

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

and

KERN COUNTY REGIONAL CENTER,

Service Agency.

OAH Case No. 2012070377

DECISION

Administrative Law Judge Ralph B. Dash heard this matter on January 9, 2013, at Bakersfield, California.

Claimant's mother represented Claimant.

Jeffrey Popkin, Associate Director, represented Kern County Regional Center (Regional Center or Service Agency).

The record was held open until March 31, 2013, for Claimant to secure and file a psychological evaluation and for Regional Center to comment thereon. Claimant filed the evaluation on February 27, 2013. It was marked as Exhibit A-11 and admitted. Regional Center did not file any comments on the report and the record was closed on March 31, 2013.

ISSUE

Whether Claimant has a qualifying condition to receive Regional Center services.

FINDINGS OF FACT

1. Claimant is three years, 11 months old and is a Regional Center Client through the Early Start Program, Welfare and Institutions Code section 95000, et seq. Although a client ordinarily receives services through that program only until age three, Regional Center has continued to provide services to Claimant pending a Decision in this matter as to whether he should continue receiving services under the Lanterman Act, Welfare and Institutions Code section 4500, et seq.

2. Claimant has two siblings, both of whom were diagnosed with autism. Claimant's mother believes Claimant is also eligible for services based on autism. However,

Claimant has never been so diagnosed. In a psychological evaluation dated April 16, 2012, performed at the University of California, San Francisco Autism Clinic, Claimant received a diagnosis of Receptive and Expressive Language Disorder (Exhibit 2). In an assessment done on September 11 and 22, 2011, at Kern Psychological Services, Inc. Claimant received “provisional” diagnoses of Attention Deficit/Hyper Activity Disorder Combined Type and Mixed Expressive/Receptive Language Disorder (Exhibit 3). None of these diagnoses entitles Claimant to Regional Center benefits. It is not necessary to detail the findings in either of these two assessments, as a third assessment, performed at the mother’s request by Alexis M. Valos, Ph.D., on February 4, 2013 (Exhibit A-11), also failed to contain a diagnosis of a condition that would entitle Claimant to benefits. As more fully set forth below, it is Claimant’s burden to establish that he has qualifying diagnosis and he has failed to do so.

3. In Exhibit A-11, Dr. Valos made the following diagnosis:

On Axis I, I offered a diagnosis of Pervasive Developmental Disorder, NOS (provisional). This provisional diagnosis is supported by a review of records, parent report, and this writer's observations of the client. It should be noted that Pervasive Developmental Disorder, NOS "is a severe and pervasive impairment in the development of reciprocal social interaction associated with impairment in either verbal or non-verbal communication skills or with the presence of stereotyped behaviors, interests, or activities but the criteria are not met for a specific Pervasive Developmental Disorder" (i.e. Autism, Asperger's Disorder, Rett's Disorder, or Childhood Disintegrative Disorder) (Diagnostic and Statistical Manual of Mental Disorder, Fourth Edition, Text Revision (DSM-IV-TR) page 84). It should be noted that Pervasive Developmental Disorders are often referred to by experts as Autism Spectrum Disorders. For [Claimant], specific areas of concern include poor eye contact and flat affect (based on parent report and this writer's observations), lack of initiation and maintenance of social interactions (based on parent report and this writer's observations), impaired communication skills (based on parent report, this writer's observations, and [Claimant’s] performance on the WPSI-III Verbal IQ Index) and reported sensory issues and restricted patterns of interest (based on parent report). It should be noted that [Claimant] does not meet criteria for a diagnosis of Autism, as he spoke, in at least single words, before the age of three. Furthermore, he does not meet criteria for a diagnosis of Asperger's Disorder, as he reportedly demonstrates significant delays in self-help and adaptive behavior skills (VABS Adaptive Behavior Composite placed Ryan below their^t percentile when compared to other children his same age).

On Axis I, I considered a diagnosis of Attention Deficit-Hyperactivity Disorder, Combined Type. However, due to [Claimant’s] young age and co-existing diagnosis of Pervasive Developmental Disorder, NOS, a reliable diagnosis could not be made at this time.

4. Although Dr. Valos did not diagnose a specific qualifying condition, she nevertheless felt that Respondent should be considered for Regional Center eligibility “until at least the age of five.” She made this recommendation based on the following:

[Claimant] presents with significant limitations in adaptive functioning, including communication skills (receptive and expressive communication), self-help skills (personal and in the community), social skills (interpersonal and play/leisure), and motor skills (fine motor). Furthermore, [Claimant] presents with several age-inappropriate maladaptive behaviors, including smearing feces, physical aggression toward strangers, and dislike of wearing certain clothing items. Due to significant limitations in adaptive functioning, [Claimant’s] service needs appear to be similar to someone with mental retardation, as he requires repetitive instruction/treatment that spans a number of disciplines and is geared toward improving his adaptive living skills and social skills.

