

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency.

OAH No. 2016030443

DECISION

Administrative Law Judge Thomas Heller, State of California, Office of Administrative Hearings, heard this matter at Los Angeles, California on April 19, 2016.

Claimant appeared and represented herself. Her name is omitted to protect her privacy.

Pat Huth, Esq., Waterson & Huth, LLP, represented respondent Frank D. Lanterman Regional Center (FDLRC).

The matter was submitted on April 19, 2016.

ISSUE

Is Claimant eligible for services under the Lanterman Developmental Disabilities Services Act?

EVIDENCE RELIED UPON

Documents: FDLRC Exhibits 1 through 8; Claimant's Exhibit A.

Testimony: Renee Kim, Psy.D.; Maria Tapia-Montes; Hasmig Mandossian; Claimant.

FACTUAL FINDINGS

Parties and Jurisdiction

1. FDLRC determines eligibility and provides funding for services to persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Lanterman Act), among other entitlement programs. (Welf. & Inst. Code, § 4500 et seq.)¹

2. Claimant is a 58-year-old woman. In August 2015, she asked FDLRC to provide services to her under the Lanterman Act.

3. FDLRC evaluated Claimant and determined she was not eligible for services, because she did not have a developmental disability as defined in the Lanterman Act. (See § 4512, subd. (a).) FDLRC mailed her written notice of the determination on January 26, 2016.

4. On February 26, 2016, Claimant submitted a fair hearing request to FDLRC.²

Claimant's Background

5. Claimant grew up and lives in the Los Angeles area, and is a graduate of California State University – Northridge. She lives with her husband, whom she married in 1984. She is unemployed, but has worked in the past, including as a federal government program clerk and typist. She took a disability retirement from that job in 1997, after working there six years. She and her husband have no children, and jointly own their home. Her husband works and she receives Social Security disability benefits, and they use the combined income to pay their mortgage and other expenses.

6. Claimant has a history of anxiety symptoms, depression, and Attention-Deficit/ Hyperactivity Disorder (ADHD). She sees a psychiatrist for her mental health issues, and takes psychotropic medications for them. In June 2014, she started seeing a psychologist who diagnosed her with Autism Spectrum Disorder and Persistent Depressive Disorder, as defined in the Diagnostic and Statistical Manual for Mental Disorders, Fifth

¹ Undesignated statutory references are to the Welfare and Institutions Code.

² Claimant personally delivered the request to FDLRC on February 26, 2016, but FDLRC told the Office of Administrative Hearings the request was received on March 1, 2016. Due to the error, the hearing was one day late; the deadline was April 18, 2016. (See § 4512, subd. (a) [“The fair hearing shall be held within 50 days of the date the hearing request form is received by the service agency. . . .”].) But there is still jurisdiction to proceed, because nothing in the Lanterman Act suggests the deadline is “mandatory in the jurisdictional sense.” (See *Bd. of Education v. Sacramento County Bd. of Education* (2001) 85 Cal.App.4th 1321, 1328.)

Edition (DSM-5). She requests services from FDLRC based on the psychologist's diagnosis, and also because she reports having seizures from the 1990's until at least 2013. Her last seizure in 2013 occurred when she "ingested too much cannabis medicinally."

FDLRC's Assessments

7. After receiving the request for services, Mercedes Shamlo, an Assessment Coordinator for FDLRC, performed a psychosocial assessment of Claimant on September 16, 2015. During the two-hour interview, Claimant displayed good eye contact, attention, and focus, and provided appropriate responses. She reported that she drives, runs errands, cooks meals, divides chores with her husband, and makes her own medical appointments. But she also reported being disorganized and a "hoarder," and having trouble remembering her appointments and finishing tasks. She considers herself unable to read facial or body expressions very well, and believes she has always been socially awkward, gullible, and unable to understand nonliteral communication. She also reported seeing a psychiatrist at age nine for odd mannerisms, including becoming "catatonic" at times, rocking back and forth, and becoming fixated on certain things like toys and cartoon characters. The psychiatrist reportedly diagnosed her with depression due to her idiosyncrasies.

