

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

CENTRAL VALLEY REGIONAL CENTER,

Service Agency.

OAH No. 2013071110

DECISION

This matter was heard before Administrative Law Judge Elaine H. Talley, Office of Administrative Hearings, State of California, in Fresno, California, on July 15, 2014.

Claimant was represented by his mother and brother. Claimant's mother used the services of a Spanish language interpreter throughout the hearing.

Shelley Celaya, Client Appeals Specialist, represented the service agency, Central Valley Regional Center (CVRC).

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 because he has the substantially handicapping developmental disability of autism as defined by Welfare and Institutions Code section 4512, subdivision (a)?

FACTUAL FINDINGS

1. Claimant is a 4-year-old boy who lives with his mother and brother in his family's home. He received early intervention services when he was two years old. In August 2012, just prior to claimant's third birthday, he was assessed and CVRC found he

was not eligible for regional center services under the Lanterman Act. In March 2013 his mother asked CVRC to assess claimant again to determine whether he was eligible for regional center services. CVRC assessed him again and found he was not eligible for services.

2. On June 17, 2013, CVRC sent a Notice of Proposed Action (NPA) informing claimant that the Interdisciplinary Eligibility Team had completed a comprehensive reassessment to determine claimant's eligibility for CVRC services. The team determined he did not have a developmental disability and therefore was not eligible for services.

3. On July 3, 2013, claimant's mother filed a Fair Hearing Request, appealing CVRC's determination that claimant is not eligible for regional center services.

4. Claimant's mother asserts that claimant is eligible for regional center services under the category of autism. She does not contend that he is eligible for regional center services under any other category of disability.

Psychological Assessments and Observations Regarding Eligibility

Matthew Battista, Ph.D., Assessment August 2012

5. In August 2012, prior to claimant's third birthday, Matthew Battista, Ph. D., Licensed Clinical Psychologist, assessed claimant at the request of CVRC. Dr. Battista used the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III) to assess claimant. Claimant's Full Scale IQ score was 86, with a Verbal IQ score of 88 and a Performance IQ score of 87, placing him in the Low Average range. Dr. Battista administered the Vineland Adaptive Behavior Scale-II (Vineland II) and concluded that claimant's adaptive skills were consistent with his IQ, noting that his lowest scores on the Vineland II were in Communication, with a standard score of 66. His score on the Daily Living Skills portion of the assessment was a standard score of 82 (Moderately Low) and on the Socialization portion, claimant's score was 76 (Moderately Low), while his Motor Skills score was 93 (Adequate).

Dr. Battista administered the Pervasive Developmental Disorder Screening Test (PDDST) and the Autism Behavior Checklist (ABC). Dr. Battista found that:

PDDST was at, and ABC score was just below, the cutoffs typically associated with cases of autism.

Dr. Battista concluded that claimant had Pervasive Developmental Disorder NOS and recommended claimant receive special education services and speech therapy. Additionally, due to claimant's young age, he recommended a psychological re-evaluation in one year to more reliably establish a diagnosis.

The CVRC Multidisciplinary Eligibility Review Team reviewed claimant's eligibility for services, using Dr. Battista's assessment and an assessment completed by Fresno Unified School District, and found that claimant did not have a developmental disability as defined by the Lanterman Act.

Lindsey Gerner, Ph. D., Assessment March and April 2013

6. On February 12, 2013, claimant was referred to CVRC by Gladys Prado from the Assessment Center for Children. At that time, information was provided to CVRC from FUSD indicating his primary disability for purposes of providing special education services was autistic-like behavior. CVRC agreed to reassess claimant.

7. Lindsey Gerner, Ph.D., Licensed Clinical Psychologist, assessed claimant at the request of CVRC. Dr. Gerner testified at hearing regarding her assessment results. Her behavioral observations included the following:

He made good eye contact when greeted in the lobby and provided a social smile. He transitioned easily to the assessment office and no abnormalities were noted in gait or posture as he walked down the hall. Once in the room, [he] explored the toys provided while consent forms were reviewed with his mother and grandmother. ...

