

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ANGEL R.,

Claimant,

vs.

CENTRAL VALLEY REGIONAL CENTER,

Service Agency.

OAH No. 2013010183

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Fresno, California, on April 24, 2013.

The Service Agency, Central Valley Regional Center (CVRC), was represented by Shelley Celaya, Client Appeals Specialist.

Claimant was represented by his mother.

Oral and documentary evidence was received. At the conclusion of the hearing, the record was closed and the matter was submitted for decision.

ISSUE

Is claimant eligible for regional center services based on a qualifying condition of autism, mental retardation or “the fifth category” (a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation) pursuant to Welfare and Institutions Code section 4512, subdivision (a), and California Code of Regulations, title 17, section 54000?¹

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

FACTUAL FINDINGS

1. Claimant is a four-year-old boy who lives in the family home with his mother and two older brothers. His mother seeks services from CVRC because she believes he qualifies as an individual with autism.

2. CVRC requested The Sullivan Center for Children (Sullivan Center) evaluate claimant's intellectual, adaptive and social functioning to help determine his eligibility for services. The CVRC Eligibility Team considered the results of this evaluation, reviewed claimant's records and met with claimant and his mother. Based on the available information, the Eligibility Team determined that claimant did not have a qualifying developmental disability.

3. As a result of the eligibility team determination, A Notice of Proposed Action (NOPA) was issued on December 5, 2012, informing claimant that CVRC determined he is not eligible for regional center services. The NOPA stated:

Reason for action: No evidence of qualifying disability.

4. On January 1, 2013, claimant's mother filed a Fair Hearing Request, disputing his ineligibility, stating that she believes her son was "not tested right."

5. An informal meeting was held with claimant's mother to share the findings and explain the criteria for regional center eligibility. Claimant's mother expressed concern that claimant had not been properly observed and, as a result, CVRC Staff Psychologist Dr. Carol Sharp agreed to observe claimant at school on two additional occasions.

Dr. Sharp completed these additional observations on March 18 and 21, 2013. The results of these observations were consistent with the findings of the Sullivan Center and claimant's School Districts and did not cause CVRC to change its original determination that claimant did not meet the criteria for regional center eligibility.

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

"Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual...[T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation [commonly known as the

“fifth category”], but shall not include other handicapping conditions that are solely physical in nature.

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

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

(b) The Development Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

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

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

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

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

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

8. Welfare and Institutions Code section 4512, subdivision (1), defines substantial disability as:

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

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

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

(a) “Substantial disability” means:

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

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

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

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

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

10. As a preschool student in the Clovis Unified School District (CUSD), claimant was referred for an initial Psychological Evaluation to determine eligibility for special education services. The assessment was conducted in September, 2012, with results discussed and incorporated into an Individualized Education Program (IEP) dated October 4, 2012. Based on the “reasons for referral and all other available information,” the areas of suspected disability were “Speech and Language Impairment and Intellectual Disability.” The evaluator, School Psychologist Silvia Marquez, noted that claimant’s mother’s “main concerns include sensory needs such as making sounds and pulling on ears, impulsivity, language development and overall development.”

Ms. Marquez concluded that claimant “has a speech and language disorder” and “may receive educational benefit from placement in a Functional Skills program.” She also noted the following:

It is the opinion of this psychologist that [claimant] does not meet the eligibility criteria for special education services due to delays in development (Intellectual Disability)² at this time. Although [claimant] exhibits significant developmental delays in cognition, language and adaptive skills, it is likely that his significant language delays attributed to these lower scores. It is important to note that specific diagnostic criteria may change over time as very young children are periodically reassessed. Cognitive testing results may also change, particularly in relation to progress in the acquisition and use of language.

