

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

VALLEY MOUNTAIN REGIONAL CENTER,
Service Agency.

OAH No. - 2013051054

DECISION

This matter was heard before Administrative Law Judge Elaine H. Talley, Office of Administrative Hearings, State of California, in Stockton, California, on January 27, 2014, and March 7, 2014.

Claimant was represented by Holly Cash, claimant's family friend. Claimant's grandfather, who serves as his guardian and foster parent, also attended the hearing.

Anthony Hill, Assistant Director of Case Management Services, represented the service agency, Valley Mountain Regional Center (VMRC).

Oral and documentary evidence was received. At the conclusion of the hearing, the record remained open for parties to submit closing briefs. Closing briefs were submitted by both parties on March 14, 2014, and the record was closed and the matter was submitted for decision.

ISSUE

Was VMRC's original determination that claimant was eligible for regional center services due to a diagnosis of autism clearly erroneous pursuant to Welfare and Institutions Code section 4643.5, subdivision (b)?

FACTUAL FINDINGS

1.- Claimant is a seven-year-old boy who was found to be eligible for services from VMRC in 2009, at the age of three years six months, due to a diagnosis of autism. He lives with his maternal grandfather, who also serves as his foster parent.

2. In May 2010, claimant moved to Fresno, an area served by -Central Valley Regional Center (CVRC), and his case was transferred to CVRC. At that time, CVRC continued claimant's eligibility for services and recommended his eligibility for regional center services be reevaluated in 2013. He returned to Stockton, an area served by VMRC, in 2012. His case was transferred back to VMRC.

3. On April 29, 2013, VMRC sent a Notice of Proposed Action (NPA) to claimant informing him that the Interdisciplinary Eligibility Team had completed a comprehensive reassessment to determine claimant's ongoing eligibility for VMRC services. The team determined claimant did not have a developmental disability and therefore the original determination that he had a developmental disability was clearly erroneous. The NPA stated that VMRC would no longer be providing services to claimant after May 30, 2013.

4. On May 22, 2013, claimant's father filed submitted a Fair Hearing Request to VMRC appealing the service agency's determination that claimant is no longer eligible for regional center services and authorizing claimant's grandfather to act as claimant's representative.

5.- -Claimant asserts that he remains eligible for regional center services due to a diagnosis of autism. Claimant does not contend that he is eligible for regional center services under any other eligibility category or disability.

Reevaluation of Claimant and Testimony Regarding the 2013 Autism Assessment

6. Michelle Thomason-Jimenez, Ph.D., completed the original assessment of claimant in November 2009 and the reevaluation in February 2013. She testified at hearing regarding the findings from both assessments. At the time of the 2009 assessment claimant was three and a half years old and had been living with his maternal grandfather for only one month, having been removed from his mother's care. The following is information from the 2009 assessment regarding claimant's available records at that time.

[Claimant] was born as the product of a full term, generally uncomplicated pregnancy. However, his grandfather reports that he was prenatally exposed to methamphetamine and possible other drugs. He did not have any significant medical problems at birth, and was released from the hospital one day after his birth. [Claimant] has not been diagnosed with any major medical problems, and he has not required any hospitalizations or surgeries.

However, he had his upper front teeth removed at the age of two, and had two root canals, secondary to tooth decay.

...it is noted that [claimant] does not have any intelligible language.

As a result of the initial assessment, Dr. Thomason-Jimenez found that claimant met the criteria for an autism diagnosis. However, upon reassessment in February 2013, she found he no longer meets the criteria for a diagnosis of autism.

Summary of Data Sources Used and Tests Administered in the February 2013 Assessment

7. When she reassessed claimant in 2013, Dr. Thomason-Jimenez reviewed available records, completed a clinical interview with claimant's grandfather, made behavioral observations, and used the Autism Diagnostic Observation Schedule, Module 3, and the Adaptive Behavior Assessment System, 2nd Edition (ABAS-II), and administered the Wechsler Preschool and Primary Scale of Intelligence, 3rd Edition (WPPSI-III). The 2013 assessment summarizes claimant's living situation since the initial assessment as follows:

In March or April of 2011, [claimant's] mother took him back into her care. CPS removed him from her care in March 2012, reportedly due to her drug use, paranoia, and psychotic symptoms (secondary to methamphetamine use). [Claimant] was placed in a (non-family) foster placement at that time; his mother was given a 6-month period to improve the situation and she did not do so. She had supervised visits with him, but eventually lost the privilege of these visits. [Claimant] was placed back with his grandfather in June 2012. At this time, [claimant's] mother is not involved with him; CPS is not allowing her to have contact with him. [Claimant's] father lives in Southern California and has intermittent contact with him.

