

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency.

OAH No. 2014030232

DECISION

This matter was heard on September 24, 2014, at Los Angeles, California, before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. The Frank D. Lanterman Regional Center (Service Agency or FDLRC) was represented by Pat Huth, Waterson & Huth LLP. Claimant was represented by his cousin, L.B.¹

Evidence was received by documents and testimony. The record was closed and the matter was submitted for decision on September 24, 2014.

ISSUE

The parties agreed that the following issue is to be resolved: Is Claimant eligible to receive services from the Service Agency?

FACTUAL FINDINGS

1. Claimant was born in August 1956 and is 58 years old. He contends that he suffers from mental and developmental disabilities from birth and is eligible for services from the Service Agency.

¹ Initials are used to maintain privacy for Claimant and his family.

2. In a letter dated October 24, 2012 (ex. 2), the Service Agency notified Claimant that he was not eligible for services.

3. L.B., who is Claimant's cousin and conservator, submitted a Request for Fair Hearing that resulted in this hearing.

4. A statute and some regulations relating to eligibility apply to Claimant's request for services. There are five developmental disabilities that would make someone eligible for services under Welfare and Institutions Code² section 4512, subdivision (a), which states, as relevant here: " 'Developmental disability' means a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . [T]his term shall include intellectual disability, ³cerebral palsy, epilepsy and autism . . . [and] 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." This last category is known as the fifth category.

As relevant here, California Code of Regulations (CCR), title 17, section 54000, defines "developmental disability" as a disability attributable to one of these five eligible disabilities that originates before age 18, is likely to continue indefinitely, and constitutes a substantial handicap. Excluded are handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or disabilities that are solely physical in nature.

5. In summary, the Service Agency contends that Claimant may suffer other conditions, including a learning disability and/or psychiatric disorders, but does not have a diagnosis of intellectual disability, autism, epilepsy or another eligible condition which manifested before age 18, and is not eligible for services.

6. There is no evidence that Claimant suffers from cerebral palsy. The other eligible disabilities will be discussed. A base level understanding of intellectual disability will help place in context the evidence of Claimant's behaviors, test scores, evaluations and diagnoses.

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² All statutory references are to the Welfare and Institutions Code, unless otherwise noted. Section 4500 et seq. are referred to as the Lanterman Developmental Disabilities Services Act, or Lanterman Act.

³ The statute was amended in 2013 to change the phrase "mental retardation" to "intellectual disability." Most of the evidence in this case uses the older phrase, mental retardation.

Eligibility Guidelines For Intellectual Disability

7. The Diagnostic and Statistical Manual of Mental Disorders is a well respected and generally accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders. The first edition was published in 1952 and it has undergone various revisions. The most recent edition, the fifth, is referred to as the DSM-5 and was published in May 2013. The prior editions referred to the diagnosis of mental retardation. In the DSM-5, this is referred to as intellectual disability.

8. The DSM-5 states: “[T]he diagnosis of intellectual disability (intellectual developmental disorder) is revised from the DSM-IV diagnosis of mental retardation. The significant changes address what the disorder is called, its impact on a person’s functioning, and criteria improvements to encourage more comprehensive patient assessment.”

(DSM-5 Intellectual Disability Fact Sheet, p. 1.⁴)

9. The DSM-5 lists criteria which must be met to provide a specific diagnosis of Intellectual Disability, as follows:

“Intellectual disability (intellectual development 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, and practical understanding confirmed by both clinical assessment and individualized, standardized intelligence testing.

“B. Deficits in adaptive functioning that result 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, and across multiple environments, such as home, school, work, and recreation.

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

[¶] . . . [¶]

“Specify current severity (see Table 1):

317 (F70) Mild

318.0 (F71) Moderate

⁴ Source:

<http://www.dsm5.org/Documents/Intellectual%20Disability%20Fact%20Sheet.pdf>

318.1 (F72) Severe

318.2 (F73) Profound [Bolding in original.]

(DSM-5, p. 33.)

