

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ALICIA S.,

Claimant,

vs.

GOLDEN GATE REGIONAL CENTER,

Service Agency.

OAH No. 2012090034

DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on November 8, 2012, in San Francisco, California.

Lisa Rosene represented Golden Gate Regional Center, the service agency.

Claimant Alicia S. represented herself and was present throughout the hearing.

The matter was submitted for decision on November 8, 2012.

ISSUE PRESENTED

Does claimant meet the eligibility criteria for receiving services from the Golden Gate Regional Center?

FACTUAL FINDINGS

1. Alicia S. (claimant) applied for services from Golden Gate Regional Center (GGRC). Following consideration by its assessment team, GGRC notified claimant of its decision, in a Notice of Proposed Action dated August 14, 2012, that she was not eligible for regional center services. Claimant appealed and this hearing followed.

Introduction

2. Claimant is a 34-year old woman who recently moved to San Francisco. She grew up in Southern California and was raised by her aunt. Claimant asserts that she is eligible for regional center services because she believes she suffers from autism.

3. The GGRC eligibility assessment team examined claimant's medical and academic background against all statutory bases for eligibility, and determined that claimant does not suffer from a developmental disability. Instead, the eligibility team concluded that claimant suffers from psychiatric conditions which have affected her cognitive ability. There is also evidence that claimant suffers from Asperger's syndrome. Psychiatric conditions and Asperger's syndrome are not developmental disabilities for which regional center services are provided under the Lanterman Developmental Disabilities Services Act (Lanterman Act).¹

Claimant's Medical and Academic Background During Childhood

4. Claimant was born to a 29-year-old woman with a history of emphysema, who passed away when claimant was an infant. Claimant's father died in 1993 at the age of 43. Claimant's 37-year-old brother is reportedly developmentally disabled and living in Texas with a grandparent. There is a strong family history of mental illness.

5. Claimant's aunt has reported that claimant first sat at 24 months, walked at three to four years old, and combined words at four to five years of age.

6. Claimant suffered petit mal seizures as a child which resolved by the age of 12. Claimant has not been prescribed anti-seizure medication since age 16, and there is no evidence that she has ever been diagnosed with epilepsy. Findings from two EEG's² performed on claimant, one in 1996 and another later, have been within normal limits.

7. There is no evidence that claimant has ever exhibited symptoms of, or been diagnosed with, cerebral palsy.

8. Claimant received special education services since pre-school when she was placed in a communicatively handicapped program. At age 10, claimant was placed in a Special Day Class (SDC) with language, speech and hearing specialist services and adaptive physical education services. Claimant remained in SDC classes through high school. Claimant received psychiatric treatment when she was in the second grade. Her special education eligibility changed throughout her schooling, from communication difficulties to a learning disability. School records also indicate a history of poor social skills and obsessive

¹ Welfare and Institutions Code, section 4500 et seq.

² Electroencephalography

thoughts. She attended mainstream classes in math and science and did well in reading. By high school graduation, claimant was found to be no longer eligible for special education services, but retained those services because it was thought that discontinuation would be detrimental to her emotionally.

9. According to school records, in early 1996, at age 17, claimant was reading at a sixth grade level. She scored at the seventh grade level in the area of math. Claimant scored at the fifth grade level in written language. Overall, her academic skills were estimated at the sixth grade level.

10. Psychoeducational assessments completed in June 1995 and February 1996 (at age 17), reported that claimant's cognitive ability was in the low average range of functioning. The Wechsler Adult Intelligence Scale, Revised (WAIS-R) was administered on June 16, 1995. The WAIS-R is standardized, comprehensive test of general intellectual functioning. It measures how well an individual processes information and solves problems using a variety of modalities. The WAIS-R measured claimant's Full Scale Intelligence Quotient (FSIQ) at 85. The Test of Nonverbal Intelligence, Second Edition, a nonverbal test used to assess intelligence, was administered to claimant in February 1996. Claimant's FSIQ score on this test was 88. Both test scores are within the low average range.

Individuals with a FSIQ score of 70 or below are considered to fall within mental retardation. Tests measuring an individual's IQ have a range of error of five points. Claimant's FSIQ scores from 1995 and 1996 do not support a finding of mental retardation, or a condition that is closely related to mental retardation.

11. While in high school, claimant was referred to AB32³ counseling services to assist her with social and emotional issues. She received intermittent psychiatric treatment from the San Bernadino County Department of Mental Health from May 30, 1996, through November 3, 2011.

³ In 1984, the California Legislature passed Assembly Bill 3632, adding Chapter 26.5 to the Government Code, which provided that mental health services required by IEP's for special education students would be delivered by community health agencies. These were commonly referred to as AB 3632 or Chapter 26.5 evaluations and services. On October 8, 2010, the former Governor vetoed funding for mental health services provided by county mental health agencies. In *California School Boards Association v. Brown* (2011) 192 Cal.App.4th 1507, the court found that the veto suspended the mandate of county mental health agencies to provide mental health services. Subsequently, on June 30, 2011, the Governor signed into law a budget bill (SB 87) and a trailer bill affecting educational funding (AB 114). Together they made substantial amendments to Chapter 26.5 of the Government Code which is no longer referred to as AB 3632.