Claimant's Intellectual Functioning using the Wechsler

8. Dr. Thomason-Jimenez assessed claimant's intellectual functioning using the WPPSI-III. Dr. Thomason-Jimenez notes in her report that claimant was reluctant to complete the testing and repeatedly asked to go home. The testing battery was shortened. On the tests that were completed, claimant's verbal IQ score was 81, which falls within the Low Average range. His performance IQ score was 110, which falls within the High Average range. The performance IQ test is designed to measure novel, non-verbal problem solving, such as the ability to identify visual patterns and replicate visual designs with blocks. She concluded that claimant appears to have High Average cognitive potential overall.

Claimant's Adaptive Functioning as Measured by ABAS-II

9. Dr. Thomason-Jimenez also used the ABAS-II as part of her evaluation of claimant in February 2013. The ABAS-II is a questionnaire designed to evaluate adaptive skills. Adaptive skills are the activities of daily living, including communication skills, self-care

skills, and social and leisure skills. Claimant’s grandfather was asked to respond to questions about various aspects of claimant’s daily living skills and asked to rate -his ability to complete age appropriate tasks. A scaled score of 10 is considered to be average. All of claimant’s grandfather’s ratings were below average. Below is a summary of claimant’s scores.

| <u>Skill Area</u> | <u>Scaled Score</u> |
|----------------------|---------------------|
| Communication | 3 |
| Community Use | 3 |
| Functional Academics | 6 |
| Home Living | 4 |
| Health and Safety | 2 |
| Leisure | 7 |
| Self Care | 5 |
| Self Direction | 3 |
| Social | 6 |

| <u>Composite Scores</u> | <u>Standard Score</u> | |
|-----------------------------------|-----------------------|----------------------|
| Conceptual | 64 | Extremely Low |
| Social | 85 | Below Average |
| Practical | 60 | Extremely Low |
| General Adaptive Composite | 65 | Extremely Low |

(A standard score of 100 is considered to be average)

Claimant’s grandfather reported him as having significant deficits in most areas of daily living skills. - However, Dr. Thomason-Jimenez notes social skills were described as an area of relative strength (although still below average). She notes it is unusual for a child with an Autism Spectrum Disorder to have a relative strength in social skills.

-Claimant’s functioning as measured by the Autism Diagnostic Observation Schedule (ADOS)

10.- As part of the February 2013 assessment, Dr. Thomason-Jimenez administered the Autism Diagnostic Observation Schedule (ADOS). The ADOS is a play-based test that includes both a free-play portion, as well as structured play sequences with the examiner. The purpose of the ADOS is to observe the child’s social and communicative behaviors, the two areas of development that are most often affected by autism.

Dr. Thomason-Jimenez found that claimant had made significant improvements between the 2009 assessment and the February 2013 assessment. While he had virtually no language in 2009, she found that he communicated in full sentences during the 2013 evaluation. However, he made grammatical errors and was at times difficult to understand due to poor articulation. He did not often make eye contact with her as she administered the examination. She did not find that claimant displayed unusual sensory seeking behaviors, nor did he engage in repetitive behaviors.-

As a result of the 2013 comprehensive reassessment of claimant, Dr. Thomason-Jimenez concluded that claimant does not suffer from autism using definition of autism in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders Fourth Edition Text Revised (DSM-IV TR)¹.

DSM-IV Diagnostic Criteria for an Autism Diagnosis

11. To be diagnosed with an autistic disorder under the DSM-IV-TR, an individual must have: (1) qualitative impairments in social interaction; (2) at least one qualitative impairment in communication; and (3) at least one restricted repetitive and stereotyped pattern of behavior, interest, or activity. There must be a total of at least six of these items. The impairments in social interaction and communication must be marked and sustained. An individual must also have delays or abnormal functioning, with an onset prior to three years, in social interaction, language as used in social communication, or symbolic or imaginative play. The three broad criteria are set forth below:

- 1) There must be a qualitative impairment in social interaction as manifested by at least two of the following items:
 - (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) lack of spontaneous seeking to share enjoyment, interests, or achievements with other people...
 - (d) lack of social or emotional reciprocity.

- 2) There must be a qualitative impairment in communication as manifested by at least one of the following items:
 - (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).

¹ The DSM-IV TR was the American Psychiatric Association's (APA) classification and diagnostic tool at the time of claimant's assessment (February 2013). In May 2013, the DSM-5 was published.

(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 the developmental level.

3) There must be restricted repetitive and stereotyped patterns of behavior, interests, and activities as manifested by at least one of the following items:

(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....

(d) persistent preoccupation with parts of objects.