Fifth Category Eligibility Guidelines

10. As noted above, the fifth category of eligibility in section 4512, subdivision (a), is developmental disabilities that are “found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. . . .” In 2002, the Association of Regional Centers promulgated “Guidelines for Determining ‘5th Category’ Eligibility for the California Regional Centers” (Guidelines). The Guidelines state that for an individual’s condition to be considered “closely related to mental retardation,” the individual’s general IQ score should fall within the low borderline range of intelligence, i.e. ranging from 70-74, and that the higher the score above 70, the less similar to mentally retarded a person should be considered. According to the Guidelines, the higher an individual’s IQ score rises above 70, the more increasingly essential it is to demonstrate substantial adaptive deficits, and that these deficits are “clearly related to cognitive limitations.” The Guidelines also dictate that, where an individual has an IQ score in the low borderline range of IQ 70-74, but with discrepant subtest scores such that any subtest score exceeds 85, “the more difficult [it is] to describe the individual’s general intellectual functioning as being similar to that of a person with mental retardation.” (Id. at p. 2.) “In some cases, these individuals may be considered to function more like persons with learning disabilities than persons with mental retardation.” (Ibid.)

11. With respect to eligibility under the alternate language in the fifth category, as an individual who “requires treatment similar to that required for individuals with intellectual disability,” the Guidelines state that the eligibility team should consider the nature of the training and intervention required for an individual who does have global cognitive deficits, for example, in pertinent part, that “individuals who require long term training with steps broken down into small, discrete units taught through repetition may be eligible.” (Id. at p. 3.)

Claimant’s History, Behavior and Test Results

12. Claimant’s cousin, and her mother (Claimant’s aunt), describe Claimant, as a child, as not being able to keep up with his cousins. Claimant suffered from asthma but, moreover, he did not seem to understand things at the same level of the other children his age. When Claimant was older and was living with his infirm mother, he had to be repeatedly told how to do things, such as how to maneuver her wheelchair or help his mother with stairs. L.B. added that she also saw these limitations by comparison with the advancement of her own children.

13. L.B. added that Claimant's mother treated him as if he were normal and, despite the urging of family members and a social worker, Claimant's mother did not want to have Claimant evaluated. L.B. believed it was due to the fear on the part of Claimant's mother that Claimant would be taken away from the family home.

14. Claimant did not develop friendships, was isolated, and never had sustained employment. Eventually, the family became concerned that Claimant and his mother should not care for each other without help. The home was dirty, with feces and rodents. The family called for intervention and Claimant's mother was placed in a nursing home where she recently died at age 100. Claimant stayed first with a family from the church he attended and, after about six months, he was placed in the Alexandria Care Center in February 2013, where he presently resides and receives treatment.

15. Claimant is under the care of Dr. Kalindjian at the Alexandria Care Center. Medical records from the Alexandria Care Center (ex. B) include numerous handwritten treatment notes indicating "MR," among other things. A diagnosis sheet includes mental retardation as well as other medical conditions, including seizures, and a psychiatric condition, schizophrenia. A typed list of physician orders contains a list of diagnoses, again including medical conditions, as well as paranoid schizophrenia and "epilep NOS W/O Intr Epil," the meaning of which is unclear. This list has no reference to either MR or mental retardation. The same list of diagnoses appears on the face sheet of the medical records.

16. School records for Claimant (ex. A) are often difficult to read due to the poor quality of the copies. The records reveal that Claimant attended a high school that was traditionally for handicapped students (Whidney High School) and that he had a mix of grades, some passing, some failing and some that cannot be interpreted. Handwritten notes in the records are also hard to read, however some indicate that he seemed unable to follow simple directions, did not respond to group situations until singled out, had difficulty with motor control and coordination, and needed help with spoken language. However, the scant school records provide little information about the reasons for Claimant's placement at Whidney High School and do not include any definitive diagnosis, such as mental retardation or autism that satisfies the requirements of the Lanterman Act.

17. In March 2005, Claimant was evaluated by Thompson Kelly, Ph.D., a psychologist, at the request of the Westside Regional Center, to determine if he was eligible for services. At that time Claimant lived with his mother and was referred by a reverend at his church. Claimant was unaccompanied and had no records with him, so Dr. Kelly's only source of information was Claimant. Claimant reported he was placed in special education since kindergarten to help with his academics. Dr. Kelly noted Claimant could be understood and spoke in complete sentences, however he exhibited some unusual fluctuations in tone, volume and rhythm of his speech. Claimant was somewhat concrete at times and missed subtle innuendos or humor in speech. He made some unusual and illogical statements, had some problems remembering at times, and sometimes answered a question by referencing information that would have answered a previous question. Dr. Kelly noted there was an

absence of the types of behaviors and symptoms that would suggest an autism spectrum diagnosis.