5. Dr. Valos’ statement that Claimant’s “service needs appear to be similar to someone with mental retardation” is an allusion to the “fifth category” of developmental disability that entitles an individual to regional center services. A developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely and that constitutes a substantial disability for the individual. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism and what is commonly known as the “fifth category” – a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals. (Welf. & Inst. Code, § 4512, subd. (a).) Given the disjunctive definition – a condition closely related to mental retardation or requiring similar treatment to that required for individuals with mental retardation – the fifth category encompasses two separate grounds for eligibility.

6. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, the appellate court held that “the fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.” (Id. at p. 1129.) It is therefore helpful to review the factors required for a diagnosis of mental retardation. The Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision, 2000, American Psychiatric Association, also known as DSM-IV-TR), provides that the “**essential feature of Mental Retardation is significantly sub-average general intellectual functioning. . . .**” (Emphasis added.) It must be accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.

7. Significantly sub-average intellectual functioning is defined as an IQ of about 70 or below – approximately two standard deviations below the mean. It is undisputed that Claimant’s general intellectual functioning is not significantly sub-average. He does not show borderline intellectual functioning, nor anything near sub-average intellectual functioning. In Exhibit 3, Claimant was assessed as having a “partial IQ Test Composite [of 97] which falls within the Average range of intellectual functioning.” Although Dr. Valos found Claimant to have “scatter” in his IQ sub-tests, she found that Claimant’s “cognitive functioning is best represented by his average performance on the Performance IQ Index . . . of 90.” Claimant is in the average range of intellectual functioning.

8. That Claimant does not have this “essential feature” of mental retardation is not in dispute. Claimant contends, rather, that he is eligible because deficits in his adaptive functioning suggest either that he has a condition closely related to mental retardation, or that he requires services or treatment similar to that received by individuals with mental retardation. Fifth category eligibility determinations typically begin with a threshold consideration of whether an individual has deficits in intellectual functioning. This is done prior to consideration of other fifth category elements related to similarities between the two conditions, or the treatment needed. Claimant seeks to bypass such threshold consideration of intellectual functioning and focus instead on his significant limitations in adaptive functioning and need for services similar to that provided to individuals with mental retardation.

9. A recent appellate decision has suggested, when considering whether an individual is eligible for regional center services under the fifth category, that eligibility may be based largely on the established need for treatment similar to that provided for individuals with mental retardation notwithstanding an individual’s relatively high level of intellectual functioning. (*Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462.) In *Samantha C.*, the individual applying for regional center services did not meet the criteria for mental retardation. Her WAIS-III test results scored her above average in the areas of abstract reasoning and conceptual development and she had good scores in vocabulary and comprehension. She did perform poorly on subtests involving working memory and processing speed, but her scores were still higher than persons with mental retardation. The court understood and noted that the Association of Regional Center Agencies (ARCA) had guidelines which recommended consideration of fifth category for those individuals whose “general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74).” (*Id.* at p. 1477.) However, the court confirmed that individuals may qualify for regional center services under the fifth category on either of two independent bases, with one basis requiring only that an individual require treatment similar to that required for individuals with mental retardation. Here, Claimant believes he requires “treatment similar to that required for individuals with mental retardation.”

10. “Treatment” and “services” do not mean the same thing. Individuals without developmental disabilities, even those without any diagnosed disabilities of any kind, may benefit from many of the services and supports provided to regional center consumers.

Under Welfare and Institutions Code section 4512, subdivision (b), “services and supports for persons with developmental disabilities” means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.

11. Regional center services and supports targeted at improving or alleviating a developmental disability may be considered “treatment” of developmental disabilities. Thus, section 4512 elaborates further upon the services and supports listed in a consumer’s individual program plan as including “diagnoses, evaluation, **treatment**, personal care, day care, domiciliary care, special living arrangements, physical, occupational and speech therapy, training, education, supported and sheltered employment, mental health services, . . .” (Welf. & Inst. Code, § 4512, subd. (b), emphasis added.) The designation of “treatment” as a separate item is clear indication that it is not a synonym for “services and supports,” and this stands to reason given the broader mission of the Lanterman Act: “It is the intent of the Legislature that regional centers assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community.” (Welf. & Inst. Code, § 4640.7, subd. (a).)

12. Since Claimant does not have a condition similar to mental retardation, fifth category eligibility for him must be based upon his requiring “treatment” similar to that required by individuals with mental retardation. The wide range of services and supports listed under section 4512, subdivision (b), are not specific to mental retardation. One would not need to suffer from mental retardation, or any developmental disability, to benefit from the broad array services and supports provided to individuals with mental retardation. They could be helpful for individuals with other developmental disabilities, or for individuals with mental health disorders, or individuals with no disorders at all. The Legislature clearly intended that an individual would have to have a condition similar to mental retardation, or would require treatment that is specifically required by individuals with mental retardation, and not any other condition, in order to be found eligible.

