

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ASHLEY R.,

Claimant,

vs.

NORTH LOS ANGELES COUNTY
REGIONAL CENTER,

Service Agency.

OAH No. 2013010467

DECISION

Administrative Law Judge Michael A. Scarlett, Office of Administrative Hearings, State of California, heard this matter on June 4, 2013, in Lancaster, California. Ruth Janka, Contract Administrator, represented North Los Angeles County Regional Center (Service Agency or NLACRC). Rosa R. (Mother) was present and represented Ashley R. (Claimant).¹ Oral and documentary evidence was received, and argument was heard. The record was closed and the matter was submitted for decision on June 4, 2013.

ISSUE

Is Claimant eligible for regional center services on the basis of Autism?

FACTUAL FINDINGS

1. Claimant is a nine year-old girl who currently resides with her mother and father, and three siblings: sister age 11, brother age 10 and sister age three. Her three year-old sister was diagnosed with Autism in April 2012, and is currently a consumer receiving regional center services. Mother seeks regional center eligibility for Claimant based on Autism. The parties stipulated that Claimant is not seeking a determination of eligibility based upon mental retardation or fifth category eligibility and that the evidence would not support eligibility on these grounds. There was also no evidence to support a determination that Claimant was eligible for regional center service based on cerebral palsy or epilepsy.

¹ Claimant's last initials are used in this Decision, in lieu of her surname, in order to protect her privacy.

Mother sought regional center services after she became concerned about Claimant's behaviors in approximately April 2012, when Claimant told Mother that she was "hearing voices" in her head. Mother also reports that Claimant has an unusual sensitivity to noise, walks on tiptoes, and sometimes bangs her head against the wall. Mother believed that Claimant was displaying behaviors similar to behaviors shown by her three year-old sister who had been diagnosed with Autism.

2. On December 21, 2012, Service Agency determined that Claimant was not eligible for regional center services. The Service Agency denied services to Claimant and issued a Notice of Proposed Action (NOPA) on December 21, 2012. On January 4, 2013, Claimant submitted a request for fair hearing. On February 6, 2013, after an informal meeting with Claimant had been held, Service Agency deferred an "informal decision" on Claimant's appeal pending a school observation and teacher interview by a regional center psychologist. On February 28, 2013, after the school observation was conducted by Sandi J. Fisher, Ph.D., Service Agency again advised Claimant that she was not eligible for regional center services and that if she was not in agreement with the ineligibility determination, Claimant should proceed to fair hearing. All jurisdictional requirements have been satisfied to proceed to hearing.

3. Service Agency based its initial determination of ineligibility on a social assessment dated October 15, 2012, prepared by Veronica Salinas (Salinas) and an October 25, 2012, psychological evaluation prepared by Robert Rome, Ph.D. During the informal meeting process, Service Agency also considered Dr. Fisher's February 13, 2013, school observation, which included a review of Claimant's first and second grade report cards from the Palmdale School District.

4. Based upon information provided by Mother during the October 15, 2012, social assessment, Claimant is in good health, although she has asthma and is overweight. She is fully ambulatory. Claimant met her developmental milestones within normal time limits. Claimant's behaviors that have raised concerns are: she is sensitive to noise, she walks on her tiptoes, she is forgetful, she bangs her head against the wall regardless of her temperament, she hears voices in her head, including babies crying, she talks to herself in a whisper so that others cannot hear her, and Claimant does not respond to her name when called. Mother states Claimant also moves her thumb in a circular motion and will strip down to her shirt and underwear at home because she does not like to wear clothes. Claimant has good self-care skills, although recently Mother reported that she has forgotten how to tie her shoes. Mother also reports that Claimant needs supervision because she is impulsive and will not seek assistance when she suffers small cuts because of her lack of awareness. Claimant is not displaying cognitive delays as she appears to be reading and writing at grade level, and is showing age appropriate competence in mathematics. Claimant was generally meeting her academic goals and showing excellent or satisfactory effort in all of her classes during her first and second grade school years. Mother noticed that Claimant began to regress and forget basic skills when she started third grade.