18. Dr. Kelly administered three tests, including the Wechsler Adult Intelligence Scale-III (WAIS-III) and obtained the following outcomes: Verbal IQ 81 (low average range), Performance IQ 68 (mildly delayed range), Full Scale IQ 73 (borderline range). He noted the significant discrepancy between the Verbal and Performance IQ's and explained it could be due to a learning problem or cerebral impairment, or because Claimant reported an unspecified difficulty with his vision. The following scores were obtained on the Wide Range Achievement Test-3: Reading Recognition, 105 (post-high school level; standard range); Arithmetic, 82 (sixth grade level; low average range). The following scores were obtained on the Vineland Adaptive Behavior Scales (Vineland) in these skill domains: Communication, 74; Daily Living Skills, 106; Socialization, 81.

19. Dr. Kelly found no basis for a diagnosis of autism spectrum disorder and did not find a sufficient basis of a diagnosis of mental retardation (now intellectual disability). He reported that Claimant appeared to present with a learning disability in the area of non-verbal learning and the possibility of organic involvement.

20. FDLRC referred Claimant for evaluation by Thomas Carrillo, Ph.D., who evaluated him on October 30, 2013. His report is found in exhibit 5. Dr. Carrillo was asked to evaluate whether there were developmental delays attributable to mental retardation or an Autistic Spectrum Disorder. L.B. accompanied Claimant and provided information. Dr. Carrillo reviewed Dr. Kelly's report and noted Claimant had a history of learning disability and suspected cognitive delays. Dr. Carrillo noted that Claimant had never experienced a seizure, and that there was no information concerning his childhood development.

21. Dr. Carrillo noted Claimant presented with difficulties with processing information, with expressive language, and with formulating information in a coherent manner. Dr. Carrillo administered the WAIS-IV and obtained the following scores: Verbal Comprehension IQ Composite Score of 76, Perceptual Reasoning IQ Composite Score of 69, Working Memory Score of 77, Processing Speed Score of 74 and a Full-Scale IQ Composite Score of 69. Dr. Carrillo characterized Claimant's cognitive abilities as within the borderline range of delay. As did Dr. Kelly, Dr. Carrillo noted that Claimant sometimes responded to a question with an answer that was appropriate to a previous question.

22. Dr. Carrillo administered the Vineland, obtained the following results, and included comments. Communication: Standard Score of 70, which is within the borderline range of delay; Receptive Language Age Equivalent of 9 years, 6 months and an Expressive Language Age Equivalent of 8 years, 0 months, suggesting that Claimant demonstrated delays in both receptive and expressive language. However, Dr. Carrillo opined that communication delays were secondary to Claimant's cognitive delays, and his communication abilities and cognitive potential are both within the borderline range of delay. Daily living skills: Standard Score of 28 which is within the severe range of delay. For his adaptive and social skills,

portions of the Vineland established that Claimant had difficulty making change or purchasing items. In the area of Socialization, Claimant received a Standard Score of 20, which is also within the severe range of delay. Dr. Carrillo commented that Claimant's ability to function independently in social and daily living skills had diminished over time. Claimant was able to develop and maintain friendships, but had difficulty with responding to the successes of others or understanding the wants and desires of others. He was able to develop and maintain friendships and read social cues, but has only emerging skills in being able to avoid risky situations or follow through on arrangements. Comparing three areas of adaptive functioning, including Communication, Daily Living Skills and Socialization Skills, Claimant was seen as having overall adaptive abilities within the moderate range of delay with an Adaptive Behavior Composite of 37. In conclusion Dr. Carrillo repeated that Claimant's cognitive and communication skills are the borderline range, and he has severe delays in socialization and daily living skills, which may be due to his failing health. Dr. Carrillo made a diagnosis of Borderline Intellectual Functioning.

23. Dr. Carrillo had not seen the school records or medical records before the hearing. After reviewing the school records, he testified that Claimant was in special education programs and his grades were not normal. However, Dr. Carrillo pointed out that the records did not state why Claimant was receiving special education services and that the information was suggestive of a learning disability, not a developmental disability.

24. With respect to the medical records, Dr. Carrillo correctly noted that there were no documents, notes or testing indicating why the reference to mental retardation was included. He questioned the ability of Dr. Kalindjian, a medical doctor, to diagnose mental retardation when that diagnosis relies upon the administration of standardized tests, such as an IQ test, which should be performed by a psychologist.

