

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

ANTHONY R.

Claimant,

vs.

CENTRAL VALLEY REGIONAL
CENTER,

Service Agency

OAH No. N 2005010068

DECISION

Administrative Law Judge M. Amanda Behe, Office of Administrative Hearings, State of California, heard this state level fair hearing in Fresno, California, on May 24, 2005.

Claimant Anthony R. was represented by Barbara W., his mother.

Amy Westling, Client Appeals Specialist, represented Central Valley Regional Center, the service agency.

The matter was electronically recorded and the evidentiary record closed on May 24, 2005. The matter was submitted on May 24, 2005.

ISSUES IN DISPUTE

Is claimant eligible for regional center services as a person with mental retardation or a disabling condition closely related to mental retardation or requiring treatment similar to that required for people with mental retardation?

FACTUAL FINDINGS

1. Anthony R. (claimant) was born on May 13, 1991, and is 14 years old. He resides in Fresno with his mother and two brothers.

2. Claimant applied for regional center services in 2000. Effective April 25, 2000, the application was denied on the basis of a psychological evaluation, by Dr. Mark Barnes of the Sullivan Center, which stated that claimant is not mentally retarded and has average nonverbal intelligence.

3. On June 30, 2004, claimant's mother filed another request for services at the suggestion of his Fresno County Mental Health psychiatrist.

Effective November 17, 2004, the regional center provided a Notice of Proposed Action which stated that, pursuant to Welfare and Institutions Code section 4512, the case would be closed because claimant does not have mental retardation, cerebral palsy, autism or epilepsy. It further noted that claimant's IQ precludes the finding of a condition similar to mental retardation and he does not require services similar to someone with mental retardation or have three noted areas of substantial handicaps. The Notice also stated that claimant is functioning in the range of Low Average Perceptual Reasoning Ability, and has a Cognitive Disorder Not Otherwise Specified as diagnosed by Dr. Howard Glidden.

4. Claimant's mother filed a timely and proper Fair Hearing Request which was received by the regional center on December 18, 2004. The Request stated that she needed help with claimant, that he has "major problems," is "35 to 45% mental retarded," has other behavior and speech and language problems and ADHD, and is like a 3½-4 year old child.

5. The application for regional center services was considered by the regional center's Assessment Team. The team reviewed records and reports regarding claimant including a neuropsychological assessment by Howard J. Glidden, Ph.D.; the Fresno County Department of Children and Family Services progress notes from January 2 to September 20, 2004; the Integrated Psycho-Educational Report prepared for the San Jose Unified School District; a Child Development Consultation by Sharon Baker, PNP; and the letter report of Michael Danovsky, Ph.D.

The Assessment Team found that claimant does not suffer from autism, mental retardation or a condition similar to or requiring similar treatment as mental retardation within the parameters of Welfare and Institutions Code section 4512, subdivision (a). The team concluded that based on that finding claimant was ineligible for regional center services.

6. Marilyn Stewart, Ph.D., is the regional center's clinical psychologist. Her training includes two years of post-doctoral experience in neuropsychology. Dr. Stewart conducts psychological evaluations for the regional center, reviews the reports of other professionals, and participates in eligibility staffing as a member of the Assessment Team. She is familiar with the qualifying criteria for regional center services.

7. Dr. Stewart testified that Dr. Glidden's report of June 2, 2004, summarizes the results of previous testing, which noted claimant's relatively low scores except for his results on mathematical computation. Dr. Glidden conducted a mental status examination and

administered additional testing including the Wechsler Intelligence Scale for Children-IV, the Wide Range Achievement Test-III, the Beery Picture Vocabulary and Visual Motor Integration tests, Sentence Memory Test, Vineland Adaptive Behavior Scales-Interview Edition, etc.

Dr. Glidden reported that claimant:

... is currently functioning variably within the range associated with Extremely Low intellectual abilities. Verbal comprehension measures are inferior to perceptual-organizational (non-verbal) measures, revealing evidence of a specific significant language disability. Subtest scores ranged from 2 to 10, and from the Extremely Low to Average levels of ability. Again, Anthony had the greatest degree of difficulty on subtests requiring language-processing abilities. He had the greatest degree of success on non-verbal measures that reward associative logic.