During semi structured play, [claimant] liked to play with the ball. When I held the ball and asked him if he wanted to play more he said "si more" while shaking his head and giving eye contact. He was able to play a game of catch back and forth for quite some time. He also liked playing with bubbles and once prompted he said, "More bubbles" when he wanted more. He liked when I traced his hands on a sheet of paper and he wanted me to do this several times yet he did not protest when I stopped...[Claimant] played with a car and made appropriate noises as he pushed it...He played with a toy phone and pushed the buttons. He said "hello" and "goodbye." He also put the phone on his ear and had his grandmother do the same with her phone. He then wanted his grandmother to pick up her phone and he pretended to talk with her on his own phone. Much of what he said could not be understood yet he clearly was pretending to have a conversation with her. When she put her phone away he prompted her to pull it out again. ...He sat on the floor and played appropriately with a car. [He] pretended to push it into a house while making appropriate sounds. Then pretended the cars were crashing into one another. When I said "stop" and "go" he appropriately moved his car forward or stopped it. He

called attention to the computer monitor which has various pictures that scroll across the screen and he became interested in the shark picture. I asked him “Is that a shark?” [He] did not answer but shook his head yes. He loudly said “house” and pointed to another picture on the computer. [Claimant] waved “bye” to a hot air balloon that was shown on the computer. He sat with his mother for a minute and they looked at the pictures. He pointed to ones he found interesting and said “Look.” He also called attention to the car and wanted me to come closer. He demonstrated this by turning toward me and motioning with his hand. He said, “Oh no, car” when the picture was changed.

8. Dr. Gerner noted that claimant was recently found eligible for special education services by the Fresno Unified School District under the eligibility category of Autistic-Like Behaviors. His Individualized Education Program (IEP) team placed him in an autism program. Dr. Gerner interviewed claimant’s teacher and provided the following summary of her interview:

...she indicated that [Claimant] has only been in her class for a few weeks and she has concerns about his behaviors. She indicated that he can be aggressive and he will hit when he is upset. If someone is hurt he will attempt to comfort them by kissing their hand. She further stated that the other day [Claimant] comforted another student who was injured by rubbing his hand, giving a kiss on the hand, and saying, “it’s okay” to him. He will throw his body on the ground and he is constantly “shooting.” He makes things into guns and he will pretend to be shot by falling back in a “slow motion manner” as if he has been killed. She is working on replacing this behavior with roaring like a lion. She reported that the structure of the classroom has been helpful. She indicated that he is different from the other children in her class and she sometimes wonders “How did he get in my room?” She indicated that he attempts to communicate using his words yet because he is just learning English, it can be frustrating for him at times. He will use his words to communicate and he does make eye contact with others in the class. He is constantly chasing the kids and attempting to interact with them. He will play with a variety of toys in the classroom and he is demonstrating some imaginative skills. She feels that he can do more than he is showing at this point. She is concerned that he has limited safety awareness. Academically he is catching up on his alphabet recognition. He follows the schedule and easily transitions. One of the aides observed that

his mother loves him very much and she is very nurturing with him. She also noted that mother has a tendency to “treat him like a baby.”

9. In addition to observing claimant and interviewing his mother and teacher, Dr. Gerner used the Adaptive Behavior Assessment System II (ABAS II) Spanish, the Social Communication Questionnaire (Spanish), and the Gilliam Autism Rating Scale (GARS), Second Edition. The ABAS II and the Social Communication Questionnaire were both completed by claimant’s mother. The GARS was completed by claimant’s mother and his teacher.

The results of the ABAS II as reported by claimant’s mother show his adaptive skills fall within the extremely low range. The Social Communication Questionnaire helps evaluate communication skills and social functioning in children who may have autism or autism spectrum disorder. Claimant’s score was a 16. This is just over the cutoff score.

The GARS is a standardized instrument designed for assessing persons with autism and other severe behavioral disorders. The rating scale provides norm-referenced information that can assist in the diagnosis of autism. When claimant’s mother completed the rating scale, claimant received a score of 72, which falls with the “Possibly” range. When claimant’s teacher completed the rating scale, claimant received a score of 66, which falls within the “Unlikely” range.

10. Dr. Gerner compared claimant’s behaviors and symptoms to the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders Fourth Edition Text Revision (DSM-IV-TR)¹ diagnostic criteria for Autistic Disorder and found that he did not meet the criteria. She diagnosed him with Pervasive Developmental Disorder, NOS (Provisional). She explained that she used the term “Provisional” because of claimant’s young age.

Linda Copeland, M.D., Assessments October 2012, June 2013, and February 2014

11. Linda Copeland, M.D., is a developmental behavioral pediatrician who has assessed claimant several times. Dr. Copeland testified at hearing. Dr. Copeland has extensive experience diagnosing and treating children with autism dating back to the late 1970s. She is also a Board Certified Behavior Analyst.

12. In October 2012, Dr. Copeland had an initial consultation with claimant. At that time she reviewed claimant’s developmental history and assessed claimant’s behavior. She found that he did meet the DSM-IV-TR criteria for Autistic Disorder.

