

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF THE EAST BAY,

Service Agency.

OAH No. 2014070032

DECISION

The undersigned Administrative Law Judge with the Office of Administrative Hearings, State of California, heard this matter in Concord, California, on September 4, 2014.

Claimant's mother, who appeared telephonically, represented Claimant at hearing. Claimant was not present.

Regional Center of the East Bay (RCEB) was represented by M. Dugan.

The record closed and the matter was submitted on September 4, 2014.

ISSUE

Whether Claimant is eligible for regional center services because he suffers from a developmental disability, or a disabling condition that is related to an intellectual disability and/or that requires treatment similar to that required for individuals with an intellectual disability, commonly referred to as the "fifth category" of eligibility, under the Lanterman Developmental Disability Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act).¹

¹ All citations are to the Welfare and Institutions Code, unless otherwise specified.

FACTUAL FINDINGS

1. At the time of hearing, Claimant was a 17-year-old male. He will turn 18 years old in September. He resides with his mother, and his four siblings.²

2. Claimant applied to RCEB for services. In a Notice of Proposed Action dated June 16, 2014, RCEB found Claimant ineligible for services. Claimant filed a Fair Hearing Request appealing the decision.

Early History

3. According to Claimant's mother, he was born full term and his birth weight was in the normal range. His mother did not use alcohol, drugs, or tobacco during the pregnancy. His developmental milestones were in the normal range, except that he had speech delays. He also has sickle cell anemia and asthma.

4. Claimant has a history of receiving special education services. He had been placed in special day classes or day treatment programs throughout his schooling because of emotional disturbances, a speech impairment, and a specific learning disability. He did not initiate interactions with peers at school. He does not have any friends and acknowledges being taken advantage of by other teenagers in his neighborhood. He is independent in completing his personal care tasks. He uses public transportation.

5. Claimant also has a history of receiving mental health treatment, including psychotherapy. He has problems with anger, aggressive behavior, and depression. He often daydreams and "spaces out." He has a history of taking medications for "night terrors." He has been withdrawn, less talkative, and has exhibited odd behavior since his father's death in April 2013. He has a family history of mental illness, including bipolar disorder and schizophrenia. Two of his siblings have learning disabilities.

6. Claimant has a history of traumatic experiences including exposure to domestic violence directed toward his mother. At one point, Claimant and his siblings were removed from their mother's custody and placed in relative foster care because of domestic violence. Claimant was also shot at in 2010 during an incident of community violence.

Assessments

7. There was no evidence provided of any psychological assessments performed on Claimant until January 2014.

8. In January and February 2014, Claimant was assessed by Hugh Molesworth, Ph.D. Claimant had been referred to Dr. Molesworth for an evaluation of his competence to stand trial in juvenile court. Dr. Molesworth found Claimant incompetent to stand trial. Dr.

² At the time of hearing, Claimant was in custody in juvenile hall as a result of an arrest for theft.

Molesworth's assessment was based on a parent interview, a clinical interview of Claimant, and formal testing. During the clinical interview, Dr. Molesworth observed that Claimant was cooperative. His mood was dysthymic and anxious, he was tearful at times, and his eye contact was fleeting. Claimant's focus, frustration tolerance, and impulse control were adequate. His thought processes were mostly coherent. He reported a history of auditory and visual hallucinations, and suicidal thinking. He also reported excessive use of marijuana.

9. Dr. Molesworth administered the following tests to Claimant:

a. Wechsler Adult Intelligence Scale-IV (WAIS-IV) - Claimant received a Full Scale IQ score of 76. He also received a verbal comprehension score of 70, a working memory score of 83, a perceptual reasoning score of 88, and a processing speed score of 81. There is a significant discrepancy between his verbal score in the impaired range and his perceptual reasoning score in the low average range. His impaired verbal comprehension skills mean that he has difficulty understanding and processing verbal information.

b. Woodcock Johnson Test of Achievement III – Form B - Claimant received a score of 59 in reading, 61 in academic skills, 65 in letter-word identification, 65 in calculation, 76 in spelling, and 56 in passage comprehension. Overall, Claimant's academic skills are in the impaired range.

c. ASEBA – Youth Self Report/11-18, completed by Claimant, which is designed to obtain an adolescent's perception of his competencies, adaptive functioning and behavior problems. Overall, Claimant fell into the clinical range on the scales for anxious/depressed, withdrawn/depressed, social problems and thought problems. His specific test results were as follows:

Activities	39	Normal range
Social	29	Clinical range
Positive Qualities	57	Normal range
Total Competence	32	Clinical range

d. Firestone Assessment of Suicide Intent (FASI) - Claimant received a T-score of 92 which is a score in the extremely elevated range and his risk for suicide was high.