Dr. Glidden reported claimant's results on the Wide Range Achievement Test-III, and noted that utilizing norms based on age, "the discrepancy between Anthony's Full Scale IQ of 66 and academic achievement does not support evidence of a specific learning disability."

Dr. Glidden opined that the intellectual testing of claimant revealed that he is functioning variably within the range associated with Extremely Low intellectual abilities. Based on the mother's report, medical and school reports, and his evaluation, Dr. Glidden diagnosed that claimant has the DSM-IV¹ diagnoses of: Behavior Disorder, Not Otherwise Specified, Cognitive Disorder, Not Otherwise Specified, Phonological Disorder, Attention Deficit/Hyperactivity Disorder (ADHD) and Learning Disorder, Not Otherwise Specified. Dr. Glidden recommended that claimant be considered for regional center advocacy services, and noted his current school placement is the most appropriate setting.

With regard to Dr. Glidden's IQ testing, Dr. Stewart testified that like claimant's prior scores the results do not indicate mental retardation. Mental retardation is a global deficit, and because claimant has close to average non-verbal skills he does not have a global deficit. Neither Dr. Glidden's DSM-IV diagnoses nor the ICD 9 diagnoses of Brain Injury, Dysarthria and ADHD establish that claimant is eligible for regional center services.

8. In April 2002 San Jose Unified School District assessment team member Maria Arias diagnosed claimant's intellectual functioning. During the testing claimant was noted to be cooperative, well-behaved, and inquisitive. He asked appropriate questions and demonstrated appropriate pragmatic skills including carrying on conversations.

¹ The Diagnostic and Statistical Manual of Mental Disorders, Text Revision¹ (DSM-IV-TR) identifies the diagnostic categories for mental disorders. The current Diagnostic Statistical Manual, Fourth Edition, Text Revised, was published in 2000 by the American Psychiatric Association.

The Wechsler Intelligence Scale for Children-IV, the Wide Range Achievement Test-III, Test of Non-Verbal Intelligence-3, Bender-Gestalt Visual Motor Test, and Behavior Assessment System for Children-Teacher Rating Scale were administered. The test results indicated claimant has a full-scale IQ of 76, which is not indicative of mental retardation. The Test of Non-Verbal Intelligence-3 produced an IQ score of 97, which corresponds to the average range of cognitive functions. Dr. Stewart persuasively testified that such a score could not be achieved by a mentally retarded child.

The testing performed by the San Jose Unified School District did not establish that claimant is mentally retarded. Dr. Stewart noted that it is not possible for claimant to have scored higher than his true abilities on intelligence tests. It is possible to score lower than merited due to inattention, tiredness, or language difficulties, and claimant does have attention and language disorders. Dr. Glidden also notes, and the claimant's mother describes, behavioral difficulties. Dr. Stewart concurs with Ms. Arias' conclusions regarding claimant including the following statement:

[Claimant] is in the low average range in terms of academic potential. There was a significant discrepancy between his Verbal IQ and his Performance IQ indicating that Anthony handles nonverbal better than verbal information. Such discrepancy is common among children of bilingual background and children with speech and language difficulties.

9. The DSM-IV describes mental retardation as significantly subaverage general intellectual functioning (an IQ of 70 or below) accompanied by significant limitations in adaptive functioning in at least two of the skill areas of: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, and functional academic skills, work, leisure, health and safety. "General intellectual functioning" is defined by the IQ or its equivalent obtained by one or more of listed standardized tests, noting a measurement error of approximately five points depending upon the instrument.

The DSM-IV-TR notes that it is possible to diagnose a person with an IQ between 70 and 75 to be diagnosed with mental retardation if that individual exhibits significant deficits in adaptive behavior and, conversely, not diagnose an individual with an IQ below 70 who has no significant impairments in adaptive functioning.

