’s adaptive functioning, the evidence suggested that claimant was significantly limited in not just two, but many skill areas. At age 17, he could not care for himself, he was living at Serendipity for mental health care, he engaged in many incidents of indecent exposure in his teens, he was unkempt, he was in special education classes in grade school, and he dropped out of school in the 10th grade. Claimant was not safe to be around, particularly with young girls. At the time, claimant was not diagnosed with Schizophrenia, but rather, Child Onset Pervasive Developmental Disorder. ACRC’s argument that claimant’s adaptive functioning at the time was related to his mental illness, rather than his intellectual functioning, is persuasive, particularly because claimant’s behaviors such as impulse control, mood, and judgment improved with appropriate psychotropic medications.

Conclusion Based on Fifth Category Eligibility – Condition Closely Related

49. It was not established by a preponderance of the evidence that claimant is eligible under Fifth Category for a condition closely related to mental retardation.

Fifth Category Eligibility – Condition Requiring Treatment Similar to that Required by Individuals with Mental Retardation

50. Fifth category eligibility may also be based upon a condition requiring treatment similar to that required for individuals with mental retardation. Dr. Magnani indicated that treatment for individuals with mental retardation involves simplification of content and form of information, using more concrete terms and simpler vocabulary, breaking down information into small bits, and using repetition to assist in learning. In 1987, Dr. Leek recommended treatment well-controlled treatment environment, a neurological evaluation, and individual and group treatment related to claimant’s sexual impulses. In

1988, Serendipity recommended that claimant be subject to 24-hour supervision due to his sexual acting out, and stated that he needed to be in a locked facility due to his increasingly aggressive behavior. Navarro and Dr. Elliot determined that claimant might benefit from group therapy with other sex offenders. While at Serendipity, claimant received medications and psychiatric and medical consultation, group therapy, education for severely emotionally disturbed students, socialization skills training, and family therapy. Napa Hospital recommended continued, structured psychiatric treatment for claimant. None of the recommended treatments for claimant were similar those with mental retardation.

51. No evidence was presented that claimant's early diagnoses of Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, Psychosexual Disorder not elsewhere classified, Pedophilia, Schizoid personality disorder, Childhood Onset of Pervasive Developmental Disorder, and Exhibitionism, required treatment similar to treatment required by mentally retarded individuals. Moreover, the El Dorado Public Guardian did not seek ACRC services for claimant until 2011. The evidence indicated that claimant was relatively stable in his various placements under the LPS conservatorship until he was taken off of Clozaril in 2010 which affected his blood count. After that time, claimant began to "decompensate," which led to his arrest in 2011 for sexual battery and attempted rape. Dr. Nievod acknowledged that claimant's offense appeared to be a direct consequence of his change in medication. Claimant's treatment was solely for his psychiatric condition, which is not treatment similar to that required for individuals with mental retardation.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act, the State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. (Welf. & Inst. Code, § 4501.) As defined in the Act a developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely and that constitutes a substantial disability for the individual. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and what is commonly known as the "fifth category" – a disabling condition found to be closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals. (Welf. & Inst. Code, § 4512, subd. (a).)

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).)

2. "Substantial handicap" is defined by regulations to mean "a condition which results in major impairment of cognitive and/or social functioning." (Cal. Code Regs., tit. 17, § 54001, subd. (a).) Because an individual's cognitive and/or social functioning is multifaceted, regulations provide that the existence of a major impairment shall be determined through an assessment that addresses aspects of functioning including, but not

limited to: 1) communication skills, 2) learning, 3) self-care, 4) mobility, 5) self-direction, 6) capacity for independent living and 7) economic self-sufficiency. (Cal. Code Regs., tit. 17, § 54001, subd. (b).)

3. It was not established that claimant has a developmental disability that originated before age 18, is likely to continue indefinitely, and constitutes a substantial disability for him. His condition appears to be largely, if not solely attributable to his serious psychiatric disorders.

Solely psychiatric disorders or solely learning disabilities do not qualify as a developmental disability under the Lanterman Act. (Cal. Code Regs., tit. 17, § 54000, subd. (c).) It was not established that claimant suffers from mental retardation, cerebral palsy, epilepsy, autism, or otherwise qualifies under the fifth category.

Claimant is not eligible for services under the Lanterman Act and is therefore not eligible to receive services through the ACRC.

ORDER

Claimant's appeal from the Alta California Regional Center's denial of services is DENIED. Claimant is not eligible for services under the Lanterman Act.

DATED: December 21, 2012

Danette C. Brown
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 ninety (90) days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)