8. Ms. Shamlo recommended psychological testing to assess Claimant's eligibility more fully. Renee Kim, Psy.D., assessed Claimant for FDLRC on October 28 and November 11, 2015, administering four tests: the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV), the Vineland Adaptive Behavior Scales – Second Edition Survey Interview Form (VABS-II), the Street Survival Skills Questionnaire (SSSQ), and the Autism Diagnostic Observation Schedules, Module 4 (ADOS-II). The WAIS-IV provides a measure of overall cognitive functioning (Full Scale IQ), as well as four index scores: Verbal Comprehension, Perceptual Reasoning, Working Memory, and Processing Speed. The VABS-II assesses adaptive functioning, including communication, daily living, and socialization skills. The SSSQ assesses a person's ability to live independently in the community. The ADOS-II is a standardized assessment of a person's communication, reciprocal social interaction, imagination, and creativity, and allows the assessor to observe behaviors identified as important to the diagnosis of Autism Spectrum Disorder.

9. On the WAIS-IV, Claimant's Full Scale IQ was 90, placing her in the low end of the Average range. Her index score for Processing Speed was 74, in the Borderline range, but her other three index scores were in the Low Average or Average range. On the VABS-II, her Adaptive Behavior Composite score was 74, in the Moderately Low range, at the 4th percentile. On the SSSQ, her Total Survival Skills Quotient was 103, in the Average range. According to the SSSQ description, persons in the Average range generally have the basic skills of independent living (e.g., ability to prepare meals, clean, use public transportation, etc.), and have at least a basic knowledge of health, safety, and first aid.

10. On the ADOS-II, Claimant's Communication and Reciprocal Social Interaction scores were 1 and 3, respectively. The combined score of 4 is below the autism

spectrum cutoff of 7. Her Stereotyped Behaviors and Restricted Interests score was 0, because Dr. Kim observed no such behaviors or interests.

11. Like Ms. Shamlo, Dr. Kim noted Claimant made good eye contact and was attentive during the assessments. She also displayed social insight and varied facial expressions to communicate, and initiated and reciprocated interaction. She spoke in complete sentences with appropriate grammar, used gestures paired with vocalizations, and did not present with stereotyped language.

12. Based on the assessments, Dr. Kim determined Claimant did not meet the criteria for Autism Spectrum Disorder. Instead, Dr. Kim diagnosed Claimant with anxiety symptoms and ADHD “by history.” Dr. Kim was aware of the Autism Spectrum Disorder diagnosis of Claimant’s psychologist, but had no documentation of the symptoms observed or diagnostic criteria used. At the time, FDLRC only had a three-sentence letter from Claimant’s psychologist, Mariah R. Gomez-Falcon, Ph.D., stating: “This is to confirm that [Claimant] has been consistently participating in weekly, individual psychotherapy with me since June 9, 2014. I have diagnosed her with Autism Spectrum Disorder If you would like more information about this patient, please call me”

13. On January 20, 2016, a four-person FDLRC eligibility team met to review Claimant’s request for services. The team included an Assistant Director of Intake, an Intake Specialist, a psychologist, and a physician. The team concluded Claimant was ineligible for services because she did not have a developmental disability as defined in the Lanterman Act.

Claimant’s Evidence

14. At the hearing, Claimant provided another letter from her psychologist, stating Claimant has Autism Spectrum Disorder and Persistent Depressive Disorder. The two-page letter from Dr. Gomez-Falcon is dated March 8, 2016, but Claimant did not provide it to FDLRC until the day of the hearing.³ The letter states Claimant “clearly” meets the criteria for Autism Spectrum Disorder, including “persistent deficits in social communication and social interaction across multiple contexts.” According to Dr. Gomez-Falcon, Claimant displays difficulty with nonverbal communication, eye contact, gestures, and facial expressions. She also has restricted and repetitive patterns of interest or activities, such as earthquakes, political figures, and physical deformities. In addition, she struggles with sensory input, such as loud noises, strong odors, and certain tactile input. While she has learned to compensate for those deficits, as she did during Dr. Kim’s assessments, the deficits are still there.

15. Claimant testified she has always had a “disconnect” with people, resulting in a “very difficult life.” She reported being bullied and abused as a child due to her “odd”

³ The letter was admitted into evidence over FDLRC’s objection in the interest of justice, despite the tardy disclosure. (See § 4712, subd. (d).)

behaviors. She cannot find or keep a job, and has had little success seeking employment through the California Department of Rehabilitation. She has trouble interpreting nonverbal cues, and with people misunderstanding her as lazy or apathetic. Her main goal is to find a job, so she can contribute more to her household expenses.