11. CUSD determined that claimant has a speech and language impairment. He demonstrated delayed language skill in both receptive and expressive language. His October 4, 2012, IEP stated:

Receptively, he followed one-step commands, understood some action words and discriminated between two pictures. He was also beginning to answer simple questions (especially when the answer was “No”). Expressively, [claimant] used a combination of gesture and verbal words to communicate his wants and needs. His Language Comprehension Age Range on the Rossetti Infant-Toddler Language Scale was a scatter from 9-21 months. His Language Expression Age Range was a scatter from 12-24

² The terms “Mental Retardation” and “Intellectual Disability” are used interchangeably.

months. The IEP recommendation was a “special education preschool classroom, with language-speech services, extended school year service.” Claimant’s mother signed her consent to the IEP.

The IEP notes explained that “autistic-like behaviors were a concern of parents. Autistic-like eligibility was ruled out due to [claimant’s] social abilities. [Claimant] qualifies for special education services under the eligibility of Speech-Language impairment.”

12. On October 12, 2012, claimant was evaluated by the Sullivan Center at the request of CVRC. The tests administered were the Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPSI-III), the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II), and the Gilliam Autism Rating Scale, Second Edition (GARS-II).

13. Claimant was administered the WPPSI-III and the examiners found that he was generally compliant except during the Block Design subtest. Claimant would not participate and refused to attempt to make his blocks look like the examiner’s blocks. He impulsively grabbed the blocks from the examiner and stacked them on top of his blocks. He did not seem to understand the instructions to this subtest nor would he participate. As a result, the block Design subtest was not completed. This yielded an estimation of claimant’s overall intellectual abilities rather than a fully valid IQ score. The report by Examiner Ashley Davenport, M.A., and Supervisor Mark Barnes, Ph.D., documented test results as follows:

IQ	Standard Score
Verbal	74
*Performance	--
*Full Scale	--
Global Language	62

*Based on lack of cooperation, the Block Design subtest could not be completed and therefore a valid performance and Full Scale IQ score could not be reported.

14. The Sullivan Center report explained:

[Claimant] did not receive a Full Scale IQ score based on his lack of cooperation on the Block Design subtest. [Claimant’s] overall intellectual abilities are estimated to fall within the Borderline to Low Average range.

On verbally-based tasks, [claimant] displayed an extremely low ability to identify items in pictures or to identify items by their function. On performance-based tasks, [claimant] was uncooperative in displaying his abilities to reconstruct block

designs. [Claimant] displayed a relatively average ability to construct designs that included two or more puzzles pieces.

On the Global Language Index, [claimant] received a score falling within the mildly impaired range. This reflects his difficulty with verbally related tasks as he showed extremely low abilities in both receptive and expressive language tasks. While this score does not represent a significant discrepancy in terms of his Full Scale IQ score, it does represent his overall difficulty with receptive and expressive language tasks. These language difficulties appear to be affecting [claimant's] overall performance profoundly.

15. Claimant's mother was administered the Vineland-II in order to assess claimant's adaptive behaviors. The same test was previously administered by CUSD. This adaptive scale was chosen over the Adaptive Behavior Assessment System, Second Edition (ABAS-II), based on claimant's mother's highest completed grade being tenth grade.

The results of the Vineland-II suggest that [claimant's] overall level of adaptive functioning falls within the mildly impaired range. His domain scores within the Communication and Daily Living Skills domains fell within the moderately impaired range and his skills within the Socialization and Motor Skill domains fell within the borderline range.

16. The GARS-II is a screening device used to differentiate children with Autism from those with other developmental delays, such as mental retardation. Claimant's mother rated different behaviors commonly associated with autism and a total Autism Index score was calculated. Based on claimant's language development, two subscales were used instead of three in that the communication subscale was not yet a valid measure of his abilities. Claimant received the following scores:

Subscales	Standard Score
Stereotyped Behaviors	11
Social Interaction	13
Autism Index	119

Based on claimant's mother's observations of claimant's behavior, claimant received an Autism index score of 119, which falls in the "Very Likely" range for probability of autism.

