

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MICHAEL M.,

Claimant,

vs.

VALLEY MOUNTAIN REGIONAL
CENTER,

Service Agency.

OAH No. 2013030717

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Stockton, California, on May 30, 2013.

The Service Agency, Valley Mountain Regional Center (VMRC), was represented by Anthony Hill, Assistant Director of Case Management.

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 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 three-year-old boy whose parents are seeking services from VMRC based on concerns with his development, behaviors and social skills. He and his fraternal twin brother were born at twenty-six weeks gestation via emergency C-section following his mother's three-week hospitalization when her water broke at twenty-three weeks. Claimant weighed 1lb. 13oz., and remained in the neonatal intensive care unit for four months. He was on and off a ventilator for the first month and had heart surgery to close a valve. He had several blood transfusions and surgery to repair a hernia.

2. Claimant was born and resided in the State of New York. As the twins developed, they qualified for, and began receiving, early intervention services in New York based on a diagnosis of "prematurity" as set forth in their Individualized Family Services Plans (IFSP).

3. In the fall of 2012, claimant's family moved to Stockton. Claimant qualified for California Early Start services through VMRC, pursuant to the California Early Intervention Services Act² which provides early intervention services for infants and toddlers from birth to two years of age, inclusive, who have disabilities or are at risk of disabilities, to enhance their development and to minimize the potential for developmental delays.

4. As the twins' third birthday approached on December 4, 2012 and they would no longer qualify for early intervention services, VMRC began evaluating their eligibility for services pursuant to the Lanterman Developmental Disabilities Services Act.

5. 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.

² California Government Code Section 95000 et. Seq.

6. 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.

7. 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.

8. 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.

9. The VMRC Eligibility Review Team concluded that claimant did not have a qualifying developmental disability. Therefore, he was found “not eligible” for regional center services. Claimant’s twin brother was found eligible for VMRC services on the basis of autism.

10. As a result of the eligibility team determination, a Notice of Proposed Action (NOPA) was issued on February 25, 2013, informing claimant that FNRC determined he is not eligible for regional center services. The NOPA stated that “an interdisciplinary team composed of VMRC’s clinical psychologist, physician, and service coordinator reviewed medical, psychological, and educational records and found your child ineligible for VMRC services.”

Reason for action: The applicant does not have a substantially handicapping developmental disability.

11. Claimant filed a Fair Hearing Request dated February 28, 2013, which contained the following reason for requesting the hearing:

[Claimant] recently started Head Start and immediately the teachers felt he needed additional services as I do. I feel that his social skills are lacking and [he has] challenges w/ social interactions and physical.

Claimant sought:

Occupational therapy, physical therapy, special instruction/behavior, support services for parents.

12. Dr. Barbara Johnson is a VMRC Clinical Psychologist with extensive experience assessing and diagnosing individuals with disabilities. In this role, one of her responsibilities is eligibility review. She testified that VMRC began gathering information looking towards regional center eligibility as claimant approached his third birthday.

13. Claimant was referred to Robert L. Mattesich, Licensed Educational Psychologist, for a psychodiagnostic evaluation to assist in determining his eligibility for services. An evaluation of his present cognitive, perceptual-motor, academic and emotional status in relation to social functioning was requested.

On November 26, 2012, Mr. Mattesich administered the Bayley Scales of Infant and Toddler Development, Third Edition, and Vineland Adaptive Behavior Scales, Second Edition.

Claimant's performance on the Bayley Scales of Infant and Toddler Development indicated the presence of low-average cognitive skills, average motor skills and high-average language skills. He obtained an Adaptive Behavior Composite of 88 on the Vineland Adaptive Behavior Scales, Second Edition, which suggests the presence of low-average adaptive behavior skills. Mr. Mattesich concludes as follows:

This 2 year, 11 month of age boy is reported to have been born severely premature with related medical issues. He was reported to have been delayed in reaching his early developmental milestones. His mother reported that he has made a lot of progress since turning two years of age. Results from standardized tests indicated that [claimant] is functioning within the average range for his chronological age group. His scores would have been higher had this examiner made adjustments for his premature birth. [Claimant] achieved scores placing his skills within the low-average range on standardized tests appraising his cognitive and adaptive behavior skills. [Claimant's] motor skills were appraised to be in the average range, and his language skills were appraised to be in the high-average range. [Claimant] essentially did not exhibit a significant delay in any specific developmental area.