Testimony of Renee Kim, Psy.D.

16. Dr. Kim testified by phone without objection, and reiterated her determination Claimant does not have Autism Spectrum Disorder. She testified she made several attempts to contact Dr. Gomez-Falcon by phone before the hearing, without success. She did not comment on Dr. Gomez-Falcon's March 8, 2016 letter, because Claimant only produced it at the hearing.

Discussion of Evidence

17. Dr. Kim's determination Claimant does not have Autism Spectrum Disorder is more persuasive than Dr. Gomez-Falcon's determination she does. Dr. Kim better explained and supported her determination, and her testimony as to her determination was credible. Dr. Gomez-Falcon did not testify, and her letters do not indicate she evaluated Claimant using any standardized assessment for Autism Spectrum Disorder, such as the ADOS-II. The lack of evidence of a standardized assessment, and the limited detail in the letters, give her diagnosis less persuasive force. Furthermore, Claimant presented no evidence her psychiatrist has also diagnosed her with Autism Spectrum Disorder. One would expect a diagnosis from both her psychiatrist and psychologist if she "clearly" has Autism Spectrum Disorder, as her psychologist asserts.

LEGAL CONCLUSIONS

1. The Lanterman Act provides facilities and services to meet the needs of those with "developmental disabilities," regardless of age or degree of disability. (§ 4501.) "Developmental disability" means a disability that originates before an individual attains 18 years of age; 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." (§ 4512, subd. (a).)

2. FDLRC determined Claimant does not have a developmental disability as defined in the Lanterman Act. Claimant disagrees, and has properly exercised her right to an administrative fair hearing. (Factual Findings 1-4; see §§ 4700-4716.) As an applicant seeking to establish eligibility for government benefits or services, the burden of proof is on her. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th

1119, 1136 [denying eligibility where an applicant’s expert opinion evidence did not “sufficiently refute” the regional center’s expert opinion evidence].) Her burden is proof by a preponderance of the evidence, because no law or statute (including the Lanterman Act) provides otherwise. (Evid. Code, § 115.)

3. Claimant did not meet her burden of proof. First, the evidence did not establish she is intellectually disabled. While she scored in the Borderline range on one WAIS-IV index score, her other index scores were higher, and her Full Scale IQ was on the low end of the Average range. (Factual Finding 9.) Nothing about those results suggests she is intellectually disabled.

4. Second, Claimant did not prove she has cerebral palsy or epilepsy. She reported having seizures from the 1990’s until 2013, (see Factual Finding 6), but presented no evidence any professional has linked the seizures to either condition. Absent a professional diagnosis, her reported seizures are not enough to prove she has epilepsy or cerebral palsy.

5. Third, Claimant did not prove she has Autism Spectrum Disorder. FDLRC’s evidence she does not have Autism Spectrum Disorder was better supported and more persuasive than the evidence she does. (See Factual Finding 17.)

6. Fourth, the evidence did not establish Claimant has a “disabling condition[] . . . closely related to intellectual disability or . . . requir[ing] treatment similar to that required for individuals with an intellectual disability. . . .” (§ 4512, subd. (a).) She scored in the Moderately Low range on one adaptive skills test, but other scores and her current lifestyle suggest she can live independently, and does not require treatment similar to an intellectually disabled person. (See Factual Findings 5, 7 & 9.) Moreover, adaptive deficits alone are not enough for eligibility under this “fifth category;” there must also be cognitive impairment. (*Samantha C. v. State Dept. of Developmental Services* (2010) 185 Cal.App.4th 1462, 1486-1487.) Her WAIS-IV score suggests she is not cognitively impaired. (Factual Finding 9.)

7. Because Claimant did not prove she has a developmental disability as defined in the Lanterman Act, she is not eligible for Lanterman Act services from FDLRC.

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ORDER

Claimant's appeal is denied.

DATE: May 2, 2016

Thomas Heller
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. Either party may seek judicial review of this decision in a court of competent jurisdiction within 90 days.