During her initial assessment claimant exhibited a flat affect. Claimant's aunt reported that claimant had been diagnosed with organic brain syndrome due to hypoxia from complications at birth. Claimant's aunt also reported that claimant had obsessive thoughts, exhibited poor insight, judgment, and social skills, and had few friends. Claimant received medication support and individual therapy. During therapy, claimant reported hearing muffled voices and seeing shadows.

During her treatment at the San Bernadino Mental Health Department, claimant was diagnosed with Psychotic Disorder-Not Otherwise Specified (NOS), Pervasive Developmental Disorder-NOS, Depressive Disorder-NOS, Obsessive Compulsive Disorder, and Borderline Intellectual Functioning.

12. On August 22, 1997, when claimant was 18 years old, Gurmeet Singh Muitani, M.D., wrote on a prescription pad note that claimant was suffering from Obsessive Compulsive Disorder, Mild Mental Retardation and Psychotic Disorder-NOS, and had limited judgment and insight. No evidence of testing to support Dr. Muitani's opinion that claimant suffered from Mild Mental Retardation was presented.

Medical and Academic Information in Adulthood

13. Claimant lived with her aunt until age 21 when she moved in with a friend. She returned to reside with her aunt five years later. Last year, claimant lived alone for a period of six months. Since moving to Northern California earlier this year, claimant has shared an apartment with a friend who is a client of GGRC.

14. Claimant is able to manage her activities of daily living without assistance. She cooks, cleans, washes dishes, and does the laundry. Claimant reports knowing how to use credit cards, a debit card, and a computer. Claimant also reports being able to use public transportation. Currently, claimant is taking computer classes at City College of San Francisco, having found the website and accessed their disabled students programs and services center. Claimant and her roommate recently adopted a pet duck and a pet goose.

15. Claimant receives Supplementary Security Income, Social Security benefits and Medi-Cal. She would like a case manager to assist her in obtaining medical care. Claimant was referred to San Francisco County mental health services and was given the contact information for in-home-support-services, but has been unable to avail herself of these resources on her own. Claimant has medical insurance through Kaiser, but has been unable to manage transferring her benefits to Northern California. Since moving to Northern California, claimant has not received mental health treatment and has not used any psychotropic medications.

16. Claimant believes that she would benefit from regional center services. She would like case management services to help her obtain medical care. She would also like to attend a day program to help her develop her social skills.

GGRC Evidence

17. Mai Nguyen, Psy.D., a psychologist employed by GGRC, performed a psychological evaluation of claimant on August 13, 2012. Dr. Nguyen spent time with claimant, reviewed her medical and educational history, including past IQ tests, and administered the WAIS-IV.⁴ Claimant's FSIQ on the WAIS-IV was 58, which is in the extremely low classification. Based upon the results of the IQ tests from 1995 and 1996, Dr. Nguyen concluded that claimant does not meet the diagnostic criteria for mental retardation or a condition similar to mental retardation. Dr. Nguyen considers the marked decline in cognitive impairment as demonstrated on the recent WAIS-IV assessment, to be attributable to ongoing and untreated mental health difficulties, such as poor concentration, disorganized thinking, depressive symptoms and anxiety symptoms. Dr. Nguyen did not observe deficits in adaptive functioning, as claimant is able to independently handle chores and is goal-oriented.

Dr. Nguyen also assessed claimant pursuant to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) criteria for Autistic Disorder. Dr. Nguyen observed claimant to be guarded and anxious, but once a rapport was developed, her eye contact was more sustained. Claimant has had difficulty making friends, but slowly achieves a friendship on a one-to-one basis. When her anxiety subsides, claimant is successful in making friends, and currently has a good relationship with her roommate. With regard to claimant's ability to communicate, Dr. Nguyen noted that although she had a communication delay in childhood, school records indicate that communication support services were discontinued at age 10. Dr. Nguyen observed claimant to be slow to communicate, but able to respond. Claimant demonstrated basic verbal skills without the repetitive use of language. Finally, although her records indicated a history of obsessional thinking and speech, Dr. Nguyen did not observe these behaviors at present.

Dr. Nguyen opined that claimant exhibited features of Pervasive Developmental Disorder, but did not meet the severity warranted for a diagnosis of Autistic Disorder.

Although Dr. Nguyen considered it possible that claimant suffers from Asperger's Syndrome, a condition on the "autism spectrum," she concluded that claimant does not meet the diagnostic criteria for Autistic Disorder as described in the DSM-IV-TR.

Dr. Nguyen concluded that claimant does not suffer from Autistic Disorder or Mental Retardation, and does not have a condition or needs similar to individuals with mental retardation. Rather, Dr. Nguyen believes that based upon the current information from clinical observations and the clinical interview, claimant's condition is consistent with a thought disorder, depressive symptomatology, and symptoms of anxiety, rather than from a developmental disability. Dr. Nguyen opined that claimant would benefit from mental health services.

⁴ The WAIS-IV is a later version of the WAIS-R.