10. Dr. Molesworth concluded that Claimant has conduct disorder, disordered emotions, major depression, a history of traumatic experiences, and an emerging psychotic disorder. His pattern of mental health symptoms and behaviors are a sign of prodromal (early) phase of schizophrenia. Also, with a background of emotional disturbance, poor school achievement, and poor social adjustment, history of traumatic experiences and family chaos, it is not uncommon in such individuals to develop severe psychological disorders.

11. Dr. Molesworth's diagnostic impression of Claimant was the following under the DSM-IV³:

Conduct disorder, age of onset unclear (312.9)⁴
Major depressive disorder, moderate, recurrent (296.32)⁵
R/O major depressive disorder, with psychotic features
Post-traumatic stress disorder, chronic (309.81)⁶
Cannabis abuse disorder (305.20)⁷
R/O psychosis not otherwise specified (NOS)
R/O learning disorder NOS

12. On June 2, 2014, Claimant was assessed by Jon Bathori, Psy.D., to determine his eligibility for RCEB services. He determined that Claimant's adaptive functioning is below age-appropriateness, and concurred with Dr. Molesworth's clinical impressions that Claimant is significantly depressed. He also determined that with Claimant's substance abuse, history of trauma, suicidality, depression, and psychotic problems, Claimant should have a psychiatric consult and careful follow-up. After a course of treatment and stabilization, it may be possible to more accurately determine if the effects of his cognitive problems are related to an emotional disorder versus intellectual deficits.

13. Dr. Bathori concluded that Claimant met the DSM-V⁸ requirements for a diagnosis of borderline intellectual functioning and believed it "reasonable to conclude that his cognitively-based problems existed before his current psychiatric problems." He further concluded that Claimant was not functioning at an age appropriate level and will "need a good deal of support in order to live independently."

³DSM-IV refers to Diagnostic and Statistical Manual of Mental Disorders, 4th Edition.

⁴Conduct disorder is defined as a mental disorder, usually diagnosed when a child seriously misbehaves with aggressive or nonaggressive behaviors against people or property that may be characterized as destructive, threatening, deceitful, or dishonest, and may include stealing.

⁵Major depressive disorder is defined as a mental disorder where an individual experiences episodes of persistent and pervasive emotional depression.

⁶Post-traumatic stress disorder is defined as a mental disorder where an individual has been exposed to a traumatic event and develops anxiety symptoms and re-experiencing of the event.

⁷ Cannabis abuse disorder is defined as a mental disorder where an individual abuses cannabis for the purpose of the effect on the central nervous system.

⁸DSM-V refers to Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (2013).

Expert Opinion

14. Paul Fajita, M.D., is a developmental pediatrician with a subspecialty in behavioral pediatrics. He has worked with regional centers for over 20 years. He was a member of the eligibility team that reviewed Claimant's request for service and reviewed the records identified in Findings 7 through 8.

15. Dr. Fajita agreed with Dr. Molesworth's diagnosis of Claimant's mental health disorders. He interpreted Claimant's test results to be consistent with a learning disability as Claimant also received special education services through his school. He found that Claimant has a significant degree of psychosis that makes him quite disabled, and his ability to understand is quite impaired. However, the "qualitative disturbances in [his] thinking" is not a condition eligible for regional center services. Claimant's symptoms are most consistent with severe mental health disorders.

16. Dr. Fajita described the difference between a mental health disorder and intellectual disability. For an intellectual disability the condition is apparent at a fairly young age, and one has limited cognitive abilities in thinking, emotions, behavior, which is marked by difficulties in learning. There is no treatment for intellectual disability. A mental health disorder has abnormalities in behaviors or emotions which can have later onset. Treatment for a mental health disorder involves medical and psychological treatment. Ultimately, in his opinion, Claimant does not have a condition closely related to an intellectual disability or that requires treatment similar to that required by individuals with an intellectual disability.

17. Dr. Sheryll Casuga, licensed clinical psychologist, is a member of RCEB's eligibility team. Dr. Casuga concurs with Dr. Molesworth's and Dr. Fajita's conclusions. Claimant fits more of a mental health profile. In addition, his test scores are generally above the range of someone with an intellectual disability. The types of services to be provided for significant mental health disorder should come through the mental health system, and not through a regional center which serves individuals with intellectual disabilities.

18. The expert testimony was credible and persuasive. No expert testimony was offered to rebut their medical opinions.

Claimant's Evidence

19. There were no records provided by Claimant.

20. Claimant's mother testified at hearing. She describes him as a "great kid." He was always a "reserved kid" who seemed to be "on a level of his own." Because of a domestic violence incident, child protective services removed Claimant from the home and placed him into foster care when he was seven years old and he did not return home until he was 13 years old. Claimant had only met his father three times in his life, and just when they were trying to establish a relationship, his father died. She describes his mental stress to have been exacerbated by his father's death.

21. At least one doctor has told Claimant's mother that he is severely depressed and has behavioral problems. Claimant needs help to deal with his emotional issues. Claimant and his mother have a difficult time communicating with each other. She believes that he could benefit from RCEB services. She has not yet applied for Social Security Disability for Claimant or sought other mental health services.