17. Behavior observations, reports by claimant's mother and information available in the GARS-II were used to determine whether claimant meets the diagnostic criteria for Autistic Disorder, according to the Diagnostic and Statistical Manual of Mental Disorders: Fourth Edition, Text Revision (DSM-IV-TR):³

³ The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text

18. DSM-IV-TR section 299.00, Autistic Disorder, states:

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

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

19. In analyzing claimant's functioning in relation to this criterion, the examiners found that in the area of Reciprocal Social Interactions, "zero of the four criteria were met." In the Communication area, "one out of the four criteria were met and one was not applicable." "Zero of the four criteria were met," in the Activities and Interests category.

The examiners cited numerous examples supporting their findings. Some examples of reciprocal social interactions included claimant's consistent eye contact and engagement with the examiner, willing engagement with peers, and showing others toys he is interested in.

While claimant experiences a delay in the development of spoken language, he attempts to communicate through pointing and "babbling," and was observed engaging in imaginative play.

Revision (DSM-IV-TR) is the current standard for diagnosis and classification. It is a multi-axial system which involves five axes, each of which refers to a different domain of information as follows:

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

No hand flapping or other repetitive movements were observed, nor did claimant display a preoccupation with parts of objects.

20. The report concluded as follows:

In order to meet the criteria for a diagnosis of Autistic Disorder, at least six criteria must be met, with a significant deficit noted in each area of Reciprocal Social Interactions, Communication, and Stereotyped Behaviors and Interests. [Claimant] met one out of twelve criteria indicating that a diagnosis of Autistic Disorder is inappropriate at this time. It is believed that [claimant's] difficulty understanding and expressing language often causes him to be nonresponsive.

DIAGNOSIS:

Axis I: 315.32 Mixed Receptive-Expressive Language Disorder

Axis II: V62.89 Borderline Intellectual Functioning (with mildly impaired adaptives.)

Axis III: None reported

RECOMMENDATIONS:

1. Consider a re-evaluation of [claimant's] overall functioning in two years to assess his progress and make any necessary changes to his diagnosis and treatment.
2. Consider sharing this report with [claimant's] school to assist in planning special education services and accommodations.

21. Claimant transferred from CUSD to the Fresno Unified School District (FUSD). An IEP dated February 15, 2013, noted "delays in the areas of Language, Preacademics, Fine Motor and Attention Skills impact his academic levels and warrant the support and individualized instruction offered through the Special Education Program." He was found to have "Speech or Language Impairment (SLI)" as a primary disability with no secondary disability noted.

22. Dr. Sharp completed her additional observations on March 18 and 21, 2013. The results of these observations were consistent with the findings of the Sullivan Center and the School Districts. She gave extensive testimony regarding her observations and the relationship of claimant's observed behaviors with the DSM-IV-TR diagnostic criteria. It was her professional opinion that he did not meet the criteria for Autistic Disorder. She explained that

claimant has difficulty understanding and expressing language but an individual may have language delays without being autistic.

23. Claimant's mother testified that she "knows [claimant] is autistic." She explained that she "is his mother twenty-four hours per day, seven days per week." She stated that she sees behaviors that are not being observed in other settings. She also has two older sons and is very concerned with claimant's development as compared to his brothers.

24. Dr. Sharp testified that the CVRC Interdisciplinary Team also considered whether claimant might qualify for services on the basis of mental retardation or the "fifth category."

25. The diagnostic criteria for "Mental Retardation" as set forth in section 4512 is defined in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) to require:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test...

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her culture group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before 18 years.

26. Dr. Sharp testified that CVRC considered the Sullivan Center testing which estimated claimant's intellectual abilities to fall within the Borderline to Low Average range. Of importance was the finding that his language difficulties appeared to be profoundly affecting his overall performance. CVRC noted that language difficulties were affecting the cognitive testing and agreed that it interfered with obtaining an accurate verbal score.

