

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2016010269

DECISION

This matter came on regularly for hearing on March 25, 2016, in Alhambra, California, before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Claimant was represented by her mother, who is her authorized representative. (Names are not used in order to protect their privacy.) Eastern Los Angeles Regional Center (Service Agency) was represented by Jacob Romero, Fair Hearing/HIPAA Manager.

Oral and documentary evidence was received. The record was closed on the hearing date, and the matter was submitted for decision.

ISSUE

Is Claimant eligible for regional center services under the diagnosis of autism?

EVIDENCE RELIED UPON

Exhibits: Service Agency's 1 through 8.

Testimony of: Service Agency witness Dr. Randi Bienstock and Claimant's mother.

FACTUAL FINDINGS

1. Claimant is an 18-year-old female who is applying for regional center services. She resides with her mother and six siblings. As described in more detail below, the Service Agency claims that Claimant does not have a diagnosis of an eligible developmental disability. Claimant contends that she is eligible based on the developmental disability of autism.

2. As described in more detail below, the Service Agency evaluated Claimant and determined she was not eligible for services. The Service Agency notified Claimant's mother of its decision in a letter dated November 24, 2015 (exhibit 7). Claimant's mother submitted a Fair Hearing Request form received by the Service Agency on December 21, 2015 (exhibit 8). Claimant's mother also signed a time waiver.

3. The Service Agency prepared a Psychosocial Assessment based on interviews with Claimant and her mother (exhibit 1). Mother mentioned a family history of bipolar and anxiety disorders. The assessment notes that Claimant isolates herself and is not motivated, and can do self-help and hygiene tasks but chooses not to. Claimant hears voices and has hallucinations, for which she receives medication and treatment, noted in more detail below. Claimant attends high school, is in the regular education program, and has not been evaluated by the school district to determine if she is eligible for special education services.

4. At the Service Agency's request, Claimant was evaluated by Larry E. Gaines, Ph.D., psychologist, in July 2015. His report (exhibit 2) refers to various tests that were administered and interviews of Claimant and her mother. Mother reported a history of mental illness in the family, with no specific diagnoses. One test, the Autistic Diagnostic Observation Scale-2 (ADOS) produced a score of 9 in the Social Affect segment, and a score of 0 in the Restricted and Repetitive Behavior segment. Dr. Gaines report was reviewed by Randi Bienstock, Psy.D. psychologist, who testified that a total test score of 9 is considered in the autism range; however, it is necessary to have a positive score on the Restricted and Repetitive Behavior segment for a diagnosis of autism to be made. More specifically, for a diagnosis of autism to be made, the behaviors and symptoms must include a clinically significant element of restricted and repetitive behaviors. Based on the test results and interviews, Dr. Gaines commented that Claimant's cognitive functioning fell within the low-average to borderline range, with symptoms reflecting mental health issues. Claimant did not meet the requirements for a diagnosis of Autistic Spectrum Disorder.

5. Dr. Gaines used the Diagnostic and Statistical Manual-fifth edition (DSM-5) as a reference in making his observations and report. The DSM-5 is a well-known and respected compilation of diagnostic criteria and identifying factors of most known mental disorders used by psychologists and psychiatrists, and others, to standardize the diagnostic process.¹ He concluded that Claimant did not meet the diagnostic criteria for Autistic

¹ The DSM is published by the American Psychiatric Association. Prior editions referred to the disability of Autistic Disorder. In 2013, a new, fifth edition was issued,

Spectrum Disorder. Although some criteria were present (e.g., impaired social communication, difficulty initiating and maintaining conversations, does not try to make friends), other observations and test results were inconsistent with the criteria of Autistic Spectrum Disorder (e.g., adequate eye contact, asking questions and engaging in some spontaneous conversation, no stereotyped or repetitive behaviors). Dr. Gaines determined that the majority of Claimant’s behaviors and symptoms seemed to stem from Claimant’s mental health issues.

6. The Preface to the DSM-5 notes that it was developed for use in clinical, educational and research settings and is designed for use by those with appropriate training and experience, including a specialized body of knowledge and clinical skills. The Introduction (DSM-5, p. 6) states: “Clinical training and experience are needed to use DSM for determining a diagnosis.” The section titled “Use of the Manual” (DSM-5, p. 19) refers to the use of clinical judgment to determine the presence and severity of the criteria necessary to make a diagnosis, as well as to determine the valence of symptoms; i.e., how symptoms react or interact with other symptoms. “Diagnostic criteria are offered as guidelines for making diagnoses, and their use should be informed by clinical judgment.” (DSM-5, p. 21.) It should not be applied mechanically or in a cookbook fashion. Therefore, behaviors and characteristics must rise to a level such that a trained clinician would find them to be significant.