12. At least six of the 12 above-mentioned criteria must be met in order to be diagnosed with autism. Dr. Thomason-Jimenez found that claimant had the following significant impairments in only three of the twelve criteria:

(1)(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. She noted, “[Claimant’s] eye contact, gestures, and facial expressions are not consistently well coordinated. Additionally, his affect is somewhat blunted.”

(1)(b) failure to develop peer relationships appropriate to developmental level. She noted, “[Claimant’s] grandfather reported that he is indifferent about other children.” and.

(2)(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. Dr. Thomason-Jimenez noted, “[Claimant’s] language development is significantly delayed and he has not developed sufficient gestures to compensate for his limitations in verbal skills.”

13. As stated above, to be diagnosed with autism, an individual must meet six criteria. Therefore, she found that he did not meet the criteria for an autism diagnosis. Claimant was not found to meet the criteria for an autism diagnosis in the following nine categories:

1) -Under qualitative impairment in social interaction, he did not meet the criteria in two of the four categories:

(1)(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people as manifested by a lack of showing, bringing, or pointing out objects of interest.

(1)(d) a lack of social or emotional reciprocity, although Dr. Thomason-Jimenez notes that claimant's skills in this domain are diminished, she concludes they are not entirely lacking.

-2) Under qualitative impairments in communication, he did not meet the criteria in three of the four categories:

(2) (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others. Dr. Thomason-Jimenez notes that claimant has some impairment in this area, but opines that it may be secondary to his poor language development.

(2) (c) stereotyped and repetitive use of language or idiosyncratic language.

(2)(d) lack of varied, spontaneous make-believe play or social imitative play appropriate to the developmental level. Dr. Thomason-Jimenez found that claimant has some mild delays in pretend play, but he does not fully meet this criterion.

3) Under restricted repetitive and stereotyped patterns of behavior, interests, and activities, Dr. Thomason-Jimenez did not find that claimant met any of the four criteria listed but did note that claimant's grandfather reported some mildly rigid behaviors.

14. Given that claimant only met three of the criteria listed above, Dr. Thomason-Jimenez found that he no could no longer be diagnosed with autism. She diagnosed him as having Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS).

DSM-V Diagnostic Criteria for an Autism Diagnosis

15. Claimant asserted at hearing that, because the DSM-IV had been replaced with the DSM-5 between the time of his assessment and the hearing, he should remain eligible for regional center services. However, the DSM-5 requires that a person demonstrate at least three deficits in social communication and at least two symptoms in the category of restricted range of activities and repetitive behaviors. Because Dr. Thomason-Jimenez found that claimant did not meet the criteria for any of the sub-categories under restricted repetitive and stereotyped behaviors, he would most likely not to have found to have autism had the assessment taken place after the DSM-5 was published.

16. Dr. Barbara Johnson, Clinical Psychologist at VMRC also testified at hearing. She explained that sometimes the service agency reevaluates people who have been found eligible for regional center services, especially when they received the original diagnosis at a young age, as was the case with claimant.

17. Claimant did not call any witnesses to testify at hearing.

18. The evidence established that VMRC's initial determination of eligibility was clearly erroneous. Claimant no longer meets the criteria to be diagnosed with autism. At the time of his initial assessment, he was very young and he had been subject to an unstable home environment. Since his removal from that environment his condition has improved considerably. This is, no doubt, due to the care provided by his grandfather.

LEGAL CONCLUSIONS

Burden of Proof

1.- The service agency is seeking to change claimant's eligibility and therefore has the burden of proof in this matter.

2.- Under the Lanterman Act, the State of California accepts responsibility for providing services and supports for persons with developmental disabilities and an obligation to help 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 to require 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, § 54001, subd. (c).)

3. "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, § 540001, subd. (b).)

4. -Welfare and Institutions Code section 4643.5, subdivision (b), sets forth the standard of proof that a regional center must meet when it -seeks to terminate the eligibility of an individual once deemed eligible for services under the Lanterman Act:

An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous. (Welf. & Inst. Code, § 4643.5, subd. (b)).

5. Evidence provided at hearing supports VMRC's finding that its original determination that claimant suffers from autism was clearly erroneous.

6. No evidence was offered that claimant suffers from mental retardation, cerebral palsy, epilepsy, or a disability condition found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals.

ORDER

Claimant's appeal from VMRC's decision that claimant is no longer eligible for services is DENIED. VMRC's determination that claimant is no longer eligible for services under the Lanterman Act is SUSTAINED.

DATED: March 25~~4~~, 2014



ELAINE H. TALLEY

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 this decision. (Welf. & Inst. Code, § 4712.5, subd.(a).)