25. As part of the process to determine whether Claimant was eligible for services, FDLRC determined that he had not completed the intake procedure at WRC and therefore no final determination of eligibility had been made. The school records were reviewed. Wendy Leskiw, M.D., reviewed the medical records. She noted they included reference to a first time grand mal seizure on February 12, 2013. However, Claimant was diagnosed with aspiration pneumonia and hyponatremia, a low sodium concentration in the blood, was not diagnosed with seizure disorder at that time and was not placed on anti-convulsants.

26. The eligibility team for FDLRC met on January 22, 2014. The team included Dr. Yadira Navarro, who had met with and interviewed Claimant and L.B. and prepared a psychosocial evaluation. She has worked for FDLRC for 15 years. The team also included Dr. Leskiw, who reviewed the medical records as noted above; Hasmig Mandossian, the Assistant Director of Intake, who has worked for FDLRC for 33 years; and Mandana Moradi, Psy.D.

27. The letter denying eligibility (October 24, 2012, exhibit 2), is signed by Navarro and Mandossian. The bases for denial are the diagnosis of Borderline Intellectual Functioning, a history of psychiatric issues, and the absence of records to substantiate the presence of

cognitive/intellectual deficits prior to age 18.

28. The preponderance of the evidence supports the Service Agency's decision to deny eligibility for Claimant to receive services. Claimant has not established that he is eligible to receive services or that a further assessment is required.

LEGAL CONCLUSIONS AND DISCUSSION

Pursuant to the foregoing factual findings, the Administrative Law Judge makes the following conclusions of law and determination of the issue:

1. Throughout the applicable statutes and regulations (sections 4700 - 4716, and CCR, title 17, sections 50900 - 50964), the state level fair hearing is referred to as an appeal of the regional center's decision. Particularly in this instance, where Claimant seeks to establish his eligibility for services, the burden is on Claimant to demonstrate that the Service Agency's decision is incorrect. Under Evidence Code section 500, the burden of proof is on the party making a claim for relief.

2. Section 4512 lists specific categories for possible eligibility. The statute and supporting regulations also require that the condition must constitute a substantial disability to that individual and that it must be evidence before age 18. Further, the regulations exclude conditions that are solely psychiatric disorders or solely learning disabilities.

3. The Full Scale IQ of 69 obtained by Dr. Carrillo raises the potential that Claimant may meet the eligibility requirements for mental retardation or the fifth category. However, Dr. Carrillo's diagnosis of Borderline Intellectual Disability is also supported by those scores. Unfortunately, the paucity of information about Claimant's early development negatively affects the ability to be more definitive about his condition. It is likely that Claimant's mother limited the types of evaluations which might otherwise have been done.

4. More specifically, although Claimant received special education services,, and the school records provide some information about his difficulties in school, there is not enough information to know why Claimant received those services. It could have been for reasons related to a developmental disability, which would support a finding that he is now eligible for Lanterman Act services. Or, Claimant may have received special education services due to a learning disorder or other psychological condition – he has a present diagnosis of schizophrenia – which would not make him eligible for Lanterman Act services.

5. Similarly, the medical records are not sufficient to establish a seizure disorder as a basis for eligibility. There was one seizure noted, but no diagnosis of seizure disorder, and no prescription of medication to prevent further seizures. The references to mental retardation and MR are not enough, without proper supporting tests or other documentation, to establish that Claimant suffers from mental retardation/ intellectual disability. As to the fifth category, there

is again not enough information to determine the nature of Claimant's disabilities prior to age 18 or that his disabling condition is closely related to intellectual disability, or, rather, is caused by a learning disorder or other disorder that is not eligible. Also as to the fifth category, although there is some evidence that Claimant requires repetition to accomplish tasks, that information was limited.

6. The present body of information is suggestive that Claimant might suffer from an eligible disability, but it is not enough. The conclusions reached by Dr. Kelly, Dr. Carrillo and the FDLRC eligibility team that Claimant does not have a developmental disability are supported by the available documents and evaluations. See Factual Findings 4 through 28.

7. The preponderance of the evidence supports the Service Agency's decision to deny eligibility for Claimant to receive services at this time.

ORDER

Claimant's appeal of the Service Agency's determination that he is not eligible for services from the Service Agency is denied.

DATED: October 2, 2014

_____/s/_____
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.