7. The DSM-5 article on Autistic Spectrum Disorder notes that the diagnosis is made

only when the characteristic deficits of social communication are accompanied by excessively repetitive behaviors, restricted interests, and insistence on sameness. [¶] Autism spectrum disorder is characterized by persistent deficits in social communication and social interaction across multiple contexts, including deficits in social reciprocity, nonverbal communicative behaviors used for social interaction, and skills in developing, maintaining, and understanding relationships. In addition to the social communication deficits, the diagnosis of autism spectrum disorder requires the presence of restricted, repetitive patterns of behavior, interests, or activities. Because symptoms change with development and may be masked by compensatory mechanisms, the diagnostic criteria may be met based on historical information, although the current presentation must cause significant impairment.”

(DSM-5, pp. 31-32.)

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referred to as DSM-5. The DSM-5 includes new diagnostic criteria and a discussion of the disability now titled Autistic Spectrum Disorder.

8. The DSM-5 lists the many specific factors and behaviors necessary to support the diagnosis of Autistic Spectrum Disorder. Of significance here are the following:

“A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive, see text):

“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.

“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.

“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.
[¶] . . . [¶]

“B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

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

“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 the same food every day).

“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).

“4. Hyper- or hyporeactivity 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).”

“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 in later 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. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.”

9. Dr. Bienstock agreed with Dr. Gaines’ conclusions and diagnostic impressions. Dr. Bienstock did not see behaviors or symptoms that met any developmental disability that would make Claimant eligible for services from the Service Agency.

10. Claimant’s mother testified that the family has a history of schizophrenia and autism. She is very concerned about various behaviors of Claimant, specifically her isolation and failure to care for herself. Mother stated that Claimant has received psychotherapy and treatment since she was 12 years old. Presently, Claimant is prescribed Sertraline HCL by Dr. Kocsis. A letter was provided from Natalie Carpio, a Marriage and Family Therapy Intern (February 8, 2016; exhibit 6) who is supervised by Larry Lyons, a Licensed Clinical Social Worker. The stated diagnoses are Dysthymic Disorder (a form of depression), and Anxiety Disorder NOS (Not Otherwise Specified).

LEGAL CONCLUSIONS

1. Claimant did not prove that she is entitled to regional center services.
2. Claimant bore the burden to prove she has a developmental disability that makes her eligible for services. The standard of proof is a preponderance of the evidence. Claimant failed to sustain her burden of proof.
3. Welfare and Institutions Code section 4512, subdivision (a) states:

“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 intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but

shall not include other handicapping conditions that are solely physical in nature.

4. California Code of Regulations (CCR), title 17, section 54000 also defines a developmental disability, contains the same criteria as Welfare and Institutions Code section 4512, but also excludes conditions that are:

(c)(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. . . .

5. The three exclusions from the definition of “developmental disability” under CCR, title 17, section 54000 are further defined therein. Impaired intellectual or social functioning which originated as a result of a psychiatric disorder, if it was the individual’s sole disorder, would not be considered a developmental disability. “Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have been seriously impaired as an integral manifestation of the disorder.” (CCR, tit. 17, § 54000, subd. (c)(1).) Similarly, an individual would not be considered developmentally disabled if his/her only condition was a learning disability (a significant discrepancy between estimated cognitive potential and actual level of educational performance) which is not “the result of generalized mental retardation, educational or psycho-social deprivation, [or] psychiatric disorder” (CCR, tit. 17, § 54000, subd. (c)(2).) Also excluded are solely physical conditions such as faulty development, not associated with a neurological impairment, that result in a need for treatment similar to that required for mental retardation.

6. The reference by Claimant’s mother at the hearing to a family history including autism was not included in the interviews for either the psychosocial or psychological assessments. The psychological assessment did not reveal the behaviors or symptoms that would meet the requirements for a diagnosis of Autism Spectrum Disorder under the DSM-5 such that a regional center would find eligibility. The diagnoses made by

Claimant's psychotherapist are of psychiatric disorders. Such disorders are excluded from establishing eligibility for regional center services.

7. The present record does not support a diagnosis of Autism Spectrum Disorder. There was insufficient evidence that Claimant has a developmental disability that would make her eligible for services from the Service Agency.

ORDER

Claimant has not established her eligibility for regional center services under a diagnosis of Autism Spectrum Disorder. Claimant's appeal of the Service Agency's determination that she is not eligible for services from the Service Agency is denied.

Dated: April 11, 2016

DAVID B. ROSENMAN
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.