¹ The DSM-IV-TR was updated and replaced with the DSM 5 in May 2013. In April 2013, the DSM-IV-TR was the current version of the manual.

13. In June 2013, Dr. Copeland conducted a Follow-up Child Development Consultation with claimant. At that time her diagnosis, using the DSM-IV-TR was Pervasive Developmental Disorder Not Otherwise Specified (PDD NOS). She noted,

[Claimant's] developmental status appears to be improving, but still with significant mixed receptive-expressive language deficits and behavioral challenges as part of his clinical presentation. Full autism can't be completely ruled out at this time, so his condition will need to be monitored closely over the next several years. In particular, it remains to be seen whether he will start manifesting more intense, stereotyped preoccupations and/or non-functional rituals and whether or not he will be able to make and keep meaningful friendships as he matures. He is sharing and showing much more than he previously used to, and is a persistent communicator, which are good prognostic indicators for potential for social improvement. Currently he does enjoy being around other children, such as his cousin... but of concern is that he never asks for [his cousin] in any way when the cousin is not present. This is unusual given the current amount of language [claimant] has (he has the ability to say [cousin's] name and form a variety of sentences, but has never asked to "see [cousin]" or "play with [cousin]"). Hopefully, this social skill set will emerge.

14. Dr. Copeland did another Follow-up Child Development Consultation of claimant on February 25, 2014, and March 19, 2014. Using the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM 5) criteria for Autism Spectrum Disorder, Dr. Copeland found that claimant met the criteria at that time. Dr. Copeland stated,

In this examiner's clinical opinion, [Claimant] is substantially handicapped in communication in self-help skills and in self-direction as documented by all the information contained in this report. His diagnosis of autism spectrum disorder constitutes a lifelong neuro-developmental disability for which he needs substantial support.

Dr. Copeland testified at hearing that, based on his history and her assessment, she believes claimant suffers from Autism Spectrum Disorder.

Central California Autism Center Assessment October 2013

15. On October 8, 2013, claimant was assessed by the Central California Autism Center (CCAC). The CCAC assessment included the use of three tools to examine skills and deficits across many areas. They used the Childhood Autism Rating Scale (CARS),

the Baby and Infant Screen for Children with aUtisIm Traits (BISCUIT), and direct behavioral observation across settings. The CCAC assessment report states in part,

Assessment results for CARS:

[Claimant] scored a total of **29** on this assessment corresponding with “Non-autistic” autism range on the CARS. Even though [Claimant] scored within this diagnostic category of Minimal-to-No symptoms of Autism Spectrum Disorder, he was one point away from scoring within the Mild-to-Moderate symptoms of Autism Spectrum Disorder criteria.

...

Conclusion/Recommendations

[Claimant] is a fun and active 3-year-10 month old child. His main deficit areas include: speech & language skills, social & play skills, attending skills, potty & some self-help skills, self-emotional regulation skills, and group learning & classroom skills. Behavior problems that need to be addressed are: physical aggression, tantrums, and elopement. Based on our assessment [claimant] does not meet the diagnostic criteria for Autism.

Carol Sharp, Ph.D., Observations, Record Review, and Assessment August 2013, October 2013, January 2014, and analysis dated July 9, 2014

16. Carol Sharp, Ph.D., is a clinical psychologist on staff with CVRC. She testified at hearing. Dr. Sharp observed claimant in his home, his school, and in the community. Those observations took place on August 22, 2013, October 23, 2013, and January 24, 2013. At home, Dr. Sharp observed that claimant was able to answer questions, play with a toy parking structure, and request help. He also requested that Dr. Sharp go see his bedroom so he could show her his toys and name his favorite ones.

At school Dr. Sharp observed claimant making eye contact with a classroom aide and asking her for help. His name was called and he responded by looking up. At one point he said “no” when it was time to clean up, but, after his teacher spoke to him quietly, he cleaned up the toy he had been playing with and appeared pleased with himself when the aide praised him for cleaning up.

Dr. Sharp had a brief conversation with claimant’s teacher. The teacher reported that she has not noticed any stereotypies. She said she has seen a lot of improvement in claimant’s behavior.

In the community, Dr. Sharp and his mother went to a discount clothing store together. One of the concerns claimant’s mother has reported is that is very difficult to be in public with claimant because of his behaviors. Dr. Sharp’s observation report states,

Upon arrival, this observer received an enthusiastic greeting from [claimant]. He established excellent eye contact and commenced a conversation. He pointed out various items of interest and made comments about them. Once inside the store, he resisted his mother's attempts to have him walk through the aisles. Instead, he climbed up her in such a way that his head towered above all present. "I big, I big." He seemed to enjoy his joke and was pleased that the others went along with it.