14. The VMRC Intake Coordinator assessed claimant using the Developmental Profile, Third Edition, which is based on parental report. Also considered were the results of two M-CHATs (Modified Checklist for Autism in Toddlers) completed by claimant's parents. The M-CHAT is a level one screener used for the purpose of exploring whether or not a child exhibits evidence of an autism spectrum disorder. The checklist completed by claimant's mother showed areas of clinical significance while father's did not. Based on this information, VMRC moved to a level two screening tool, the PDDST-II (Pervasive Developmental Disorders Screening Test-II), which is also parent reported. This evaluation also showed clinical significance so VMRC moved forward with a formal, comprehensive, autism assessment performed by Licensed Clinical Psychologist, Leslie J. Deprey, Ph.D.

15. Dr. Deprey conducted her evaluation on December 20, 2012, utilizing Behavioral Observations/Autism Diagnostic Observation Schedule-Module 1- Second Edition (ADOS-2), Mullen Scales of Early Learning (MSEL), and Adaptive Behavior Assessment System-Second Edition (ABAS-II). She made the following diagnoses:

[Claimant] presents with an autism spectrum disorder (ASD). He currently meets criteria for a DSM-IV-TR diagnosis of 299.80: Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS).

Dr. Deprey noted that claimant’s “symptoms of ASD appear less pronounced than his fraternal twin brother with autism. Symptom severity can vary across family members with ASD.” [Claimant] clearly displays the following symptoms of PDD-NOS:

- Impairments in using nonverbal behavior to regulate social interaction (1-A)
- Impairments in social and emotional reciprocity (1-D) (partial)
- Delays in the development of play skills and imitation (2-D)
- Inflexible adherence to nonfunctional routines (3-B)
- Preoccupation with parts of objects (3-D)

16. Dr. Johnson testified that the Eligibility Review Team gathered all available information 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

17. 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

³ The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) is the current standard for diagnosis and classification. It is a multiaxial 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

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.

18. Dr. Johnson testified that the Eligibility Review Team concluded that while claimant met the criteria for an autism spectrum disorder, he did not meet the criteria for autism. PDD-NOS is not autism and is not an eligibility category for regional center services. In addition, she noted that the evidence did not support a finding that claimant possesses a “substantial disability.”

19. The parties agreed that claimant does not have mental retardation or a condition closely related to mental retardation, or requiring treatment similar to that required for individuals with mental retardation. Nor does he have cerebral palsy or epilepsy.

20. Claimant’s mother is understandably concerned that one of her twin sons qualifies for regional center services while the other does not. It was her opinion that they demonstrated very similar symptoms and she struggles with the fact that they are so close yet only one qualifies for VMRC services. She does not want claimant to regress while his brother receives services and advances. She asked VMRC for “special consideration” to allow claimant to receive services.

21. The Lanterman Act does not provide for “special consideration” in the provision of services. The parties did acknowledge that appropriate services for claimant may be available through other resources including claimant’s school district.

22. The parties demonstrated a sincere desire to continue to work together in the best interest of the claimant. They acknowledged that he is young and that he will experience change as he grows and matures. As new information becomes available, VMRC remains available to assist the family in the event that claimant becomes eligible for regional center services.

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. 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 functional impairments and delays. He has been diagnosed with PDD-NOS, an autism spectrum disorder that is not autism. However, regional centers may only provide services to those individuals meeting the stated eligibility criteria. The parties agreed that claimant does not have mental retardation or a condition closely

related to mental retardation, or requiring treatment similar to that required for individuals with mental retardation. Nor does he have cerebral palsy or epilepsy. Accordingly, he does not have a developmental disability as defined by the Lanterman Act.

3. While claimant does not meet the criteria for regional center services at this time, the parties agreed that it would be important to continue to monitor claimant in the future and to consider any new information as he ages and develops.

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 VMRC.

ORDER

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

DATED: June 3, 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).)