Also considered was the fact that the school districts did not find claimant eligible for special education services and supports on the basis of mental retardation. Claimant's general intellectual functioning has not been found to be significantly subaverage, as defined by the DSM-IV-TR, at this time.

27. The evidence presented demonstrates that claimant is not currently eligible for CVRC services based upon a diagnosis of mental retardation.

28. In addressing eligibility under the “fifth category” (A Disabling Condition Found to be Closely Related to Mental Retardation or to Require Treatment Similar to Mental Retardation), the Court in *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129, stated in part:

...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. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.

29. Dr. Sharp testified that CVRC follows guidelines for determining “fifth category” eligibility that were established by the Association of Regional Center Agencies. She opined that a condition closely related to mental retardation would require the essential feature of sub-average general intellectual functioning, accompanied by “significant deficits in adaptive skills including, but not limited to, communication, learning, self-care, mobility self-direction, capacity for independent living, and economic self-sufficiency.” The eligibility team must demonstrate that these “substantial adaptive deficits are clearly related to cognitive limitations” and must not be the result of mental health issues, learning disabilities or physical conditions.

30. Claimant did not demonstrate a degree of global intellectual impairment similar to that possessed by persons with mental retardation.

31. It was not disputed that claimant exhibits deficits or impairments in his adaptive functioning. CVRC does not dispute that claimant has significant deficits in language skills but asserts that such deficits may occur in the absence of significant deficits in general cognitive ability. Dr. Sharp opined that there may be a variety of reasons for deficits in adaptive functioning which may occur even in the absence of significant deficits in cognitive ability. In this case, claimant has been diagnosed with a speech and language impairment that results in significant language delays. Dr. Sharp testified persuasively that claimant’s deficits in functioning are most likely derived from this diagnosis rather than a condition closely related to mental retardation.

32. Dr. Sharp also testified that claimant does not require treatment similar to that required for individuals with mental retardation. She opined that a similar treatment would be inappropriate for claimant’s functioning level and that claimant’s limiting conditions would be better served from a treatment perspective of one with a speech and language impairment. These treatments would not be the same or similar to those required by individuals with mental retardation.

33. It was not established that claimant’s adaptive deficits were consistent with “fifth category” eligibility. The evidence at hearing was persuasive that claimant’s difficulties appear to derive from his speech and language disorder, rather than a condition similar to mental

retardation. Nor was the treatment required for this speech and language disorder demonstrated to be similar to that specifically required by an individual with mental retardation.

33. Claimant does not have epilepsy or cerebral palsy.

LEGAL CONCLUSIONS

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

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual...[T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation [commonly known as the “fifth category”], but shall not include other handicapping conditions that consist solely physical in nature.

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

2. It was not disputed that claimant exhibits functioning deficits or impairments. However, regional center services are limited to those individuals meeting the stated eligibility criteria. The evidence presented did not prove that claimant’s current impairments resulted from a qualifying condition which originated and constituted a substantial disability before the age of eighteen. There was no evidence to support a finding of autism, mental retardation or a condition closely related to mental retardation, or requiring treatment similar to that required for individuals with mental retardation. It was not established that claimant has cerebral palsy or epilepsy. Accordingly, he does not have a developmental disability as defined by the Lanterman Act.

3. Claimant has been diagnosed with Mixed Receptive-Expressive Language Disorder. It was undisputed that claimant has significant language delays which has a profound effect on his overall performance. While he does not meet the criteria for regional center services at this time, it would be important to monitor and reevaluate claimant in the future, as recommended in the Sullivan Center report. Testing results may change, particularly in relation to claimant’s progress in the acquisition and use of language.

4. Claimant does not meet the eligibility requirements for services under the Lanterman Act at this time and is therefore not currently eligible for services through CVRC.

ORDER

Claimant's appeal from the Central Valley Regional Center's denial of eligibility for services is denied.

DATED: April 29, 2013

SUSAN H. HOLLINGSHEAD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

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