5. Claimant is able to communicate effectively, although she is "shy" and has

difficulty with reciprocal conversations. Mother reports recently her articulation has been less clear. Claimant has friends, but she does not initiate interactions. She smiles at peers and is able to share take turns. However, she does not make strong eye contact and frequently wears “hoodie-type” sweaters to cover her eyes and hide her face. She requires encouragement to engage in social activities with other children and at family gatherings. Claimant displays appropriate play with dolls and cars. Finally, although Claimant does show aggressive behaviors, if she is frustrated Mother states she will “shut down,” which sometimes leads to “head banging” behavior.

6. On October 25, 2012, Dr. Rome performed a psychological evaluation on Claimant primarily to evaluate whether she suffered from autism. Dr. Rome noted that Claimant appeared “somewhat spaced out” when she arrived for the psychological evaluation. She was slow in answering questions and nodding her head when answering affirmatively on some questions. Claimant twirled her thumb frequently while undergoing the evaluation. However, she cooperated throughout the evaluation completing all tasks to the best of her ability. Dr. Rome also noted that it was reported that Claimant hears voices and babies crying, and that there are so many voices in her head that she does not understand.

7. Dr. Rome administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV); Woodcock-Johnson – Third Edition Tests of Achievement (Woodcock); the Vineland Adaptive Behavior Scales – Second Edition (Vineland-II); the Autism Diagnostic Observational Schedule, Module 3 (ADOS, Module 3); and the Autism Diagnostic Interview-Revised (ADI-R). He also conducted a clinical observation, interviewed Claimant and Mother and reviewed reports provided by Service Agency. Claimant’s cognitive functioning was generally in the low average range based upon her performance on the WISC-IV. Her academic performance on the Woodcock placed her in the average range of academic functioning. Claimant’s communication skills based upon the Vineland II tested in the borderline range. She was able to communicate in complete sentences, although she has problems with maintaining conversations because of her shyness. She can follow multiple step problems, but could not elaborate on her experiences. Dr. Rome also noted that Claimant whispers to herself when performing tasks. Claimant scored in the low average range for adaptive functioning on the Vineland-II. On the ADOS, Module 3, Claimant had a total score of 8, which was in the Autism Spectrum Range. On the ADI-R, Claimant’s Social Score was 8, her Communication Score was 6 and her Repetition Score was 2, all of which were the range for an Autistic Disorder.

9. Dr. Rome diagnosed Claimant with Pervasive Developmental Disorder, Not Otherwise Specified (PDD/NOS) and Attention Deficit-Hyperactivity Disorder (ADHD), Combined Type. He noted that Claimant exhibited many “autistic-like symptoms, including: poor eye contact, withdrawing from social situations, shying away from social interaction and showing repetitive motor mannerisms (twirling of the thumb). However, Dr. Rome concluded she did not have a history of developmental disability that manifested itself before the age of three years-old. He also noted Claimant’s ability to make friends at school as a factor against a diagnosis of Autism. Dr. Rome recommended that Claimant’s case be reviewed for regional center eligibility, that she receive psychotherapy to assist her with

appropriate social interaction, and that she receive resource assistance at school to help her retain information.

LEGAL CONCLUSIONS

1. Claimant did not establish that she suffers from a developmental disability entitling her to regional center services. (Factual Findings 1 through 9.)

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his or her eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has not met her burden of proof in this case.

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a),² defines "developmental disability" as:

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 ... [and] disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

4. To prove the existence of a developmental disability within the meaning of section 4512, an individual must have a "substantial disability." Section 4512, subdivision (1), defines "substantial disability" as the existence of significant functional limitations in three or more of the following areas of major life activity: (1) self-care, (2) receptive and expressive language, (3) learning, (4) mobility, (5) self-direction, (6) capacity for independent living, and (7) economic self-sufficiency. California Code of Regulations, title 17, section 54001, subdivision (a), provides that:

(a) "Substantial disability" means:

² All further references are to the Welfare and Institutions Code unless otherwise indicated.