13. In *Samantha C.*, no attempt was made to distinguish treatment under the Lanterman Act as a discrete part or subset of the broader array of services provided to those seeking fifth category eligibility. Thus, the appellate court made reference to individuals with mental retardation and with fifth category eligibility both needing “many of the same kinds of treatment, such as services providing help with cooking, public transportation, money management, rehabilitative and vocational training, independent living skills training, specialized teaching and skill development approaches, and supported employment services.” (*Samantha C. v. State Department of Developmental Services*, *supra*, 185 Cal.App.4th 1462, 1493. This broader characterization of “treatment” cannot properly be interpreted as allowing individuals with difficulties in adaptive functioning, and who require, for example, assistance with public transportation, vocational training or money management, to qualify under the fifth category without more. For example, services such as

vocational training are offered to individuals without mental retardation through the California Department of Rehabilitation. This demonstrates that it is not necessary for an individual to have mental retardation to demonstrate a need for services which can be helpful for individuals with mental retardation.

14. Individuals with mental retardation might require many of the services and supports listed in Welfare and Institutions Code section 4512, which could benefit any member of the public: assistance in locating a home, child care, emergency and crisis intervention, homemaker services, paid roommates, transportation services, information and referral services, advocacy assistance, technical and financial assistance, and respite. To extend the reasoning of *Samantha C.*, an individual found to require assistance in any one of these areas could be found eligible for regional center services under the fifth category. This was clearly not the intent of the Legislature.

15. Thus, while fifth category eligibility has separate condition and needs-based prongs, the latter must still consider whether the individual's condition has many of the same, or close to the same, factors required in classifying a person as mentally retarded. (*Mason v. Office of Administrative Hearings, supra*, 89 Cal.App.4th 1119.) Furthermore, the various additional factors required in designating an individual as developmentally disabled and substantially handicapped must apply as well. (*Id.* at p. 1129.) *Samantha C.* must therefore be viewed in context of the broader legislative mandate to serve individuals with developmental disabilities only. A degree of subjectivity is involved in determining whether the condition is substantially similar to mental retardation and requires similar treatment. (*Id.* at p. 1130; *Samantha C. v. State Department of Developmental Services, supra*, 185 Cal.App.4th 1462, 1485.) This recognizes the difficulty in defining with precision certain developmental disabilities. Thus, the *Mason* court determined: "it appears that it was the intent of those enacting the Lanterman Act and its implementing regulations not to provide a detailed definition of 'developmental disability' so as to allow greater deference to . . . professionals in determining who should qualify as developmentally disabled and allow some flexibility in determining eligibility so as not to rule out eligibility of individuals with unanticipated conditions, who might need services." (*Id.* at p. 1129.)

16. While Dr. Valos suggested that Claimant is eligible for regional center services based on fifth category eligibility based on his service needs, she did not specify what "treatment" Claimant needs that is similar to the treatment needed by those with mental retardation. She stated that Claimant's "service needs appear to be similar to someone with mental retardation, as he requires repetitive instruction/treatment that spans a number of disciplines and is geared toward improving his adaptive living skills and social skills." These are also the same types of non-specific, generically described services from which those with autism, or with other socially impairing disorders, may benefit. There are many persons and groups with sub-average functioning and impaired adaptive behavior; however, a service agency does not have a duty to serve all of them. The fifth category does not provide unlimited access to all persons with some form of learning or behavioral disability.

CONCLUSIONS OF LAW

1. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his/her eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision to deny services is incorrect.

2. "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court; except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it." (citations omitted) . . . The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) (Emphasis in original.) In meeting the burden of proof by a preponderance of the evidence, Claimant "must produce substantial evidence, contradicted or uncontradicted, which supports the finding." (*In re Shelley J.* (1998) 68 Cal.App.4th 322 at p. 329.) Except as otherwise provided by law, a party has the burden of proof as to each fact, the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting. (Evid. Code, § 500.) Where a petitioner seeks to obtain government benefits or services, the petitioner bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161-162 (disability benefits); *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 56-58 (retirement benefits).

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3. Claimant has not met his burden to establish, by a preponderance of the evidence that he suffers from a condition that would qualify him for Regional Center services. He has no diagnosis of autism, mental retardation, or a condition similar to mental retardation, and he has not presented sufficient evidence to determine that he requires treatment similar to persons with mental retardation.

* * * * *

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant's application for Regional Center services is denied.

Date: April 10, 2013

/s/
RALPH B. DASH
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.