Intellectual Disability

22. The DSM-V defines "intellectual disability" as follows:

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social and practical domains. The following three criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that results in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

As set forth in the DSM-V, "The essential features of intellectual disability (intellectual developmental disorder) are deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual's age, gender, and socioculturally matched peers (Criterion B).

23. The DSM-V also distinguishes intellectual disability from communication and specific learning disorders: "These neurodevelopmental disorders are specific to the communication and learning domains and do not show deficits in intellectual and adaptive behavior." There is also a requirement that the intellectual deficits must be "general" in nature in order to meet the definition of an intellectual disability. In other words, an individual must display global intellectual deficits to be identified as having an intellectual disability under the DSM-V.

24. Claimant does not have a diagnosis of intellectual developmental disorder. He does have a diagnosis of borderline intellectual functioning which is defined in the DSM-V as follows:

This category can be used when an individual's borderline intellectual functioning is the focus of clinical attention or has an impact on the individual's treatment or prognosis. Differentiating borderline intellectual functioning and mild intellectual disability (intellectual developmental disorder) requires careful assessment of intellectual and adaptive functions and their discrepancies, particularly in the presence of co-occurring mental disorder that may affect patient compliance with standardized testing procedure (e.g., schizophrenia or attention-deficit/hyperactivity disorder with severe impulsivity).

Fifth Category

25. It is undisputed that Claimant has impairments in cognitive and social functioning.

26. The intellectual testing of Claimant has shown a wide degree of variation in the subtests of the various standardized tests with scores ranging from low to average levels of ability. This is not indicative of "global intellectual deficits" because his deficits are not general in nature. Claimant is on the borderline of having an intellectual disability, but the significant variations in Claimant's intellectual testing preclude a finding that Claimant has a condition that is similar to an intellectual disability. From the evaluations conducted, Claimant's cognitive abilities appear to be significantly impacted by his severe mental health disorders. And as the experts testified at hearing, Claimant's severe mental health disorders (and learning disability) are not comparable to an intellectual disability. Claimant did not provide any medical expert evidence to rebut NBRC's medical evidence.

27. When all the evidence is considered, Claimant failed to establish that he has an intellectual disability. While Claimant may have a low level of adaptive functioning, the evidence did not establish that it is due to a disabling condition that is closely related to intellectual disability or requires treatment similar to that required for individuals with an intellectual disability. Instead, the evidence established that Claimant has severe mental health disorders and a learning disability which are not considered to be eligible conditions under the Lanterman Act.

28. RCEB's assessment team recommends comprehensive and supportive mental health services, including psychiatric care, for Claimant.

LEGAL CONCLUSION

1. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. (§ 4501.) The Act defines a developmental disability as:

[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. . . . [A developmental disability] 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. A developmental disability not resulting from one of the four listed conditions is commonly referred to as a “fifth category” developmental disability. Eligibility under this category may be found despite normally disqualifying IQ scores, where it can be shown that an individual is in fact functioning at an adaptive and cognitive level as if he were developmentally disabled, and/or that the treatment he requires is consistent with that needed by an individual with developmental disabilities.

3. Handicapping conditions that consist solely of psychiatric disorders do not qualify as developmental disabilities under the Lanterman Act. (Cal. Code Regs., tit. 17, § 54000, subd. (c).) This is the case even when serious problems with social and intellectual functioning exist. This is also the case even when social and intellectual functioning have become seriously impaired as an integral manifestation of the psychiatric disorders.

4. Neither the Lanterman Act nor its implementing regulations assign burdens of proof. In this case, Claimant asserts that he is eligible for regional center services. Claimant has the burden of proving that he has a qualifying condition. The standard of proof is preponderance of the evidence. (Evid. Code, § 115.)

5. Claimant has not met his burden of proof. As set forth in the Factual Findings, Claimant did not establish that he qualifies for services under the Lanterman Act because he has a developmental disability or that he is an individual with a disabling condition that is

closely related to an intellectual disability or requires treatment similar to that required for individuals with an intellectual disability.⁹ He has severe mental health disorders and a learning disability which are not covered under the Lanterman Act. Consequently, his appeal must be denied.

6. Because of his serious mental health disorders, Claimant requires services that are in many respects similar to those needed by some individuals with intellectual disabilities. However, this is insufficient to entitle him to regional center services, but may qualify him for services through other entities that assist individuals with mental health problems.

ORDER

Claimant's appeal is denied. Claimant is not entitled to regional center services.

DATED: September 18, 2014

_____/s/_____
R. Brown
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Judicial review of this decision may be sought in a court of competent jurisdiction within ninety (90) days.

⁹ Given that Claimant has failed to establish that he is eligible under the fifth category, there is no need to address the issue of whether his condition constitutes a substantial disability.