- (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 significant functional limitations, 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:
 - (A) Receptive and expressive language;
 - (B) Learning;
 - (C) Self-care;
 - (D) Mobility;
 - (E) Self-direction;
 - (F) Capacity for independent living;
 - (G) Economic self-sufficiency.

5. Claimant must show that her "substantial disability" fits into one of the five categories of eligibility in section 4512. These categories are mental retardation, epilepsy, autism and cerebral palsy, and a fifth category of eligibility described as having "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." (§ 4512, subd. (a); Cal. Code. Regs., tit. 17, § 54000.) Under the Lanterman Act, "developmental disability" excludes conditions that are *solely* physical in nature. (§ 4512; Cal. Code. Regs., tit. 17, § 54000.) Section 54000, subdivision (c), excludes conditions that are *solely* psychiatric disorders, learning disabilities, or physical in nature.

Autistic Disorder

6. The DSM-IV-TR states that "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." The DSM-IV-TR describes the diagnostic criteria for autism to include the following:

- A. A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):
 - (1) qualitative impairment in social interaction, as manifested by at least two of the following:

- (a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction;
 - (b) failure to develop peer relationships appropriate to developmental level;
 - (c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest);
 - (d) lack of social or emotional reciprocity;
- (2) qualitative impairments in communication as manifested by at least one of the following:
- (a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime);
 - (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others;
 - (c) stereotyped and repetitive use of language or idiosyncratic language;
 - (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level;
- (3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
- (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus;
 - (b) apparently inflexible adherence to specific, nonfunctional routines or rituals;
 - (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements);
 - (d) persistent preoccupation with parts of objects;
- B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.
- C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.

(DSM-IV-TR at pp. 70-71, and 75.)

7. Claimant has qualitative impairment in social interaction as is shown by her difficulty in making eye contact and her reluctance to initiate interaction with others (lacks social and emotional reciprocity). Claimant arguably has met the criteria for a qualitative impairment in communication because of her inability to initiate or sustain conversations, although this limitation could be caused by her shyness, rather than a communication deficiency. Claimant also met the requirements for a restricted repetitive and stereotyped pattern of behavior in that she exhibited stereotyped and repetitive motor mannerisms (thumb twirling). However, Claimant must satisfy at least six of the diagnostic criteria for a diagnosis of Autism. The evidence showed that Claimant only satisfied four criteria: two for impairment in social interaction, and one each for communication impairment and restrictive repetitive stereotyped patterns of behaviors. More importantly, there is insufficient evidence to conclude that Claimant's delays or abnormal functioning occurred prior to the age of three years old. Mother testified that she did not become concerned or aware that Claimant was having problems until April 2012, when Claimant began to complain about hearing voices in her head. Claimant was eight years old at that time. Consequently, there is insufficient evidence to conclude that Claimant suffers from an Autistic Disorder.

8. Dr. Rome determined that although Claimant exhibited many autistic-like symptoms, she did not meet the qualifications for Autism. Claimant's symptoms, hearing voices in her head, suggest that she may be experiencing mental health problems that are conceivably solely psychiatric in nature, and thus, an excluded condition under the Lanterman Act. Mother currently is having Claimant evaluated by the Department of Mental Health, an evaluation that has not been concluded. Mother should be concerned about the symptoms Claimant is exhibiting, but these symptoms have not been shown to constitute a developmental disability upon which an eligibility determination for regional center services may be based.

ORDER

The Service Agency's determination that Claimant Ashley R. is not eligible for regional center services is upheld. Claimant's appeal is denied.

DATED: June 20, 2013



MICHAEL A. SCARLETT
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.