10. Dr. Stewart is familiar with, and has applied, the March 16, 2003, ACRA Guidelines for Determining "Fifth Category" Eligibility. The "fifth category" concerns conditions similar to mental retardation or requiring treatment similar to that for persons with mental retardation. From the test results and the information in the medical, psychological and school reports claimant does not have such a condition because of his strong non-verbal abilities, very strong word and memory skills, and Low Average intelligence. Claimant has the capacity to do well in the nonverbal domain. He does have a learning disability in the areas of language usage and processing combined with attentional difficulties.

The diagnosis of mental retardation is made based upon testing and an assessment of adaptive functioning. Claimant's scores on the tests administered by Dr. Glidden reflect skills that range from average to significantly below average, which are not indicative of the "significantly subaverage general intellectual functioning" identified in the DSM-IV. Claimant clearly has deficits but does not meet the criteria for eligibility because of his demonstrated cognitive abilities, low-average perceptual reasoning abilities and nonverbal strengths. Claimant's adaptive difficulties alone do not qualify for regional center services. Adaptive factors can only be considered after eligibility is established due to an individual's qualifying cognitive status.

Claimant's childhood brain injury does not make him mentally retarded or qualify him for regional center services. Claimant's ADHD diagnosis does not make him mentally retarded or qualify him for regional center services.

11. Claimant's mother described that when claimant was two years old he had a "shaken baby syndrome" and his eyes "rolled back in his head." His walking, toilet training, verbalization and other milestones were significantly delayed. When claimant was about four years old Mrs. Warnaca was told at a hospital that he was mildly mentally retarded.

Mrs. Warnaca testified that claimant still cannot concentrate, and had difficulty processing and understanding information. She believes her son acts and talks like a three year old everywhere they go. His teachers are working with him, and he can do math but has difficulty with spelling and writing. She believes he needs regional center help because he has difficulty eating showering and dressing right.

Mrs. Warnaca understood that Dr. Glidden does not like to use the label "mentally retarded" but thinks claimant needs regional center help. She testified that the Mental Health Department also thinks claimant should be a regional center client.

12. Sherry Lewis, MSW, is employed by the Fresno County Department of Mental Health. Ms. Lewis has been seeing claimant weekly for about six months. She noted that he has a number of disabilities including ADHD, behavior problems, and learning and language disorders. Ms. Lewis described that claimant does not seem able to take in what occurs in classes and what is stated in therapy, and that he often has difficulty understanding and repeating her.

Ms. Lewis opined that it would be possible to assume claimant is mentally retarded by simply looking at the surface, without any tests. Claimant occasionally acts like a mentally retarded child would act. On occasions his ADHD is difficult to control even with medication. She believes that as an adult he will continue to need 24-hour supervision.

Ms. Lewis acknowledged that he seems to do better on objects and picture tests, and has "amazing skills in building and structural" tasks. His lack of appropriate social and verbal skills hinder him socially, and potentially academically. Ms. Lewis believes that the same problems will limit his ability to acquire adaptive skills.

LEGAL CONCLUSIONS

1. Welfare and Institutions Code section 4512, subdivision (a), defines “developmental disability” as follows:

‘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. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

2. The Director of Developmental Services defined “developmental disability” in California Code of Regulations, title 17, section 54000, which states the following:

(a) ‘Developmental Disability’ means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals.

(b) The Developmental Disability shall:

- (1) Originate before age eighteen;
- (2) Be likely to continue indefinitely;
- (3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(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. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

3. The preponderance of the evidence did not establish that claimant is not developmentally disabled within the meaning of Welfare and Institutions Code section 4512, subdivision (a).

4. The preponderance of the evidence did not establish that claimant has a developmental disability requiring treatment similar to that required for individuals with mental retardation.

ORDER

Claimant's appeal is DENIED. Claimant is not eligible for regional center services as a person with mental retardation or a disabling condition closely related to mental retardation or requiring treatment similar to that required for people with mental retardation.

NOTICE

This is the final administrative decision in this matter and both parties are bound by its contents. Either party may appeal this decision to a court of competent jurisdiction within ninety days.

Dated: _____

M. AMANDA BEHE
Administrative Law Judge
Office of Administrative Hearings