He called attention to items that caught his interest, pointing out, for example, T-shirts decorated with Angry Birds and Disney characters.....Some of his language was difficult to understand, but the communicative intent was evident.

Throughout the tour of the store, [claimant] was an enthusiastic communicator, wanting to show his visitors the things that caught his eye.

17. Dr. Sharp used the DSM-5 criteria for Autism Spectrum Disorder in relation to her observations and previous assessments.

DSM-5: Autism Spectrum Disorder – 299.00 (F84.0)

Diagnostic Criteria

A. *Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently, or by history:*

1. *Deficits in social–emotional reciprocity, ranging , for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.*

NOT MET

[Claimant] was observed 3 times over a 5 month period. [He] was socially responsive at each visit. At the second and third observations, he greeted this observer with a broad social smile, indicating both recognition and pleasure. He was eager to share things he was excited about. At home, he wanted to show his special toys and engage in interactive play. At school he shared his completed work. At the store, he called

attention to various items he wanted this observer to notice. We were able to have conversations about these items.

Over the 5 months, there was noticeable improvement in [claimant's] use of spoken language. At the first visit, his vocabulary was markedly limited. Nonetheless, he showed communicative intent, using gestures to assist in conveying his message. ... By the third observation, it was possible to have a conversation....

2. *Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.*

NOT MET

Good eye contact, facial expressions, and communicative gestures were evident at all 3 observations.

3. *Deficits in developing, maintaining, and understanding relationships, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.*

NOT MET

[Claimant] appears to be interested in developing social relationships. He makes social overtures and seeks attention from others. He was eager to engage this observer in his activities. He took delight in a spontaneous game of pretending he was bigger than the adults when his mother lifted him up so that his head was above the adults.'

[Claimant] was able to engage in cooperative play with this observer and to follow a change in the direction of play initiated by the observer. In the classroom, he showed awareness of the other students. He was in a classroom for autistic-like students. He was the only student who demonstrated awareness that this observer was in the room. While his fellow students were inattentive to others, [claimant] was attuned to some of their needs and called upon the adults in the room to intervene.

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history.

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, or echolalia, idiosyncratic phrases).

NOT MET

No unusual motor mannerisms or use of objects were observed. None were reported by his teacher...He appears to be reaching for words in an attempt to communicate his thoughts.

2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).

NOT MET

No major difficulties in this area were observed. While [Claimant] resisted stopping a preferred activity at the beginning of the school observation, he successfully managed later changes in activity. On his own initiative, he changes to the next activity when signal was given even though the teacher had missed it. He easily prepared to go out to recess and assisted in the routines needed to return to the classroom when recess ended.

3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g. strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interest).

None observed.

4. Hyper- or hypo-reactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).

None observed

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies later in life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay.

Dr. Sharp summarized claimant's strengths in communication and social reciprocity. She acknowledged he has behavioral and speech and language needs, but concluded he does not meet the criteria for a diagnosis of Autism Spectrum Disorder and therefore is not eligible for regional center services.

Parent and Family Concerns Regarding Claimant's Needs

18. Claimant's mother testified at hearing. She is very concerned about her son and is struggling with his difficult behavior. It is difficult for her to take him out in public because he demands all of her attention and she is not able to shop or make purchases at stores because his behavior can be very disruptive.

19. Claimant's brother testified at hearing and described some of claimant's problematic behaviors. Claimant wants to play his brother's video games and gets very upset if he is not allowed to play them. Both he and his mother are struggling because they really do not know how to help claimant.

LEGAL CONCLUSIONS

1. 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 intellectual disability, cerebral palsy, epilepsy, autism, and what is commonly known as the "fifth category" – a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disabilities. (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).)

2. “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).).

3. Claimant had the burden of proof at this hearing.

4. When all the evidence is considered, claimant’s mother did not establish that claimant is an individual with autism eligible for services under the Lanterman Act. While claimant exhibits deficits in speech and language and other behavioral concerns, he does not meet the criteria set forth in the DSM-IV-TR or the DSM-5 to be diagnosed with an Autism Spectrum Disorder. Consequently, his request for services from CVRC must be denied.

5. No evidence was offered that claimant suffers from cerebral palsy, epilepsy, intellectual disability, or a condition closely related to intellectual disability or requiring treatment similar to that required by people with intellectual disability.

ORDER

Claimant’s appeal from CVRC’s decision that claimant is not eligible for regional center supports and services under the Lanterman Act is DENIED.

DATED: July 21, 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).)