18. Theresa Keyes-Osantowski, M.D., is a board certified pediatrician with a background in genetics. She has been a staff physician at GGRC for 22 years. Dr. Keyes-Osantowski was part of the multi-disciplinary team that reviewed claimant's eligibility for regional center services. Dr. Keyes-Osantowski reviewed all of the available reports and documents concerning claimant, and met with other staff and claimant. After reviewing all of the information available, Dr. Keyes-Osantowski's impressions were that claimant a) exhibited cognitive potential in the low average range; b) had a history of obsessions and was possibly suffering from obsessive compulsive disorder; c) had a history of a learning disorder; d) had history of seeing "ghosts" and flashing lights, which could be related to psychosis or migraines; e) had history of obesity, sleep disturbance, somnolence and "spacing out," which could be the result of sleep apnea; and, f) had a history of poor peer relationships.

Dr. Keyes-Osantowski opined that the marked decrease in claimant's FSIQ between 1995 and 1996, and the present, is due to psychiatric disorders and because she is not taking her psychotropic medication.

Dr. Keyes-Osantowski concluded that claimant is not entitled to regional center services because she is not substantially handicapped by mental retardation, cerebral palsy, epilepsy, autism or by another condition similar to mental retardation or that requires treatment similar to mental retardation. Dr. Keyes-Osantowski believes that claimant would benefit from mental health services.

Conclusion

19. None of the information presented establishes that claimant suffers from autism, epilepsy, cerebral palsy, mental retardation, a disabling condition closely related to mental retardation, or that she requires treatment similar to that required by individuals with mental retardation.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. A developmental disability is defined in the Lanterman Act as a "disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes as substantial disability for that individual." (Welf. & Inst. Code, § 4512, subd. (a).) The term "developmental disability" includes mental retardation, cerebral palsy, epilepsy, autism or what is commonly referred to as the "fifth category." (Welf. & Inst. Code, § 4512, subd. (a).)

The "fifth category" includes "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental

retardation, but shall not include other handicapping conditions that are solely physical in nature.” (Welf. & Inst. Code, § 4512, subd. (a).)

2. Claimant has not been diagnosed with cerebral palsy, or exhibited symptoms of cerebral palsy. (Factual Finding 7.) Although claimant suffered petit mal seizures until the age of 12, there is no evidence that she has been diagnosed with epilepsy. (Factual Finding 6.)

3. Claimant is a member of an Asperger’s Syndrome group, and believes that she suffers from autism. The Lanterman Act does not provide services for individuals afflicted with Asperger’s Syndrome. There is no evidence that claimant has ever been diagnosed with Autistic Disorder. Dr. Nguyen evaluated applicant for Autistic Disorder, and concluded that although she exhibits some of the traits of the disorder, she does not meet the criteria as it is described in the DSM-IV-TR, which is required for regional center eligibility. (Factual Finding 17.) Dr. Keyes-Osantowski agrees with this conclusion. (Factual Finding 18.)

4. Claimant’s FSIQ was in the low average range when tested twice at age 17. Although claimant received special education services in school, she was not provided those services on the basis of mental retardation. The evidence does not support a finding that claimant is eligible for benefits based upon mental retardation. (Factual Findings 9, 10, 17, 18.)

5. The “fifth category” of eligibility includes “disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.” (Welf. & Inst. Code, § 4512, subd. (a).) Thus, the “fifth category” includes individuals whose IQ scores do not fall squarely within the range of mental retardation, but whose cognitive and/or social functioning is similar to individuals who are mentally retarded. Claimant’s IQ scores from the tests administered to her when she was 17 years of age, do not fall within the range of mental retardation, and do not fall within the margin of error for the tests. Neither Dr. Nguyen nor Dr. Keyes-Osantowski concluded that claimant suffers from a condition closely related to mental retardation, or requires treatment similar to that required for individuals with mental retardation. Instead, they concluded that claimant suffers from psychiatric conditions and would benefit from mental health services. (Factual Findings 17 and 18.)

The regulations implementing this section of the Lanterman Act provide that conditions that are solely psychiatric in nature or solely learning or physical disabilities are not considered developmental disabilities under the Act. California Code of Regulations, title 17, section 54000, subdivision (c), provides that the term developmental disability shall not include 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.

6. Claimant has the burden of proof with respect to demonstrating her eligibility for services under the Lanterman Act. Claimant has not met her burden based upon the evidence presented. The evidence established that claimant suffers from psychiatric disorders, and that as a child she suffered from a learning disability. (Factual Findings 8, 11, 17 and 18.) Individuals with learning disabilities, and disorders that are psychiatric in nature, are not developmentally disabled, as that term is defined by the Lanterman Act. While it is undisputed that claimant suffers from a host of impairments, the evidence presented established that these impairments stem from claimant's psychiatric condition rather than a developmental disability. Consequently, she is beyond the reach of the Lanterman Act.

ORDER

The appeal of claimant Alicia S. is denied. Alicia S. is not eligible for regional center services.

DATED: _____

JILL SCHLICHTMANN
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.